

THE
FEDERAL CASES
COMPRISING
CASES ARGUED AND DETERMINED
IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES

FROM THE EARLIEST TIMES TO THE BEGINNING OF THE FEDERAL REPORTER,
ARRANGED ALPHABETICALLY BY THE TITLES OF THE CASES,
AND NUMBERED CONSECUTIVELY

BOOK 1

Case No. 1 — Case No. 564

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BOOK 1

AALESUND—ARTHUR

Case No. 1—Case No. 564

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1894

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PREFACE.

THIS series of reports, known as the Federal Cases, is a comprehensive compilation of the decisions of the United States Circuit and District Courts which have been rendered from the organization of the Government in 1789 to the first publication of the Federal Reporter in 1880. It constitutes, in conjunction with the Federal Reporter, a complete and consecutive series of reports, beginning with the first organization of the courts reported and continuing down to the last decision rendered.

Origin of the Enterprise.

In 1880 the Federal Reporter was established for the purpose of reporting the decisions of the United States Circuit and District Courts. It included all cases heard after January 1, 1880, and has become a repository of all current Federal decisions. This function has been performed so satisfactorily that within a few years it came to be recognized as the official Reporter of the Federal Courts.

The Federal Reporter had started in "in the midst of things." Nothing else was possible, since there had to be a beginning. What lay back of 1880 was partly to be found scattered through the different series of Circuit and District Court Reports, none of which had ever been exhaustive, and many of which had long been out of print. Sometimes cases which attracted attention at the time had appeared in current periodicals. Sometimes they were published with the early State Reports, or in different series of Selected Cases. Some opinions found a place in several contemporaneous series, and some were never printed at all. This period has been aptly called by Judge HAMMOND "The Dark Continent of American Jurisprudence."

After the Federal Reporter was fairly established, its publishers were frequently urged by Judges and practitioners in the United States Courts to gather up and republish the decisions of earlier date, so as to make the record of American Federal adjudications exhaustive. An annotated reprint would be more valuable than the original set, even at the same price; yet it could be made much cheaper. Theoretically, the plan was an admirable one, but the practical difficulties in the way of obtaining the earlier Federal cases, scattered as they were, made it seem at first impracticable. But the requests for the work were so frequent that the publishers were finally led to issue an experimental circular, and canvass the field to see whether there were really sufficient demand to make the formidable undertaking commercially feasible. The results of this inquiry were so satisfactory that the plans of the publication were at once elaborated, and no time was lost in beginning the collection of cases and material. This involved great labor and expense,—greater even than had been anticipated,—and it has now only been accomplished after five years of busy preparation.

The publishers and the editors have studied the peculiar conditions of the problem of how best to make this great mass of heterogeneous material available for the use of the Bench and Bar. They have worked out a method of treatment of these cases which seems specially adapted to bring the scattered reports together into a complete and consecutive series, to be their final repository.

Sources of Material.

It is the purpose of Federal Cases to cover, with the Federal Reporter and the United States Supreme Court Reports, the whole body of the law as it has been administered by the Federal courts. The successful accomplishment of this end re-

quires not only the republication, entire, of all of the old Circuit and District Court Reports, but also all Federal cases which can be brought to light by an exhaustive examination of the United States Supreme Court Reports, the law periodicals, state reports, text books, and other works likely to contain such cases, and an unremitting search for all accessible decisions whether to be found in pamphlets, in any of the great libraries, in the hands of individuals, or in the records of the courts. In this way several thousand decisions have been discovered which are not to be found in what is generally regarded as a complete Federal library. Prominent among these unpublished decisions might be mentioned the opinions of Judge BETTS in the Southern District of New York, which are on file in the office of the clerk of the court, in a series of manuscript books in the handwriting of the judge. These manuscript books are in two series, denominated for convenience, Circuit Court MS. and District Court MS., respectively. There are also a great many valuable cases largely from the same district, but some from other districts, which were collected by Judge BETTS from newspapers and similar publications and preserved in the form of a scrap-book. A similar scrap-book collection of cases has been found in the office of the clerk for the Eastern District of Pennsylvania.

Attention is called to the large number of new admiralty decisions, including many of the most important of those of Judge BETTS, and the cases received from the Southern District of Florida, which for many years were preserved in manuscript in what is locally known as the Admiralty Records, comprising some twelve large volumes of recorded cases, containing the decisions of Judges WEBB, MARVIN, BOYNTON, and MCKINNEY upon different questions of admiralty law. Many of these cases have been cited in recent decisions from that district and also in Judge MARVIN'S work on Wreck and Salvage. Most of them are of great importance, but comparatively few have ever been published. The unpublished decisions of Hon. JAMES W. LOCKE secured, through the courtesy of the judge, are mostly in admiralty, as are also many of those contained in the collections of the opinions of the late Judge HOFFMAN, in the California district, known as "Hoffman's Opinions" and "Hoffman's Decisions," respectively, and published by permission of Judge HOFFMAN.

The case law relating to patents is enriched by many new decisions particularly in the Southern District of New York, and the Districts of Massachusetts and Connecticut. In the District of Columbia, MacArthur's Patent Cases includes all appeals from the decisions of the Commissioner of Patents after the period covered by Cranch's Circuit Court Reports, from the year 1841 to 1859. From 1859 to the establishment of the Supreme Court of the District of Columbia in 1863, a large number of patent cases were decided which were to have made the second volume of MacArthur's Patent Cases, but which has never appeared. Many of these decisions have been cited in Law's Patent Digest and elsewhere. They are enrolled in manuscript form, and are on file in the United States Patent Office. These opinions have all been copied and duly reported under their proper titles.

In addition to these special collections of cases, inquiry of the clerks of all of the Federal courts for unreported decisions has produced a large number of important opinions, as has also an exhaustive search of the files of the newspapers published during and prior to the late war, such, for instance, as the New York Daily Times and Niles' Weekly Register. It has been the constant aim to preserve everything of importance, and no effort has been spared to make the reports of these cases full and complete in every respect.

Arrangement.

The most difficult problem in the publication of the Federal Cases, was to find a satisfactory method of arranging the decisions. Investigation and experiment showed that it was impracticable to arrange them chronologically,—or by Circuits and Districts, or by the original reports. The great object to be attained was to so arrange the cases that the reader can readily find any case, no matter how or where it may be cited. The publishers believe they have accomplished this purpose in the Federal Cases.

The cases in this series are reported in the alphabetical order of their titles. This alphabetical arrangement is rendered necessary by the fact that the same case

is frequently found reported in two or more reports, and also because the material for this compilation has been derived from a great variety of sources. It is also the best possible arrangement from a practical point of view in a compilation of this description. It applies to the cases in a series of reports the order and method always applied to a digest or an encyclopædia, and thereby greatly facilitates the discovery of the case wanted. An examination of any volume of this series will fully demonstrate the practical utility of this arrangement. Where there are two or more titles, the case is reported under that title which comes first in alphabetical order, and the other titles are printed in the series in their regular alphabetical order, with proper references to the title under which the case is reported. Where there are two or more cases of the same title, the cases are printed in the alphabetical order of the names of the respective reporters. (See, in illustration, *The Alabama*, Case No. 123, and *The America*, Case No. 279.) An elaborate system of cross-references has been devised, the title of every case appearing (in the form of a cross-reference) alphabetically under the name of each of the parties, and in many cases, where the names are spelled differently, under each different form of spelling, thus enabling the reader to turn to the case at once. The cases have also been numbered consecutively throughout the series. These numbers have been introduced for the purpose of furnishing a more specific and ready reference to a given case when such case is cited in the text or referred to in a cross-reference. (See, in illustration, references already given and cross-references under *Adams*, page 157.) By this method of numbering the cases can be referred to specifically, in advance of their publication, saving the necessity of referring to the old reports which are superseded by the Federal Cases. When the entire series shall have been completed, every reference to every case embraced within the series will have the specific case-number citation,—a great aid in referring back and forth from one volume to another, which could not be secured in any other way.

Every effort has been made to render this duplex arrangement of the cases as effective as possible. Among other details the letters and numbers included in each volume are stamped on the back of the book. Each subscriber is also furnished with a printed table giving in alphabetical and numerical order the title of each case published in the series; also a table setting out in alphabetical order the original reports of the United States Circuit and District Courts, and giving in regular sequence the volume and page of each case found in such reports with a parallel reference to the number of such case in this series. A brief examination of these tables will demonstrate their value and utility.

Style of Reporting and Annotating.

The Federal Cases is essentially a *verbatim* reprint of the decisions; the cases with comparatively few exceptions being reprinted exactly as they appear in the original reports, headnotes, statement, and opinion, and all original matter supplied by the editors being indicated by the use of brackets. In the preparation of the cases for publication, the fact soon developed that the great majority of them had been published in more than one place, and in very many instances some one of these several reports of the same case is much more complete than any of the others, while one of the incomplete reports may contain important matter not to be found in the best report of the same case. It has been the intention to make the Federal Cases a *verbatim* reprint of all the reports of all the cases; and in doing this, the best report of each case has been selected and indicated by being placed first among the references immediately following the title of the case itself. All matter from all other reports of that case, not included in the report adopted, is inserted in its proper place, inclosed in brackets, with a footnote stating the source from which it was secured; giving the reader the benefit of a careful comparison of every published report of all of the decisions. That this is a matter of considerable importance is evidenced by the fact that in some instances several paragraphs are added to the opinion of the court in this way, or important matter incorporated in the statement necessary to a clear understanding of the decision. (See, in illustration, *In re Alexander*, Case No. 161.) It should be understood that all matter inclosed in brackets is the result of the editorial treatment of the cases, unless there is a footnote explaining its source.

A page to page examination of all the reports of the Supreme Court of the United States, the Federal Reporter, and all cases included within this series, has been made for citations of the Circuit and District Court cases. These citations have all been carefully edited, and placed under the appropriate paragraphs of the syllabus of the cited case, stating in each instance whether in fact that case is cited, distinguished, followed, or overruled, as the case may be, in any later decision. In this way, each case gives the references to every place in which it has been subsequently referred to by any Federal court in any manner. Where a case is cited to a proposition not contained in the syllabus, such additional point will be stated briefly. Additional citations of authorities are also given with the more important cases; and where a case was afterwards taken to the Supreme Court, a reference is made to the opinion of the Supreme Court bearing directly upon the points involved in the case as reported below. This reference is appended as a note. Copious notes are also prepared showing subsequent changes in the law involved in any particular case where necessary. (See, in illustration, *Adams v. The Sophia*, Case No. 65, and *Adams v. Burks*, Case No. 50.)

The page to page examination of the reports produced a large list of cases cited which were apparently unreported. Special investigation has been made of every one of these unreported cases. A large number of them have been found, but in other instances the fact has developed that the court records have either been lost or destroyed, through the burning of a courthouse, or some other calamity, so that the case cannot be obtained, or for some reason the opinion, if one was written, is not now on file. Where these unreported cases have been obtained, they will be published in full. If they have not been found, a statement of the circumstances will be given, and such statement of the points decided as can be gleaned from the records and the various digests and text-books in which they were mentioned. (See, in illustration, *The Alfred*, Case No. 189.) In fine, it is the purpose to make this series exhaustive so far as the title of every Federal case anywhere cited or referred to is concerned, so that the reader may feel sure of either finding each case reported herein or of getting all the information about it that can be obtained anywhere.

Special acknowledgment should be made of the interest shown in the work by the Judges, many of them revising their own opinions in proof.

Special Matter in Book I.

The first volume of the series contains the following important tables:

1. A chronological table of the several circuits showing their geographical limits under the various acts of congress from 1789 to the present time. This table will aid in determining the circuit, of which any state was a part, at any given time.

2 and 3. A list of the judges arranged chronologically under their respective circuits and districts. A list of the judges arranged alphabetically without regard to their respective circuits and districts. The lists of Federal judges have been the result of a great deal of careful research and investigation. It is somewhat strange that no reliable list of Federal judges has ever been published. Fragmentary lists and memoranda, of the judges' names for a particular district for a short period of time have appeared in various reports, but no complete list with any pretense to reliability has ever been prepared, so far as known. This list has been made up from a careful examination of the lists of names in all of the periodicals and reports. It has been checked carefully with the records in the departments at Washington, and also with the various biographical works and local histories. The aim has been to make this list complete, and as accurate as possible. In doing this, extended inquiry has been made of all the judges and clerks of the various courts and many other persons likely to possess information on the subject. The result obtained is what is believed to be the most reliable roll of Federal judges to be found anywhere. Special acknowledgments are due to many of the living judges for the great assistance they have rendered in this matter.

4. A table of the United States Circuit and District Court Reports arranged by circuits and districts.

5. A table of the reports, periodicals, and text-books examined for the United States Circuit and District Court cases therein reported and cited. The very exten-

sive character of this latter table will afford an idea of the great care and extent of the inquiries necessary to gather in all of the decisions in the Federal courts.

In presenting this series to the public, the publishers desire to express their obligation to the owners of the reports from which cases have been reprinted, and to the members of the Bench and Bar throughout the whole country who have so effectively aided in the development of these reports.

January 25, 1894.

WEST PUBLISHING COMPANY.

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CHRONOLOGICAL TABLE

SHOWING THE CONSTITUTION OF THE SEVERAL CIRCUITS.

	Circuits.	Act Sept. 24, 1789, (1 Stat. 73.)	Circuits.	Act Feb. 13, 1801, (2 Stat. 89.)	Circuits.	Act April 29, 1802, (2 Stat. 156.)	Circuits.	Act Mar. 3, 1837, (5 Stat. 176.)	Circuits.	Act July 23, 1866, (14 Stat. 209.)						
Eastern.	1.	N. H. Mass. R. I. ¹	1.	Maine. N. H. Mass. R. I.	1.	Maine. ⁴ N. H. Mass. R. I.	1.	Maine. N. H. Mass. R. I.	1.	Maine. N. H. Mass. R. I.						
	2.	Vt. ² Conn. N. Y.	2.	Vt. Conn. N. Y.	2.	Vt. Conn. N. Y.	2.	Vt. Conn. N. Y., S. D. " " N. D.	2.	Vt. Conn. N. Y., S. D. " " N. D. " " E. D.						
	3.	Penn.	3.	Penn.	3.	Penn. N. J.	3.	Penn., E. D. " W. D. N. J.	3.	Penn., E. D. " W. D. N. J.						
	4.	N. J. Del. Md. Va.	4.	N. J. Del. Md. Va.	4.	Del. Md.	4.	Del. Md.	4.	Del. Md.						
	5.	N. C. ³ S. C. Ga.	5.	N. C. S. C. Ga.	5.	Va.	5.	Va., E. D. ¹³ " W. D. ¹³ N. C. ^{10, 13}	5.	Va., E. D. " W. D. W. Va. ¹⁴ N. C., E. D. " W. D. S. C. ¹⁰						
Middle.	6.	Maine. ⁴ Ky. ⁴ Tenn. ⁵	6.	Ky. Tenn. Ohio. ⁶	6.	N. C. S. C. ¹⁰ Ga.	6.	S. C. ¹⁰ Ga. ¹⁰	6.	Ga., N. D. " S. D. La., E. D. " W. D. Miss., N. D. ¹⁶ " S. D. Ala., N. & Mid. D. " S. D. Fla., N. D. " S. D. Tex., E. D. " W. D. " N. D.						
	7.		7.		7.		7.		7.		7.	7.	7.	7.		
	8.		8.		8.		8.		8.		8.	8.	8.	8.	8.	
	9.		9.		9.		9.		9.		9.	9.	9.	9.	9.	
	10.		10.		10.		10.		10.		10.	10.	10.	10.	10.	
	Independent Districts.		Independent Districts.		Independent Districts.		Independent Districts.		Independent Districts.		Independent Districts.	Independent Districts.	Independent Districts.	Independent Districts.	Independent Districts.	Independent Districts.
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	Independent Districts.		Independent Districts.		Independent Districts.		Independent Districts.		Independent Districts.		Independent Districts.	Independent Districts.	Independent Districts.	Independent Districts.	Independent Districts.	Independent Districts.

NOTES TO PRECEDING PAGE.

¹ Rhode Island added to Eastern Circuit by Act June 23, 1790, (1 Stat. 123.)

² Vermont added to Eastern Circuit by Act Mar. 2, 1791, (1 Stat. 197.)

³ North Carolina added to Southern Circuit by Act June 4, 1790, (1 Stat. 123.)

⁴ Circuit court powers were conferred upon the district courts of the independent districts of Maine and Kentucky by Act Sept. 24, 1789, (1 Stat. 73;) and by Act Mar. 30, 1820, (3 Stat. 554.) Maine was added to the 1st Circuit.

⁵ Circuit court powers conferred upon the district courts of Tennessee by Act Jan. 31, 1797, (1 Stat. 493.)

⁶ Ohio, under Act Feb. 13, 1801, embraced Indiana Territory and the Northwest Territory. By Act Feb. 24, 1807, (2 Stat. 420,) Ohio, Kentucky, and Tennessee were constituted the 7th Circuit; and by Act Jan. 23, 1863, (12 Stat. 637,) Ohio and Michigan were constituted the 7th Circuit.

⁷ Kentucky and Tennessee were made independent districts by Act Apr. 29, 1802, (note 5.)

⁸ Circuit court powers were conferred upon the district courts of the following independent districts:

Louisiana	by Act April 8, 1812,	(2 Stat. 703.)
Indiana	" " Mar. 3, 1817,	(3 " 390.)
Mississippi	" " April 3, 1818,	(3 " 413.)
Illinois	" " Mar. 3, 1819,	(3 " 502.)
Alabama	" " April 21, 1830,	(3 " 564.)
Missouri	" " Mar. 16, 1822,	(3 " 653.)
Arkansas	" " June 15, 1836,	(5 " 51.)
Michigan	" " July 1, 1834,	(5 " 62.)
Florida	by Act Mar. 3, 1845,	(5 " 788.)
Iowa	" " Mar. 3, 1845,	(5 " 789.)
Texas	" " Dec. 29, 1845,	(9 " 1.)
Minnesota	" " May 11, 1858,	(11 " 285.)
Kansas	" " Jan. 29, 1861,	(12 " 128.)

⁹ Alabama and Louisiana constituted the 5th Circuit by Act Aug. 16, 1842, (5 Stat. 507.)

¹⁰ North Carolina, South Carolina, and Georgia constituted the 6th Circuit by Act Aug. 16, 1842, (5 Stat. 507.) South Carolina was divided into the Eastern and Western Districts by Act Feb. 21, 1823, (3 Stat. 726.) Circuit court powers were conferred upon the district court for the Western District by Act Aug. 16, 1856, (11 Stat. 43.) A

circuit court for the Western District was established by Act Feb. 6, 1839, (25 Stat. 655.) Act April 26, 1890, (26 Stat. 71.) regulates the terms of the circuit court for the " district of South Carolina, and of the district courts for the Eastern and Western Districts of South Carolina, respectively "

¹¹ Indiana, Illinois, and Wisconsin constituted the 8th Circuit by Act Jan. 23, 1863, (12 Stat. 637;) and Wisconsin was transferred to 9th Circuit by Act Feb. 9, 1863, (12 Stat. 648.)

¹² California constituted a separate circuit by Act Mar. 2, 1855, (10 Stat. 631;) and, with Oregon, constituted the 10th Circuit by Act Mar. 3, 1863, (12 Stat. 794.)

¹³ Va.	added to 4th Cir. by Act Aug. 16, '42,	(5 Stat. 507.)
Nev.	" " 10th " " " Feb. 27, '65,	(13 " 440.)
N. C.	" " 4th " " " July 15, '62,	(12 " 576.)
Neb.	" " 8th " " " Mar. 25, '67,	(15 " 5.)
Col.	" " 8th " " " June 26, '76,	(19 " 61.)
Mont.	" " 9th " " " Feb. 22, '89,	(25 " 682.)
N. Dak.	" " 8th " " " Feb. 22, '89,	(25 " 682.)
S. Dak.	" " 8th " " " Feb. 22, '89,	(25 " 682.)
Wash.	" " 9th " " " Feb. 22, '89,	(25 " 682.)
Idaho	" " 9th " " " July 3, '90,	(26 " 217.)
Wyo.	" " 8th " " " July 10, '90,	(26 " 225.)

¹⁴ West Virginia, comprising part of the territory of Virginia, was admitted as a state June 20, 1863, (13 Stat. 731.)

¹⁵ Certain circuit court powers were conferred on the district court of Alaska; and writs of error in criminal cases were authorized to issue from the circuit court for the district of Oregon to the district court of Alaska, by Act May 17, 1884, (23 Stat. 24.)

¹⁶ Circuit court established by Act Feb. 6, 1883, (25 Stat. 655.)

¹⁷ Louisiana, Texas, Arkansas, Kentucky, and Tennessee constituted the 6th circuit by Act July 15, 1862, (1 Stat. 576.)

¹⁸ Ohio and Indiana constituted the 7th circuit by Act July 15, 1862, (12 Stat. 576.)

¹⁹ Michigan, Wisconsin, and Illinois constituted the 8th circuit by Act July 15, 1862, (12 Stat. 576.)

²⁰ Missouri, Iowa, Kansas, and Minnesota constitute the 9th circuit by Act July 15, 1862, (12 Stat. 576.)

FEDERAL JUDGES.

ARRANGED CHRONOLOGICALLY UNDER THEIR RESPECTIVE
CIRCUITS AND DISTRICTS.

ALL CIRCUITS.¹

Circuit Justices.²

JOHN JAY	September 26, 1789.....	April 18, 1794
WILLIAM CUSHING	September 27, 1789.....	February 13, 1801
JAMES WILSON	September 29, 1789.....	August 23, 1798
JOHN BLAIR	September 30, 1789.....	January 27, 1796
JOHN RUTLEDGE	September 27, 1789.....	March 5, 1791
JOHN RUTLEDGE	July 1, 1795.....	December 15, 1795
JAMES IREDELL	February 10, 1790.....	October 20, 1799
THOMAS JOHNSON	August 5, 1791.....	March 3, 1793
WILLIAM PATERSON	March 4, 1793.....	February 13, 1801
SAMUEL CHASE	January 27, 1796.....	February 13, 1801
OLIVER ELLSWORTH	March 4, 1796.....	September 30, 1800
BUSHROD WASHINGTON	September 29, 1798.....	February 13, 1801
ALFRED MOORE	December 10, 1799.....	February 13, 1801
JOHN MARSHALL	January 31, 1801.....	February 13, 1801

FIRST CIRCUIT.³

Circuit Justices.

WILLIAM CUSHING.....	July 1, 1802.....	September 13, 1810
JOSEPH STORY.....	November 18, 1811.....	September 10, 1845
LEVI WOODBURY	September 20, 1845.....	September 4, 1851
BENJAMIN ROBBINS CURTIS.....	September 22, 1851.....	September 30, 1857
NATHAN CLIFFORD	January 12, 1858.....	May 2, 1881
JOHN MARSHALL HARLAN.....	May 2, 1881.....	January 30, 1882
HORACE GRAY	January 30, 1882.....	_____

Circuit Judges.

JOHN LOWELL (Chief Judge).....	February 20, 1801.....	July 1, 1802
BENJAMIN BOURN.....	February 20, 1801.....	July 1, 1802
JEREMIAH SMITH	February 20, 1801.....	July 1, 1802
GEORGE FOSTER SHEPLEY.....	December 22, 1869.....	July 20, 1878
JOHN LOWELL	December 18, 1878.....	May 1, 1884
LE BARON BRADFORD COLT.....	July 5, 1884.....	_____
WILLIAM LE BARON PUTNAM.....	March 17, 1892.....	_____

¹ Organized as eastern, middle, and southern circuits by Act Sept. 24, 1789, (1 Stat. 74, § 4.) Reorganized by Act Feb. 13, 1801, (2 Stat. 90.) as first, second, third, fourth, fifth, and sixth circuits. No complete record can be found of the allotment of the justices to the several circuits, under Act April 13, 1792, (1 Stat. 253, § 3,) which provided that at each session the supreme court shall assign to the justices, respectively, "the circuits which they are to attend at the ensuing sessions of the circuit courts." The justices of the supreme court did not sit in the circuit courts from Feb-

ruary 13, 1801, (2 Stat. 90.) until April 29, 1802, (2 Stat. 156.)

² The words "circuit justice" are used throughout the Federal Cases "to designate the justice of the supreme court who is allotted to any circuit," (Rev. St. 605;) though they do not appear to have had any such contemporaneous use prior to the enactment of that section.

³ Organized by Act Feb. 13, 1801, (2 Stat. 90.) Abolished by Act March 8, 1802, (2 Stat. 132.) Reorganized by Act April 29, 1802, (2 Stat. 156.)

SECOND CIRCUIT.⁴**Circuit Justices.**

WILLIAM PATERSON.....	July 1, 1802.....	September 19, 1806
BROCKHOLST LIVINGSTON.....	November 10, 1806.....	March 18, 1823
SMITH THOMPSON.....	September 1, 1823.....	December 18, 1843
SAMUEL NELSON.....	March 3, 1845.....	December 1, 1872
WARD HUNT.....	December 11, 1872.....	January 7, 1882
STEPHEN JOHNSON FIELD.....	January 30, 1882.....	April 3, 1882
SAMUEL BLATCHFORD.....	April 3, 1882.....	July 7, 1893
HORACE GRAY.....	July 15, 1893.....	_____

Circuit Judges.

OLIVER WOLCOTT.....	February 20, 1801.....	July 1, 1802
SAMUEL HITCHCOCK.....	February 20, 1801.....	July 1, 1802
EGBERT BENSON.....	February 20, 1801.....	July 1, 1802
LEWIS B. WOODRUFF.....	December 22, 1869.....	September 10, 1875
ALEXANDER SMITH JOHNSON.....	October 20, 1875.....	January 26, 1878
SAMUEL BLATCHFORD.....	March 4, 1878.....	March 22, 1882
WILLIAM JAMES WALLACE.....	April 6, 1882.....	_____
EMILE HENRY LACOMBE.....	May 26, 1887.....	_____
NATHANIEL SHIPMAN.....	March 17, 1892.....	_____

THIRD CIRCUIT.⁴**Circuit Justices.**

BUSHROD WASHINGTON.....	July 1, 1802.....	November 26, 1829
HENRY BALDWIN.....	February 11, 1830.....	April 21, 1844
ROBERT COOPER GRIER.....	August 4, 1846.....	January 31, 1870
WILLIAM STRONG.....	April 4, 1870.....	December 14, 1880
JOSEPH P. BRADLEY.....	December 21, 1880.....	January 22, 1892
JOHN MARSHALL HARLAN.....	February 1, 1892.....	October 1, 1892
GEORGE SHIRAS, JR.....	October 7, 1892.....	_____

Circuit Judges.

WILLIAM GRIFFITH.....	February 20, 1801.....	July 1, 1802
RICHARD BASSETT.....	February 20, 1801.....	July 1, 1802
WILLIAM TILGHMAN (Chief Judge)...	March 3, 1801.....	July 1, 1802
WILLIAM McKENNAN.....	December 22, 1869.....	January 3, 1891
MARCUS W. ACHESON.....	February 9, 1891.....	_____
GEORGE M. DALLAS.....	March 17, 1892.....	_____

FOURTH CIRCUIT.⁵**Circuit Justices.**

SAMUEL CHASE.....	July 1, 1802.....	June 19, 1811
GABRIEL DUVAL.....	November 18, 1811.....	January, 1835
ROGER BROOKE TANEY.....	March 15, 1836.....	October 12, 1864
SALMON PORTLAND CHASE.....	December 6, 1864.....	May 7, 1873
MORRISON REMICK WAITE.....	April 1, 1874.....	March 23, 1888
JOHN MARSHALL HARLAN.....	April 2, 1888.....	December 17, 1888
MELVILLE WESTON FULLER.....	December 17, 1888.....	_____

Circuit Judges.

PHILIP BARTON KEY (Chief Judge)...	February 20, 1801.....	July 1, 1802
GEORGE K. TAYLOR.....	February 20, 1801.....	July 1, 1802
CHARLES MAGILL.....	March 3, 1801.....	July 1, 1802
HUGH LENNOX BOND.....	July 13, 1870.....	October 24, 1893
NATHAN GOFF.....	March 7, 1892.....	_____
CHARLES H. SIMONTON.....	December 19, 1893.....	_____

⁴Organized by Act Feb. 13, 1801, (2 Stat. 90.)
Abolished by Act March 8, 1802, (2 Stat. 132.)
Reorganized by Act April 29, 1802, (2 Stat.
156.)

⁵Organized by Act Feb. 13, 1801, (2 Stat. 90.)
Abolished by Act March 8, 1802, (2 Stat. 132.)
Reorganized by Act April 29, 1802, (2 Stat.
156.)

FIFTH CIRCUIT.⁵

Circuit Justices.

JOHN MARSHALL	July 1, 1802.....	July 6, 1835
PHILIP PENDLETON BARBOUR.....	March 15, 1836.....	February 24, 1841
PETER VIVIAN DANIEL.....	March 3, 1841.....	March 3, 1845
JOHN MCKINLEY	March 3, 1845.....	July 19, 1852
JOHN ARCHIBALD CAMPBELL.....	March 22, 1853.....	May 21, 1861
JAMES MOORE WAYNE.....	March 10, 1863.....	July 5, 1867
NOAH HAYNES SWAYNE.....	January 15, 1869.....	April 4, 1870
JOSEPH P. BRADLEY.....	April 4, 1870.....	December 21, 1880
WILLIAM BURNHAM WOODS.....	January 10, 1881.....	May 14, 1887
LUCIUS QUINTUS CINCINNATUS LA-MAR	January 23, 1888.....	January 23, 1893
JOHN MARSHALL HARLAN.....	May 27, 1887.....	January 25, 1888
HOWELL EDMUNDS JACKSON	March 15, 1893.....	—————

Circuit Judges.

JOSEPH CLAY.....	February 24, 1801.....	July 1, 1802
HENRY POTTER.....	May 9, 1801.....	April 7, 1802
EDWARD HARRIS.....	May 3, 1802.....	July 1, 1802
DOMINICK AUGUSTINE HALL.....	July 1, 1801.....	July 1, 1802
(Chief Judge.)		
WILLIAM BURNHAM WOODS.....	December 22, 1869.....	December 23, 1880
DON A. PARDEE.....	March 13, 1881.....	—————
ANDREW PHELPS McCORMICK.....	March 17, 1892.....	—————

SIXTH CIRCUIT.⁶

Circuit Justices.

ALFRED MOORE.....	July 1, 1802.....	March, 1804
WILLIAM JOHNSON.....	March 26, 1804.....	August 11, 1834
JAMES MOORE WAYNE.....	January 9, 1835.....	March 10, 1863
JOHN CATRON.....	March 10, 1863.....	May 30, 1865
NOAH HAYNES SWAYNE.....	April 8, 1867.....	July 24, 1881
STANLEY MATTHEWS.....	January 30, 1882.....	March 22, 1889
DAVID JOSIAH BREWER.....	March 10, 1890.....	January 19, 1891
HENRY BILLINGS BROWN.....	January 18, 1891.....	—————

Circuit Judges.

WILLIAM McCLUNG.....	February 24, 1801.....	July 1, 1802
HALMOR HULL EMMONS.....	January 17, 1870.....	May 14, 1877
JOHN BAXTER.....	December 13, 1877.....	April 2, 1886
HOWELL EDMUND ⁶ JACKSON.....	April 12, 1886.....	February 18, 1893
WILLIAM HOWARD TAFT.....	March 17, 1892.....	—————
HORACE H. LURTON.....	March 27, 1893.....	—————

SEVENTH CIRCUIT.⁷

Circuit Justices.

THOMAS TODD.....	March 3, 1807.....	February 7, 1826
ROBERT TRIMBLE.....	May 9, 1826.....	August 25, 1828
JOHN McLEAN.....	February 11, 1830.....	April 4, 1861
NOAH HAYNES SWAYNE.....	January 24, 1862.....	April 8, 1867
DAVID DAVIS.....	April 8, 1867.....	March 4, 1877
JOHN MARSHALL HARLAN.....	April 22, 1878.....	December 19, 1892
MELVILLE WESTON FULLER.....	December 19, 1892.....	October, 1893
JOHN MARSHALL HARLAN.....	October, 1893.....	—————

⁵ See note 5, on page xiv.

⁶ Organized by Act Feb. 13, 1801, (2 Stat. 90.)
 Abolished by Act March 8, 1802, (2 Stat. 132.)

Reorganized by Act April 29, 1802, (2 Stat. 156.)

⁷ Organized by Act Feb. 24, 1807, (2 Stat. 420.)

SEVENTH CIRCUIT—Continued.**Circuit Judges.**

THOMAS DRUMMOND.....	December 22, 1869.....	July, 1884
WALTER Q. GRESHAM.....	October 28, 1884.....	March, 1893
WILLIAM ALLEN WOODS.....	March 21, 1892.....	_____
JAMES G. JENKINS.....	March 23, 1893.....	_____

EIGHTH CIRCUIT.⁸**Circuit Justices.**

JOHN CATRON.....	March 8, 1837.....	March 10, 1863
DAVID DAVIS.....	March 10, 1863.....	April 8, 1867
SAMUEL FURMAN MILLER.....	April 8, 1867.....	October 13, 1890
DAVID JOSIAH BREWER.....	January 19, 1891.....	_____

Circuit Judges.

JOHN FORREST DILLON.....	December 22, 1869.....	September 1, 1879
GEORGE WASHINGTON McCRARY..	December 9, 1879.....	March, 1884
DAVID JOSIAH BREWER.....	March 31, 1884.....	January 6, 1890
HENRY CLAY CALDWELL.....	March 7, 1890.....	_____
WALTER H. SANBORN.....	March 17, 1892.....	_____

NINTH CIRCUIT.⁹**Circuit Justices.**

JOHN McKINLEY.....	April 22, 1837.....	March 3, 1845
PETER VIVIAN DANIEL.....	March 3, 1845.....	May 31, 1860
SAMUEL FURMAN MILLER.....	July 16, 1862.....	April 8, 1867
STEPHEN JOHNSON FIELD.....	July 1, 1867.....	_____

Circuit Judges.

LORENZO SAWYER.....	January 10, 1870.....	September 7, 1891
JOSEPH McKENNA.....	March 17, 1892.....	_____
WILLIAM B. GILBERT.....	March 18, 1892.....	_____

TENTH CIRCUIT.¹⁰**Circuit Justice.**

STEPHEN JOHNSON FIELD.....	March 10, 1863.....	July 23, 1866
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CALIFORNIA CIRCUIT.¹¹**Circuit Judge.**

MATTHEW HALL McALLISTER.....	March 3, 1855.....	April 7, 1862
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DISTRICT OF COLUMBIA, CIRCUIT COURT.¹²**Chief Judges.**

⁸ WILLIAM KILTY	March 23, 1801.....	January, 1806
WILLIAM CRANCH.....	February 24, 1806.....	September 11, 1855
JAMES DUNLOP.....	November 27, 1855.....	March 3, 1863

⁸ Organized by Act March 3, 1837, (5 Stat. 176.)

⁹ Organized by Act March 3, 1837, (5 Stat. 176.)

¹⁰ Organized by Act March 3, 1863, (12 Stat. 794.) Abolished by Act July 23, 1866, (14 Stat. 209, c. 210.)

¹¹ Organized by Act March 2, 1855, (10 Stat. 631.) Abolished by Act March 3, 1863, (12 Stat. 794,) creating the tenth circuit.

¹² Organized by Act Feb. 27, 1801, (2 Stat. 105, § 3.) Abolished by Act March 3, 1863, (12 Stat. 764, § 16.)

¹³ See note 38, on page xxi.

DISTRICT OF COLUMBIA, CIRCUIT COURT—Continued.

Circuit Judges.

WILLIAM CRANCH	March 3, 1801.....	February 24, 1806
JAMES MARSHALL.....	March 3, 1801.....	1803
NICHOLAS FITZHUGH.....	November 25, 1803.....	December 31, 1814
ALLEN BOWIE DUCKETT.....	March 17, 1806.....	August, 1809
BUCKNER THRUSTON	December 14, 1809.....	August 30, 1845
JAMES SEWALL MORSELL.....	January 11, 1815.....	March 3, 1863
JAMES DUNLOP	October 3, 1845.....	November 27, 1855
WILLIAM MATTHEWS MERRICK ...	December 14, 1855.....	March 3, 1863

DISTRICT JUDGES.

ALABAMA DISTRICT.¹³

CHARLES TAIT	May 13, 1820.....	March 10, 1824
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— NORTHERN AND SOUTHERN DISTRICTS.¹³

CHARLES TAIT	March 10, 1824.....	1826
WILLIAM CRAWFORD	May 22, 1826.....	February 6, 1839

— NORTHERN, SOUTHERN, AND MIDDLE DISTRICTS.¹³

WILLIAM CRAWFORD	February 6, 1839.....	1849
JOHN GAYLE	March 13, 1849.....	July 21, 1859
WILLIAM G. JONES	September 29, 1859.....	January 11, 1861
RICHARD BUSTEED	November 17, 1863.....	October 20, 1874
JOHN BRUCE	February 27, 1875.....	August 2, 1886

— NORTHERN AND MIDDLE DISTRICTS.^{13 14}

JOHN BRUCE	August 2, 1886.....	—
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— SOUTHERN DISTRICT.^{13 14}

HARRY T. TOULMIN	January 13, 1887.....	—
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ALASKA DISTRICT.¹⁵

WARD McALLISTER, JR	July 5, 1884.....	August 28, 1885
EDWARD J. DAWNE	August 28, 1885.....	December 3, 1885
LAFAYETTE DAWSON	December 3, 1885.....	August 25, 1888
JOHN H. KEATLEY	August 25, 1888.....	December 7, 1889
JOHN S. BUGBEE	December 7, 1889.....	April 21, 1892
WARREN TRUITT	January 15, 1892.....	—

ALBEMARLE DISTRICT.⁵⁵

(See North Carolina.)

¹³ Organized by Act April 21, 1830, (3 Stat. 564.) Divided by Act March 10, 1824, (4 Stat. 9.) into northern and southern districts, and by Act Feb. 6, 1839, (5 Stat. 315.) into northern, middle, and southern districts.

¹⁴ The jurisdiction of the district judge for the districts of Alabama was confined to the

northern and middle districts, and the appointment of a district judge for the southern district was authorized, by Act Aug. 2, 1886, (24 Stat. 213, c. 842.)

¹⁵ Organized by Act May 17, 1884, (23 Stat. 24, § 3.)

⁵⁵ See note 56, on page xxiv.

ARKANSAS DISTRICT.¹⁶

BENJAMIN JOHNSON June 29, 1836..... 1849
 DANIEL RINGO November 5, 1849.....March 3, 1851

———— EASTERN AND WESTERN DISTRICTS.¹⁷

DANIEL RINGO March 3, 1851.....May 6, 1861
 HENRY CLAY CALDWELL..... June 20, 1864.....March 3, 1871

———— EASTERN DISTRICT.¹⁷

HENRY CLAY CALDWELL..... March 3, 1871.....March 7, 1890
 JOHN A. WILLIAMS..... September 25, 1890.....————

———— WESTERN DISTRICT.¹⁷ •

WILLIAM STORY March 3, 1871..... 1875
 ISAAC C. PARKER..... March 19, 1875.....————

CALIFORNIA DISTRICT.¹⁸

OGDEN HOFFMAN July 27, 1866.....August 5, 1886

———— NORTHERN DISTRICT.¹⁹

OGDEN HOFFMAN February 27, 1851.....July 27, 1866
 OGDEN HOFFMAN August 5, 1886.....August 9, 1891
 WILLIAM W. MORROW September 18, 1891.....————

———— SOUTHERN DISTRICT.¹⁹

J. M. JONES..... December 26, 1850..... 1854
 ISAAC S. K. OGIER..... January 23, 1854..... 1861
 FLETCHER M. HAIGHT August 5, 1861.....July 27, 1866
 BRSKINE M. ROSS..... January 13, 1887.....————

CAPE FEAR DISTRICT.⁵⁶

(See North Carolina.)

COLORADO DISTRICT.²⁰

MOSES HALLETT January 12, 1877.....————

CONNECTICUT DISTRICT.²¹

RICHARD LAW September 26, 1789.....January 26, 1806
 PIERREPONT EDWARDS February 24, 1806.....April 5, 1826
 WILLIAM BRISTOL May 22, 1826.....March 7, 1836
 ANDREW THOMPSON JUDSON July 4, 1836.....March 17, 1853
 CHARLES ANTHONY INGERSOLL ... April 8, 1853.....February 7, 1860
 WILLIAM D. SHIPMAN March 12, 1860.....April 14, 1873
 NATHANIEL SHIPMAN April 16, 1873.....March 19, 1892
 WILLIAM K. TOWNSEND March 28, 1892.....————

¹⁶ Organized by Act June 15, 1836, (5 Stat. 51, § 4.)

¹⁷ Organized by Act March 3, 1851, (9 Stat. 594, c. 24.) The appointment of a judge for each district was authorized by Act March 3, 1871, (16 Stat. 472, § 5.)

¹⁸ Organized by Act July 27, 1866, (14 Stat. 300.) Abolished by Act Aug. 5, 1886, (24 Stat. 308.)

¹⁹ Organized by Act Sept. 28, 1850, (9 Stat. 521.) Abolished by Act July 27, 1866, (14 Stat. 300.) Reorganized by Act Aug. 5, 1886, (24 Stat. 308.)

²⁰ Organized by Act June 26, 1876, (19 Stat. 61, c. 147.)

²¹ Organized by Act Sept. 24, 1789, (1 Stat. 73.)

⁵⁶ See note 56, on page xxiv.

DELAWARE DISTRICT.²¹

GUNNING BEDFORD, JR.....	September 26, 1789.....	March 30, 1812
JOHN FISHER	April 23, 1812.....	April 23, 1823
WILLARD HALL	May 6, 1823.....	December, 1871
EDWARD G. BRADFORD	December 12, 1871.....	January 16, 1884
LEONARD E. WALES	March 20, 1884.....	_____

EAST JERSEY DISTRICT.⁵⁰

(See New Jersey.)

EDENTON DISTRICT.⁵⁵

(See North Carolina.)

FLORIDA DISTRICT.²³

ISAAC H. BRONSON	August 8, 1840.....	February 23, 1847
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———— NORTHERN DISTRICT.²³

ISAAC H. BRONSON	February 23, 1847.....	August 13, 1855
McQUEEN McINTOSH	March 11, 1856.....	January 10, 1861
PHILIP FRASER	July 17, 1862.....	May, 1876
THOMAS SETTLE	January 30, 1877.....	November 30, 1883
CHARLES SWAYNE	May 17, 1889.....	_____

———— SOUTHERN DISTRICT.²³

WILLIAM MARVIN	March 3, 1847.....	July 1, 1863
THOMAS JEFFERSON BOYNTON	October 19, 1863.....	1870
JOHN McKINNEY	November 8, 1870.....	October 15, 1871
JAMES W. LOCKE	February 1, 1872.....	_____

GEORGIA DISTRICT.²⁴

NATHANIEL PENDLETON.....	September 26, 1789.....	1796
JOSEPH CLAY.....	September 16, 1796.....	May, 1801
WILLIAM STEPHENS.....	October 22, 1801.....	January, 1819
WILLIAM DAVIES.....	January 14, 1819.....	June, 1821
JEREMIAH CULYER.....	June 12, 1821.....	May 7, 1839
JOHN C. NICOLL.....	May 11, 1839.....	August 11, 1848

———— NORTHERN AND SOUTHERN DISTRICTS.^{24 25}

JOHN C. NICOLL.....	August 11, 1848.....	January 19, 1861
JOHN ERSKINE.....	July 10, 1865.....	April 25, 1882

———— NORTHERN DISTRICT.^{24 25}

HENRY KENT McCAY.....	August 4, 1882.....	July 30, 1886
WILLIAM T. NEWMAN.....	August 13, 1886.....	_____

———— SOUTHERN DISTRICT.^{24 25}

JOHN ERSKINE.....	April 25, 1882.....	December 19, 1883
EMORY SPEER.....	February 18, 1885.....	_____

²¹ Organized by Act Sept. 24, 1789, (1 Stat. 73.)

²² Organized by Act March 3, 1845, (5 Stat. 788.) Abolished by Act Feb. 23, 1847, (9 Stat. 131.)

²³ Organized by Act Feb. 23, 1847, (9 Stat. 131.) Under Act May 23, 1828, (4 Stat. 291,) the superior court for the southern district of Florida was created, with certain admiralty jurisdiction. The judges were James Webb, from May 26, 1828, to 1839, and William Marvin, from March 11, 1839, to March 3, 1847.

²⁴ Organized by Act Sept. 24, 1789, (1 Stat. 73.) Divided into northern and southern districts by Act Aug. 11, 1848, (9 Stat. 239.)

²⁵ The jurisdiction of the district judge for the districts of Georgia was confined to the southern district, and the appointment of a district judge for the northern district authorized, by Act April 25, 1882, (22 Stat. 47, c. 87.)

⁵⁰ See note 50, on page xxiii.

⁵⁵ See note 56, on page xxiv.

IDAHO DISTRICT.²⁶

JAMES H. BEATTY..... March 7, 1891.....

ILLINOIS DISTRICT.²⁷

NATHANIEL POPE..... March 3, 1819..... 1849
 THOMAS DRUMMOND..... February 19, 1850.....February 13, 1855

— NORTHERN DISTRICT.²⁸

THOMAS DRUMMOND..... February 13, 1855.....December 22, 1869
 HENRY WILLIAM BLODGETT..... January 11, 1870.....December 5, 1892
 PETER S. GROSSCUP..... December 21, 1892.....

— SOUTHERN DISTRICT.²⁸

SAMUEL HUBBEL TREAT..... March 3, 1855.....March 27, 1887
 WILLIAM J. ALLEN..... April 18, 1887.....

INDIANA DISTRICT.²⁹

BENJAMIN PARKE..... March 6, 1817..... 1835
 JESSE LYNCH HOLMAN..... September 16, 1835.....March 28, 1842
 ELISHA MILLS HUNTINGTON..... May 2, 1842.....October 26, 1862
 CALEB BLOOD SMITH..... December 22, 1862.....January 7, 1864
 ALBERT SMITH WHITE..... January 18, 1864.....September 4, 1864
 DAVID McDONALD..... December 13, 1864.....August 25, 1869
 WALTER Q. GRESHAM..... September 1, 1869.....April, 1883
 WILLIAM ALLEN WOODS..... May 2, 1883.....March 21, 1892
 JOHN H. BAKER..... March 29, 1892.....

IOWA DISTRICT.³⁰

JOHN S. DYER..... March 3, 1847.....September, 1855
 JAMES M. LOVE..... October 5, 1855.....July 20, 1882

— NORTHERN DISTRICT.³¹

OLIVER P. SHIRAS..... August 4, 1882.....

— SOUTHERN DISTRICT.³¹

JAMES M. LOVE..... July 20, 1882.....July 2, 1891
 JOHN SIMSON WOOLSON..... August 17, 1891.....

KANSAS DISTRICT.³²

ARCHIBALD WILLIAMS..... March 12, 1861.....September, 1863
 MARK W. DELAHAY..... October 6, 1863.....December, 1873
 CASSIUS G. FOSTER..... March 10, 1874.....

KENTUCKY DISTRICT.³³

HARRY INNIS..... September 26, 1789.....September 20, 1816
 ROBERT TRIMBLE..... January 31, 1817.....May 9, 1826

²⁶Organized by Act July 3, 1890, (26 Stat. 217.)

²⁷Organized by Act March 3, 1819, (3 Stat. 502.) Abolished by Act Feb. 13, 1855, (10 Stat. 606.)

²⁸Organized by Act Feb. 13, 1855, (10 Stat. 606.)

²⁹Organized by Act March 3, 1817, (3 Stat. 390, c. 100.)

³⁰Organized by Act March 3, 1845, (5 Stat.

789.) Abolished by Act July 20, 1882, (22 Stat. 172.)

³¹Organized by Act July 20, 1882, (22 Stat. 172.)

³²Organized by Act Jan. 29, 1861, (12 Stat. 128.)

³³Organized by Act Sept. 24, 1789, (1 Stat. 73.) The district court was abolished by Act Feb. 13, 1801, (2 Stat. 97, § 24.) and reorganized by Act March 3, 1802, (2 Stat. 132, c. 8.)

KENTUCKY DISTRICT—Continued.

JOHN BOYLE.....	October 20, 1826.....	January 28, 1834
THOMAS B. MONROE.....	March 8, 1834.....	1861
BLAND BALLARD.....	October 16, 1861.....	July 29, 1879
WILLIAM H. HAYS.....	September 6, 1879.....	March 7, 1880
JOHN W. BARR.....	April 16, 1880.....	—

LOUISIANA, ORLEANS DISTRICT.³⁴

DOMINICK AUGUSTINE HALL.....	December 11, 1804.....	April 8, 1812
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— DISTRICT.³⁴

DOMINICK AUGUSTINE HALL.....	June 1, 1812.....	March, 1813
DOMINICK AUGUSTINE HALL.....	June 1, 1813.....	December, 1820
JOHN DICK	March 2, 1821.....	April 23, 1824
THOMAS BOLLING ROBERTSON....	May 26, 1824.....	November 5, 1828
SAMUEL A. HARPER.....	March 7, 1829.....	1837
PHILIP K. LAWRENCE.....	September 12, 1837.....	1841
THEODORE H. McCALEB.....	September 3, 1841.....	March 3, 1849
* GEORGE A. PEABODY.....	October 20, 1862.....	July 28, 1866
EDWARD H. DURELL.....	July 27, 1866.....	1874
EDWARD COKE BILLINGS.....	February 10, 1876.....	March 3, 1881

— EASTERN DISTRICT.³⁵

THEODORE H. McCALEB.....	March 3, 1849.....	January 26, 1861
EDWARD H. DURELL.....	May 20, 1863.....	July 27, 1866
EDWARD COKE BILLINGS.....	March 3, 1881.....	December 1, 1893
CHARLES PARLANGE.....	January 15, 1894.....	—

— WESTERN DISTRICT.³⁶

HENRY BOICE	May 9, 1849.....	January 21, 1861
ALECK BOARMAN	May 18, 1881.....	—

MAINE DISTRICT.³⁷

DAVID SEWALL.....	September 26, 1789.....	January, 1818
ALBION KEITH PARRIS.....	February, 1818.....	January, 1822
ASHUR WARE	February 15, 1822.....	May 31, 1866
EDWARD FOX	May 31, 1866.....	December 14, 1881
NATHAN WEBB	January 24, 1882.....	—

MARYLAND DISTRICT.³⁸

WILLIAM PACA	December 22, 1789.....	October, 1799
* JAMES WINCHESTER	October 31, 1799.....	March, 1806
JAMES HOUSTON	April 21, 1806.....	June, 1819

³⁴ Organized by Act April 8, 1812, (2 Stat. 703, § 3,) comprising the district of Orleans, which had been organized by Act March 26, 1804, (2 Stat. 285, § 8.) District of Louisiana abolished by Act March 3, 1849, (9 Stat. 401.) Reorganized by Act July 27, 1866, (14 Stat. 300.) Again abolished by Act March 3, 1881, (21 Stat. 507.)

³⁵ Appointed provisional judge for the state of Louisiana by proclamation. See U. S. v. Reiter, Case No. 16,146; The Grapeshot, 9 Wall. (76 U. S.) 129. The records of the provisional court were transferred to the district court by Act July 28, 1866, (14 Stat. 344, c. 310.)

³⁶ Organized by Act March 3, 1849, (9 Stat. 401.) Abolished by Act July 27, 1866, (14 Stat.

300.) Reorganized by Act March 3, 1881, (21 Stat. 507.)

³⁷ Organized by Act Sept. 24, 1789, (1 Stat. 73.)

³⁸ The district of Potomac, including a portion of the states of Maryland and Virginia, was organized by Act Feb. 13, 1801, § 21, (2 Stat. 96,) and the district court, by that act, was to be held by the district judge for the district of Maryland. After the District of Columbia was erected, it was provided by Act March 3, 1801, § 7, (2 Stat. 124,) that the chief judge of the circuit court for the District of Columbia should hold the district court for the district of Potomac. The district of Potomac was abolished by Act March 8, 1802, (2 Stat. 132, c. 8,) taking effect July 1, 1802.

MARYLAND DISTRICT—Continued.

THEODORICK BLAND	November 23, 1819.....	June 5, 1824
ELIAS GLENN	August 31, 1824.....	March 28, 1836
UPTON S. HEATH.....	April 4, 1836.....	February 21, 1852
JOHN GLENN	March 19, 1852.....	July 8, 1853
WILLIAM FELL GILES.....	July 18, 1853.....	March 22, 1870
THOMAS J. MORRIS.....	July 1, 1879.....	_____

MASSACHUSETTS DISTRICT.³⁹

JOHN LOWELL	September 26, 1789.....	February 20, 1801
JOHN DAVIS	February 20, 1801.....	July, 1841
PELEG SPRAGUE	July 16, 1841.....	March, 1865
JOHN LOWELL	March 11, 1865.....	December 18, 1878
THOMAS LEVERETT NELSON.....	January 10, 1879.....	_____

MICHIGAN DISTRICT.⁴⁰

ROSS WILKINS	January 26, 1837.....	February 24, 1863
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— EASTERN DISTRICT.⁴¹

ROSS WILKINS	February 24, 1863.....	February 18, 1870
JOHN WESLEY LONGYEAR.....	February 18, 1870.....	March 10, 1875
HENRY BILLINGS BROWN.....	March 19, 1875.....	December 31, 1890
HENRY H. SWAN.....	January 21, 1891.....	_____

— WESTERN DISTRICT.⁴¹

SOLOMON L. WITHEY.....	March 11, 1863.....	April 25, 1886
HENRY F. SEVERENS.....	May 25, 1886.....	_____

MINNESOTA DISTRICT.⁴²

RENSELAE RUSSELL NELSON...	May 20, 1858.....	_____
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MISSISSIPPI DISTRICT.⁴³

WILLIAM BAYARD SHIELDS.....	April 20, 1818.....	1823
PETER RANDOLPH	June 25, 1823.....	1832
POWHATAN ELLIS	July 14, 1832.....	January 5, 1836
GEORGE ADAMS	January 20, 1836.....	June 18, 1838

— NORTHERN AND SOUTHERN DISTRICTS.⁴³

GEORGE ADAMS	June 18, 1838.....	1839
SAMUEL JAMESON GHOLSON	February 13, 1839.....	January 9, 1861
ROBERT A. HILL	May 1, 1866.....	August 1, 1891
HENRY C. NILES	August 17, 1891.....	_____

MISSOURI DISTRICT.⁴⁴

JAMES H. PECK.....	April 5, 1822.....	March 8, 1836
ROBERT W. WELLS.....	June 27, 1836.....	March 3, 1857

³⁹ Organized by Act Sept. 24, 1789, (1 Stat. 73.)

⁴⁰ Organized by Act July 1, 1836, (5 Stat. 61, c. 234.) Abolished by Act July 24, 1863, (12 Stat. 660.)

⁴¹ Organized by Act July 24, 1863, (12 Stat. 660.)

⁴² Organized by Act May 11, 1858, (11 Stat. 285.)

⁴³ Organized by Act April 3, 1818, (3 Stat. 413.) Divided into northern and southern districts by Act June 18, 1838, (5 Stat. 247.)

⁴⁴ Organized by Act March 16, 1822, (3 Stat. 653.) Abolished by Act March 3, 1857, (11 Stat. 197.)

MISSOURI—Continued. EASTERN DISTRICT.⁴⁵

SAMUEL TREAT..... March 3, 1857.....February 15, 1887
 AMOS M. THAYER..... February 26, 1887.....

WESTERN DISTRICT.⁴⁵

ROBERT W. WELLS..... March 3, 1857.....September 22, 1864
 ARNOLD KREKEL..... March 9, 1865.....June 8, 1888
 JOHN F. PHILIPS..... June 25, 1888.....

MONTANA DISTRICT.⁴⁶

HIRAM KNOWLES..... February 21, 1890.....

NEBRASKA DISTRICT.⁴⁷

ELMER S. DUNDY..... April 9, 1868.....

NEVADA DISTRICT.⁴⁸

ALEXANDER W. BALDWIN..... March 11, 1865.....November 15, 1869
 EDGAR W. HILLYER..... December 21, 1869.....May 10, 1882
 GEORGE M. SABIN..... July 26, 1882.....May 13, 1890
 THOMAS P. HAWLEY..... September 15, 1890.....

NEWBERN DISTRICT.⁴⁹

(See North Carolina.)

NEW HAMPSHIRE DISTRICT.⁴⁹

JOHN SULLIVAN..... September 26, 1789.....January 23, 1795
 JOHN PICKERING..... February 11, 1795.....March, 1804
 JOHN SAMUEL SHERBURNE..... March 26, 1804.....August 2, 1830
 MATTHEW HARVEY..... November 2, 1830.....April 7, 1866
 DANIEL CLARK..... July 27, 1866.....January 2, 1891
 EDGAR ALDRICH..... February 25, 1891.....

NEW JERSEY DISTRICT.⁵⁰

DAVID BREARLY..... September 26, 1789.....August 16, 1790
 *ROBERT MORRIS August 28, 1790.....May 2, 1815
 WILLIAM SANDFORD PENNINGTON June 19, 1815.....September 26, 1826
 WILLIAM ROSSELL..... November 10, 1826.....June 20, 1840
 MAHLON DICKERSON..... July 23, 1840..... 1841
 PHILEMON DICKERSON..... March 2, 1841.....December 10, 1862
 RICHARD STOCKTON FIELD..... January 14, 1863.....May 25, 1870
 JOHN THOMPSON NIXON..... April 28, 1870.....September 28, 1889
 EDWARD T. GREEN..... October 24, 1839.....

NEW YORK DISTRICT.⁵¹

JAMES DUANE September 26, 1789.....April, 1794
 JOHN LAWRENCE..... May 6, 1794.....December, 1796

⁴⁵ Organized by Act March 3, 1857, (11 Stat. 197.)

⁴⁶ Organized by Act Feb. 22, 1889, (25 Stat. 682.)

⁴⁷ Organized by Act April 19, 1864, (13 Stat. 50.)

⁴⁸ Organized by Act Feb. 27, 1865, (13 Stat. 410.)

⁴⁹ Organized by Act Sept. 24, 1789, (1 Stat. 73.)

⁵⁰ Organized by Act Sept. 24, 1789, (1 Stat. 73.) Divided into districts of East and West Jersey by Act Feb. 13, 1801, (2 Stat. 96;) the district court to be held by the district judge for the district of Jersey. District of New Jersey reorganized by Act March 8, 1802, (2 Stat. 132, c. 8.)

⁵¹ Organized by Act Sept. 24, 1789, (1 Stat. 73.) Abolished by Act April 9, 1814, (3 Stat. 120, c. 49.)

* See note 56, on page xxiv.

NEW YORK DISTRICT—Continued.

ROBERT TROUPE.....	December 10, 1796.....	April, 1798
JOHN SLOSS HOBART.....	April 12, 1798.....	February 4, 1805
MATTHIAS BURNET TALLMADGE..	June 12, 1805.....	April 9, 1814
⁶² WILLIAM PETER VAN NESS.....	May 27, 1812.....	April 9, 1814

— NORTHERN DISTRICT.⁶³

MATTHIAS BURNET TALLMADGE..	April 9, 1814.....	October 7, 1819
ROGER SKINNER.....	November 24, 1819.....	1825
ALFRED CONKLING.....	December 14, 1825.....	August 6, 1852
NATHAN KELSEY HALL.....	August 31, 1852.....	March 21, 1874
WILLIAM JAMES WALLACE.....	April 7, 1874.....	April 6, 1882
ALFRED CONKLING COXE.....	May 4, 1882.....	_____

— SOUTHERN DISTRICT.⁶⁴

WILLIAM PETER VAN NESS.....	April 9, 1814.....	November 7, 1826
SAMUEL ROSSITER BETTS.....	December 21, 1826.....	May, 1867
SAMUEL BLATCHFORD.....	May 3, 1867.....	March 4, 1878
WILLIAM GARDINER CHOATE.....	March 25, 1878.....	June 2, 1881
ADDISON BROWN.....	June 2, 1881.....	_____

— EASTERN DISTRICT.⁶⁴

CHARLES L. BENEDICT.....	March 9, 1865.....	_____
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NORFOLK DISTRICT.⁷⁵

(See Virginia.)

NORTH CAROLINA DISTRICT.⁶⁵

JOHN STOKES	August 3, 1790.....	October, 1790
⁶⁶ JOHN SITGREAVES	December 20, 1790.....	February 13, 1801

— ALBEMARLE, PAMPTICO, AND CAPE FEAR DISTRICTS.⁶⁶

JOHN SITGREAVES	February 13, 1801.....	March 4, 1802
HENRY POTTER	April 7, 1802.....	December 20, 1857
ASA BIGGS	May 3, 1858.....	April, 1861
GEORGE W. BROOKS.....	August 19, 1865.....	June 4, 1872

— EASTERN DISTRICT.⁶⁷

GEORGE W. BROOKS.....	June 4, 1872.....	January 6, 1882
AUGUSTUS SHERILL SEYMOUR.....	February 21, 1882.....	_____

— WESTERN DISTRICT.⁶⁷

ROBERT P. DICK.....	June 7, 1872.....	_____
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NORTH DAKOTA DISTRICT.⁶⁸

ALFRED D. THOMAS.....	February 25, 1890.....	_____
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⁶³ Additional district judge authorized by Act April 29, 1812, (2 Stat. 719, c. 71.)⁶⁴ Organized by Act April 9, 1814, (3 Stat. 120, c. 49.)⁶⁵ Organized by Act Feb. 25, 1865, (13 Stat. 438, c. 54.)⁶⁶ Organized by Act June 4, 1790, (1 Stat. 126.) Divided into three districts by Act June 9, 1794, § 3, (1 Stat. 396.) Reorganized by Act March 3, 1797, § 2, (1 Stat. 518.) Again divided into three districts by Act Feb. 13, 1801, (2 Stat. 96.)⁶⁷ The districts of Wilmington, Newbern, and

Edonton were organized by Act June 9, 1794, § 3, (1 Stat. 396.) Abolished by Act March 3, 1797, § 2, (1 Stat. 518.) The districts of Albemarle, Pamptico, and Cape Fear were organized by Act Feb. 13, 1801, (2 Stat. 96.) Abolished by Act June 4, 1872, (17 Stat. 215.) See, also, Act March 8, 1802, (2 Stat. 132,) and Act April 29, 1802, § 7, (2 Stat. 162.)

⁶⁸ Organized by Act June 4, 1872, (17 Stat. 215.)⁶⁹ Organized by Act Feb. 22, 1889, (25 Stat. 682.)⁷⁵ See note 75, on page xxvii.

OHIO DISTRICT.⁵⁹

CHARLES WILLING BYRD.....	March 3, 1803.....	August 11, 1828
WILLIAM CREIGHTON, JR.....	November 1, 1828.....	December 31, 1828
JOHN WILSON CAMPBELL.....	March 7, 1829.....	September 24, 1833
BENJAMIN TAPPAN	October 12, 1833.....	December 26, 1833
HUMPHREY HOWE LEAVITT.....	June 30, 1834.....	February 11, 1855

NORTHERN DISTRICT.⁶⁰

HIRAM V. WILLSON.....	February 20, 1855.....	November 11, 1866
CHARLES TAYLOR SHERMAN.....	March 2, 1867.....	November 28, 1873
MARTIN WELKER.....	December 2, 1873.....	June 1, 1889
AUGUSTUS J. RICKS.....	July 2, 1889.....	

SOUTHERN DISTRICT.⁶⁰

HUMPHREY HOWE LEAVITT.....	February 11, 1855.....	March 30, 1871
PHILIP B. SWING.....	March 30, 1871.....	October 30, 1882
GEORGE R. SAGE.....	March 20, 1883.....	

OREGON DISTRICT.⁶¹

MATTHEW P. DEADY.....	March 9, 1859.....	March 24, 1893
CHARLES B. BELLINGER.....	April 15, 1893.....	

ORLEANS DISTRICT.⁶⁴

(See Louisiana.)

PAMPTICO DISTRICT.⁶⁴

(See North Carolina.)

PENNSYLVANIA DISTRICT.⁶²

FRANCIS HOPKINSON.....	September 26, 1789.....	May 9, 1791
WILLIAM LEWIS.....	July 14, 1791.....	1792
RICHARD PETERS.....	January 12, 1792.....	April 20, 1818

EASTERN DISTRICT.⁶³

RICHARD PETERS.....	April 20, 1818.....	August 22, 1828
JOSEPH HOPKINSON.....	October 23, 1828.....	January 13, 1842
ARCHIBALD RANDALL.....	March 8, 1842.....	June 8, 1846
JOHN KENTZING KANE.....	June 17, 1846.....	February 21, 1858
JOHN CADWALADER.....	April 24, 1858.....	January 26, 1879
WILLIAM BUTLER.....	February 19, 1879.....	

WESTERN DISTRICT.⁶³

JONATHAN H. WALKER.....	April 20, 1818.....	January, 1824
WILLIAM WILKINS.....	May 12, 1824.....	March, 1831
THOMAS IRWIN.....	April 14, 1831.....	January 4, 1859
WILSON McCANDLESS.....	February 8, 1859.....	July 24, 1876
WINTHROP W. KETCHUM.....	June 26, 1876.....	December 6, 1879
MARCUS W. ACHESON.....	January 14, 1880.....	February 7, 1891
JAMES H. REED.....	February 20, 1891.....	February 15, 1892
JOSEPH BUFFINGTON.....	February 23, 1892.....	

⁵⁹ See note 34, on page xxi.

⁶⁰ See note 56, on page xxiv.

⁶¹ Organized by Act Feb. 19, 1803, (2 Stat. 201.) Abolished by Act Feb. 11, 1855, (10 Stat. 604.)

⁶² Organized by Act Feb. 11, 1855, (10 Stat. 604.)

⁶³ Organized by Act March 3, 1830, (11 Stat. 437.)

⁶⁴ Organized by Act Sept. 24, 1789, (1 Stat. 73.) Abolished by Act April 20, 1818, (3 Stat. 462.)

⁶⁵ Organized by Act April 20, 1818, (3 Stat. 462.)

POTOMAC DISTRICT.⁵⁶

(See Maryland.)

RHODE ISLAND DISTRICT.⁶⁴

HENRY MARCHANT.....	July 3, 1790.....	August 30, 1796
BENJAMIN BOURN.....	October 13, 1796.....	February 20, 1801
DAVID LEONARD BARNES.....	April 30, 1801.....	November 3, 1812
DAVID HOWELL.....	November 17, 1812.....	July 29, 1824
JOHN PITMAN.....	August 4, 1824.....	November 17, 1864
JONATHAN RUSSELL BULLOCK.....	February 11, 1865.....	September, 1869
JOHN POWER KNOWLES.....	October 9, 1869.....	March 8, 1881
LE BARON BRADFORD COLT.....	March 21, 1881.....	July 5, 1884
GEORGE MOULTON CARPENTER...	December 18, 1884.....	-----

SOUTH CAROLINA DISTRICT.⁶⁵

WILLIAM DRAYTON.....	November 18, 1789.....	May 18, 1790
THOMAS BEE.....	June 14, 1790.....	1812
JOHN DRAYTON.....	May 7, 1812.....	November, 1822
THOMAS LEE.....	February 17, 1823.....	February 21, 1825

EASTERN AND WESTERN DISTRICTS.⁶⁵

THOMAS LEE.....	February 21, 1825.....	October 24, 1839
ROBERT BUDD GILCHRIST.....	October 30, 1839.....	May 1, 1856
A. GORDON MAGRATH.....	May 12, 1856.....	November 7, 1860
GEORGE S. BRYAN.....	March 12, 1866.....	September, 1886
CHARLES H. SIMONTON.....	September 3, 1886.....	December 19, 1893
WILLIAM H. BRAWLEY.....	January 18, 1894.....	-----

SOUTH DAKOTA DISTRICT.⁶⁶

ALONZO J. EDGERTON.....	November 19, 1889.....	-----
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TENNESSEE DISTRICT.⁶⁷

JOHN McNAIRY.....	February 20, 1797.....	July 1, 1802
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EASTERN AND WESTERN DISTRICTS.⁶⁸

JOHN McNAIRY.....	July 1, 1802.....	1834
MORGAN W. BROWN.....	January 3, 1834.....	January 18, 1839

EASTERN, MIDDLE, AND WESTERN DISTRICTS.⁶⁸

MORGAN W. BROWN.....	January 18, 1839.....	March 6, 1853
WEST H. HUMPHREYS.....	March 26, 1853.....	June 26, 1862
CONNALLY F. TRIGG.....	July 17, 1862.....	June 14, 1878

EASTERN AND MIDDLE DISTRICTS.^{68 69}

CONNALLY F. TRIGG.....	June 14, 1878.....	April 25, 1880
DAVID McKENDREE KEY.....	May 27, 1880.....	-----

WESTERN DISTRICT.^{68 69}

ELI SHELBY HAMMOND.....	June 17, 1878.....	-----
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⁶⁴ See note 56, on page xxiv.⁶⁵ Organized by Act June 23, 1790, (1 Stat. 128.)⁶⁶ Organized by Act Sept. 24, 1789, (1 Stat. 73.) Divided into eastern and western districts by Act Feb. 21, 1823, (3 Stat. 726, c. 9.) For other acts relating to the districts of South Carolina, see 11 Stat. 43; 25 Stat. 655, c. 113; 26 Stat. 71, c. 165; 27 Stat. 261, c. 235.⁶⁷ Organized by Act Feb. 22, 1889, (25 Stat. 682.)⁶⁸ Organized by Act Jan. 31, 1797, (1 Stat. 496.) The district court was abolished by Act Feb. 13, 1801, (2 Stat. 97, § 24.) and reorganized by Act March 8, 1802. (2 Stat. 132, c. 8.) The district was abolished by Act April 29, 1802, (2 Stat. 165, §§ 16, 17.)⁶⁹ Organized by Act April 29, 1802, (2 Stat. 165, §§ 16, 17.) Middle district organized by Act Jan. 18, 1839, (5 Stat. 313.)⁷⁰ Appointment of judge for the western district authorized by Act June 14, 1878, (20 Stat. 132.)

TEXAS DISTRICT.⁷⁰

JOHN C. WATROUS..... May 29, 1846.....February 21, 1857

EASTERN DISTRICT.^{71 72}

JOHN C. WATROUS..... February 21, 1857.....January, 1869
 JOEL C. C. WINCH..... October 4, 1870.....March 4, 1871
 AMOS MORRILL..... February 5, 1872.....March, 1884
 CHAUNCEY BREWER SABIN..... April 5, 1884.....March 30, 1890
 DAVID E. BRYANT..... May 28, 1890.....

WESTERN DISTRICT.^{71 72}

THOMAS H. DUVAL..... March 3, 1857..... October 10, 1880
 EZEKIEL B. TURNER..... November 18, 1880.....June 2, 1888
 THOMAS S. MAXEY..... June 25, 1888.....

NORTHERN DISTRICT.^{71 72}

ANDREW PHELPS McCORMICK.... April 10, 1879.....March 17, 1892
 JOHN B. RECTOR..... March 30, 1892.....

VERMONT DISTRICT.⁷³

NATHANIEL CHIPMAN..... March 4, 1791..... 1793
 SAMUEL HITCHCOCK..... September 3, 1793.....February 20, 1801
 ELIJAH PAINE..... March 3, 1801.....March, 1842
 SAMUEL PRENTISS..... April 3, 1842.....January 15, 1857
 DAVID A. SMALLEY..... February 3, 1857.....March, 1877
 HOYT H. WHEELER..... March 16, 1877.....

VIRGINIA DISTRICT.^{74 75 38}

⁷⁴ CYRUS GRIFFIN November 28, 1789.....December 14, 1810
 JOHN TYLER January 7, 1811.....January 6, 1813
 ST. GEORGE TUCKER January 19, 1813.....February 4, 1819
 JOHN CURTISS UNDERWOOD..... June 11, 1864.....February 3, 1871

EASTERN DISTRICT.⁷⁶

ST. GEORGE TUCKER February 4, 1819.....April 8, 1825
 GEORGE HAY July 5, 1825.....September 21, 1830
 PHILIP PENDLETON BARBOUR October 8, 1830.....March 15, 1836
 PETER VIVIAN DANIEL April 19, 1836.....March 3, 1841
 JOHN YOUNG MASON March 3, 1841.....March 5, 1844
 JAMES D. HALLYBURTON June 15, 1844.....April 17, 1861
 JOHN CURTISS UNDERWOOD March 27, 1863.....June 11, 1864
 JOHN CURTISS UNDERWOOD February 3, 1871.....December 7, 1873
 ROBERT WILLIAM HUGHES January 14, 1874.....

WESTERN DISTRICT, (Old.)⁷⁷

JOHN GEORGE JACKSON February 24, 1819.....March 29, 1825
 PHILIP C. PENDLETON May 6, 1825..... 1825

³⁸ See note 38, on page xxi.

⁷⁰ Organized by Act Dec. 29, 1845, (9 Stat. 1.) Abolished by Act Feb. 21, 1857, (11 Stat. 164.)

⁷¹ Organized by Act Feb. 21, 1857, (11 Stat. 164.)

⁷² Northern district organized by Act Feb. 24, 1879, (20 Stat. 318.)

⁷³ Organized by Act March 2, 1791, (1 Stat. 297.)

⁷⁴ Organized by Act Sept. 24, 1789, (1 Stat. 73.) Abolished by Act Feb. 4, 1819, (3 Stat. 478, c. 12.) Reorganized by Act June 11, 1864,

(13 Stat. 124.) Again abolished by Act Feb. 3, 1871, (16 Stat. 403.)

⁷⁵ The district of Norfolk was organized by Act Feb. 13, 1801, (2 Stat. 96, § 21.) and abolished by Act March 8, 1802, (2 Stat. 132, c. 8.) The court was held by the district judge of the district of Virginia.

⁷⁶ Organized by Act Feb. 4, 1819, (3 Stat. 478, c. 12.) Abolished by Act June 11, 1864, (13 Stat. 124.) Reorganized by Act Feb. 3, 1871, (16 Stat. 403.)

⁷⁷ Western district of Virginia organized by Act Feb. 4, 1819, (3 Stat. 478, c. 12.) Changed to the district of West Virginia by Act June 11, 1864, (13 Stat. 124.)

VIRGINIA, WESTERN DISTRICT, (Old)—Continued.

ALEXANDER CALDWELL	October 28, 1825.....	April 8, 1839
ISAAC SAMUELS PENNYBACKER ...	April 23, 1839.....	1845
JOHN W. BROCKENBROUGH.....	January 14, 1846.....	June, 1861
JOHN J. JACKSON, JR	August 3, 1861.....	June 11, 1864

— **WESTERN DISTRICT, (New.)⁷⁸**

ALEXANDER RIVES	February 6, 1871.....	August 1, 1882
JOHN PAUL	March 3, 1883.....	_____

WASHINGTON DISTRICT.⁷⁹

CORNELIUS HOLGATE HANFORD... ..	February 25, 1890.....	_____
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WEST JERSEY DISTRICT.⁸⁰

(See New Jersey.)

WEST VIRGINIA DISTRICT.⁷⁷

(See Western District of Virginia, Old.)

JOHN J. JACKSON	June 11, 1864.....	_____
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WILMINGTON DISTRICT.⁵⁴

(See North Carolina.)

WISCONSIN DISTRICT.⁸⁰

ANDREW G. MILLER	June 12, 1848.....	June 30, 1870
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— **EASTERN DISTRICT.⁸¹**

ANDREW G. MILLER	June 30, 1870.....	December 31, 1873
JAMES H. HOWE	January 3, 1874.....	January 1, 1875
CHARLES E. DYER	February 10, 1875.....	May 4, 1888
JAMES G. JENKINS	July 2, 1888.....	March 23, 1893
WILLIAM H. SEAMAN	April 3, 1893.....	_____

— **WESTERN DISTRICT.⁸¹**

JAMES CAMPBELL HOPKINS	July 9, 1870.....	September 3, 1877
ROMANZO BUNN	October 30, 1877.....	_____

WYOMING DISTRICT.⁸²

JOHN A. RINER	September 23, 1890.....	_____
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⁷⁸ See note 50, on page xxiii.

⁷⁹ See note 56, on page xxiv.

⁸⁰ See note 77, on page xxvii.

⁷⁷ Organized by Act Feb. 3, 1871, (16 Stat. 403.)

⁷⁸ Organized by Act Feb. 22, 1889, (25 Stat. 682.)

⁸¹ Organized by Act Aug. 6, 1846, (9 Stat. 57.) Abolished by Act June 30, 1870, (16 Stat. 171.)

⁸² Organized by Act June 30, 1870, (16 Stat. 171.)

⁸³ Organized by Act July 10, 1890, (26 Stat. 225.)

FEDERAL JUDGES.

ALPHABETICALLY ARRANGED.

ACHESON, MARCUS W.....	District Judge, W. D. Pa.....	1880-1891
	Circuit Judge, 3d Circuit.....	1891-
ADAMS, GEORGE.....	District Judge, D. Miss.....	1836-1838
	District Judge, N. and S. D. Miss..	1838-1839
ALDRICH, EDGAR.....	District Judge, D. N. H.....	1891-
ALLEN, WILLIAM J.....	District Judge, S. D. Ill.....	1887-
BAKER, JOHN H.....	District Judge, D. Ind.....	1892-
BALDWIN, ALEXANDER W.....	District Judge, D. Nev.....	1865-1869
BALDWIN, HENRY.....	Circuit Justice, 3d Circuit.....	1830-1844
BALLARD, BLAND.....	District Judge, D. Ky.....	1861-1879
BARBOUR, PHILIP PENDLETON.....	District Judge, E. D. Va.....	1830-1836
	Circuit Justice, 5th Circuit.....	1836-1841
BARNES, DAVID LEONARD.....	District Judge, D. R. I.....	1801-1812
BARR, JOHN W.....	District Judge, D. Ky.....	1880-
BAXTER, JOHN.....	Circuit Judge, 6th Circuit.....	1877-1886
BASSETT, RICHARD.....	Circuit Judge, 3d Circuit.....	1801-1802
BEATTY, JAMES H.....	District Judge, D. Idaho.....	1891-
BEDFORD, JR., GUNNING.....	District Judge, D. Del.....	1789-1812
BEE, THOMAS.....	District Judge, D. S. C.....	1790-1812
BELLINGER, CHARLES B.....	District Judge, D. Or.....	1893-
BENEDICT, CHARLES L.....	District Judge, E. D. N. Y.....	1865-
BENSON, EGBERT.....	Circuit Judge, 2d Circuit..	1801-1802
BETTS, SAMUEL ROSSITER.....	District Judge, S. D. N. Y.....	1826-1867
BIGGS, ASA.....	District Judge, D. Albemarle, Pamptico, and Cape Fear.....	1858-1861
BILLINGS, EDWARD COKE.....	District Judge, D. La.....	1876-1881
	District Judge, E. D. La.....	1881-1893
BLAIR, JOHN.....	Circuit Justice, All Circuits.....	1789-1796
BLAND, THEODORICK.....	District Judge, D. Md.....	1819-1824
BLATCHFORD, SAMUEL.....	District Judge, S. D. N. Y.....	1867-1878
	Circuit Judge, 2d Circuit.....	1878-1882
	Circuit Justice, 2d Circuit.....	1882-1893
BLODGETT, HENRY WILLIAM.....	District Judge, N. D. Ill.....	1870-1892
BOARMAN, ALECK.....	District Judge, W. D. La.....	1881-
BOICE, HENRY.....	District Judge, W. D. La.....	1849-1861
BOND, HUGH LENNOX.....	Circuit Judge, 4th Circuit.....	1870-1893
BOURN, BENJAMIN.....	District Judge, D. R. I.....	1796-1801
	Circuit Judge, 1st Circuit.....	1801-1802
BOYLE, JOHN.....	District Judge, D. Ky.....	1826-1834
BOYNTON, THOMAS JEFFERSON.....	District Judge, S. D. Fla.....	1863-1870
BRADFORD, EDWARD G.....	District Judge, D. Del.....	1871-1884
BRADLEY, JOSEPH P.....	Circuit Justice, 5th Circuit.....	1870-1880
	Circuit Justice, 3d Circuit.....	1880-1892
BRAWLEY, WILLIAM H.....	District Judge, E. and W. D. S. C.	1814-
BREARLY, DAVID.....	District Judge, D. N. J.....	1789-1790
BREWER, DAVID JOSIAH.....	Circuit Judge, 8th Circuit.....	1884-1890
	Circuit Justice, 6th Circuit.....	1890-1891
	Circuit Justice, 8th Circuit.....	1891-
BRISTOL, WILLIAM.....	District Judge, D. Conn.....	1826-1836
BROCKENBROUGH, JOHN W.....	District Judge, W. D. Va.....	1846-1861
BRONSON, ISAAC H.....	District Judge, D. Fla.....	1846-1847
	District Judge, N. D. Fla.....	1847-1855

BROOKS, GEORGE W.....	District Judge, D. Albemarle, Pamptico, and Cape Fear.....	1865-1872
	District Judge, E. D. N. C.....	1872-1882
BROWN, ADDISON.....	District Judge, S. D. N. Y.....	1881-
BROWN, HENRY BILLINGS.....	District Judge, E. D. Mich.....	1875-1890
	Circuit Justice, 6th Circuit.....	1891-
BROWN, MORGAN W.....	District Judge, E. and W. D. Tenn..	1834-1839
	District Judge, E., M., and W. D. Tenn.....	1839-1853
BRUCE, JOHN.....	District Judge, N., S., and M. D. Ala.....	1875-1886
	District Judge, N. and M. D. Ala..	1886-
BRYAN, GEORGE S.....	District Judge, E. and W. D. S. C.	1866-1886
BRYANT, DAVID E.....	District Judge, E. D. Tex.....	1890-
BUFFINGTON, JOSEPH.....	District Judge, W. D. Pa.....	1892-
BUGBEE, JOHN S.....	District Judge, D. Alaska.....	1889-1892
BULLOCK, JONATHAN RUSSELL.....	District Judge, D. R. I.....	1865-1869
BUNN, ROMANZO.....	District Judge, W. D. Wis.....	1877-
BUSTEED, RICHARD.....	District Judge, N., S., and M. D. Ala.....	1863-1874
BUTLER, WILLIAM.....	District Judge, E. D. Pa.....	1879-
BYRD, CHARLES WILLING.....	District Judge, D. Ohio.....	1803-1828
CADWALADER, JOHN.....	District Judge, E. D. Pa.....	1858-1879
CALDWELL, ALEXANDER.....	District Judge, W. D. Va.....	1825-1839
CALDWELL, HENRY CLAY.....	District Judge, E. and W. D. Ark..	1864-1871
	District Judge, E. D. Ark.....	1871-1890
	Circuit Judge, 8th Circuit.....	1890-
CAMPBELL, JOHN ARCHIBALD.....	Circuit Justice, 5th Circuit.....	1853-1861
CAMPBELL, JOHN WILSON.....	District Judge, D. Ohio.....	1829-1833
CARPENTER, GEORGE MOULTON.....	District Judge, D. R. I.....	1884-
CATRON, JOHN.....	Circuit Justice, 8th Circuit.....	1837-1863
	Circuit Justice, 6th Circuit.....	1863-1865
CHASE, SALMON PORTLAND.....	Circuit Justice, 4th Circuit.....	1864-1873
CHASE, SAMUEL.....	Circuit Justice, All Circuits.....	1796-1801
	Circuit Justice, 4th Circuit.....	1802-1811
CHIPMAN, NATHANIEL.....	District Judge, D. Vt.....	1791-1793
CHOATE, WILLIAM GARDINER.....	District Judge, S. D. N. Y.....	1878-1881
CLARK, DANIEL.....	District Judge, D. N. H.....	1866-1891
CLAY, JOSEPH.....	District Judge, D. Ga.....	1796-1801
	Circuit Judge, 5th Circuit.....	1801-1802
CLIFFORD, NATHAN.....	Circuit Justice, 1st Circuit.....	1858-1881
COLT, LE BARON BRADFORD.....	District Judge, D. R. I.....	1881-1884
	Circuit Judge, 1st Circuit.....	1884-
CONKLING, ALFRED.....	District Judge, N. D. N. Y.....	1825-1852
COXE, ALFRED CONKLING.....	District Judge, N. D. N. Y.....	1882-
CRANCH, WILLIAM.....	Circuit Judge, D. C.....	1801-1806
	Chief Judge, D. C.....	1806-1855
CRAWFORD, WILLIAM.....	District Judge, N. and S. D. Ala..	1826-1839
	District Judge, N., S., and M. D. Ala.....	1839-1849
CREIGHTON, JR., WILLIAM.....	District Judge, D. Ohio.....	1828-1828
CULYER, JEREMIAH.....	District Judge, D. Ga.....	1821-1839
CURTIS, BENJAMIN ROBBINS.....	Circuit Justice, 1st Circuit.....	1851-1857
CUSHING, WILLIAM.....	Circuit Justice, All Circuits.....	1789-1801
	Circuit Justice, 1st Circuit.....	1802-1810
DALLAS, GEORGE M.....	Circuit Judge, 3d Circuit.....	1892-
DANIEL, PETER VIVIAN.....	District Judge, E. D. Va.....	1836-1841
	Circuit Justice, 5th Circuit.....	1841-1845
	Circuit Justice, 9th Circuit.....	1845-1860
DAVIES, WILLIAM.....	District Judge, D. Ga.....	1819-1821
DAVIS, DAVID.....	Circuit Justice, 8th Circuit.....	1863-1867
	Circuit Justice, 7th Circuit.....	1867-1877
DAVIS, JOHN.....	District Judge, D. Mass.....	1801-1841
DAWNE, EDWARD J.....	District Judge, D. Alaska.....	1885-1885
DAWSON, LAFAYETTE.....	District Judge, D. Alaska.....	1885-1888
DEADY, MATTHEW P.....	District Judge, D. Or.....	1859-1893
DELAHAY, MARK W.....	District Judge, D. Kan.....	1863-1873

DICK, JOHN.....	District Judge, D. La.....	1821-1824
DICK, ROBERT P.....	District Judge, W. D. N. C.....	1872-
DICKERSON, MAHLON.....	District Judge, D. N. J.....	1840-1841
DICKERSON, PHILEMON.....	District Judge, D. N. J.....	1841-1862
DILLON, JOHN FORREST.....	Circuit Judge, 8th Circuit.....	1869-1879
DRAYTON, JOHN.....	District Judge, D. S. C.....	1812-1822
DRAYTON, WILLIAM.....	District Judge, D. S. C.....	1789-1790
DRUMMOND, THOMAS.....	District Judge, D. Ill.....	1850-1855
	District Judge, N. D. Ill.....	1855-1869
	Circuit Judge, 7th Circuit.....	1869-1884
DUANE, JAMES.....	District Judge, D. N. Y.....	1789-1794
DUCKETT, ALLEN BOWIE.....	Circuit Judge, D. C.....	1806-1809
DUNDY, ELMER S.....	District Judge, D. Neb.....	1868-
DUNLOP, JAMES.....	Circuit Judge, D. C.....	1845-1855
	Chief Judge, D. C.....	1855-1863
DURELL, EDWARD H.....	District Judge, E. D. La.....	1863-1866
	District Judge, D. La.....	1866-1874
DUVAL, GABRIEL.....	Circuit Justice, 4th Circuit.....	1811-1835
DUVAL, THOMAS H.....	District Judge, W. D. Tex.....	1857-1880
DYER, CHARLES E.....	District Judge, E. D. Wis.....	1875-1888
DYER, JOHN S.....	District Judge, D. Iowa.....	1847-1855
EDGERTON, ALONZO J.....	District Judge, D. S. Dak.....	1889-
EDWARDS, PIERREPONT.....	District Judge, D. Conn.....	1806-1826
ELLIS, POWHATAN.....	District Judge, D. Miss.....	1832-1836
ELLSWORTH, OLIVER.....	Circuit Justice, All Circuits.....	1796-1800
EMMONS, HALMOR HULL.....	Circuit Judge, 6th Circuit.....	1870-1877
ERSKINE, JOHN.....	District Judge, N. and S. D. Ga...	1865-1882
	District Judge, S. D. Ga.....	1882-1883
FIELD, RICHARD STOCKTON.....	District Judge, D. N. J.....	1863-1870
FIELD, STEPHEN JOHNSON.....	Circuit Justice, 10th Circuit.....	1863-1866
	Circuit Justice, 9th Circuit.....	1867-
	Circuit Justice, 2d Circuit.....	1882-1882
FISHER, JOHN.....	District Judge, D. Del.....	1812-1823
FITZHUGH, NICHOLAS.....	Circuit Judge, D. C.....	1803-1814
FOSTER, CASSIUS G.....	District Judge, D. Kan.....	1874-
FOX, EDWARD.....	District Judge, D. Me.....	1866-1881
FRASER, PHILIP.....	District Judge, N. D. Fla.....	1862-1876
FULLER, MELVILLE WESTON.....	Circuit Justice, 4th Circuit.....	1888-
	Circuit Justice, 7th Circuit.....	1892-1893
GAYLE, JOHN.....	District Judge, N., S., and M. D.	
	Ala.....	1849-1859
GHOLSON, SAMUEL JAMESON.....	District Judge, N. and S. D. Miss..	1839-1861
GILBERT, WILLIAM B.....	Circuit Judge, 9th Circuit.....	1892-
GILCHRIST, ROBERT BUDD.....	District Judge, E. and W. D. S. C.	1839-1856
GILES, WILLIAM FELL.....	District Judge, D. Md.....	1853-1879
GLENN, ELIAS.....	District Judge, D. Md.....	1824-1836
GLENN, JOHN.....	District Judge, D. Md.....	1852-1853
GOFF, NATHAN.....	Circuit Judge, 4th Circuit.....	1892-
GRAY, HORACE.....	Circuit Justice, 1st Circuit.....	1882-
	Circuit Justice, 2d Circuit.....	1893-
GREEN, EDWARD T.....	District Judge, D. N. J.....	1889-
GRESHAM, WALTER Q.....	District Judge, D. Ind.....	1869-1883
	Circuit Judge, 7th Circuit.....	1884-1893
GRIER, ROBERT COOPER.....	Circuit Justice, 3d Circuit.....	1846-1870
GRIFFIN, CYRUS.....	District Judge, D. Va.....	1789-1810
GRIFFITH, WILLIAM.....	Circuit Judge, 3d Circuit.....	1801-1802
GROSSCUP, PETER S.....	District Judge, N. D. Ill.....	1892-
HAIGHT, FLETCHER M.....	District Judge, S. D. Cal.....	1861-1866
HALL, DOMINICK AUGUSTINE.....	Chief Judge, 5th Circuit.....	1801-1802
	District Judge, D. Orleans.....	1804-1812
	District Judge, D. La.....	1812-1813
	District Judge, D. La.....	1813-1820
HALL, NATHAN KELSEY.....	District Judge, N. D. N. Y.....	1852-1874
HALL, WILLARD.....	District Judge, D. Del.....	1823-1871
HALLETT, MOSES.....	District Judge, D. Colo.....	1877-
HALLYBURTON, JAMES D.....	District Judge, E. D. Va.....	1844-1861
HAMMOND, ELI SHELBY.....	District Judge, W. D. Tenn.....	1878-

HANFORD, CORNELIUS HOLGATE.....	District Judge, D. Wash.....	1890-
HARLAN, JOHN MARSHALL.....	Circuit Justice, 7th Circuit.....	1873-1892
	Circuit Justice, 1st Circuit.....	1881-1882
	Circuit Justice, 5th Circuit.....	1887-1888
	Circuit Justice, 4th Circuit.....	1888-1888
	Circuit Justice, 3d Circuit.....	1892-1892
	Circuit Justice, 7th Circuit.....	1893-
HARPER, SAMUEL A.....	District Judge, D. La.....	1829-1837
HARRIS, EDWARD.....	Circuit Judge, 5th Circuit.....	1802-1802
HARVEY, MATTHEW.....	District Judge, D. N. H.....	1830-1866
HAWLEY, THOMAS P.....	District Judge, D. Nev.....	1890-
HAY, GEORGE.....	District Judge, E. D. Va.....	1825-1830
HAYS, WILLIAM H.....	District Judge, D. Ky.....	1879-1880
HEATH, UPTON S.....	District Judge, D. Md.....	1836-1852
HILL, ROBERT A.....	District Judge, N. and S. D. Miss..	1866-1891
HILLYER, EDGAR W.....	District Judge, D. Nev.....	1869-1882
HITCHCOCK, SAMUEL.....	District Judge, D. Vt.....	1793-1801
	Circuit Justice, 2d Circuit.....	1872-1882
HOBART, JOHN SLOSS.....	District Judge, D. N. Y.....	1798-1805
HOFFMAN, OGDEN.....	District Judge, N. D. Cal.....	1851-1866
	District Judge, D. Cal.....	1866-1886
	District Judge, N. D. Cal.....	1886-1891
HOLMAN, JESSE LYNCH.....	District Judge, D. Ind.....	1835-1842
HOPKINS, JAMES CAMPBELL.....	District Judge, W. D. Wis.....	1870-1877
HOPKINSON, FRANCIS.....	District Judge, D. Pa.....	1789-1791
HOPKINSON, JOSEPH.....	District Judge, E. D. Pa.....	1828-1842
HOUSTON, JAMES.....	District Judge, D. Md.....	1806-1819
HOWE, JAMES H.....	District Judge, E. D. Wis.....	1874-1875
HOWELL, DAVID.....	District Judge, D. R. I.....	1812-1824
HUMPHREYS, WEST H.....	District Judge, E., M., and W. D. Tenn.....	1853-1862
HUNT, WARD.....	Circuit Justice, 2d Circuit.....	1872-1882
HUNTINGTON, ELISHA MILLS.....	District Judge, D. Ind.....	1842-1862
HUGHES, ROBERT WILLIAM.....	District Judge, E. D. Va.....	1874-
INGERSOLL, CHARLES ANTHONY.....	District Judge, D. Conn.....	1853-1860
INNIS, HARRY.....	District Judge, D. Ky.....	1789-1816
IREDELL, JAMES.....	Circuit Justice, All Circuits.....	1790-1799
IRWIN, THOMAS.....	District Judge, W. D. Pa.....	1831-1859
JACKSON, HOWELL EDMUNDS.....	Circuit Judge, 6th Circuit.....	1886-1893
	Circuit Justice, 5th Circuit.....	1893-
JACKSON, JOHN GEORGE.....	District Judge, W. D. Va.....	1819-1825
JACKSON, JR., JOHN J.....	District Judge, W. D. Va.....	1861-1864
	District Judge, D. W. Va.....	1864-
JAY, JOHN.....	Circuit Justice, All Circuits.....	1789-1794
JENKINS, JAMES G.....	District Judge, E. D. Wis.....	1888-1893
	Circuit Judge, 7th Circuit.....	1893-
JOHNSON, ALEXANDER SMITH.....	Circuit Judge, 2d Circuit.....	1875-1878
JOHNSON, BENJAMIN.....	District Judge, D. Ark.....	1836-1849
JOHNSON, THOMAS.....	Circuit Justice, All Circuits.....	1791-1793
JOHNSON, WILLIAM.....	Circuit Justice, 6th Circuit.....	1804-1834
JONES, J. M.....	District Judge, S. D. Cal.....	1850-1854
JONES, WILLIAM G.....	District Judge, N., S., and M. D. Ala.....	1859-1861
JUDSON, ANDREW THOMPSON.....	District Judge, D. Conn.....	1836-1853
KANE, JOHN KENTZING.....	District Judge, E. D. Pa.....	1846-1858
KEATLEY, JOHN H.....	District Judge, D. Alaska.....	1888-1889
KETCHUM, WINTHROP W.....	District Judge, W. D. Pa.....	1876-1879
KEY, DAVID MCKENDREE.....	District Judge, E. and M. D. Tenn.	1880-
KEY, PHILIP BARTON.....	Chief Judge, 4th Circuit.....	1801-1802
KILTY, WILLIAM.....	Chief Judge, D. C.....	1801-1806
KNOWLES, HIRAM.....	District Judge, D. Mont.....	1890-
KNOWLES, JOHN POWER.....	District Judge, D. R. I.....	1869-1881
KREKEL, ARNOLD.....	District Judge, W. D. Mo.....	1865-1888
LACOMBE, EMILE HENRY.....	Circuit Judge, 2d Circuit.....	1887-

LAMAR, LUCIUS QUINTUS CINCINNATUS	Circuit Justice, 5th Circuit.....	1888-1893
LAW, RICHARD.....	District Judge, D. Conn.....	1789-1806
LAWRENCE, JOHN.....	District Judge, D. N. Y.....	1794-1796
LAWRENCE, PHILIP K.....	District Judge, D. La.....	1837-1841
LEAVITT, HUMPHREY HOWE.....	District Judge, D. Ohio.....	1834-1855
	District Judge, S. D. Ohio.....	1855-1871
LEE, THOMAS.....	District Judge, D. S. C.....	1823-1825
	District Judge, E. and W. D. S. C.	1825-1839
LEWIS, WILLIAM.....	District Judge, D. Pa.....	1791-1792
LIVINGSTON, BROCKHOLST.....	Circuit Justice, 2d Circuit.....	1806-1823
LOCKE, JAMES W.....	District Judge, S. D. Fla.....	1872-
LONGYEAR, JOHN WESLEY.....	District Judge, E. D. Mich.....	1870-1875
LOVE, JAMES M.....	District Judge, D. Iowa.....	1855-1882
	District Judge, S. D. Iowa.....	1882-1891
LOWELL, JOHN.....	District Judge, D. Mass.....	1789-1801
	Circuit Judge, 1st Circuit.....	1801-1802
LOWELL, JOHN.....	District Judge, D. Mass.....	1865-1878
	Circuit Judge, 1st Circuit.....	1878-1884
LURTON, HORACE H.....	Circuit Judge, 6th Circuit.....	1893-
McALLISTER, MATTHEW HALL.....	Circuit Judge, Cal. Circuit.....	1855-1862
McALLISTER, JR., WARD.....	District Judge, D. Alaska.....	1884-1885
McCALEB, THEODORE H.....	District Judge, D. La.....	1841-1849
	District Judge, E. D. Ia.....	1849-1861
McCANDLESS, WILSON.....	District Judge, W. D. Pa.....	1859-1876
McCAY, HENRY KENT.....	District Judge, N. D. Ga.....	1882-1886
McCLUNG, WILLIAM.....	Circuit Judge, 6th Circuit.....	1801-1802
McCORMICK, ANDREW PHELPS.....	District Judge, N. D. Tex.....	1879-1892
	Circuit Judge, 5th Circuit.....	1892-
McCRARY, GEORGE WASHINGTON.....	Circuit Judge, 8th Circuit.....	1879-1884
McDONALD, DAVID.....	District Judge, D. Ind.....	1864-1869
McINTOSH, McQUEEN.....	District Judge, N. D. Fla.....	1856-1861
McKENNA, JOSEPH.....	Circuit Judge, 9th Circuit.....	1892-
McKENNAN, WILLIAM.....	Circuit Judge, 3d Circuit.....	1869-1891
McKINLEY, JOHN.....	Circuit Justice, 9th Circuit.....	1837-1845
	Circuit Justice, 5th Circuit.....	1845-1852
McKINNEY, JOHN.....	District Judge, S. D. Fla.....	1870-1871
McLEAN, JOHN.....	Circuit Justice, 7th Circuit.....	1830-1861
McNAIRY, JOHN.....	District Judge, D. Tenn.....	1797-1802
	District Judge, E. and W. D. Tenn.	1802-1834
MAGILL, CHARLES.....	Circuit Judge, 4th Circuit.....	1801-1802
MAGRATH, A. GORDON.....	District Judge, E. and W. D. S. C.	1856-1860
MARCHANT, HENRY.....	District Judge, D. R. I.....	1790-1796
MARSHALL, JAMES.....	Circuit Judge, D. C.....	1801-1803
MARSHALL, JOHN.....	Circuit Justice, All Circuits.....	1801-1801
	Circuit Justice, 5th Circuit.....	1802-1835
MARVIN, WILLIAM.....	District Judge, S. D. Fla.....	1847-1863
MASON, JOHN YOUNG.....	District Judge, E. D. Va.....	1841-1844
MATTHEWS, STANLEY.....	Circuit Justice, 6th Circuit.....	1882-1889
MAXEY, THOMAS S.....	District Judge, W. D. Tex.....	1888-
MERRICK, WILLIAM MATTHEWS.....	Circuit Judge, D. C.....	1855-1863
MILLER, ANDREW G.....	District Judge, D. Wis.....	1848-1870
	District Judge, E. D. Wis.....	1870-1873
MILLER, SAMUEL FURMAN.....	Circuit Justice, 9th Circuit.....	1862-1867
	Circuit Justice, 8th Circuit.....	1867-1890
MONROE, THOMAS B.....	District Judge, D. Ky.....	1834-1861
MOORE, ALFRED.....	Circuit Justice, All Circuits.....	1799-1801
	Circuit Justice, 6th Circuit.....	1802-1804
MORRILL, AMOS.....	District Judge, E. D. Tex.....	1872-1884
MORRIS, ROBERT.....	District Judge, D. N. J.....	1790-1815
MORRIS, THOMAS J.....	District Judge, D. Md.....	1879-
MORROW, WILLIAM W.....	District Judge, N. D. Cal.....	1891-
MORSELL, JAMES SEWALL.....	Circuit Judge, D. C.....	1815-1863
NELSON, RENSSELAER RUSSELL.....	District Judge, D. Minn.....	1858-
NELSON, SAMUEL.....	Circuit Justice, 2d Circuit.....	1845-1879
NELSON, THOMAS LEVERETT.....	District Judge, D. Mass.....	1879-
NEWMAN, WILLIAM T.....	District Judge, N. D. Ga.....	1886-

NICOLL, JOHN C.....	District Judge, D. Ga.....	1839-1848
	District Judge, N. and S. D. Ga...	1848-1861
NILES, HENRY C.....	District Judge, N. and S. D. Miss..	1891-
NIXON, JOHN THOMPSON.....	District Judge, D. N. J.....	1870-1889
OGIER, ISAAC S. K.....	District Judge, S. D. Cal.....	1854-1861
PACA, WILLIAM.....	District Judge, D. Md.....	1789-1799
PAINE, ELIJAH.....	District Judge, D. Vt.....	1801-1842
PARDEE, DON A.....	Circuit Judge, 5th Circuit.....	1881-
PARKE, BENJAMIN.....	District Judge, D. Ind.....	1817-1835
PARKER, ISAAC C.....	District Judge, W. D. Ark.....	1875-
PARLANGE, CHARLES.....	District Judge, E. D. La.....	1894-
PARRIS, ALBION KEITH.....	District Judge, D. Me.....	1818-1822
PATERSON, WILLIAM.....	Circuit Justice, All Circuits.....	1793-1801
	Circuit Justice, 2d Circuit.....	1802-1806
PAUL, JOHN.....	District Judge, W. D. Va.....	1833-
PEABODY, GEORGE A.....	Provisional Judge, D. La.....	1862-1866
PECK, JAMES H.....	District Judge, D. Mo.....	1822-1836
PENDLETON, NATHANIEL.....	District Judge, D. Ga.....	1789-1796
PENDLETON, PHILIP C.....	District Judge, W. D. Va.....	1825-1825
PENNINGTON, WILLIAM SANDFORD....	District Judge, D. N. J.....	1815-1826
PENNYBACKER, ISAAC SAMUELS.....	District Judge, W. D. Va.....	1839-1845
PETERS, RICHARD.....	District Judge, D. Pa.....	1792-1818
	District Judge, E. D. Pa.....	1818-1828
	District Judge, W. D. Mo.....	1833-
PHILIPS, JOHN F.....	District Judge, D. N. H.....	1795-1804
PICKERING, JOHN.....	District Judge, D. R. I.....	1824-1864
PITMAN, JOHN.....	District Judge, D. Ill.....	1819-1849
POPE, NATHANIEL.....	Circuit Judge, 5th Circuit.....	1801-1802
POTTER, HENRY.....	District Judge, D. Albemarle, Pamptico, and Cape Fear.....	1802-1857
PRENTISS, SAMUEL.....	District Judge, D. Vt.....	1842-1857
PUTNAM, WILLIAM LE BARON.....	Circuit Judge, 1st Circuit.....	1892-
RANDALL, ARCHIBALD.....	District Judge, E. D. Pa.....	1842-1846
RANDOLPH, PETER.....	District Judge, D. Miss.....	1823-1832
RECTOR, JOHN B.....	District Judge, N. D. Tex.....	1892-
REED, JAMES H.....	District Judge, W. D. Penn.....	1891-1892
RICKS, AUGUSTUS J.....	District Judge, N. D. Ohio.....	1889-
RINER, JOHN A.....	District Judge, D. Wyo.....	1890-
RINGO, DANIEL.....	District Judge, D. Ark.....	1849-1851
	District Judge, E. and W. D. Ark.	1851-1861
RIVES, ALEXANDER.....	District Judge, W. D. Va.....	1871-1882
ROBERTSON, THOMAS BOLLING.....	District Judge, D. La.....	1824-1828
ROSS, ERSKINE M.....	District Judge, S. D. Cal.....	1887-
ROSSELL, WILLIAM.....	District Judge, D. N. J.....	1826-1840
RUTLEDGE, JOHN.....	Circuit Justice, All Circuits.....	1789-1791
	Circuit Justice, All Circuits.....	1795-1795
SABIN, CHAUNCEY BREWER.....	District Judge, E. D. Tex.....	1884-1890
SABIN, GEORGE M.....	District Judge, D. Nev.....	1882-1890
SAGE, GEORGE R.....	District Judge, S. D. Ohio.....	1883-
SANBORN, WALTER H.....	Circuit Judge, 8th Circuit.....	1892-
SAWYER, LORENZO.....	Circuit Judge, 9th Circuit.....	1870-1891
SEAMAN, WILLIAM H.....	District Judge, E. D. Wis.....	1893-
SETTLE, THOMAS.....	District Judge, N. D. Fla.....	1877-1888
SEVERENS, HENRY F.....	District Judge, W. D. Mich.....	1886-
SEWALL, DAVID.....	District Judge, D. Me.....	1789-1818
SEYMOUR, AUGUSTUS SHERILL.....	District Judge, E. D. N. C.....	1882-
SHEPLEY, GEORGE FOSTER.....	Circuit Judge, 1st Circuit.....	1869-1878
SHERBURNE, JOHN SAMUEL.....	District Judge, D. N. H.....	1804-1830
SHERMAN, CHARLES TAYLOR.....	District Judge, N. D. Ohio.....	1867-1873
SHIELDS, WILLIAM BAYARD.....	District Judge, D. Miss.....	1818-1823
SHIPMAN, NATHANIEL.....	District Judge, D. Conn.....	1873-1892
	Circuit Judge, 2d Circuit.....	1892-
SHIPMAN, WILLIAM D.....	District Judge, D. Conn.....	1860-1873
SHIRAS, JR., GEORGE.....	Circuit Justice, 3d Circuit.....	1892-
SHIRAS, OLIVER P.....	District Judge, N. D. Iowa.....	1882-

FEDERAL JUDGES, ALPHABETICALLY ARRANGED.

xxxv

SIMONTON, CHARLES H.....	District Judge, E. and W. D. S. C.	1886-1893
SITGREAVES, JOHN.....	Circuit Judge, 4th Circuit.....	1893-
	District Judge, D. N. C.....	1790-1801
	District Judge, D. Albemarle, Pamptico, and Cape Fear.....	1801-1802
SKINNER, ROGER.....	District Judge, N. D. N. Y.....	1819-1825
SMALLEY, DAVID A.....	District Judge, D. Vt.....	1857-1877
SMITH, CALEB BLOOD.....	District Judge, D. Ind.....	1862-1864
SMITH, JEREMIAH.....	Circuit Judge, 1st Circuit.....	1801-1802
SPEER, EMORY.....	District Judge, S. D. Ga.....	1885-
SPRAGUE, PELEG.....	District Judge, D. Mass.....	1841-1865
STEPHENS, WILLIAM.....	District Judge, D. Ga.....	1801-1819
STOKES, JOHN.....	District Judge, D. N. C.....	1790-1790
STORY, JOSEPH.....	Circuit Justice, 1st Circuit.....	1811-1845
STORY, WILLIAM.....	District Judge, W. D. Ark.....	1871-1875
STRONG, WILLIAM.....	Circuit Justice, 3d Circuit.....	1870-1880
SULLIVAN, JOHN.....	District Judge, D. N. H.....	1789-1795
SWAN, HENRY H.....	District Judge, E. D. Mich.....	1891-
SWAYNE, CHARLES.....	District Judge, N. D. Fla.....	1889-
SWAYNE, NOAH HAYNES.....	Circuit Justice, 7th Circuit.....	1862-1867
	Circuit Justice, 5th Circuit.....	1869-1870
	Circuit Justice, 6th Circuit.....	1867-1881
SWING, PHILIP B.....	District Judge, S. D. Ohio.....	1871-1882
TAFT, WILLIAM HOWARD.....	Circuit Judge, 8th Circuit.....	1892-
TAIT, CHARLES.....	District Judge, D. Ala.....	1820-1824
	District Judge, N. and S. D. Ala..	1824-1826
TALLMADGE, MATTHIAS BURNET.....	District Judge, D. N. Y.....	1805-1814
	District Judge, N. D. N. Y.....	1814-1819
TANEY, ROGER BROOKE.....	Circuit Justice, 4th Circuit.....	1836-1864
TAPPAN, BENJAMIN.....	District Judge, D. Ohio.....	1833-1833
TAYLOR, GEORGE K.....	Circuit Judge, 4th Circuit.....	1801-1802
THAYER, AMOS M.....	District Judge, E. D. Mo.....	1887-
THOMAS, ALFRED D.....	District Judge, D. N. D.....	1890-
THOMPSON, SMITH.....	Circuit Justice, 2d Circuit.....	1823-1843
THRUSTON, BUCKNER.....	Circuit Judge, D. C.....	1809-1845
TILGEMAN, WILLIAM.....	Chief Judge, 3d Circuit.....	1801-1802
TODD, THOMAS.....	Circuit Justice, 7th Circuit.....	1807-1826
TOULMIN, HARRY T.....	District Judge, S. D. Ala.....	1837-
TOWNSEND, WILLIAM K.....	District Judge, D. Conn.....	1802-
TREAT, SAMUEL HUBBEL.....	District Judge, S. D. Ill.....	1855-1887
TREAT, SAMUEL.....	District Judge, E. D. Mo.....	1857-1887
TRIGG, CONNALLY F.....	District Judge, E., M., and W. D. Tenn.....	1862-1878
	District Judge, E. and M. D. Tenn.	1878-1880
TRIMBLE, ROBERT.....	District Judge, D. Ky.....	1817-1826
	Circuit Justice, 7th Circuit.....	1826-1823
TROUPE, ROBERT.....	District Judge, D. N. Y.....	1796-1798
TRUITT, WARREN.....	District Judge, D. Alaska.....	1892-
TUCKER, ST. GEORGE.....	District Judge, D. Va.....	1813-1819
	District Judge, E. D. Va.....	1819-1825
TURNER, EZEKIEL B.....	District Judge, W. D. Tex.....	1880-1888
TYLER, JOHN.....	District Judge, D. Va.....	1811-1813
UNDERWOOD, JOHN CURTISS.....	District Judge, E. D. Va.....	1863-1864
	District Judge, D. Va.....	1864-1871
	District Judge, E. D. Va.....	1871-1873
VAN NESS, WILLIAM PETER.....	District Judge, D. N. Y.....	1812-1814
	District Judge, S. D. N. Y.....	1814-1826
WAITE, MORRISON REMICK.....	Circuit Justice, 4th Circuit.....	1874-1888
WALES, LEONARD E.....	District Judge, D. Del.....	1884-
WALKER, JONATHAN H.....	District Judge, W. D. Pa.....	1818-1824
WALLACE, WILLIAM JAMES.....	District Judge, N. D. N. Y.....	1874-1882
	Circuit Judge, 2d Circuit.....	1882-
WARE, ASHUR.....	District Judge, D. Me.....	1822-1866
WASHINGTON, BUSHROD.....	Circuit Justice, All Circuits.....	1798-1801
	Circuit Justice, 3d Circuit.....	1802-1829

WATROUS, JOHN C.....	District Judge, D. Tex.....	1846-1857
	District Judge, E. D. Tex.....	1857-1869
WAYNE, JAMES MOORE.....	Circuit Justice, 6th Circuit.....	1835-1863
	Circuit Justice, 5th Circuit.....	1863-1867
WEBB, NATHAN.....	District Judge, D. Maine.....	1882-
WELKER, MARTIN.....	District Judge, N. D. Ohio.....	1873-1889
WELLS, ROBERT W.....	District Judge, D. Mo.....	1836-1857
	District Judge, W. D. Mo.....	1857-1864
WHEELER, HOYT H.....	District Judge, D. Vt.....	1877-
WHITE, ALBERT SMITH.....	District Judge, D. Ind.....	1864-1864
WILKINS, ROSS.....	District Judge, D. Mich.....	1837-1863
	District Judge, E. D. Mich.....	1863-1870
WILKINS, WILLIAM.....	District Judge, W. D. Pa.....	1824-1831
WILLIAMS, ARCHIBALD.....	District Judge, D. Kan.....	1861-1863
WILLIAMS, JOHN A.....	District Judge, E. D. Ark.....	1890-
WILLSON, HIRAM V.....	District Judge, N. D. Ohio.....	1855-1860
WILSON, JAMES.....	Circuit Justice, All Circuits.....	1789-1798
WINCH, JOEL C. C.....	District Judge, E. D. Tex.....	1870-1871
WINCHESTER, JAMES.....	District Judge, D. Md.....	1799-1806
WITHEY, SOLOMON L.....	District Judge, W. D. Mich.....	1863-1886
WOLCOTT, OLIVER.....	Circuit Judge, 2d Circuit.....	1801-1802
WOODBURY, LEVI.....	Circuit Justice, 1st Circuit.....	1845-1851
WOODRUFF, LEWIS B.....	Circuit Judge, 2d Circuit.....	1869-1875
WOODS, WILLIAM ALLEN.....	District Judge, D. Ind.....	1883-1892
	Circuit Judge, 7th Circuit.....	1892-
WOODS, WILLIAM BURNHAM.....	Circuit Judge, 5th Circuit.....	1869-1880
	Circuit Justice, 5th Circuit.....	1881-1887
WOOLSON, JOHN SIMSON.....	District Judge, S. D. Iowa.....	1891-

CIRCUIT AND DISTRICT COURT REPORTS

BY

CIRCUITS AND DISTRICTS.

CIRCUIT COURT REPORTS.

First Circuit.

	Vols.	Period Covered.
Garrison.....	2	1812-1815
Mason.....	5	1816-1830
Sumner.....	3	1829-1839
Story.....	3	1839-1845
Woodbury & Minot.....	3	1845-1847
Curtis.....	2	1851-1856
Ware.....	3	1822-1866
Lowell.....	2	1865-1877
Clifford.....	4	1858-1878
Holmes.....	1	1870-1875
Haskell.....	2	1866-1881

Second Circuit.

Paine.....	2	1810-1840
Blatchford.....	24	1845-1887
Blatchford's Prize Cases.....	1	1861-1865

Third Circuit.

Wallace.....	1	1801
Peters.....	1	1803-1818
Washington.....	4	1803-1827
Fisher's Prize Cases.....	1	1812-1813
Baldwin.....	1	1827-1833
Wallace, Jr.....	3	1842-1862

Fourth Circuit.

Brockenbrough.....	2	1802-1836 ¹
Taney.....	1	1836-1861
Chase.....	1	1861-1869
Hughes.....	5	1792-1883 ²

Fifth Circuit.

Woods.....	3	1870-1879
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¹ Reports for the districts of Virginia and North Carolina; in the fifth circuit during this period.

² Reports for the districts of Maryland, Virginia, West Virginia, North Carolina, and South Carolina. During part of this period Virginia and North Carolina were in the fifth circuit, and South Carolina in the sixth.

³ These are reports for the old seventh circuit, as constituted by Act April 29, 1802, (2 Stat. 156,) and Act March 3, 1837, (5 Stat. 176.)

⁴ Entitled reports for the seventh circuit, but covering some districts which are now (1893) in the sixth circuit.

⁵ Reports for the southern district of Ohio; in the seventh circuit during part of this period.

CIRCUIT COURT REPORTS, Continued.

Sixth Circuit.

	Vols.	Period Covered.
McLean.....	6	1829-1855 ⁶
Bissell.....	11	1851-1883 ⁴
Bond.....	2	1856-1871 ⁵
Flippin.....	2	1859-1880 ⁶

Seventh Circuit.

McLean.....	6	1829-1857
Bissell.....	11	1851-1883 ⁵
Woolworth.....	1	1863-1869

Eighth Circuit.

Hempstead.....	1	1839-1855 ⁹
Woolworth.....	1	1863-1869
Dillon.....	5	1870-1879
M'Crory.....	5	1877-1883

Ninth Circuit.

McAllister.....	1	1855-1859 ¹⁰
Deady.....	1	1861-1869 ¹¹
Sawyer.....	14	1870-1891

District of Columbia.

Cranch.....	6 ¹²	1801-1840
Hayward and Hazleton.....	1	1840-1849

⁶ Reports for the districts of Kentucky, Tennessee, Ohio, and Michigan. During a part of this period Kentucky and Tennessee were in the eighth circuit, and Ohio and Michigan in the seventh.

⁷ Reports of cases in the old seventh circuit, as constituted by Act April 29, 1802, (2 Stat. 156,) and Act March 3, 1837, (5 Stat. 176.)

⁸ Entitled reports for the seventh circuit, but including some districts now (1893) in the sixth circuit.

⁹ Reports for the district of Arkansas; at this period in the ninth circuit.

¹⁰ Reports for the northern and southern districts of California. At this period these districts constituted the California circuit, under Act March 2, 1855, (10 Stat. 631.)

¹¹ Reports for the districts of California and Oregon; in the tenth circuit during part of this period, under Act March 3, 1863, (12 Stat. 794.) The districts of California made a separate circuit during part of this period, under Act March 2, 1855, (10 Stat. 631.)

¹² Volume six contains only an index.

CIRCUIT COURT REPORTS,
Continued.

From All the Circuits.

	Vols.	Period Covered.
Wharton's State Trials.....	1	1789-1801
Brunner's Collected Cases.....	1	1789-1860
Abbott's U. S. Reports.....	2	1856-1871
National Bankruptcy Register.....	19	1867-1879

PATENT REPORTS AND DECISIONS.

Robb.....	2	1789-1850
Fisher's Patent Reports.....	1	1821-1851
Cranch's Patent Decisions.....	1	1841-1847
MacArthur's Patent Cases.....	1	1841-1859
Fisher's Patent Cases.....	6	1848-1873
Banning & Arden.....	5	1874-1880

DISTRICT COURT REPORTS.

District of Maine.

Ware.....	3	1822-1866
Haskell.....	2	1866-1881

District of Massachusetts.

Bee's Admiralty ¹³	1	1792-1809
Fisher's Prize Cases ¹³	1	1812-1813
Ware.....	3	1822-1866
Sprague.....	2	1841-1864
Lowell.....	2	1865-1877

District of Vermont.

Benedict.....	10	1865-1879
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District of Connecticut.

Benedict.....	10	1865-1879
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Southern District of New York.

Van Ness (Prize Cases).....	1	1814 ¹⁴
Blatchford & Howland.....	1	1827-1837
Olcott (Admiralty).....	1	1848-1847
Abbott's Admiralty.....	1	1847-1850
Blatchford's Prize Cases.....	1	1861-1865
Benedict.....	10	1865-1879

Northern District of New York.

Benedict.....	10	1865-1879
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Eastern District of New York.

Benedict.....	10	1865-1879
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¹³ One case.

¹⁴ At this time there was only one district of New York.

DISTRICT COURT REPORTS,
Continued.

Eastern District of Pennsylvania.

	Vols.	Period Covered.
Peter's Admiralty.....	2 ¹⁵	1789-1807 ¹⁶
Fisher's Prize Cases.....	1	1812-1813 ¹⁷
Gilpin.....	1	1828-1836
Crabbe.....	1	1836-1846

Western District of Pennsylvania.

Newberry's Admiralty.....	1	1820-1849
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District of Maryland.

Peter's Admiralty ¹⁸	2 ¹⁹	1789-1807
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District of South Carolina.

Bee's Admiralty.....	1	1792-1809
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District of Arkansas.

Hempstead.....	1	1820-1849
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Southern District of Ohio.

Bond.....	2	1856-1871
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Southern Districts.

Hughes.....	5	1792-1833
Newberry's Admiralty ²⁰	1	1842-1857

Western Districts.

Newberry's Admiralty ²¹	1	1842-1857
Bissell.....	11	1851-1823
Brown's Admiralty ²²	1	1859-1875
Flippin.....	2	1859-1880

Pacific State Districts.

Hoffman (Land Cases) ²³	1	1858-1858
Deady ²⁴	1	1861-1869
Sawyer.....	14	1870-1892

All the Districts.

Abbott's U. S. Reports.....	2	1865-1871
National Bankruptcy Register.....	19	1867-1879

¹⁵ Sometimes bound in one volume.

¹⁶ At this time there was only one district of Pennsylvania. These volumes contain cases in the admiralty court of Pennsylvania before 1789.

¹⁷ At this time there was only one district of Pennsylvania.

¹⁸ One case.

¹⁹ Sometimes bound in one volume.

²⁰ Western district of Louisiana.

²¹ Districts of Michigan, Ohio, Illinois, Missouri.

²² Districts of Michigan and Ohio.

²³ Northern district of California.

²⁴ Districts of Oregon and California.

REPORTS, PERIODICALS, DIGESTS, TEXT BOOKS, ETC.

EXAMINED FOR REPORTS AND CITATIONS OF FEDERAL CASES.

NAME OF PERIODICAL, ETC.	HOW CITED—REMARKS.
Abbott's Admiralty Reports.....	Abb. Adm. (Continuation of Olcott's Reports.)
Abbott's Circuit Court Reports.....	(See Abbott's United States Reports.)
Abbott's National Digest.....	Abb. Nat. Dig.
Abbott's New Cases (New York).....	Abb. N. C.
Abbott's Practice Reports, New Series (New York)	Abb. Pr. (N. S.)
Abbott's Practice Reports, Old Series (New York)	Abb. Pr.
Abbott's Shipping.....	Abb. Shipp.
Abbott's United States Courts Practice.....	Abb. U. S. Pr.
Abbott's United States Reports.....	Abb. (U. S.) (Sometimes cited as Abbott's Circuit Court Reports.)
Admiralty Records.....	Adm. Rec. (Twelve Volumes of Manuscript Reports of Admiralty Cases in the Southern District of Florida.)
Alabama Law Journal.....	Ala. Law J.
Albany Law Journal.....	Alb. Law J.
American and English Railroad Cases.....	Amer. & Eng. R. Cas.
American Civil Law Journal.....	Amer. Civ. Law J.
American Jurist and Law Magazine.....	Amer. Jur. (Continued in American Law Magazine.)
American Law Journal, Hall's.....	Amer. Law J. (Sometimes cited as Hall's Law Journal or Hall's Admiralty Law Journal. See Journal of Jurisprudence.)
American Law Journal, New Series.....	Amer. Law J. (N. S.) (Continuation of Pennsylvania Law Journal.)
American Law Magazine.....	Amer. Law Mag. (Continuation of American Jurist and Law Magazine.)
American Law Record.....	Amer. Law Rec.
American Law Register, New Series.....	Amer. Law Reg. (N. S.)
American Law Register, Old Series.....	Amer. Law Reg.
American Law Review.....	Amer. Law Rev.
American Law Times, New Series.....	Amer. Law T. (N. S.)
American Law Times, Old Series.....	Amer. Law T.
American Law Times Reports, New Series...	Amer. Law T. Rep. (N. S.) (United States Courts Reports and Bankruptcy Reports. Continued in Reporter.)
American Law Times Reports, Old Series...	Amer. Law T. Rep. U. S. Cts.; Amer. Law T. Rep. Bankr.
American Leading Cases.....	Amer. Lead. Cas.
American Themis.....	Amer. Themis.
Anthon's Nisi Prius Reports (New York)....	Anth. N. P.
Appeals from the Commissioner of Patents..	App. Com'r Pat. (Manuscript decisions on appeal from the commissioner of patents before the discontinuance of the circuit court for the District of Columbia by the act of March 3, 1863, [12 Stat. 762, ch. 91.] entitled "Book of Appeals," on file in the United States patent office, and there known as "Decisions of the Court." Sometimes cited as Patent Office Appeals.)

NAME OF PERIODICAL, ETC.	HOW CITED—REMARKS.
Avery and Hobbs, Bankrupt Law of the United States.....	Avery & H. Bankr.
Baldwin's Reports.....	Baldw.
Baltimore Law Transcript.....	Balt. Law Trans.
Bankers' Magazine (New York).....	Bankers' Mag.
Bankrupt Register.....	N. B. R. (Quarto.) (Four quarto volumes, afterwards reprinted as the first four volumes of the National Bankruptcy Register Reports, q. v.)
Banning and Arden's Patent Cases.....	Ban. & A.
Bee's Admiralty Reports.....	Bee.
Bench and Bar.....	Bench & Bar.
Bench and Bar, New Series.....	Bench & Bar, (N. S.)
Benedict, American Admiralty.....	Ben. Adm.
Benedict's District Court Reports.....	Ben.
Betts' Circuit Court Manuscript Opinions....	Betts, C. C. MS. (Ten volumes of manuscript opinions in the United States Circuit Court for the Southern District of New York, by Hon. Samuel R. Betts, District Judge. On file in the office of the clerk of the district court.)
Betts' Decisions.....	(See Blatchford & Howland's Reports, Olcott's Reports, and Abbott's Admiralty Reports.)
Betts' District Court Manuscript Opinions...	Betts, D. C. MS. (Twenty-eight volumes of manuscript opinions in the United States District Court for the Southern District of New York. On file in the office of the clerk of the court.)
Betts' Prize Cases.....	Betts' Pr. Cas.
Betts' Scrap Book.....	Betts' Scr. Bk. (Cases in the United States Circuit and District Courts for the Southern District of New York from 1839 to 1862, with a few cases from other districts. Collected by Hon. Samuel R. Betts, District Judge. On file in the office of the clerk of the District Court for the Southern District of New York.)
Bigelow's Insurance Cases.....	See Bigelow's Life and Accident Insurance Cases.
Bigelow's Life and Accident Insurance Cases	Bigelow, Ins. Cas.
Bloren and Duane's Laws.....	(See United States Statutes.)
Bissell's Reports.....	Biss.
Black's United States Supreme Court Reports	Black, (U. S.)
Blatchford's Circuit Court Reports.....	Blatchf.
Blatchford's Prize Cases.....	Blatchf. Pr. Cas.
Blatchford's Rules and Statistics of United States Courts.....	Blatchf. Rules U. S. Cts.
Blatchford and Howland's Reports.....	Blatchf. & H. (Sometimes cited as Betts' Decisions, Vol. 1.)
Bond's Reports.....	Bond.
Boston Atlas.....	Boston Atlas.
Boyce's Manual of Practice (U. S. Circuit Courts)	Boyce, U. S. Pr.
Brewster's Reports (Pennsylvania).....	Brewst.
Brightly's Federal Digest.....	Brightly, Fed. Dig.
Brightly's Nisi Prius.....	(See Brightly's Reports Pennsylvania.)
Brightly's Reports (Pennsylvania).....	Brightly. (Sometimes cited as Brightly's Nisi Prius.)
Brightly's United States Digest.....	Brightly, U. S. Dig.
Brockenbrough's Reports.....	Brock. (Sometimes cited as Marshall's Decisions.)
Brown's Admiralty Reports.....	Brown. Adm.
Browne.....	(See National Bank Cas.s.)

NAME OF PERIODICAL, ETC.	HOW CITED—REMARKS.
Browne's Reports (Pennsylvania).....	Browne, (Pa.)
Browne, Trade-Marks.....	Browne, Trade-Marks.
Brunner's Collected Cases.....	Brunner, Col. Cas.
Bump, Bankruptcy.....	Bump, Bankr.
Bump, Federal Procedure.....	Bump, Fed. Proc.
Bump, Internal Revenue Laws.....	Bump, Int. Rev.
Bump, Patents.....	Bump, Pat.
Burnett's Reports (Wisconsin).....	Burn.
California Law Journal.....	Cal. Law J.
California Law Journal and Literary Review.....	Cal. Law J. & Lit. Rev.
California Reports.....	Cal.
Call's Reports (Virginia).....	Call.
Campbell's Reports.....	(See Taney's Decisions.)
Carolina Law Repository.....	Car. Law Repos.
Carpenter's Mining Code.....	Carp. Min. Code.
Casey's Reports (Pennsylvania).....	Casey. (Vols. 25-36 Pennsylvania State Reports.)
Central Law Journal.....	Cent. Law J.
Chase's Decisions.....	Chase. (Sometimes cited as Johnson's Reports, United States.)
Chase's Trial.....	Chase's Trial.
Chicago Law Journal.....	Chi. Law J.
Chicago Legal News.....	Chi. Leg. News.
Chitty's Criminal Law.....	Chit. Crim. Law. (Peters & Huntington's Edition. Banks & Gould, 1847.)
Cincinnati Law Bulletin.....	Cin. Law Bul. (Sometimes cited as Weekly Law Bulletin and as Weekly Law Bulletin and Ohio Law Journal.)
City Hall Recorder.....	City H. Rec.
Clifford's Reports.....	Cliff.
Coddington's Digest of the Law of Trade-Marks.....	Codd. Trade-Marks.
Code Reporter.....	Code Rep.
Cohen, Admiralty Jurisdiction, Law and Practice.....	Cohen, Adm.
Colorado Law Reporter.....	Colo. Law Rep.
Conkling, Admiralty.....	Conk. Adm.
Conkling, United States Courts Practice....	Conk. Pr.
Connecticut Reports.....	Conn. (See Day's Reports.)
Cooke's Reports (Tennessee).....	Cooke, (Tenn.)
Crumrine.....	(See Pittsburgh Reports.)
Cox's American Trade-Mark Cases.....	Cox, Amer. Trade-Mark Cas.
Cox's Manual of Trade-Mark Cases.....	Cox, Manual Trade-Mark Cas.
Cox's Reports of Criminal Cases in England and Ireland.....	Cox, Crim. Cas.
Crabbe's Reports.....	Crabbe.
Cranch's Circuit Court Reports.....	Cranch, O. C.
Cranch's Patent Decisions.....	Cranch, Pat. Dec.
Cranch's United States Supreme Court Reports.....	Cranch, (U. S.)
Criminal Law Magazine.....	Crim. Law Mag.
Criminal Recorder.....	(See Wheeler's Criminal Cases.)
Curtis' Circuit Court Reports.....	Curt.
Curtis, Commentaries on the United States Courts.....	Curt. U. S. Courts.
Curtis, Patents.....	Curt. Pat.
Dallas' United States Supreme Court Reports.....	Dall. (U. S.)
Dane, Abridgement and Digest of American Law.....	Dane, Abr.
Daveis' Reports.....	(See Ware.)
Day's Reports (Connecticut).....	Day.
Deady's Reports.....	Deady.
Delaware County Reports (Pennsylvania)...	Del. Co. Rep. (Pa.)

NAME OF PERIODICAL, ETC.	HOW CITED—REMARKS.
Desty, Commerce and Navigation.....	Desty, Com. & Nav.
Desty, Federal Citations.....	Desty, Fed. Cit.
Desty, Federal Constitution.....	Desty, Fed. Const.
Desty, Federal Procedure.....	Desty, Fed. Proc.
Desty, Removal of Causes from State to Federal Courts.....	Desty, Rem. Causes.
Desty, Shipping and Admiralty.....	Desty, Shipp. & Adm.
Dillon's Circuit Court Reports.....	Dill.
Dillon, Removal of Causes from State to Federal Courts.	Dill. Rem. Causes.
Drone, Copyright.....	Drone, Copyr.
English Law Times.....	(See Law Times, London, Eng.)
Federal Reporter.....	Fed.
Fenton, Law of Patents for Designs.....	Fent. Pat.
Fessenden, Essay on the Law of Patents....	Fess. Pat.
Field and Miller's Federal Practice.....	(See Miller and Field's Federal Practice.)
Field's Federal Practice.....	(See Miller and Field's Federal Practice.)
Field, Treatise on the Constitution and Ju- risdiction of the Courts of the United States, and on Pleading, Practice, and Procedure therein.....	Field, Fed. Courts.
Fisher's Patent Cases.....	Fish. Pat. Cas.
Fisher's Patent Reports.....	Fish. Pat. Rep.
Fisher's Prize Cases.....	Fish. Pr. Cas.
Flippin's Reports.....	Flip.
Garrison's Reports.....	Gall.
Gazette and Bankrupt Court Reporter.....	Gaz.
Gazzam, Bankrupt Law.....	Gazz. Bankr.
Georgia Reports.....	Ga.
Gilpin's Reports.....	Gilp.
Gould and Tucker, Notes on the Revised Statutes of the United States.....	Gould & T. Notes.
Grant's Cases (Pennsylvania).....	Grant, Cas.
Griffith's Law Register.....	Griff. Law Reg.
Hall's Admiralty Law Journal.....	(See American Law Journal, Hall's.)
Hall's Law Journal.....	(See American Law Journal, Hall's.)
Hall, Treatise on Patent Estate.....	Hall, Pat. Est.
Harris and Johnson's Reports (Maryland)...	Har. & J.
Haskell's Reports.....	Hask.
Hayward's Reports.....	(See Hayward and Hazleton's Circuit Court Reports.)
Hayward and Hazleton's Circuit Court Re- ports.....	Hayw. & H. (Sometimes cited as Hayward's Reports.)
Haywood's Reports (North Carolina).....	Hayw. (N. C.)
Hazard's Pennsylvania Register.....	Haz. Reg. Pa.
Hazard's United States Register.....	Haz. Reg. U. S.
Hempstead's Reports.....	Hempst.
Henry, Jurisdiction and Procedure of the Admiralty Courts of the United States in Civil Causes.....	Henry, Adm. Jur. & Proc.
Hilliard, Bankruptcy and Insolvency.....	Hill. Bankr.
Hoffman's Decisions.....	Hoff. Dec. (An unpublished collection of de- cisions by Hon. Ogden Hoffman, District Judge, gathered from manuscript and other sources, among them the California Law Journal and the California Law Journal and Literary Review.)
Hoffman's Land Cases.....	Hoff. Land Cas.
Hoffman's Opinions.....	Hoff. Op. (An unpublished collection of manuscript and pamphlet decisions by Hon. Ogden Hoffman, District Judge.)
Holmes' Reports.....	Holmes.

NAME OF PERIODICAL, ETC.	HOW CITED—REMARKS.
Hopkinson, Life and Letters of Hon. Francis Hopkinson, District Judge.....	Hopk. Works.
Howard's Practice Reports (New York).....	How. Pr.
Howard's United States Supreme Court Re- ports	How. (U. S.)
Howison's Criminal Trials in Richmond.....	Howison, Crim. Tr. (Sometimes cited as Virginia Criminal Cases.)
Hughes' Reports.....	Hughes.
Hunt's Merchants' Magazine.....	Hunt, Mer. Mag.
Indiana Legal Register.....	Ind. Leg. Reg.
Ingraham, View of the Insolvent Laws of Pennsylvania.....	Ingr. Insolv.
Insurance Law Journal.....	Ins. Law J.
Insurance Monitor.....	Ins. Mon.
Insurance Reporter.....	(See Legal and Insurance Reporter.)
Internal Revenue Cases.....	Int. Rev. Cas.
Internal Revenue Record.....	Int. Rev. Rec.
James, Bankrupt Law of the United States..	James, Bankr.
Johnson's Reports (United States).....	(See Chase's Decisions.)
Journal of Franklin Institute.....	Jour. Fr. Inst.
Journal of Jurisprudence.....	Jour. Jur. (Sometimes cited as Hall's Amer. Law J., Vol. 7.)
Kansas	(See McCahon.)
Kentucky Law Reporter.....	Ky. Law Rep.
Lackawanna Legal Record.....	Lack. Leg. Rec.
Lancaster Bar.....	Lancaster Bar.
Law and Equity Reporter.....	Law & Eq. Rep. (Continued in Reporter.)
Law's Digest.....	Law, Dig.
Law's Practice in United States Courts.....	Law, Pr.
Law Reporter.....	Law Rep. (Sometimes cited as Monthly Law Reporter. Vol. 11 and subsequent vol- umes are the same as Vol. 1, etc., New Se- ries.)
Law Reporter, New Series.....	Law Rep. (N. S.)
Law Times (London, Eng.).....	Law T. (Eng.)
Law Times Reports, New Series.....	Law T. Rep. (N. S.)
Law Times (Scranton, Pa.).....	(See Luzerne Law Times.)
Law Times (Washington).....	(See American Law Times.)
Law Times Reports (Washington).....	(See American Law Times Reports.)
Legal and Insurance Reporter.....	Leg. & Ins. Rep. (Sometimes cited as In- surance Reporter.)
Legal Chronicle (New York).....	Leg. Chron. (N. Y.)
Legal Chronicle (Pottsville, Pa.).....	Leg. Chron. (Pa.)
Legal Gazette.....	Leg. Gaz.
Legal Gazette Reports.....	Leg. Gaz. Rep.
Legal Intelligencer.....	Leg. Int.
Legal Opinions.....	Leg. Op.
Legal Reporter (Nashville).....	(See Tennessee Legal Reporter, New Series.)
Livingston's Law Magazine.....	Liv. Law Mag.
Louisiana Law Journal.....	La. Law J.
Louisiana Law Journal, Schmidt's.....	(See Schmidt's Law Journal.)
Louisiana Term Reports.....	(See Orleans Term Reports.)
Lowell's Decisions.....	Lowell.
Luzerne Law Times, New Series.....	Luz. Law T. (N. S.) (Sometimes cited as Law Times and as Scranton Law Times.)
Luzerne Law Times, Old Series.....	Luz. Law T. (Sometimes cited as Law Times and as Scranton Law Times.)
Luzerne Legal Observer.....	Luz. Leg. Obs.
Luzerne Legal Register.....	Luz. Leg. Reg.
McAllister's Circuit Court Reports.....	McAll.
MacArthur's Patent Cases.....	MacA. Pat. Cas.

NAME OF PERIODICAL, ETC.	HOW CITED—REMARKS.
McCahon's Reports (Kansas).....	McCahon.
McCrary's Reports.....	McCrary.
McLean's Reports.....	McLean.
Maritime Law Cases.....	Mar. Law Cas.
Marshall's Decisions.....	(See Brockenbrough's Reports.)
Martin's Reports (Louisiana).....	(See Orleans Term Reports.)
Martin's Reports (North Carolina).....	Mart. (N. C.)
Marvin's Wreck and Salvage.....	Marv. Wr. & Salv.
Maryland Law Record.....	Md. Law Rec.
Mason's Reports.....	Mason.
Massachusetts Law Reporter.....	Mass. Law Rep.
Memphis Law Journal.....	Memphis Law J.
Merwin, Patentability of Inventions.....	Merw. Pat. Inv.
Michigan Lawyer.....	Mich. Lawy.
Miles' Reports (Pennsylvania).....	Miles.
Miller and Field, Federal Practice.....	Miller & F. Fed. Pr.
Minnesota Reports.....	Minn.
Mirror of the Patent Office.....	Mirror, Pat. Off.
Missouri Bar.....	Mo. Bar.
Monthly Jurist.....	Month. Jur.
Monthly Law Reporter.....	(See Law Reporter.)
Monthly Western Jurist.....	Month. West. Jur.
Moore, Treatise on Extradition and Inter- state Rendition.....	Moore, Extrad.
Morrison's Mining Reports.....	Morr. Min. Rep.
Morrison, Mining Rights in Colorado.....	Morr. Min. Rights.
Morse, Banks and Banking.....	Morse, Banks.
Morse, Citizenship.....	Morse, Cit.
Myer's Federal Decisions.....	Myer, Fed. Dec.
National Bank Cases:	
Vol. 1 by Thompson.....	Thomp. Nat. Bank Cas.
Vol. 2 by Browne.....	Browne, Nat. Bank Cas.
Vol. 3 by Browne.....	Browne, Nat. Bank Cas.
National Bankruptcy Register Reports.....	N. B. R. (Sometimes cited as Bankrupt Register.)
National Bankruptcy Register Reports, Sup- plement	N. B. R. (Supp.)
National Intelligencer.....	Nat. Int.
National Magazine.....	Nat. Mag.
Newberry's Admiralty Reports.....	Newb.
New Chancery Cases.....	New Ch. Cas. (Sometimes cited as Younge and Collyer's Reports.)
New Hampshire.....	(See Smith.)
New Jersey Law Journal.....	N. J. Law J.
New York.....	(See Howard's Practice Reports and Abbott's Practice Reports.)
New York Daily Times.....	N. Y. Dally T.
New York Evening Post.....	N. Y. Eve. Post.
New York Law Gazette.....	N. Y. Law Gaz.
New York Legal Observer.....	N. Y. Leg. Obs.
New York Legal Register.....	N. Y. Leg. Reg.
New York Monthly Law Bulletin.....	N. Y. Mouth. Law Bul.
New York Municipal Gazette.....	N. Y. Mun. Gaz.
New York Transcript.....	N. Y. Trans.
New York Weekly Digest.....	N. Y. Wkly. Dig.
Niles' Register.....	Niles' Reg.
North Carolina.....	(See Haywood; Martin; Notes of Decisions; Phillips; Taylor.)
North Carolina Cases.....	N. C. Cas.
North Carolina Reports.....	N. C.
Northwestern Reporter, Old Series.....	N. W. Rep. (O. S.)
Notes of Decisions. (North Carolina).....	(See Martin's Reports, North Carolina.)
Official Gazette of the Patent Office.....	O. G. (Sometimes cited as Patent Office Gazette.)

NAME OF PERIODICAL, ETC.	HOW CITED—REMARKS.
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FEDERAL CASES.

BOOK 1.

A COMPREHENSIVE COLLECTION OF DECISIONS OF THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES FROM THE EARLIEST TIMES TO THE BEGINNING OF THE FEDERAL REPORTER. (1880,) ARRANGED ALPHABETICALLY BY THE TITLES OF THE CASES.

N. B. Cases reported in this series are always cited herein by their numbers. The original citations can be found when desired through the table of cases.

A.

A.

[Note. Cases cited under this letter will be found arranged in alphabetical order under the names of the articles; e. g. "A Raft of Spars. See Raft of Spars, Case No. 11,528."]

Case No. 1.

The AALESUND.

[9 Ben. 203.]

District Court, E. D. New York. July, 1877.

DAMAGES TO PERSON—RIGHT OF ACTION—STEVEDORE.

1. In an action in rem to recover of the ship damages sustained by a stevedore, engaged in discharging cargo, who was thrown down and seriously injured by the breaking of the span-rope that sustained the tackle of slings he had rigged, which rope the master of the bark had rigged expecting to discharge the cargo himself: *Held*, that the putting up an imperfect span-rope was not such a failure of duty on the part of the master in the furnishing of the ship as would give a right of action against her.

[2. Cited in *The Rheola*, 7 Fed. Rep. 783, to the point that the owner of a defective article is not liable for an injury caused thereby to a mere stranger, unless the article was imminently dangerous.]

[In admiralty. Libel in rem for personal injuries. Libel dismissed.]

Beebe, Wilcox & Hobbs, for libellant.

Butler, Stillman & Hubbard, for claimant.

BENEDICT, District Judge. This action is to recover damages for injuries received by the libellant on board a Norwegian bark when lying in navigable water at one of the piers in New York, discharging her cargo. The libellant at the time he was injured was engaged in the work of discharging the

cargo, and was actually on board the vessel. His duties were to stand at the hatch and as the cargo came up from the hold in the slings to prevent it from catching on the hatch. While thus engaged the span-rope broke, whereby the libellant was precipitated against the combings of the hatch and sustained injury, to recover for which he brings this action against the vessel. It is not disputed that the libellant, while employed as above described, received a serious injury, nor is it denied that the immediate cause of the accident was the breaking of the span-rope while being used to hoist two bags of coffee from the hold of the ship. The evidence shows that the span-rope had been rigged by the master of the vessel when he supposed that he was to discharge the cargo himself by his own crew. Subsequently he determined to employ a stevedore, and a contract was made with one Lloyd to discharge the cargo for so much, paid him by the ship. The libellant was employed by Lloyd, and was acting under his directions. It is usual even when a stevedore is employed to discharge a vessel for the vessel to furnish the span-rope; and when Lloyd was employed he used the span-rope found to have been already put up by the master as above stated, changing its position to correspond with a change in the location of the bark. The libellant himself assisted in rigging the tackle to the span-rope, and had full opportunity to know the condition of the rope so far as was disclosed by external appearance. He made no complaints in respect to the rope, and never objected to using it. The rope was originally a good rope, and was of sufficient size. If it was defective, such defect would not be apparent without a close examination of the condition of the fibre. It had been

[Reported by Rob't D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

used four years as a sheet, and upon a test made since the accident the weight of 1183 pounds was hoisted by it without breaking.

On the part of the defence it is contended that the span-rope was not imperfect, and that the accident was caused by the libellant's own negligence in permitting the bags in the slings to catch under the hatch as the horse was hoisting them up. At the time of the accident two bags of coffee were in the slings. It is also contended that as a matter of law there can be no recovery in this action, whether the rope was sound or defective.

I am of the opinion that upon the law of the case the libellant cannot recover in this action, and therefore I do not consider the question of fact, but treat the case as if it were proved that the master of this vessel put up for the purpose of discharging his cargo a span-rope of insufficient strength for that purpose. I also assume for the purposes of this case that the ship would be charged with any damages arising from the neglect of the master in a matter appertaining to the business of the ship, and such I consider the discharging of her cargo to be. In order to charge the ship, at least as much must be proved as would be necessary to make out a cause of action against the master in personam.

It is plain that the right to recover in this action does not arise out of contract. There is evidence that by the contract between the ship and Lloyd, who was employed to discharge the cargo, the ship was to furnish the span-rope, and that a span-rope is part of the tackle, apparel and furniture of a merchant-ship. But there was no privity of contract between the ship and the libellant. The libellant was employed by Lloyd, and was working under his exclusive direction and control. This point is conceded in behalf of the libellant, but it is said the action is in delicto. The fault of the master in the furnishing of the ship resulting in damages is the ground of the proceeding against the ship. The question is, then, whether putting up an imperfect span-rope is such a violation of the duty owing to any who might use the rope in the way the libellant used it as to give a right of action for injuries caused by the imperfect condition of the rope. I am of the opinion that there was no such violation of duty. Injury to a person bearing off the rope attached to the span-rope would not necessarily follow from the breaking of the rope, and the master cannot be held to have put up the rope with the reasonable expectation that such a result would follow if it broke.

None of the cases to which I have been referred appear to justify such a holding. On the other hand, the case of *Coughtry v. Globe Woolen Co.*, [1 Thomp. & C. 452,]² cit-

ed in *Wharton on Negligence*, [1st Ed.] § 441, appears to be on all fours with this, and its principle is fatal to the claim of the libellants. See, also, *Loop v. Litchfield*, 42 N. Y. 351. Again, it is proved and not disputed that the libellant himself saw the span-rope; that he rigged the block to it, and had as full an opportunity to judge of its efficiency as the master had. It is true that the master knew what the libellant did not know—that the rope had been used for a sheet during four years; but four years' use would not necessarily destroy the rope nor make it too weak for the use to which it was put. The effect of such a use would be different in different cases, and its effect on this rope would necessarily be determined by the appearance and condition of the rope itself. As to that the libellant was as well informed as the master, and, having gone to work with the rope without objection or complaint, he cannot now say that the accident was the result of the master's neglect rather than his own. The libel must be dismissed with costs.

Case No. 2.

In re A. B.

[3 Ben. 66.]¹

District Court, S. D. New York. Dec., 1868.

BANKRUPTCY—CHOICE OF ASSIGNEE.

Where, at the first meeting of a bankrupt's creditors, but one creditor appeared, and he proved his debt, and elected as assignee a person who was present, and it appeared that this person was a stranger to the creditor, and had informed him of the meeting, and solicited the creditor's vote for himself as assignee: *Held*, that the election of an assignee made under such circumstances could not be sanctioned.

In bankruptcy.

BLATCHFORD, District Judge. In this case the register, in transmitting to the court the result of the first meeting of creditors, certifies to the court, that, at such meeting, one creditor who had proved his debt appeared; that only one debt was proved; that the register inquired of such creditor if he desired to elect an assignee; that such creditor replied that he would elect Mr. C. D., who was present; that, as Mr. C. D. had been elected in six out of the last ten cases before the register, the register thought it right to make inquiries of the creditor concerning the choice, and elicited from him the statement, that Mr. C. D. was a stranger to him, and called at his place of business on the day preceding, with one of the notices to creditors, which was the first he had heard of the meeting, and called his attention to the notice, and solicited of him that he would prove his debt and elect Mr. C. D. as the assignee of the bankrupt, and,

²[Reversed by court of appeals in *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124.]

¹[Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

after consultation, it was agreed that he should attend the meeting of creditors and swear to his claim and vote for Mr. C. D. as assignee; and that this statement was made in the presence of Mr. C. D., who remarked that, if he had not so called upon the creditor, the creditor would never have known of the meeting. The register remarks, that he saw nothing in the conduct of Mr. C. D. in any way disingenuous, but that, on the other hand, Mr. C. D. was understood by the register to claim that it was not improper thus to procure himself to be elected. The register states that he certifies the case to the court, that it may be fully advised of the facts of the case, in passing upon the question of the approval or disapproval of the assignee so elected, only suggesting the inquiry whether it would be a wholesome proceeding, if adopted and approved by this court.

In addition to the facts stated in the certificate above mentioned, I have been addressed on the subject by Mr. C. D. himself, who states that he proposes to make a regular business of seeking out creditors of bankrupts and soliciting them to prove their debts and vote for him as assignee, with a view to such pecuniary emoluments as may legitimately belong to the position. He is very frank on the subject, and states that he had no idea there was anything improper in what he had done or proposed doing, and that, if the court thought there was, he would at once desist. I have before me now, unapproved as yet, the election of the same Mr. C. D. as assignee, in another case, at an earlier date, before the same register. I have also before me, unapproved as yet, his election as assignee in three other cases before three other and different registers. So far as appears from these cases, his election was made in each of them by a single creditor.

To knowingly sanction the election of an assignee made under circumstances such as those above stated would be to open the door to abuses whose character can be well conjectured. A free election, proceeding from the real choice of the creditors, is one thing. An election persuaded by the impertunity of the proposed assignee, exercised upon indifferent creditors, is another thing. The elections are disapproved in all of the cases above-mentioned.

Case No. 3.

In re A. B.

[3 N. B. R. (1869,) 244, (Quarto 53.)]

District Court, D. Maine.

BANKRUPTCY—POWER OF REGISTER—COMPELLING CONVEYANCE BY BANKRUPT.

[A register has no power, on motion of the assignee and creditors in bankruptcy, to order the bankrupt to execute deeds releasing an interest held at the time of filing his petition.]

[In bankruptcy. Certificate to district judge by register of question arising in proceedings.]

[Statement by Charles Hamlin, Register:]

Upon the examination of said bankrupt in behalf of said creditors, the assignee being present, the following question was proposed to said bankrupt, viz.: "Referring to the conveyance requested by the assignee, please state whether you are now willing to execute them." The bankrupt answered: "Upon consulting with my counsel, present, I decline signing the deeds, unless otherwise directed by the court." The deeds referred to are release deeds of an interest of the bankrupt, which he had at the time of filing his petition in bankruptcy in Penobscot county, in this district. The counsel of said creditors and assignee then moved before me, that I order the bankrupt to execute said deeds.

Mr. Crosby, for creditors, and Judge Humphrey, assignee, spoke to the point that the execution of the deeds by the bankrupt would enable the assignee to sell the property at better terms, he thereby having the title to the same as it appeared of record.

McCrillis & Varney, for bankrupt, spoke to the point that all of the bankrupt's title to the property was now vested absolutely in the assignee, by the assignment under section 14, and that the "instruments, deeds, and writings" named in general clause 59, (Rice's Manual,) section 14, of bankrupt act, contemplate real property situate beyond the jurisdiction of the court, or beyond the limits of the United States.

Opinion by Register.

I decided that I had no power to make the order requested, being of the opinion that the application should be made to the judge of this court. I did not pass upon the question of the right of the assignee as to whether or not, under sections 14, 15, and 26, the bankrupt ought or not to execute the conveyances. And the said parties requested that the same should be certified to the judge, for his opinion thereon.

FOX, District Judge. Decision approved.

—, A Bankrupt, In re.
[See Anonymous, Case No. 463.]

—, A Bankrupt, In re.
[See In re Doe, Case No. 3,957.]

Case No. 4.

In re ABBE.

[2 N. B. R. 75, (Quarto, 26); 7 Amer. Law Reg. (N. S.) 824; 15 Pittsb. Leg. J. 589.]
District Court, D. New Jersey. 1868.

BANKRUPTCY—PARTNERSHIP—DISCHARGE—PARTIES.

[Where a member of a late copartnership files his individual petition under the bankrupt

act, and inserts in his schedules partnership debts, and there are no partnership assets to be administered, he is entitled to a discharge from his partnership as well as his individual debts; and it is not necessary to make the other partners parties to the proceedings, or to have them brought in under general order number eighteen. In re Little. Case No. 8,390, distinguished.]

[Cited in Re Leland, Case No. 8,228; In re Webb, Id. 17,317; In re Marks, Id. 9,094. Distinguished in Hudgins v. Lane, Id. 6,827; Crompton v. Conkling, Id. 3,407.]

[In bankruptcy. Warren C. Abbe filed a petition that the late copartnership of which he was a member be declared bankrupt; that the petitioner be declared bankrupt, and discharged from all his debts, partnership as well as individual. The register was of the opinion that the first request should be denied and the other granted. Heard on the certification of the register. Opinion of the register concurred in.]

BY THE REGISTER. I, Whitfield S. Johnson, one of the registers of the said court, do certify that in the above case certain questions arose, which are hereby certified to the court for its opinion thereon. The bankrupt has filed his petition and schedules in a different form from that hitherto uniformly adopted in this district. He first petitions, using the form prescribed for partnership petitions, (form two.) In this petition he sets himself out as a member of "a copartnership lately composed of himself and one Henry C. Read, of the city of Philadelphia, state of Pennsylvania." The petition then proceeds in the usual form for partners, alleging inability to pay debts, &c., and closes by praying that the said firm may be declared bankrupts, &c. It also contains the allegation that Abbe has been unable to get his "late co-partner, Henry C. Read, to join in this petition." The petition is signed and sworn to by Warren C. Abbe, alone. To this petition is attached a schedule showing debts to the amount of two thousand four hundred and fifty-six dollars, all of which are stated to have been "contracted as co-partner with Henry C. Read, of the late firm of Read & Abbe." The schedules show that there are no partnership assets. Then follows an individual petition, (form one,) with schedules of individual debts and assets. These disclose but one individual debt, and that small in amount, and no individual assets, except such as are exempt from the operation of the act.

The papers altogether, then, form substantially a petition: 1st. To have the late firm of Read & Abbe declared bankrupt. 2d. To have Warren C. Abbe declared bankrupt. 3d. To have Warren C. Abbe decreed (upon full surrender, &c.) a certificate of discharge from all his debts, both individually and as a member of the former firm of Read & Abbe. On the case coming to me on order of reference, I doubted my power to make such adjudication as is

prayed for by the papers, and also as to whether I should certify the papers to be "correct in form." The practice in my district has hitherto invariably been for one who was formerly a member of a copartnership to file an individual petition, (form one,) and annex thereto a schedule of his debts, both individual and copartnership, stating opposite each debt, in its appropriate place in the schedules, "whether contracted as co-partner, &c., or not." Under this practice a large number who owed joint and separate debts have been granted certificates of discharge; and the practice was accepted without question as the correct one, until the decision of Blatchford, J., in Re Little, [Case No. 8,390,] was announced. In this decision the ground was taken that, before partnership debts could be discharged, it was necessary to have the firm declared bankrupt, and that this could only be done by each partner joining voluntarily, or by being brought in by notice, under general order number eighteen. Since that decision, I understand the practice in that district to have been modified so as to conform to it, but I am not aware of any other district in which it has been followed in practice. Aware of this decision, and, wishing to have the matter definitely settled, the attorney for the bankrupt in this case drew the papers in the form indicated, that this question might be raised and disposed of in this district. It is within my knowledge that there are a number of cases undisposed of in this district, in which the question as to the effect of a discharge upon an individual petition, upon partnership debts, becomes of great importance. I do not think I have the power to declare the firm of Read & Abbe bankrupts. The papers show that the firm was dissolved before the filing of the petition by Abbe. No act of bankruptcy is alleged or proved against Read. The petition is signed by Abbe alone. Read has not joined in it, and it is alleged that his consent cannot be obtained. He has had no notice of these proceedings. An order might be granted to give such notice to Read, and ordering him, were sufficient acts alleged, to show cause why the firm should not be declared bankrupts, but I do not think it necessary. The only object of Abbe in asking that the firm be declared bankrupts, is alleged to be that the partnership debts may be discharged as to him. He does not care whether Read is discharged from them or not. All he seeks is, that his own discharge if obtained, may discharge all the debts, both joint and separate, for which he is now liable. This, I think, would be the effect of a discharge obtained upon his petition, without reference to Read. My opinion is, if the present papers are regarded as a petition of Abbe's alone, and I adjudicate him bankrupt and not the firm, that his discharge would cover all debts both joint and separate. I have, therefore, refused to

grant the first prayer of the papers, and have held that it was not necessary to take any steps as to Read. It is true that Judge Blatchford's decision cited above holds, or seems to hold, differently; but, with all deference to his honor's learning and ability, I am inclined to doubt its correctness.

It must be evident that if, in order for one partner to rid himself of partnership debts, it is necessary for him to bring in all the other partners, a large number of partnership debts must remain undischarged. In many cases it would be impossible to find the other partners, or, if found, to procure their assent, or to prove acts of bankruptcy sufficient to sustain a petition as against them. I think it also evident, from the wording of the act, that such was not the intention of congress. Section thirty-three expressly provides that "no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint-contractor, endorser, surety, or otherwise," implying that one partner may be discharged from joint debts, though the other is not. Neither does it seem that the act was so construed by the judges of the United States supreme court, who framed the general orders in bankruptcy and the forms of proceeding under the act. Among the particulars they require to be stated with regard to each debt in schedule A 3, is "whether contracted as co-partner, or joint-contractor, with any other person, and, if so, with whom," implying that partnership and individual debts may be set out in the same schedule attached to the same petition, the value of each debt being specified. It was early settled in England that a certificate upon a separate commission discharged both joint and separate debts. See *Horsey's Case*, 3 P. Wms. 23. I have not been able to find any decision reversing this early settlement of the law, but there are several confirming it. See *Eden*, Bankr. 396; *Owen*, Bankr. 297; *Tucker v. Oxley*, 5 Cranch, [9 U. S.] 37; 2 Abb. N. Y. Dig. 479. But since this case was filed another case has arisen in the southern district of New York, (see *In re Frear*, [Case No. 5,074,]) in which Mr. Register Fitch discusses substantially the same questions and arrives at the same conclusions I have, which conclusions seem to be approved or, at least, not dissented from by Judge Blatchford.

I am of the opinion, therefore, first. That I have no power to adjudicate the firm of Read & Abbe, bankrupts. Second. That it is unnecessary to allow the papers to be amended or affidavits filed on which to issue an order to bring Read in on notice under general order number eighteen. Third. That Warren C. Abbe should be adjudicated a bankrupt, that creditors, both partnership and individual, may prove their debts under such proceedings, and that his discharge will be a bar to partnership as well as individual

debts. If the court should hold these opinions correct, I will, therefore, regard the papers simply as the petition of Warren C. Abbe to be discharged from all his debts; both joint and separate, and proceed in all respects the same as has hitherto been done in other cases. All which is respectfully certified to the honorable court for its opinion thereon.

W. S. Johnson, Register.

James Buchanan, for petitioner.

FIELD, District Judge.—I concur with the register in the opinion that where a member of a late co-partnership files his individual petition, under the bankrupt act, and inserts in his schedules debts contracted by said co-partnership, and there are no partnership assets to be administered, he will be entitled to be discharged from all his debts, individual as well as co-partnership, and that it is not necessary to make the other partners parties to the proceedings, or to have them brought in under general order number eighteen.

I have examined the two cases referred to before Judge Blatchford, and I am not sure that there is any conflict between them. In the case of *In re Little*, [Case No. 3,390,] the petition was filed by a member of an existing partnership, the schedule of debts showed that a large portion of the debts were co-partnership debts, and the inventory of assets showed that part of the assets was co-partnership property. The judge, therefore, considered the petition as, in fact, a petition to have the firm declared bankrupt on the petition of one of its partners. The application was to amend the petition by joining Dana, the other partner, with him in the proceedings; and the court, very properly, allowed the amendment to be made. It is true in giving his opinion the judge said, that until the other partner, Dana, was brought in, Little could not be discharged from the debts of the firm, because the theory and intent of section thirty-six of the act and of general orders numbers sixteen and eighteen, are, that the creditors of a firm should be required to meet but once, and that all questions in regard to the bankruptcy of the firm, and the administration of the assets of the firm, were to be determined in one bankruptcy forum. Now it is very evident that this reasoning would not apply to a case where the inventory did not include any assets of the firm, and where there were no assets of the firm to be administered.

In the other case referred to, that of *In re Frear*, [Case No. 5,074,] the petitioner filed his individual petition, praying that he might be discharged from all his debts, provable under the bankrupt act. The schedules annexed to the petition showed that the petitioner was also a member of a late co-partnership which was dissolved some

time before the filing of the petition, and that a large number of the debts were co-partnership debts. The question before the register, was whether a co-partnership debt could be proved. The register held that it could, and that the petitioner would be entitled to a discharge from all his debts, co-partnership as well as individual. Now, if the judge had thought that the register was wrong in this view of the case, he would certainly have said so. But he does not say so. All he says is: "The debt in question is provable, whether there are any assets of the co-partnership or not. If there are any such assets, they must be administered according to the provisions of section thirty-six of the act, and so must the assets of the separate estate of the bankrupt." From all which I infer the opinion of the judge to be that, when there are no assets of a co-partnership to be administered, a member of a late co-partnership may, upon his individual petition, be discharged from all his debts, co-partnership as well as individual. In this opinion I concur, and this is as far as it is necessary for me to go in order to dispose of the present case.

Case No. 5.

ABBE v. CLARK.

[3 Ban. & A. 211; 13 O. G. 274.]

Circuit Court, D. Connecticut. Feb. 4, 1878.

PATENTS FOR INVENTIONS—REISSUE—NEW MATTER.

1. The reissued patent granted to complainants, as assignees of Elijah C. Barton, September 14, 1875, for chime toys, held valid.

2. The purposes and scope of reissues considered.

[See *Yale Lock Manuf'g Co. v. Scovill Manuf'g Co.*, 3 Fed. Rep. 288; *United States & Foreign Salamander Felting Co. v. Haven*, Case No. 16,788.]

[In equity. Bill by Horatio H. Abbe and others, trading as the Gong Bell Manufacturing Company, against Jonathan C. Clark and others to restrain the infringement of patent No. 150,933. Decree for an injunction and an account.]

J. C. Clayton, for complainants.
W. E. Simonds, for defendants.

SHIPMAN, District Judge. This is a bill in equity to restrain the defendants from the alleged infringement of reissued letters patent which were granted to the plaintiffs, as assignees of Elijah C. Barton, on September 14th, 1875. The original patent was dated May 19th, 1874. The invention is a child's toy, and, as shown in the drawings attached to the patent, is a pair of wheels connected by an axle, in combination with two open-mouthed or gong-shaped bells

mounted upon the axle and between the wheels, so as to revolve therewith, and to be caused to ring whenever the wheels are rotated. A tongue or draft-bar is also connected with the wheels, so as to allow the wheels and bells to be rotated independently of the draft-bar. The three claims of the reissue are: "1. The combination with the connected wheels A A, of one or more bells, arranged between, and connected to, said wheels, so as to revolve simultaneously therewith, and to ring when so revolving. 2. The combination of the loosely-connected tongue or draft-bar P with the wheels A --, and intermediately arranged revolving bell or bells. 3. The combination of the following elements: The wheels A A, a pair of open-mouthed or gong-shaped bells, C C, provided with striking mechanism, and an axle or cross-rod, B, connecting the said wheels."

The defendants manufacture and sell two toys. The first consists of a pair of wheels connected with each other by a drum or large hollow axle. Sleigh-bells are attached to the inside of the drum or axle, between the wheels, by elastic or rigid connections, which bells revolve simultaneously with the wheels, and ring when revolving. The second toy consists of a pair of wheels connected with each other by bent metallic rims or axles, and attached to one wheel, and encircled by the rims, is a sleigh-bell, which revolves with the wheels, and rings as it revolves. In each device a bell is so connected with the axle and wheels as to allow the wheels to revolve independently of the bell. The defendants deny the novelty of the patented invention, and also deny infringement.

The record shows that prior to the date of plaintiffs' original patent, the following inventions were known in the art: First, the toy of Joseph Deuell, invented in 1865, and patented May 26th, 1874, which consists of a ring made of a piece or pieces of leather, or some similar material, with one or more bells attached to the inner periphery of the ring. Second, the Crawford and Hervey patent, dated November 19th, 1867; the Charles C. Johnson patent of March 23d, 1869; the English patent of William Robert Blake, filed April 20th, 1869; and the Rivera Ward patent of December 27th, 1870. All these devices are children's trundling-hoops, to which are attached in various ways, either upon the inside of the hoops, or upon the spokes, bells, which ring as the hoop is trundled. Third, the George W. Brown patent of June 25th, 1872, which consists of a pair of connected wheels of different diameters. It has a bell which rings by the jolting of the vehicle, but has no bell connected with the wheels so as to revolve simultaneously therewith. Fourth, the bell of William H. Nichols, patented August 27th, 1872, which is a call bell composed of two open-mouthed gong-bells which revolve upon a fixed horizontal shaft. No one of these articles has the characteristic features of the plaintiffs'

¹[Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

device, but are widely removed from their toy. The evidence in regard to the pre-existing devices shows that Barton's invention consisted in the combination of two connected wheels, with a bell or bells arranged between, and upon the axle of the wheels, which bells are connected with the wheels so as to revolve therewith, and to ring when revolving, the arrangement of wheels and bells being substantially as described. The load of bells is put between the connected wheels, and the bells revolve with the revolving wheels. He had apparently no predecessor in this combination.

It cannot be earnestly denied that the defendants' toys infringe the terms of the first and second claims of the reissue, if the plaintiffs are entitled to the described combination of connected wheels with a bell or bells of any shape. But it is insisted that in the original patent the invention was limited to gong-shaped bells, and that the first and second claims of the reissue are void unless the bell or bells which are therein mentioned are also thus limited. It is true that the plaintiffs' original specification and drawings describe gong-bells, and that the claim of the original patent was for a combination of wheels with a pair of open-mouthed or gong-shaped bells, etc. There is no difference between the drawings of the patents, and no substantial difference in the descriptive portion of the two specifications.

The purpose of a surrender and reissue is not to introduce new features, ingredients or devices, but to render effectual the actual invention for which the original patent should have been granted (*Collar Co. v. Van Dusen*, 23 Wall. [90 U. S.] 530;) but the actual invention is to be shown, suggested, or substantially indicated in the original specification, drawings or models, and the scope or effect of the invention is not to be enlarged so as to include what was not so shown, suggested or indicated. An inspection of the drawings and specification in this case clearly suggests that the shape of the bells was not an essential feature of the invention, but that their shape or form could be greatly modified, while the essential characteristics of the invention were unaltered. A moderate degree of mechanical skill could substitute a sleigh-bell or an ordinary open-mouthed bell for a gong-bell. The actual invention was indicated by the device as shown in the patent; but it was so claimed that any one might take advantage of and have the benefit of the original thought by a substitution of one form of bell for another. In order to protect inventors who have taken patents which are inoperative by reason of such inadvertence, the statute has provided for a surrender and reissue. The strong tendency of recent decisions has properly been to restrict the reissue to the precise thing which the patentee invented, and which he had shown or had indicated in the specification or drawings,

and not permit patentees to expand their claims and take in whatever improvements subsequent inventors have made. But in this case the invention manifestly had a wider scope than was claimed in the original patent. It follows that the first and second claims have been infringed. Let a decree be entered for an injunction, and an account.

Case No. 6.

ABBE v. ROOD.

[6 McLean, 106.]¹

Circuit Court, D. Michigan. June, 1854.

PRINCIPAL AND AGENT—RATIFICATION—WITNESSES
—CREDIBILITY.

1. When an agent exceeds his powers in the adjustment of a controversy, his principals, in a reasonable time, after a knowledge of it, should repudiate it. If this be not done, the principals may become bound.

[Cited in *Feild v. Farrington*, 10 Wall. (77 U. S.) 148.]

2. If an agent entered into an arrangement notifying the debtor that he would submit it to the creditor for his ratification, unless he shall ratify it, there is no binding obligation.

3. When witnesses contradict each other in a material fact, a jury will consider which of the witnesses, from the circumstances connected with the transaction, would be most likely to know and recollect the facts.

4. A witness who swears that a certain thing was said or done, is entitled to greater weight than a witness who said he did not hear the remark or witness the act. The one is positive, the other negative; and both may be true, on the supposition that the first witness swears truly.

[At law. Action by Abbe & Colt against Rood & Rood on two promissory notes. Verdict and judgment for plaintiffs.]

Mr. Lathrop, for plaintiffs.

Vandyke & Grey, for defendants.

OPINION OF THE COURT. This action is brought on two promissory notes. The signatures on both notes were erased, and they were offered in evidence without proof of their execution, as by the pleading they were not denied. But the court held that the notes could not be read without accounting for the erasures. A witness was called, who stated that the notes were sent to him as also the account, as counsel, for collection. Being unwell, he sent the notes to Mather & Taft, counsel at Niles. At that time, the signatures to the notes were not erased. On this evidence, the notes and the account were again offered in evidence. The account was receipted, and, as before stated, the signatures of the notes were erased. But the court refused to admit them, because it was not shown under what circumstances the signatures were erased, and the receipt of the account given. A deposition was then read, showing that a settlement was made, and that the defendants agreed to pay fifty cents

¹[Reported by Hon. John McLean, Circuit Justice.]

on the dollar; that on this agreement being entered into, the signatures on the notes were erased and the account was receipted. The agent, Smith, alleged, that the counsel at Niles, never having been so instructed, had no power, as counsel, to compromise on the payment of a part of the debt. And this is undoubtedly the true view. Counsel may refer suit to arbitrators, but they have no power to discharge the debt on the payment of a part of it, unless specially authorized. Smith, the agent, was dissatisfied with the compromise, as the payment of the notes of the defendants was not secured. He proposed to take one half the debt on certain payments, and to retain these notes until half of their amount was paid. The defendants refused to sign the agreement. This suit was then brought.

Mr. Smith, agent of the plaintiffs, was called as a witness, he being contradicted by another witness. Objection being made, the court said the witness might be examined as to any matter of explanation; but that he could not be called to re-affirm what at first he stated. The counsel for the plaintiffs contended that the defendants knew that Smith acted as agent, and must have known that if he went beyond his authority he could not bind his principal, and that the acceptance of a security for a less sum would not discharge a debt for a larger amount. This principle is undoubted, unless the agent acts under a special authority.—[Fitch v. Sutton,] 5 East, 230; [Down v. Hatcher,] 10 Adol. & E. 121. A payment of a part, and an acquittance under seal in full satisfaction of the whole is sufficient, as the deed amounts to an acquittance. Accord and satisfaction cannot be pleaded unless executed. As an accord there must be an acceptance. [Woodruff v. Dobbins,] 7 Blackf. 582.

The court instructed the jury, that if the principal have knowledge of the agent's acts and do not repudiate them in a reasonable time, they will stand. If the contract be repudiated, the parties must be placed in the condition in which they stood before it was entered into; the notes given on the compromise should have been returned.

Where an agent does an unauthorized act, as the compromise of a debt, and the acts of compromise are known to the principal, who makes no objection, this acquiescence will bind him. Story, Ag. § 255. This presumption of the acquiescence of the principal does not arise, unless it be shown that he had full knowledge of the transaction. It is laid down in many authorities, that money or notes for a less sum discharges the debt, if received in payment. [Cumber v. Wane,] 1 Smith, Lead. Cas. 607, 618, 630; [Sibree v. Tripp,] 15 Mees. & W. 22-31, it was held, that negotiable notes may be pleaded in payment, when given in payment of a larger amount.

The original agreement of compromise was as follows:—Whereas, H. W. Rood & Co., of

Niles, Michigan, being indebted to Messrs. Gilbert, Prentiss & Tuttle, of New York, in the sum of \$1245,57; and they are also indebted to Messrs. Abbe & Colt of said city, in the sum of \$1263,54; and also to the late firm of Colgate, Abbott & Co., in the sum of \$2111,56; and, whereas, the said Roods being unable to pay the sum in full, I have agreed in behalf of said firm to settle and compromise said debts, for fifty cents on the dollar, twenty per cent. thereof, N. P. Stuart agrees to pay in cash, for which I have taken his note, payable in thirty days, at the Michigan State Bank of Detroit, with interest; and the balance of thirty per cent. said Roods are to give other notes in equal parts payable in one, two and three years, with interest. If said twenty per cent. be paid, and they give their notes for the balance as above, then I agree to deliver up to them the notes for the said sums above specified, and the fifty per cent. to be in full therefor. Dated at Toledo, Nov. 10th, 1852, signed by E. J. Smith, who put also the other signatures to the agreement, all in his hand writing.

The notes were forwarded to Mather & Taft, lawyers of Niles, for collection, and they made the above arrangement, which Smith repudiated, having given them, as he alleges, no authority to make. The notes taken by Mather & Taft were returned to them by Smith. Mr. Smith states, that when he entered into this writing he informed the debtors that he was not authorized to make it; but that he would enter into it, and see whether his principals would sanction it. Mr. Stuart, witness called by the defendants, stated that he heard no reservation made by Smith, as to any want of authority; and that he was present when the arrangement was made. As these witnesses contradict each other, gentlemen, you are to judge of their credibility. And in doing this, they being respectable persons, you will consider who had the best opportunity of knowing what transpired at the time of the supposed compromise. And in this view it must be admitted, that Smith had a better opportunity of knowing and consequently of recollecting the facts which transpired. He was the agent of the principals, and he entered into the compromise; and he swears that he informed the parties that he was not authorized to make it, but would submit it to his principals for their approval. This condition was not heard by Mr. Stuart. The statement of the one witness is, that a fact did transpire, and of the other, that he did not hear the condition stated. The one is positive, the other negative. Now, where the witnesses are equally respectable, and one swears positively to a fact, and the other negatively, that he did not hear the condition, the weight of evidence will be with the one who affirms the fact, as his statement may be true and the statement of the other also; for though the condition was spoken

of, the other witness may not have heard it.

On the supposition that the statement of Smith be true, and the jury should so find, then their enquiry will be, did the principals repudiate the agreement of their agent, within a reasonable time after they came to a full knowledge of it.

The jury will first inquire whether the agreement set up in defense was made by competent authority. The agent who made it says he had no such authority. The paper purporting to contain the agreement is all in the hand writing of Smith, and he received Stuart's check for \$940 as part performance of the agreement. This check was payable some thirty days or more after its date. Under this paper, it is presumed that Mather and Taft made the arrangement or compromise with the defendants. This paper did not authorize these counsel to make the adjustment. But Smith offered to confirm the compromise, if the defendants would consent that the original notes should remain in his hands. When first informed of the compromise, Smith objected to it, returned the new notes given and the agreement. Upon the whole, gentlemen, if you shall find that Smith was not authorized to make the compromise, as he has sworn, and also that his principals were dissatisfied with it, and that this fact was made known to the defendants, it will be your duty to find for the plaintiff on the original causes of action, and assess their damages accordingly. The jury found for the plaintiffs—for the original notes and interest—and also on the accounts. As the plaintiffs recovered on the original ground of action, and not under the compromise, the money paid by Stuart in part performance of the compromise, should be returned to him, by Smith, the agent, unless it shall be made to appear, that the money so paid is the money of the defendants. And the court orders that no execution shall be issued on the judgment, until said sum of money shall be returned to Stuart, or satisfactory proof adduced that it is the money of the defendants; and if so shown, it should be entered as a credit on the judgment.

Case No. 7.

ABBETT v. ZUSI.

[5 Ban. & A. 38; 3 N. J. Law J. 47.]

Circuit Court, D. New Jersey. Dec. 20, 1879.

PATENTS FOR INVENTIONS—LICENSE—CONDITIONAL ASSIGNMENT—BREACH OF CONDITION—CAVEAT EMPTOR.

1. An assignment of certain patents having been granted with a condition therein that, if default were made in payment of any of the instalments of the consideration money therefor, thereupon the assignment should become null and void, and default having been made, and

a re-assignment taken, (previous to which, however, the assignee had granted a license to a third party to use the patents,) *held*, that a license granted under such circumstances was no defence to a charge of infringement by the use of the patents, because the assignee could give no better title than he himself had and the licensee ought to have inquired into the assignee's right to grant such license.

2. The maxim "caveat emptor" applied, under the facts in this case.

[In equity. Bill by Leon Abbett against Edward Zusi to enjoin infringement of letters patent, and for an accounting. Injunction granted.]

A. Q. Keasbey & Sons, for complainants.
B. C. Potts, for defendant.

NIXON, District Judge. The bill is filed for the infringement of certain letters patent, and for an injunction and an account. The answer admits the validity of the patents, and the use of the same by the defendant, but claims the right under a license granted to him by one Henry Sauerbier, who was the grantee of Flora B. Cabell, one of the owners thereof. It appears by the evidence, that on the 7th day of March, 1876, Flora B. Cabell, claiming to own the one-fourth part of the patents in controversy, for the consideration of \$10,000, executed a writing conveying to said Sauerbier, all her right and interest therein; the assignment containing a condition, nevertheless, that the same should be null and void if the grantee failed to pay within ten days after their falling due, any one of nineteen promissory notes for \$500 each, which the grantee of the patents had given, in addition to \$500 in cash, as the consideration of the conveyance.

After the payment of two or three of the notes first maturing, the grantee allowed the remaining notes to go to protest. Steps being taken to vacate the transfer on account of said default in payment, Sauerbier, on the 15th of August, 1878, reassigned his interest in the patents to Mrs. Cabell, with covenant in writing that he was the owner of the same, and had not made any other assignment thereof. It appears, however, that previous to the said reassignment, to wit, on the 7th of January, 1878, he had granted a license to the defendant to use the patents in the manufacture of fluting machines, for the period of four years from that date, for the consideration of \$4,000, and the question presented is whether a license under such circumstances is a defence to the infringement. I think that it is not. It would seem to be a proposition which required no argument, that the defendant derived from the grantor, Sauerbier, no better title than the latter had at the time of the transfer. But the notes that Sauerbier had given for the patents had remained under protest and unpaid for more than a year, and his right of ownership expressly depended upon their payment. The maxim "caveat emptor" applied, and if the defendant did

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not deem it worth his while, when he took the license, to inquire into the right of Sauerbier to grant it, he should not now complain if he comes to loss by his want of such ordinary diligence and care in the purchase.

The case of *Woodworth v. Weed*, [Case No. 18,022,] seems applicable. There a license had been given to use a patented machine, for which the licensee executed and delivered five promissory notes, payable at different times, with an agreement in writing, that if any one of the notes should become due and unpaid, the license should be void. Judge Nelson held, that from the terms of such an agreement, the license was forfeited the moment one of the notes became due and unpaid, and that the grantor might treat the rights of the grantee as forfeited, and, at once, apply for an injunction against any further use of the machine. It is not quite clear, under the facts of the case, that the complainants are entitled to an account, but their right to an injunction is without question, and it is accordingly ordered, with costs.

ABBEY, (FLANDERS v.)

[See *Flanders v. Abbey*, Case No. 4,851.]

Case No. 8.

ABBEY v. The ROBERT L. STEVENS.

[22 How. Pr. 78; 21 Law Rep. 41.]

District Court, D. New York. Sept., 1861.

TOWAGE CONTRACT—BREACH OF—ADMIRALTY JURISDICTION—NEGLIGENCE OF TUG—LIABILITY AS CARRIER—PRACTICE—COSTS.

1. A tug which tows vessels for hire is not to be regarded subject to the liabilities of a common carrier or insurer.

2. Where a tug on the Hudson river, having charge of a tow consisting of several vessels, has at night left off one of her tow near a public dock, and after doing so the officers of the tug hail to those on the other vessels in tow to know their situation, and they respond "All right, go ahead," if the tug does so in the usual manner, bearing herself diligently off into the river, and getting the whole body of the tow gradually under motion, and in doing this one of the stern tier of boats, as it was dragged along in face of the dock, either because its distance off the shore had been misapprehended by the persons conducting them, when the order was passed for the tug to proceed, or that sufficient alacrity or skill was not exercised in controlling their course, or in some other way, and thereby the barge was broken by the occurrence, so that she was shortly after found leaking, and in consequence of the injury filled with water and sunk, the tug is not legally responsible for that loss.

3. It is the duty of the tug to stop on notice of the distress of the barge, and ascertain its actual condition, and apply all means in their power for her rescue or relief.

4. In a case for damages for a breach of towage contract on the Hudson river, whereby a barge was lost between parties residents of the state of New York, the admiralty have not jurisdiction.

5. Where a point is reserved for further argument and consideration after a trial and decree in the case, it must be upon the pleadings and proofs as they stood on the original hearing.

6. Where a libel is dismissed for want of jurisdiction, no costs are allowable in the final decree to the successful party.

7. The want of jurisdiction presents a total want of power to give costs.

In admiralty. The libellants were owners of the barge Norway, employed in freighting coal upon the Hudson river. The steamboat was used as a tug in towing freighting vessels for hire up and down the river, between Port Ewen at the mouth of Rondout creek and Albany. On the 11th of November, 1856, the barge Norway, laden with coal on freight, was taken in tow by the tug at Port Ewen, under a contract to tow her for hire to Albany. The tow, on its passage up the river when completed, consisted of eight boats loaded with coal, two attached side by side on the larboard bow of the tug, and two on her starboard bow, of the latter of which the Norway was the outside one, lashed and secured to the one intervening between her and the tug. The remaining four coal barges were lashed together side by side, and secured by two hawser lines each about fifty fathoms long, passing from the starboard and larboard quarters of the tug to the larboard sterns of the extreme larboard boat, and the one placed second from the extreme starboard boat, to the latter of which, after the tow was arranged in that manner, a small sloop was taken up and attached by a tow line of about one hundred feet in length to the stern of the last mentioned boat. There was evidence that some of the masters of this tier of boats on towage by the hawser lines, objected to the sloop being subsequently tailed on astern of them, as she in that position would impede the steerage of those boats. Upon the whole evidence, however, it appeared the masters of those boats, when they engaged their towage and took their places astern, were aware that the sloop was to be added to the tail of the line, and that the objections to her being brought into that position rested with the master of the particular boat to which the sloop was to be attached. The boats were also aware, when they were taken in tow, that another freight barge was to be taken up on the passage, at or near Tivoli, to complete the full tow for Albany. When the tug arrived at the former place, she stopped, and another small boat was tailed by a line to the stern of the outside barge, which was lashed to the starboard bows of the tug, and then the rear barges were halled from the tug to know if all was ready behind. The answer was made from those barges that "all was right, go ahead;" upon which reply the tug was put in motion, and after she and the barges attached to her side had safely passed the landing place, the starboard barge of those in tail,

[Reported by Nathan Howard, Jr., Esq.]

and which was owned by the libellants, struck against a dock or pier at the head of it, and was so injured thereby that shortly after she sunk, and with her cargo of coal became a total loss.

E. C. Benedict, for libellants.
D. McMahon, for claimants.

BETTS, District Judge. The point in contestation arising out of the facts in this case is, whether there was negligence or want of proper prudence and care in the management of the tug in coming to at Tivoli, and getting again under way with the tow which caused the injury received by the barge Norway. The tug is not to be regarded subject to the liabilities of a common carrier or insurer. (See authorities.)² The tug itself was lying off from the dock a distance reasonably sufficient to secure a free course in following her lead, unless some impediment out of view of her master and pilot, or difficulty in the condition or bearing of the boats in the tow astern prevented their rendering the usual aid in their own steerage or keeping their proper line in the track of the tug. The master, before putting the tug in motion, called out to those boats to know their situation, and was informed by them they were ready, and he was directed to go ahead. This he did in the usual manner, bearing the steamer diligently off into the river, and getting the whole body of the tow gradually under motion. The stern tier of boats, as it was dragged along in face of the dock, either because its distance off the shore had been misapprehended by the persons conducting them when the order was passed for the tug to proceed, or that sufficient alacrity or skill was not exercised in controlling their course, or the action of the sloop dragging astern of them, was crowded so far in that the starboard side of the Norway pressed or struck against a pier, and was so broken by the occurrence that she was shortly after found leaking, and in consequence of the injury filled with water, and together with her cargo of coal became a total loss.

In my judgment, the tug is not legally responsible for that loss. (See authorities.)² I think, however, it was plainly the duty of the master and pilot of the tug to have stopped the steamer on notice of the distress of the barge, and ascertained its actual condition, and applied all means in their power for her rescue or relief. This was a portion of the reasonable diligence due from the tug to the bailment entrusted to her charge, and if the barge was cut adrift from the tow in its sinking condition, and then abandoned by her, the steamer should be declared liable for the whole damages sustained by the libellants. So also, if after the disaster to the barge was made

known to the master or pilot of the tug, they ordered the barge to hold on and continue with the tow, without examination of her peril or means of sustaining it, and she had been lost in following that direction, the steamer would be properly chargeable with the whole loss, as one resulting from mismanagement and carelessness in conducting the tow, unless clear proof was made that the course taken was a reasonable and proper one upon a fair consideration of the perils of the barge and the means at command for her relief. The apparent weight of the evidence is, that the barge was cut loose by persons on board of her, against the positive commands of the master of the tug, to adhere to the tow. The evidence for the claimants is also strong that the barge was safe in charge of the tug, and could have been taken to Bristol, or landed safely on the middle grounds, if that order had been obeyed. There is pointed testimony on the part of the libellants in contradiction of this representation of the case, and it does not appear to me this branch of the subject was examined with sufficient fulness to enable the court to determine satisfactorily where the truth and right between the parties in this particular lies.

I shall hold in this cause that the tug is not responsible for the original collision of the barge in tow, against the dock or pier at Tivoli; and the libel thus far is to be considered dismissed; but that the libellants are entitled to the further hearing upon the question whether the master and pilot of the tug were guilty of negligence or want of proper attention and precaution in respect to the relief or saving of the barge Norway, after they were notified she was injured and in a sinking condition, either previous to or after she was cut adrift from the tow. Order accordingly.

Subsequently, the libellants insisted that on such a re-argument they were entitled to introduce additional proofs and make new allegations. This question of practice was discussed before the court by the same counsel, and the following decision was made thereon:

BETTS, District Judge. A question is raised and submitted to the court in this case, as a sequent to the decision in the cause on the original hearing, (February term, 1858,) whether a point, reserved therein for further argument and consideration, is to be brought before the court upon the pleadings and proofs as they then stood, or if the parties are allowed to produce additional testimony or allegations. On consideration of this proposition, it is held by the court, that the further proceedings are to be restricted to a re-argument of the matters pertaining to this point as they stood on the original hearing.

²[Authorities cited do not appear in the original report.]

On the re-argument, it was insisted on by counsel for claimants that the court had no jurisdiction. The court so held, and dismissed the libel for want of jurisdiction. The libellants moved that the discontinuance be without costs. The claimants insisted upon costs.

BETTS, District Judge. This was an action for damages incurred by the libellants for alleged negligence and misconduct of the steamer and her crew, in towing a barge and her cargo, owned by the libellants, on the Hudson river, by means of which culpable conduct on the part of the steamer, the barge and her lading were both injured and became a total loss. The steamboat was employed exclusively on the Hudson river as a tug, in towing for hire vessels and other water borne craft, from one port or place to others on that river, and had undertaken to transport the barge and her cargo in question, by towage, from a place on the Hudson river, near Kingston, to Albany; and on the passage up the river, the barge, which was secured to the stern of the tug by a hawser, was, in her towage, hauled against the face of a wharf situate at Tivoli, and so damaged thereby that shortly after passing the wharf the barge sunk, and with her lading was lost. On the hearing upon the merits, in February term, 1858, the court decided that the injury was not owing to the fault of the tug, and, as to that branch of the case, the libel must be dismissed; but the point has not been fully discussed upon the proofs, whether there was a guilty remissness or wrongful action on the part of the tug in not affording relief to the wounded barge after it was made known to the tug that the tow was in a sinking condition, and was in need of and had called for assistance; and leave was accorded the libellants to move the court for further hearing in the cause upon that point. No proceeding has been since moved in the case, until the present term, on the part of the libellants, and leave is now asked in their behalf that they may have an order dismissing the cause without costs, because the subject matter of the suit is not within the jurisdiction of the court. The counsel for the claimants oppose that application, and on their side move that the cause be dismissed, with full costs, upon the state of facts before the court.

I do not consider the libellants entitled to any affirmative order on their motion. The court must necessarily remain passive as to their standing in the case, until they attempt some positive action therein prejudicial to the rights of the claimants. The actor in a suit has authority to abandon his suit at his discretion or advance in it until impeded by counter action on the part of his adversary, and accordingly the libellants in this case require no aid from the court to enable them to withdraw or discontinue the

prosecution pending in their favor. Their notice to the claimants, that such measure is contemplated, enables the latter to interpose and seek a mandate from the court, that if the act be performed and the libellants discontinue their action, they be ordered to pay all taxable costs which have been incurred therein on the part of the claimants. This motion is made, and the court is asked to adjudge the libellants, on taking an order for the dismissal of the cause for want of jurisdiction over it by the court, bound to pay claimants' costs therein.

On looking into the subject, I am satisfied, if the cause is treated as dismissed because not within the jurisdiction of the court, the claimants are not entitled to the order asked for, because the whole matter including costs with the gist of the action, is out of the cognizance of the court. There is no inconsiderable diversity of practice and decision in various state courts, upon the point whether it be competent for the court, when the cause pending therein is dismissed for want of jurisdiction over it, to adjudge costs against the party whose case is so disposed of. It is not important to collate the various opinions found in the books upon the subjects, for, however the rule may be in the state tribunals, it is found to be so definitely determined in the federal courts, after a slight wavering and hesitancy, that it cannot be longer regarded as an open question. The first case in which the point came up formally for consideration, was in February term, 1806. *Winchester v. Jackson*, 3 Cranch, [7 U. S.] 515. The cause was dismissed for want of jurisdiction. The prevailing party moved for costs. The clerk certified that it had not been the practice in such cases to give costs. But the court directed that the cause be dismissed with costs. No reasons were assigned for the judgment.

In February term, 1807, (*Montalet v. Murray*, 4 Cranch, [8 U. S.] 47,) the point was reconsidered, and in the first instance the preceding rule was followed, but on the closing of the term the court directed the clerk "that when a judgment is reversed for want of jurisdiction, it must be without costs." In December term, 1824, (*McIver v. Wattles*, 9 Wheat. [22 U. S.] 650,) the question was again moved, and Ch. Justice Marshall said "that in all cases where the case is dismissed for want of jurisdiction no costs are allowed." In the standing rule of the supreme court, (No. 45,) adopted in 1838, (1 How. [42 U. S.] Appendix 36,) that principle is again recognized in withholding costs in all cases where the dismissal of a cause shall be for want of jurisdiction. In December term, 1850, (*Strader v. Graham*, 10 How. [51 U. S.] 82,) the cause was dismissed without costs by the supreme court, for want of jurisdiction; and in December term, 1855, Mr. Crittenden moved the court to amend that judgment, and to give judgment for the defendant for

costs. The court denied the motion, saying "that this court can not give a judgment for costs in a case dismissed for want of jurisdiction." Mr. Justice Woodbury looked pretty largely into the cases touching this topic, without being able to work out any satisfactory harmony in the practices of the various judicatures respecting the granting or refusal of costs where the case the court was dealing with, was one not within its jurisdiction. It is clear, however, he regards it no longer a point depending in the United States courts of law or equity, on consideration of equities or demerits in the parties or causes of action. His general statement of the result of his examinations seems based upon the principle that the rule in the federal court is determinate and inflexible. Notwithstanding (he says) then, the equities in favor of costs where a party has been put to expense in a case dismissed for want of jurisdiction, and notwithstanding the broader discretion in courts over costs in chancery than at common law, there is a defect of power to adjudicate or award costs to either side, where there is no power to adjudicate on the merits, and where the case is dismissed on account of the want of any such power. The case is not dismissed for the want of equity or merits, but falls for want of any authority over it, and hence over its incidents also. It is "coram non judge." *Burnham v. Rangeley*, [Case No. 2,177;] *Hathaway v. Roach*, [Id. 6,213.] This case stands in that predicament, and the application of the claimants for an award of costs against the libellants, the cause being dismissed for want of jurisdiction, must be denied. Libel dismissed for want of jurisdiction, but without costs.

Case No. 9.

ABBOT v. AMERICAN HARD RUBBER CO.

[4 Blatchf. 489.]¹

Circuit Court, D. Connecticut. April, 1861.

EQUITY—NECESSARY PARTIES—DISMISSAL.

1. A circuit court of the United States will not proceed to a final decree, in a suit in equity, in the absence of a party whose interests are to be affected thereby.

[Cited in *New Jersey Zinc & Iron Co. v. Trotter*, 18 Fed. Rep. 330.]

2. Where a bill against a corporation alleged that certain directors of the corporation were about to make a fraudulent sale of all the property of the corporation to P., and prayed an injunction to restrain the corporation from consummating the sale, but P. was not made a party to the bill: *Held*, on demurrer, that P. was not a necessary party.

3. A circuit court of the United States will always dispense with a merely formal party, where he is beyond the reach of process; and, where a person is beyond the reach of process, it will dismiss a bill, on the ground of its inability to proceed, only when it discovers that

the presence of the person is indispensable, and that no relief can be given which does not necessarily involve his rights.

[In equity. Bill by Gorham D. Abbot against The American Hard Rubber Company for an injunction.]

This was a demurrer to a bill in equity. The bill alleged that the defendants were a corporation established by the laws of Connecticut, and located at Bethany, in that state; that the plaintiff was a director and a large stockholder therein; that the capital stock of the corporation was three hundred thousand dollars; that its property, consisting of various assets, amounted to not less than that sum; that certain members of the board of directors, on or about the 9th of November, 1860, met in the city of New York, and entered into certain fraudulent arrangements with one Conrad Poppenhusen and one Christian Konig, of said city, by which they agreed to sell and dispose of all the property of the corporation to said Poppenhusen and Konig, or to one of them, for the sum of one hundred and twenty thousand dollars; that said directors so engaged in this fraudulent arrangement were not a majority or legal quorum of said board of directors; that, if the arrangement should be carried out, the plaintiff would suffer great pecuniary loss and his stock would be sacrificed; and that the corporation, unless restrained by injunction, would carry out and perfect the aforesaid unlawful and fraudulent arrangement. The prayer was for an injunction, to prevent the corporation from ratifying and giving legal and practical effect to such inchoate fraudulent arrangement of some of the directors, and for the appointment of a receiver. The demurrer rested on the objection, that Poppenhusen and Konig were not made parties to the bill, and that the facts set up in the bill showed that their interests under the alleged fraudulent arrangement were directly involved in the controversy, and must be affected by any decree of the court therein.

SHIPMAN, District Judge. The argument urged in this case is, that, by the disclosures of the bill, Poppenhusen and Konig are seen to be indispensable parties thereto, as their rights must be necessarily affected by a decree; and that, inasmuch as a circuit court is not enabled, either by any act of congress, or any rule of practice, to make a decree in the absence of an indispensable party, whereby his interests can be affected, the bill should be dismissed. The cases of *Shields v. Barrow*, 17 How. [58 U. S.] 130, and *Colron v. Millaudon*, 19 How. [60 U. S.] 113, are cited in support of this view. These cases support the general proposition, that a circuit court will not proceed to a final decree in the absence of a party whose interests are to be affected thereby. But, are Poppenhusen and Konig such indispensable parties?

¹[Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

Although the bill is not drawn with that fullness or precision of statement which might be desirable, yet, it is evident that it proceeds upon the theory, that the directors who are negotiating with Poppenhusen and Konig have no power or authority to confer upon the latter any right, title or interest whatever, and, in point of fact, have conferred none, as against the rubber company, and that, in order to give effect to this inchoate fraud, the corporation must and will, itself, act, and, by its ratification or adoption of the fraudulent arrangement, inflict upon the plaintiff, through his stock, the injury he seeks to avoid. It is against this prospective injury that the plaintiff seeks protection. The bill is not brought to rescind any contract, or to take from Poppenhusen and Konig any right which they have, but to restrain the defendants from conferring any title or interest or right upon them, by giving effect to the fraudulent scheme. By what the bill alleges to have already been done, it does not appear that Poppenhusen and Konig, or either of them, have derived from the defendants any rights or interests which a court of law or of equity would enforce or protect. All that has yet been done, is merely preliminary to the consummation of the fraud. A decree enjoining the defendants from adopting the acts of their unauthorized agents, the directors concerned, would not affect any right or interest vested in these absent parties, so far as I can discover from the facts alleged in the bill and admitted by the demurrer. It is asked, whether, if Poppenhusen and Konig were to be found within the state of Connecticut, they ought not to be made parties? I hardly think this inquiry involves a true test. There may be, in a single proceeding in chancery, three classes of parties—formal parties, necessary parties, and indispensable parties. In a case where all these parties were within the jurisdiction and subject to the process of the court, it might be necessary that they should all be brought in. But the circuit courts of the United States will always dispense with merely formal parties, where they are beyond the reach of process. This is believed to be in accordance with the general practice of courts of chancery. *Russell v. Clark's Ex'rs*, 7 Cranch, [11 U. S.] 69, 98; *Shields v. Barrow*, 17 How. [58 U. S.] 130; *Joy v. Wirtz*, [Case No. 7,554.] And, even where parties come under the denomination of necessary parties, and where, if they were within the reach of process, the court would insist on their being brought in, before it would proceed to make a final decree, yet, a circuit court, where the party is beyond the reach of its process, will dismiss the bill, on the ground of its inability to proceed, only when it discovers that the presence of the party is indispensable, and that no relief can be given which does not necessarily involve his rights.

I think that a bill of this kind ought not to

be dismissed, until the court is quite certain that it cannot, under the settled rules, grant the relief asked for; and, if I had any doubt on the question raised upon this bill, I should still be inclined to overrule this demurrer, inasmuch as the objection can be made available in any future stage of the cause. If it should at any time appear that Poppenhusen and Konig, or either of them, or any other person, have interests vested in them which must necessarily be affected by the decree, then none can be passed, and the bill will have to be dismissed. The demurrer is overruled.

ABBOT, (BAMFIELD v.)

[See *Bamfield v. Abbot*, Case No. 832.]

ABBOT, (ROGERS v.)

[See *Rogers v. Abbot*, Case No. 12,004.]

ABBOT, (UNITED STATES v.)

[See *United States v. Abbot*, Case No. 14,415.]

Case No. 10.

In re ABBOTT.

[1 Hask. 250.]¹

District Court, D. Maine. Nov., 1869.

BANKRUPTCY—INJUNCTION—EVIDENCE.

1. A court of bankruptcy may enjoin the debtor and any other person, pending involuntary proceedings, from conveying away, disposing of, or interfering with, any property once owned by the debtor, and claimed to have been fraudulently transferred by him and concealed, upon prima facie proof of the fraud.
2. A motion to dissolve such injunction should not be granted, unless facts are shown, making such action just toward the creditors.
3. The withholding of books of account by a party in interest works a prejudice to his cause.

In bankruptcy. Motion to dissolve an injunction, granted, pending involuntary proceedings, restraining the debtor and Roscoe L. Bowers from conveying or disposing of certain property claimed to have been conveyed and disposed of by the debtor in fraud of the bankrupt act. The petitioning creditors objected, and the cause was submitted upon affidavits filed by both parties. The opinion is not printed in full. Some parts of it, dealing with facts, are omitted on account of their great length and particularity of circumstance.

Edwin B. Smith, for bankrupt, and Almon A. Strout and George F. Shepley, for Bowers, in support of the motion.

Edward Eastman and Josiah H. Drummond and Woodbury Davis, for creditors, contra.

¹[Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

FOX, District Judge. A petition has been presented by Wm. M. Price et als., creditors of Wm. F. Abbott, praying that he may be adjudged a bankrupt; at the same time application was made for an injunction, to restrain the debtor and one Roscoe L. Bowers, who was charged with aiding the bankrupt in a fraudulent sale, concealment, and removal of his property, from removing, disposing, or interfering with the property, until the further order of the court. Upon the affidavit of one Lothrop, the injunction was ordered. The present motion is in behalf of Bowers to dissolve the injunction, and is sustained by his own affidavit as well as that of Abbott, and is approved by the affidavit of Mr. Eastman, a solicitor for the creditors. The injunction was granted under the provisions of the 4th sec. of the bankrupt act, which authorizes the court, upon commencement of involuntary proceedings, "to restrain the debtor and any other person, from making any transfer or disposition of any part of the debtor's property, not excepted by this act from the operation thereof, and from any interference therewith." Some discussion was had at the bar as to the operation and extent of the provision, and whether it was applicable to property once belonging to the debtor, but of which it was claimed he had made a transfer in violation of the provisions of the bankrupt act. In my view, the provision is applicable to all property, which under the act would vest in the assignee, and which it would be his duty to claim for the benefit of the estate; not only that in the actual possession of the debtor at the commencement of bankrupt proceedings, and to which his title is indisputable, but to all other estate of which he has made any fraudulent transfer or concealment; and on the court being satisfied by prima facie proof that the property has been thus fraudulently transferred or concealed, the parties should be enjoined and restrained from any interference with it until the determination of the question of bankruptcy. On the affidavit of Lothrop a prima facie case was presented which justified the injunction as ordered by the court.

From the affidavits, it appears that Abbott has been for some years a cigar maker in Saco, pretty extensively engaged in the business, and as he states, without keeping proper books of account, so as to be fully informed as to his standing and condition.

Abbott says that in January last he engaged Bowers to straighten out his affairs and keep his books; and for this purpose, an account of stock was taken and a new set of books opened by Bowers. Both swear that they believed Abbott was solvent. Bowers purchased from Abbott all the cigars he manufactured from April 10th, to Sept. 24th, 1869. The whole amount sold by Abbott in 1869 being 932 M. Besides the sale of the cigars, Bowers claims that be

tween May 13th, and Aug. 25th, Abbott assigned to him \$10,073.44 of stock and pipes, on which he advanced \$12,075.75. Abbott failed on or about Sept. 28th, owing \$35,000, \$25,115 of which was for stock and fixtures purchased since May 13th. His assets consisted of \$500 of stock under attachment, and stock and fixtures sold Bowers Sept. 28th for \$1,526, and notes amounting to \$6,000 or \$8,000, of not much value.

The fairness and good faith of all these transactions between Bowers and Abbott are set forth repeatedly in the strongest language in their respective affidavits, and these averments have not escaped the attention of the court. A critical examination of Bowers' dealings with Abbott, so far as they have seen proper to explain and develop them by their affidavits, does not satisfy me that it would be just towards the creditors to remove and dissolve the injunction. Much more light might and should have been thrown on their dealings, and a more complete and satisfactory exposure of them could have been presented; but they have seen fit to deal in general denials and assertions, without going into a fair exhibit of the accounts, and purchases, and cost of the property thus acquired by Bowers. If I am in error then in any of my calculations or facts, it is rather owing to the darkness and uncertainty with which they have seen fit to obscure their dealings, than to any failure of investigation on my part, as I have twice carefully read over their affidavits in order to be fully conversant with their contents. The books of Abbott which are in the handwriting of Bowers, and wholly kept by him, have not been produced at the hearing, but although called for by the creditors' attorney, have been kept back, Bowers contenting himself by stating in his supplemental affidavit that nothing appears therein inconsistent with his statements. Under the circumstances, it would have been altogether more satisfactory for the court to have ascertained this fact by a personal examination of the books, rather than from the statement of a party in interest whose relations are such with the debtor, that no doubt can be entertained that the books would have been present, if it had been thought for the interest of Bowers that they should have been produced. From their non-production under the circumstances, I cannot but conclude, that in some way they would have afforded evidence detrimental to these parties, and that for reason satisfactory to themselves they have seen fit to withhold them from the court. I think that matters should remain as they now are until an investigation can be had by an assignee.

Motion overruled.

ABBOTT, (The JAMES T.)

[See The James T. Abbott, Case No. 7,202.]

ABBOTT, (BANK OF THE UNITED STATES v.)

[See Bank of the United States v. Abbott, Case No. 906.]

ABBOTT, (CRUM v.)

[See Crum v. Abbott, Case No. 3,454.]

ABBOTT, (DAVIS v.)

[See Davis v. Abbott, Case No. 3,622.]

Case No. 11.

ABBOTT v. ESSEX CO.

[2 Curt. 126;¹ 17 Law Rep. 607.]

Circuit Court, D. Massachusetts. Oct. Term, 1854.²

ESTATES—EXECUTORY DEVISE—FEE SIMPLE CONDITIONAL ESTATE TAIL—DEFINITE FAILURE OF ISSUE.

1. A devise, "if either of my sons, John and Jacob, should happen to die without any lawful heirs of their own, then the share of him who may first decease, shall accrue to the other survivor and his heirs;" held to provide for a definite failure of issue, and that each son took an estate in fee-simple conditional, and not an estate tail.

[See note at end of case.]

2. The rules by which an executory devise of a fee-simple conditional, and a devise of a fee-tail, are to be determined, examined.

[At law. Real action by James A. Abbott and Hannah K. Abbott, his wife, demandants, against the Essex Company, tenants, to recover a parcel of land.] Both parties claimed under the will of John Kittredge. The demandants claimed that the will of John Kittredge created estates tail in equal moieties in each of his two sons John and Jacob, with cross remainders in fee-simple. The tenants claimed under Jacob Kittredge, to whom in his lifetime his brother had conveyed all his title; and they maintained that each of the two sons took a fee-simple, and that by way of executory devise, the share of that son, who should first die without issue, was devised over to the other. The will was as follows:

"In the name of God, amen. I, John Kittredge, of Andover, in the county of Essex and province of the Massachusetts Bay, in New England, surgeon, being, through Divine goodness, favored with the due exercise of my understanding, have great cause, and accordingly I return thanks to Almighty God therefor; but being exercised with such bodily indisposition as gives me reason to think that my continuance in life is but short, I have, therefore, thought proper to discharge my mind of all worldly concerns, as far as

possible, to the end that I may spend the remainder of my days in preparation for futurity; for which purpose I make this my last will and testament, whereby I dispose of my worldly goods and estate as followeth, namely:—

"Imp's. I give to Sarah, my well-beloved wife, the one third of all my lands and buildings in Andover aforesaid, and the one third of all my household goods and furniture, to be for her use and improvement, so long as she remains my widow.

"Item. I give to my son, Benjamin Kittredge, of Tewksbury, in the county of Middlesex, the sum of twenty shillings, lawful money, and the reason I give him no more is, that I have given him his portion out of my estate some time before.

"Item. I give to my son, Thomas Kittredge, all the land I own lying in a place known by the name of Ox Common, in said Andover, which, with what I have given him, my said son Thomas, completes his full proportion of my estate.

"Item. I give to my two sons, namely, John and Jacob Kittredge, all my lands and buildings in Andover aforesaid (excepting the land I gave to my son Thomas aforesaid), which buildings consist of dwelling-houses, barns, corn-house, grist-mill, and cider-mill, all of every denomination; also, all my live-stock of cattle, horses, sheep, and swine, and all my husbandry utensils of every denomination, and all my tools that may be useful for tending the mills aforesaid, and also all my bonds and notes of hand and book accounts, together with what money I may leave at my decease; and my wearing apparel, I give the same to my said sons, John and Jacob Kittredge, to be equally divided between them; and in consideration of what I have given my said sons John and Jacob Kittredge, the executor of this testament (hereinafter named) is hereby ordered to see that all my just debts and funeral charges, together with all the legacies in this will mentioned, be paid out of that part of my estate I have given to my two sons, John and Jacob Kittredge, to whom I give each one bed and bedding.

"Item. It is my will, that if either of my said sons, namely, John and Jacob Kittredge, should happen to die without any lawful heirs of their own, then the share of him who may first decease shall accrue to the other survivor and his heirs.

"Item. I give to my granddaughter, Molly White (daughter of Aaron White, of Medway, in the county of Suffolk, the sum of fourteen pounds five shillings and two pence, lawful money; and the reason I give her no more is, I gave my daughter (mother of the said Molly White) at her marriage, as much as would make her, the said grandchild, with what I have now bequeathed, equal to my other daughters, which sum is to be paid her at the age of twenty-one years; but if she should see fit to marry be-

¹[Reported by Hon. B. R. Curtis, Circuit Justice.]

²[Affirmed by supreme court, 18 How. (59 U. S.) 202.]

fore she arrives to that age, the same to be paid her at her marriage.

"Item. I give to my granddaughter, Sarah Dwinell, the sum of sixty pounds, lawful money, to be paid in the following manner, namely, twenty pounds to be paid her as soon as she arrives to the age of twenty-one years; but if she should see fit to marry before the age of twenty-one years, the same sum of twenty pounds to be paid her and the remainder to be paid in three years after she arrives to the age of twenty-one, with lawful interest for the same till paid; and I also order her, the said Sarah Dwinell, to be maintained out of that part of my estate I give to my sons, John and Jacob Kittredg, until she arrives to the age of eighteen years.

"Item. I give to my daughter, Elizabeth Kittredg, the sum of fifty-three pounds, six shillings and eight pence, lawful money, of which sum thirteen pounds, six shillings and eight pence is to be paid her at my decease, and the remainder to be paid her in four years after, with lawful interest for the same till paid.

"Item. I give to my daughter, Hannah Kittredg, the sum of sixty pounds, lawful money, twenty pounds to be paid her when she arrives to the age of twenty-two years (except she should marry before she arrives to the age of twenty-two years), then the said twenty pounds to be paid her, and the remainder to be paid in three years after, with interest for the same till paid. I also give her my best bed and furniture.

"Item. I give to my daughter, Susanna Kittredg, the sum of sixty pounds, lawful money, twenty pounds to be paid her when she arrives to the age of eighteen years, and the remainder in five years after, with interest for the same till paid.

"Item. I give to my three daughters, namely, Elizabeth, Hannah, and Susanna Kittredg, the remainder of my household goods and furniture (excepting wet and dry cash), and also the one third which I gave Sarah, my aforesaid wife, or what of the same may remain at her decease or marriage; all of which is to be equally divided amongst them, my abovesaid daughters. I also give to them, my said daughters, the privilege of living in my house for so long as they shall live a single life, and the liberty of keeping a cow and one swine on the produce of my land I have given to my two sons, John and Jacob Kittredg.

"Item. It is my will, that if either of my daughters or granddaughters aforesaid should die and leave no lawful issue, then, what I have given to either of them, should be equally divided amongst my surviving daughters or their heirs.

"Item. I give to my said sons, John and Jacob Kittredg, my wet and dry cash, and also my pew in the North Meetinghouse in Andover, aforesaid, to be equally divided between them, they to allow my aforesaid

wife and daughters to sit in said pew as long as they live unmarried. And if there is any of my estate that I have not disposed of in this will, either real, personal, or mixed, of what name or nature soever, I give the same to my aforesaid sons John and Jacob Kittredg.

"Lastly. I do hereby constitute and appoint my aforesaid son, John Kittredg, the sole executor of this my last will and testament, allowing this and no other to be so.

"In witness whereof, I, the said John Kittredg, have hereunto set my hand and seal, this twentieth day of September, Anno Domini one thousand seven hundred and seventy-five, and the fifteenth year of His Majesty's reign. John Kittredg."

It was admitted by the parties, that said testator died in the year 1775; that his will was duly proved August 5, 1776; that his two sons, John Kittredg and Jacob Kittredg, survived him; that said John Kittredg died in the year 1826, never having been married; that said Jacob Kittredg died in the lifetime of his brother John, on July 15, 1807, leaving the following children, namely, John Kittredg, his oldest child, who died without ever having had issue, on the tenth of January, 1823; Jacob Kittredg, his next oldest child, who died December 18, 1831, having had issue one child, who is the demandant, Hannah Kittredg Abbott; Thomas W. Kittredg, his next child, who is now alive; Hannah Kittredg, his next child, who died, intestate, on the 28th October, 1815, never having had issue; George W. Kittredg, his next child, who died July 4, 1836, intestate, having had issue one child, Jacob Kittredg, who is now alive, and William H. Kittredg, his last child, who died, intestate, on the 1st of October, 1849, never having had issue. The marriage of the demandants was also admitted, and that the surviving son of Jacob Kittredg, the devisee named in said will, and also his surviving grandchild, had before the commencement of the suit, released and conveyed to demandants all their interest and title in the demanded premises. [Judgment for defendant. Affirmed, by supreme court, 18 How. (59 U. S.) 202.]

Bartlett, for demandant.

C. G. Loring and Merwin, contra.

CURTIS, Circuit Justice. The question presented for the decision of the court is, whether John and Jacob Kittredg took estates tail under the will of their father, John Kittredg. The devise to them is in the following words:—

"I give to my sons, namely, John and Jacob Kittredg, all my lands and buildings in Andover aforesaid, (excepting the land I gave to my son Thomas aforesaid,) which buildings consist of dwellings, houses, barns, corn-house, grist-mill, and cider-mill, all of every denomination; also all my live-stock

of cattle, horses, sheep, and swine, and all my husbandry utensils of every denomination, and all my tools that may be useful for tending the mills aforesaid; and also all my bonds and notes of hand and book accounts, together with what money I may have at my decease, and my wearing apparel. I give the same to my said sons to be equally divided between them; and in consideration of what I have given my said sons, John and Jacob Kittredge, the executor of this testament (hereinafter named) is hereby ordered to see that all my just debts and funeral charges, together with all the legacies in this will mentioned, be paid out of that part of my estate I have given my two sons, John and Jacob Kittredge, to whom I give each one bed and bedding.

"Item. It is my will that if either of my said sons, namely, John or Jacob Kittredge, should happen to die without any lawful heirs of their own, then the share of him who may first decease shall accrue to the other survivor and his heirs."

Independent of the last clause, by which the estate is given over, I am of opinion that the sons would have taken an absolute estate in fee-simple. 1. Because one of the devisees, John Kittredge, is made executor of the will, and is required to see that all the testator's debts and legacies be paid, out of that part of the testator's estate devised to himself and his brother Jacob. This is a charge on John, personally, in respect of the estate given to him, as was held in *Doe v. Snelling*, 5 East, 87; *Lithgow v. Kavenagh*, 9 Mass. 161; *Wait v. Belding*, 24 Pick. 129. The distinction is between a charge to be paid out of rents and profits only, and a charge to be paid by the devisee at all events out of the estate in his hands. In the last case, the devisee takes a fee, though, undoubtedly, it may be cut down to an estate tail by words showing that intent. *Slater v. Slater*, 5 Term R. 335. As this would give a fee-simple to John, and as the intent of the testator is clear, to have the two take the same estate, the estate of Jacob would necessarily be held to be a fee simple also. See *Lord Ellenborough*, in *Roe v. Daw*, 3 Maule & S. 518. 2. Among the legacies given by the will is, the maintenance of Sarah Dwinel, until she should arrive at the age of eighteen years, "out of that part of my estate I give my sons John and Jacob Kittredge." If only life estates were given to John and Jacob, both might die before the legatee became of that age, and thus the clearly expressed intention of the testator be defeated. 3. The testator directs his debts and legacies to be paid "out of that part of my estate I have given to my two sons, John and Jacob Kittredge." It is held in Massachusetts, in conformity with many decisions elsewhere, that if the testator had a fee, a devise of his estate carries a fee. The word "estate" if not controlled by some other language of the will, being

construed to designate the quantity of interest, and not merely the corpus of the subject of devise. *Godfrey v. Humphrey*, 18 Pick. 537.

Now, though this use of the word "estate" occurs only in the clause charging the debts and legacies, and not in that employed to make the gift, yet the intent of the testator may as well appear in the former, as in the latter clause. Indeed, all those cases, in which it has been held, that a charge upon the devisee of a gross sum, or of debts and legacies, implies a gift of more than a life-estate, are authorities to show that the testator's intent to give a fee may be found in such a clause. And if it may be inferred from the duty created by such a clause, why not also from the language employed in creating that duty; provided that language is sufficient to show, that the testator understood that he had given an estate in fee to his sons? If a devise, which, by its terms, would carry only an estate for life, is followed even in another part of the will, by language which shows the testator believed he had given a fee, a fee will pass, because the intent of the testator is to govern, and that intent is to be collected from the whole of the will.

This testator, in referring to what he had given to his two sons, calls it "that part of my estate." There are many cases in which it has been held, that the word estate is to be construed to refer to the testator's interest in the land devised, although coupled with other words which could refer only to the particular land, the subject of the devise. Thus, "my estate consisting of thirty acres of land, situate in the parish of A—," "my estate in the occupation of B—," carry a fee; 2 Pow. Dev. 413. Here the words "estate situate," &c., mean not only the land, but the interest of the testator therein; so in the case at bar, "that part of my estate" means, not only the particular tracts of land before described, but the interest of the testator in those tracts of land. The question is, whether he intended to devise to each son an estate tail general, with cross remainders in fee, or a fee-simple conditional, with an executory devise over; and this depends on the intent of the testator to provide for a definite or indefinite failure of issue.

If the first taker was to have a fee-simple, and the estate is given over on a definite failure of issue, that is to say, in this case, a failure at the decease of the first taker, then the limitation over may take effect as an executory devise, because the contingency is determinable within those reasonable limits established by law to prevent perpetuities. This has been the law since the case of *Pells v. Brown*, Cro. Jac. 590.

I know of no question which is involved in so much doubt, and has been the subject of so many conflicting decisions as this one concerning the definite or indefinite failure of

issue. It has been deemed expedient in England, and in several of the United States, to remove these distressing doubts and difficulties by legislation. In Massachusetts there is no statute on the subject; and this question in the case at bar must be decided according to the rules of interpretation, which make part of the common law of the state. If I can find in the decisions of the highest judicial tribunal of the state, any settled rule of construction applicable to this will, and capable of determining whether this testator has provided for a definite or indefinite failure of issue, it is my duty, as it certainly would be my pleasure, to follow and apply it. In *Jackson v. Chew*, 12 Wheat. [25 U. S.] 153, and *Waring v. Jackson*, 1 Pet. [26 U. S.] 570, cases which went to the supreme court from the state of New York, that court declined to review the decisions on this subject, because it was found there was a settled rule in the state of New York. My first duty, therefore, is to ascertain whether the law of Massachusetts is settled.

The case of *Parker v. Parker*, 5 Metc. [Mass.] 134, was cited as controlling the case at bar. I do not think it can be so considered. I think that case was determined upon two points. 1. That by the true construction of the whole will taken together, the sons took no more than an estate tail. 2. That the rule in *Purefroy v. Rogers*, required the estate limited over, to take effect by way of contingent remainder. It is true, that the rule settled in *Purefroy v. Rogers*, 2 Saund. 388, has been often recognized in this country, and especially in Massachusetts. *Hawley v. Northampton*, 8 Mass. 3; *Nightingale v. Burrell*, 15 Pick. 110; *Parker v. Parker*, 5 Metc. [Mass.] 134. That rule as laid down by Lord Hale is, that "where a contingency is limited to depend on an estate of freehold, which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise." But this rule does not operate until it is ascertained what the particular estate is, and that it is capable of supporting a contingent remainder.

I do not understand it to be a rule of construction, to be used in determining what particular estate the testator intended to devise, but a rule of law which determines the kind of estate which must be deemed to be limited over after the particular estate intended to be devised has been ascertained. And, therefore, I have not allowed it to have any weight in this case. The difficulty which I find in assenting to this decision of *Parker v. Parker*, arises from two considerations. The first is, that the limitation over is clearly upon a definite failure of issue, because the first taker must not only die without issue, but he must die before he arrives at the age of twenty-one. If he survives the age of twenty-one years, the estate is not to go

over, although the next day he should die without issue. In that event, the estate is to go to his heirs general, for he leaves no heirs of his body, and the estate is not to go over; it must therefore go to his heirs general, if he has more than a life-estate; and accordingly it has been decided in many cases, that if the limitation over be upon the contingency of dying under age and without issue, the first taker has a conditional fee-simple and not an estate tail.

Mr. Justice Story so held in *Lippett v. Hopkins*, [Case No. 3380,] where the older authorities are all cited; and more recently the same rule is laid down and acted on in *Glover v. Monckton*, 3 Bing. 13; *Doe v. Johnson*, 16 Eng. Law & Eq. 550; *Barnitz v. Casey*, 7 Cranch, [11 U. S.] 456, and also in *Ray v. Enslin*, 2 Mass. 554, and *Richardson v. Noyes*, Id. 56. This distinction between a definite or indefinite failure of issue, was not adverted to by either the counsel or the court in *Parker v. Parker*. It is not easy to reconcile this decision with that of *Richardson v. Noyes*, 2 Mass. 56; but if there is any discrepancy, it touches the question, what estate was intended to be given to the first taker.

As I am satisfied, that under this will the sons were intended to have a fee; and as the provisions of this will are substantially different from those in the case of *Parker v. Parker*, so far as respects the estate of the first taker, I do not consider that case can apply to this one. In *Hawley v. Northampton*, 8 Mass. 41, Mr. Chief Justice Parsons says: "Now it seems to be settled, that a devise to one and his heirs, and if he die without issue, or without leaving issue, then to another, creates an estate tail in the first devisee with a remainder over, when the limitation over can take effect as a remainder, unless there are other words to control this construction." This rule, with its qualification, being in conformity with the earlier cases in Massachusetts, and with the whole current of decisions in England, and with very numerous decisions elsewhere, I consider to be the law of Massachusetts, and that the difficult inquiry in this case arises under the qualification of the rule; and is, whether there are in this will words sufficient to render inapplicable this rule of construction.

Before adverting to some of the most important cases on this subject, I think it may be said with truth, that the American courts, while they have recognized the rule, have shown a strong disposition to lay hold on pretty slight expressions in the will to defeat its operation; a tendency which has been effectually sanctioned, not only in several states in this country, but in England, by legislation which abolishes the rule altogether. A review of the American cases on this subject would occupy too much space. I will refer to some of the most important. *Anderson v. Jackson*, 16 Johns.

382; *Wilkes v. Lion*, 2 Cow. 333; [*Patterson v. Ellis*,] 11 Wend. 259; [*Cutter v. Doughty*,] 23 Wend. 513; *Saund. Ch.* 456; [*Den v. Schenck*, 8 N. J. Law.,] 3 Halst. 29; [*Morgan v. Morgan*,] 5 Day, 517; [*Couch v. Gorham*,] 1 Conn. 36; [*Rapp v. Rapp*, 6 Pa. St.] 6 Barr, 45; [*Johnson v. Currin*, 10 Pa. St.] 10 Barr, 498; [*Jackson v. Chew*, 12 Wheat. [25 U. S.] 153; [*Hall v. Chaffee*,] 14 N. H. 215,] opinion of Parker, C. J.; and the supreme court of Massachusetts in *Ide v. Ide*, 5 Mass. 500, and *Richardson v. Noyes*, 2 Mass. 56, have evinced a like tendency. In *Ide v. Ide*, the devise was, to the testator's son and his heirs; but if he should die and have no lawful heirs, what estate he shall leave to be equally divided between I. and N. This was held to import a definite failure of issue, by reason of the words, what estate "he shall leave." In *Richardson v. Noyes*, 2 Mass. 56, the devise was to three sons, not expressly in fee; and if either or any of them should die without children, the survivor or survivors to take; this was held to give a fee-simple, defeasible on the first taker's dying without issue, living at his decease.

Let us now turn to this will to see whether the testator intended to give the share of each son over, if he should die without issue living at his decease, or upon an indefinite failure of issue. His words are, that if either of my said sons should happen to die without any lawful heirs of their own, then the share of him who may first decease, shall accrue to the other survivor and his heirs. The words "without any lawful heirs of his own," cannot be construed literally, because the contingency provided for, is the survivorship of one who would necessarily be a collateral heir; heirs of his own must, therefore, be construed to mean lineal heirs of his own. *Lewis, Perp.* 311; 2 *Jarm. Wills*, 238.

The question is, whether this failure of lineal heirs was to be on the decease of the first taker, or at any time afterwards. I am of opinion that it was a definite and not an indefinite failure of issue which was thus provided for, and for the following reasons:—First. There can be no doubt that a fee-simple and not a fee-tail is devised over. The devise is to "the other survivor and his heirs;" yet, this is called the share of him who may first decease. If the word "share" is construed to mean the quantity of interest in the particular land which was devised to him who may first decease, it would follow, that, inasmuch as a fee is given over from the first taker, a fee was devised to the first taker; such a deduction is but the converse of the reasoning by which a fee is held to pass under a devise of the testator's estate. That reasoning is, that the word estate means the interest of the testator, and as he had a fee-simple, a fee-simple is given. Here a fee-simple is given over, and it is designated as the share of the first taker; if that means the estate

or quantity of interest of the first taker, the testator has, in effect, described it as a fee-simple, by giving it over as such. I do not perceive any good reason why the word "share" may not be thus interpreted. In *Pettywood v. Cook*, Cro. Eliz. 52, where there was a devise in fee to three persons, in severalty, and if either of the devisees should die without issue, the survivors should enjoy "totam illam partem," it was held only a life-estate was given by those words; but *Willes, Ch. J.*, in *Moone v. Heaseman*, *Willes*, 143, says, he should have decided otherwise, as does *Lord Ellenborough*, in *Bebb v. Penoyre*, 11 East, 162, who was inclined to the opinion, that the words "my half part," would carry the interest of the deviser. In *Denn v. Balderston*, Cowp. 257, there seems to have been no doubt felt that the words "their property and share in the premises," would carry the whole estate; and the use of the phrase, "share and share alike," is habitual among conveyancers to designate an equal division of the subject, both as to quantity of estate as well as the corpus or thing devised. So in *Paris v. Miller*, 5 Maule & S. 408, the words being "my share of the Bastile and other estates," it was held that the word "share" denoted the interest in the thing devised. Without undertaking to say that a devise over of a fee, by the name and description of the share of A. B., necessarily imports that A. B. took a fee, I think it has a tendency to show such was the understanding of the testator, which may or may not be sufficient, according to the particular phraseology of the will in question.

Second. This gift to the two sons includes personal as well as real estate. The assumption, that the testator intended to limit over personal estate, consisting of tools and utensils, bonds and other choses in action, and cattle and horses, in the event of an indefinite failure of issue, is very violent; a similar state of facts in *Richardson v. Noyes*, 2 Mass. 56, led Mr. Justice Sedgwick to declare that such a supposition was absurd. I am aware that there is considerable weight of authority in favor of the position that this difficulty is to be got over by holding, that two different limitations were intended; that as to realty the testator intended an indefinite, and as to the personalty a definite failure of issue. This resort seems to be countenanced by *Parsons, Ch. J.*, in *Hawley v. Northampton*, 8 Mass. 39. He refers to some of the authorities which support it; others are: [*Sheffield v. Lord Orrery*,] 3 Atk. 288; [*Crooke v. De Vandes*,] 9 Ves. 203; [*Ryder v. Gower*,] 6 Brown Parl. Cas. 309; [*Den v. Shenton*,] 2 Chitty, 662; [*Mazyck v. Vanderhorst*,] *Bailey, Eq.* 48. But I apprehend that the number as well as the weight of the authorities is the other way. [*Addlington v. Cann*,] 3 Atk. 147; [*Morgan v. Surman*,] 1 Taunt. 289; [*Campbell v. Harding*,] 2 Russ. & M. 300, denying the

distinction between real and personal estate, as do Lord Hardwicke, [Beauclerk v. Dormer,] 2 Atk. 314; Lord Thurlow, [Newman v. Newman,] 1 Brown, Ch. 188; [Everest v. Gell,] 1 Ves. Jr. 286; Lord Alvanley, [Rawlins v. Goldfrap,] 5 Ves. 440; Lord Loughborough, [Chandless v. Price,] 3 Ves. 99; Sir William Grant, [Barlow v. Salter,] 17 Ves. 479; Lord Kenyon, [Porter v. Bradley,] 3 Term R. 143; [Roe v. Jeffery,] 7 Term R. 595; the court of king's bench, [Dansey v. Griffiths,] 4 Maule & S. 62; and the supreme court of North Carolina, [Den v. Zollicoffer,] 3 Dev. & B. 438. I would speak with proper reserve concerning what has produced this distressing conflict of opinion and decision; but it seems to me to be going too far to attribute to a testator an intention to make distinct and different limitations, when he has signified no such intention; but on the contrary has given over both species of property by the same words, as forming one subject, and to be affected by only one contingency.

Third. The particular language of this clause, in this will, in my judgment, points strongly to a definite failure of issue. The testator makes no attempt to continue the whole property in the issue; for whether the estate of the first taker be held to be a fee-simple or a fee-tail, he has clearly limited over, a fee; and it is not probable that his intent was, that in the event of both moieties being united in the survivor, he should hold one half in tail, and the other half in fee. The use of the words "other survivor," in this clause, taken in connection with the words "first decease," are also entitled to much weight. I am aware that there are many decisions that the word "survivor" means simply "other," and does not import a definite failure of issue. See Chancellor Kent's opinion in *Anderson v. Jackson*, 16 Johns. 418; *Doe v. Wainwright*, 5 Term R. 427; *Cole v. Sewell*, 2 Con. & L. 344. But there are weighty authorities the other way, particularly in the state of New York. See *Jackson v. Chew*, 12 Wheat. [25 U. S.] 153, and the New York cases cited above.

In this will the limitation over is not simply to the survivor, but to "the other survivor." To construe "survivor" here to mean simply "other," would deprive it of all force. It is to be observed, too, that it is only the share of him "who may first decease" which is given over. These words certainly add to the strength of the word survivor. That word naturally imports the one who shall be alive at the decease of the other. Here, then, the testator in describing the subject of the devise over, has called it the share of him who may first decease; and in describing the one who is to take, has used a word which indicates that he is to be alive when the estate goes over. It seems to me that the natural construction is, and the real meaning of this testator was, that if one

of these sons should die without issue in the lifetime of the other, the other was to have the whole. If this contingency should not happen, the testator desired to make no further provision on the subject.

To declare this or any other construction of this clause to be free from doubt, or in entire harmony with all the authorities, would prove nothing but want of reflection or examination. All I can venture to affirm is, that after deliberate and attentive consideration of the will, and of the rules of construction which seem to me applicable to it, the best opinion I have been able to form is, that by way of executory devise, the share of the son first dying without issue in the lifetime of the other, was to go over to that survivor, and that, subject to this contingency, each took a fee-simple.

[NOTE. The demandants sued out a writ of error from the supreme court. Mr. Justice Grier, speaking for the court, held: "There are no words of inheritance in this first clause of the devise to John and Jacob; but such words are not absolutely necessary in a will to the gift of a fee. The subject of this devise is described as 'that part of my estate.' The word 'estate,' or 'that part of my estate,' has always been construed to describe, not only the land devised, but the whole interest of the testator in the subject of the devise. * * * Moreover, the legacy given for the maintenance of Sarah Devinney, 'to be paid out of that part of my estate given to John and Jacob,' would be defeated by their death, before she arrived at the age of 18, if the devise to them was of a life estate only. The intention of the testator must be drawn from the whole context of his will. * * * We are of opinion that John and Jacob each took a fee in their respective 'share' or moiety of the estate devised to them. It remains to consider the effect of the second clause of the will, which is in these words: 'It is my will that, if either of my said sons * * * should happen to die without any lawful heirs of their own, then the share of him who may first decease shall accrue to the other survivor and his heirs.' Viewing this clause free from the confusion of mind produced by the numerous conflicting decisions of courts, and untrammelled by artificial rules of construction, we think that no two minds could differ as to the clear intention of the testator. By 'lawful heirs of their own' he evidently meant lineal descendants or issue. The contingency contemplated is as definite as language can make it." The judgment of the circuit court was affirmed. *Abbott v. Essex Co.*, 18 How. (59 U. S.) 202.]

The following opinion [reprinted from 17 Law Rep. 616, note] of the late Hon. Jeremiah Mason, given in the year 1833, will be read with interest in connection with the foregoing decision:

OPINION. I have considered the question proposed on the devise of the will of John Kittridge to his sons, John and Jacob, viz:--1st. What kind of estate did John and Jacob take by the will? 2d. Was it an estate tail? 3d. If so, could either John or Jacob so dispose of it as to bar the heirs in tail? 4th. If an estate tail was given, does Jacob's part go to the daughter of Jacob, the son of Jacob the devisee, or to Thomas, the oldest son of Jacob the devisee, now surviving?

The first clause of the devise giving the real estate with certain personal estate to the two sons, John and Jacob, without any limitation, and charged with the payment of debts and legacies, would create a fee simple by implication,

were not this implication repelled by the next clause. Such construction arises from the presumption that the testator intended a benefit to the devisees; which, if a life estate only was given, might fail or be defeated by their death, before the rents or income had equaled the amount of the charges. But a life estate cannot be thus enlarged to a fee simple by construction against the manifest intention of the testator. It is sufficiently apparent, from the subsequent clause, that such was not the intent of the testator in this case. Besides a fee tail cannot by such charge alone be converted into a fee simple. It has been held that such implication does not apply to a devise of a fee tail.

The second clause, I think, gives the two sons, John and Jacob, a fee tail general in their respective moieties, with cross remainders in fee simple. It is obvious the dying without any lawful heirs, as used in this clause, must mean heirs of the body, as neither of the brothers could die without collateral heirs, while the other or his issue survived. The giving of the share of him who may first decease to the survivor and his heirs, must be construed to mean the share of the one so dying without issue. After giving each son a fee tail, it would be absurd to suppose the testator intended that the share of the one who should happen to decease first should go to the survivor in case the deceased son left issue. Jacob, it is stated, died first in 1806, leaving issue, John, Jacob, Thomas, and other children, having by deed of bargain and sale, dated 19th September, 1789, conveyed all that was devised to him to his brother John, to hold in fee simple. John, the devisee, died in 1826, never having had issue, and by his will devised all his estate to a sister and niece. John Kittridge, the oldest son of Jacob, the devisee, died in 1822, without issue. Jacob Kittridge, the next eldest son, died in 1831, leaving issue, one daughter. Thomas Kittridge, the next oldest son, is still living. It was easy for John and Jacob, the devisees, to have destroyed the entailment by a common recovery, but it is supposed no recovery was suffered, as none is stated. By a statute of this state, (1791, c. 60,) a deed duly witnessed and for good, or valuable consideration and bona fide, destroys the entailment and bars the heir in tail. But the deed from Jacob to John was dated in 1787, before the passing of that statute, and therefore cannot have such effect. The deed was valid to pass the estate during the life of Jacob, and no longer; operating by force of the statute of uses, it created no discontinuance. On his death in 1806, the moiety given him in tail went to his eldest son John. On the death of John, the son, in 1822, without issue, it came to Jacob, the next eldest son, and on his death in 1831 it came to his daughter, she being his only child. In case I am right in the opinion that the devise created cross remainders in fee simple on the death of John in 1826 without issue, the heirs of Jacob were entitled to his moiety.

ABBOTT, (HOWE v.)

[See Howe v. Abbott, Case No. 6,766.]

Case No. 12.

ABBOTT v. McCARTNEY.

[Holmes, 80.]

Circuit Court, D. Massachusetts. Oct., 1871.

JUDICIAL SALE—GIVING CREDIT—CONVERSION.

A wagon and other articles, the property of an express company, then in possession of a

stable-keeper, attached on mesne process in a suit against the company, were bought at sheriff's sale made under statute of Massachusetts, by the attaching creditors, under an agreement with the sheriff that credit should be given for the articles they might purchase at the sale until the decision of the suit in which the attachment was made. After the sale, the officer and the auctioneer instructed the stable-keeper not to deliver any articles sold, except on production of a receipt for the purchase-money, signed by the auctioneer. Before payment for the wagon, and while it was still in the stable-keeper's possession, and without the knowledge of the purchasers, it was distrained and sold by a United States collector of internal revenue, after notice to the express company, for non-payment of taxes due from the company. *Held*, that the right of property in the wagon vested by the sale in the purchasers, and that they could maintain trespass de bonis asportatis against the collector for its conversion.

[See Corfield v. Coryell, Case No. 3,230.]

At law. Action of trespass de bonis asportatis for a wagon; heard by the court on an agreed statement of facts. The plaintiffs, on the twentieth day of November, 1868, on a writ in their favor against the New England Express Company, caused a wagon and other goods, then the property of the express company, to be attached by a deputy-sheriff. Under the statute of Massachusetts authorizing the sale of property attached on mesne process, the deputy-sheriff employed an auctioneer to sell the property attached, including this wagon. The auction was held Dec. 9, 1868, on the premises of one Johnson, a stable-keeper, where the wagon then was. Many articles belonging to the express company were sold, and the wagon in question was struck off to the agent of the plaintiffs. There was an agreement between the plaintiffs and the deputy-sheriff that they need not pay for what they purchased at the sale until the suit should be decided. They did not pay for the wagon until Jan. 6, 1869, when they gave the deputy-sheriff a due bill for it and other articles purchased by them at the sale. After the sale, the stable-keeper was instructed by the deputy-sheriff and the auctioneer not to deliver any of the articles that had not already been taken away, unless the purchaser should bring a receipt from the auctioneer showing that the articles had been paid for. Among the articles left was this wagon. Nov. 13, 1868, the New England Express Company made their monthly return of receipts during the month of October preceding to the assistant-assessor, showing a tax due from the company for the month of October, amounting to \$291.12. Thereafter, on Nov. 20, 1868, a notice that the tax had been assessed, and must be paid on or before the last week-day of November, was sent by the defendant, United States collector of internal revenue, to the New England Express Company. On the third day of December, the tax not having been paid, another notice was sent to the express company by the defendant, that if the same were not paid within ten days, with a penalty of five per cent

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additional, it would be collected by distraint and sale of property; and accordingly on Dec. 19, 1868, the defendant distrained the wagon in question for said taxes. The wagon was then still on the premises of Johnson, not having been removed by the plaintiffs. On the same day, the defendant left at the office of the express company a notice bearing that date, addressed to E. B. Taft, of Boston, signed by the defendant, as collector, of distraint of two wagons stated to belong to the express company, for non-payment of taxes due from the company, and that unless the taxes and penalty, with expenses of distraint, were paid before ten o'clock, A. M., of Jan. 2, 1869, the property would be sold by public auction on that day; and the wagon was accordingly so sold.

It was admitted that the taxes were legally assessed against the express company; and that the proceedings of the defendant, except as to notice of distraint and sale, and the proceedings of the state officer, were regular and according to law. No other notice or document of any sort relating to the distraint and sale was left with any one, but publication was duly made. One E. A. Taft was, at the time, auditor of the express company. There was no other person by the name of Taft at that time connected with or employed by the company. The plaintiffs knew nothing of the distraint of the wagon, or of the amount of the tax, or of the time or place of sale, until after their payment for the wagon.

George W. Esterbrook and Samuel C. Eastman, for plaintiffs.

John C. Ropes and Francis W. Hurd, for defendant.

SHEPLEY, Circuit Judge. It is contended on the part of the defendant that the plaintiff upon the facts in this case is not entitled to maintain an action of trespass *de bonis asportatis*. So far as the form of action is concerned, the principle of law contended for by the defendant is undoubtedly correct.

The general principle of law is, that, in order to sustain an action of trover, or trespass *de bonis asportatis*, the plaintiff must have had, at the time of the alleged taking or conversion, either possession or a right to the immediate possession of the goods; such a right as to be entitled to reduce the goods to possession when he pleased to do so. *Bloxam v. Sanders*, 4 Barn. & C. 941; *Smith v. Milles*, 1 Term R. 475, 480; *Ward v. Macauley*, 4 Term R. 489; *Putnam v. Wyley*, 8 Johns. 432; *Muggridge v. Eveleth*, 9 Metc. [Mass.] 233. Defendant contends that plaintiffs had not either property, possession, or the right to immediate possession, at the time of the alleged taking. He claims that the property of the express company had not been divested, and did not pass to the plaintiffs,

for the reasons that the sale to them was on credit, and that there was no actual delivery of the property. He contends, further, that the possession of Johnson was not the possession of the plaintiffs, and that the plaintiffs had not the right to possession until they paid the price, the officer having a special property in the goods until paid for. The case of *Prouty v. French*, 2 Pick. 586, is relied upon to show that no property passed by a sale upon credit made by an officer. The case of *Prouty v. French* was the case of a conditional sale on credit on execution. There a speedy sale was indispensable, and the proceeds were needed for the immediate satisfaction of the execution on which the sale had been made. The sale in this case was regulated by an entirely different statute, which provides for a sale on mesne process whenever the parties consent in writing, or whenever the property attached on mesne process may be liable to perish, waste, or greatly depreciate in value by keeping, or cannot be kept without great and disproportionate expense. The object is to hold the goods or the proceeds, in some form or other, till judgment shall be rendered. In reference to such a sale, the supreme court of Massachusetts (*Morton, J.*) say, in *Crocker v. Baker*, 18 Pick. 407, 412: "We do not perceive that the credit given by the officer forms any objection to the validity of the sale. The goods would not sell for less on a credit than they would for cash. The officer might, and probably would, make himself responsible for the price. But neither debtors nor creditors would be liable to suffer. Nor does the statute, expressly or by implication, prohibit this mode of sale."

The proceedings of the officer being legal, the property vested in the purchasers. There was an agreement between the sheriff and the plaintiffs that they should have credit on their purchases until the suit was decided. Where goods are sold, and nothing is said as to the time of delivery or the time of payment, and every thing the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever demanded, upon payment of the price; but the buyer has no right to have possession of the goods till he pays the price. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession. *Bloxam v. Sanders*, 4 Barn. & C. 941. After the sale, the purchaser on credit was immediately entitled to the possession, and his right was not divested by the gen-

eral instructions given by the officer and the auctioneer to the stable-keeper, after the sale, not to deliver the articles sold to the purchasers until they should bring a receipt from the auctioneer showing they had been paid for. Abbott, the purchaser, had, under his agreement for credit, a right of immediate possession against the officer, subject only to be divested by the insolvency of the purchaser and a stoppage in transitu by the vendor. Consequently, he had the same right as against the stable-keeper, who was but the servant of the officer or auctioneer, as he was not a party to the instructions given to the stable-keeper, and does not appear to have assented to them.

After the sale, the express company was neither the owner nor the possessor of the property sold. The ownership was in the purchaser, and the possession was in the stable-keeper, as the agent of the officer or the auctioneer or the plaintiffs, certainly not as the agent of the express company. The notice, therefore, of the sale by the collector of internal revenue not having been given as required by law to the owner or possessor of the property, was insufficient, and the collector, at the time of the sale having no paramount lien on the property sold, must be considered as a trespasser. After the sale on execution, the sheriff became accountable for the proceeds of the sale. Any surplus of funds in his hands, beyond what might be required to satisfy the execution issued in the suit on which the property was attached and sold, would be liable to a subsequent attachment; but the mere fact that there was no actual delivery to the purchaser would not let in another creditor to a priority of title. The case of *Lanfear v. Sumner*, 17 Mass. 110, has no application to a case of this kind.

Judgment for plaintiffs.

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ABBOTT, (MATHEWS v.)

[See *Mathews v. Abbott*, Case No. 9,275.]

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ABBOTT, (NEIL v.)

[See *Neil v. Abbott*, Case No. 10,088.]

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Case No. 13.

ABBOTT v. POWELL.

[6 Sawy. 91.]¹

District Court, D. California. Nov. 11, 1879.

JUNIOR MORTGAGEE—HOMESTEAD.

Where a mortgage was made on two pieces of real estate, and a subsequent mortgage was made on one of them, and thereafter a homestead was declared in respect of the land not embraced in the second mortgage, *held*, that the equitable right of the junior mortgagee to compel the first mortgagee to resort, in the

first instance, to the property on which he had exclusive claim, could not be taken away or impaired by a declaration of homestead, by either husband or wife, on the property exclusively mortgaged to the first mortgagee.

O. P. Evans, for plaintiff.

J. W. Winans, for defendant.

A. N. Drown, for Clay Street Savings & Loan Society.

HOFFMAN, District Judge. I have carefully examined all the authorities furnished me by the learned counsel for the defendant. I am unable to perceive that any of them are decisive of, or even discuss the principal point made in, the case at bar. It is not disputed, that as a general rule, where a creditor has a claim on two funds, on one of which another person has also a claim, and such other person will be prejudiced by allowing the creditor to satisfy his debt out of the fund subject to both claims, equity will compel the creditor to resort in the first instance to the fund to which he alone has a claim, if it can be done without injustice to him or to the common debtor. Story, Eq. Jur. §§ 560-633. But this equity, it has been held, exists only in favor of junior mortgagees and other incumbrancers, and the application of the rule has been refused when asked for by a mortgagor. Thus, in Massachusetts, where a mortgage embraced homestead property, and also property not impressed with that character, an application that the latter should be first sold, and the homestead exempted if the other property was sufficient to satisfy the mortgage, was refused by the judge, and the decision sustained by the supreme court. *Searle v. Chapman*, 121 Mass. 19.

In this case, Gray, C. J., observes: "The power of a court of chancery to compel a mortgagee to resort, in the first instance, to one of several estates mortgaged, is exercised only for the protection of the equities of different creditors or incumbrancers, or of sureties, and not for the benefit of the mortgagor. As against him, the mortgagee has the right to enforce the contract between them, according to its terms, and is not obliged to elect between different remedies or securities." In Wisconsin, the rule of equity was applied in favor of judgment creditors of the mortgagor, as against the mortgagee of the homestead, and the latter was compelled to foreclose his mortgage on the homestead, before being admitted to share with the other creditors in the proceeds of the remainder of the mortgagee's estate. *White v. Polleys*, 20 Wis. 503. But this rule was subsequently altered by statute. Laws Wis. 1870, c. 133, § 1. So, in another case in the same state, where a mortgage embraced a homestead and a business lot, and the homestead had been sold to satisfy the mortgage debt, the court refused to set aside the sale so that the business lot might be sold first, it appearing that there were

¹[Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

creditors of the mortgagor who had judgment liens on the business lot, which were not liens on the homestead. [Jones v. Dow,] 18 Wis. 241. It is unnecessary, however, to cite from the authorities. I have mentioned these merely to show the diversity of opinion which has prevailed as to the rights of the owners of homesteads as against mortgagees. In this state, it appears to be settled, that a mortgagee of lands not included in a homestead, can not compel a prior mortgagee, whose mortgage includes those lands and also the homestead, to resort to the latter before selling the lands mortgaged to the junior mortgagee. *McLaughlin v. Hart*, 46 Cal. 630.

It has also been held that the wife may, after a judgment against her husband has become a lien on the home property, file a declaration of homestead upon it, and acquire such an interest in it that she can compel the sheriff to exhaust the husband's individual property before subjecting it to sale. *Bartholomew v. Hook*, 23 Cal. 277. But neither of these cases contains the slightest intimation that where a person has made a mortgage on two pieces of property, and afterwards makes a second mortgage on one of them, the equitable right of the junior mortgagee to compel the first mortgagee to resort in the first instance to the property on which he has an exclusive claim, can be taken away or impaired by a declaration of homestead, by either husband or wife, on the property exclusively mortgaged to the first mortgagee. I have been referred to no case which hints at so inequitable a rule. The junior mortgagee, when accepting the security of a second mortgage, had a right to repose upon the protection afforded him by the familiar rule of equity, and to act upon the assurance that the first incumbrancer would be compelled to resort to the property on which he had an exclusive claim, before coming on the property covered by the second mortgage, and that no act of the mortgagor could deprive him of the right to compel him to do so.

If the mortgagor or his wife, by merely making a declaration, of homestead, could thus impair or destroy the security of the junior mortgagee, why might he not effect the same result by making a grant of the property exclusively embraced in the first mortgage?

The declaration of homestead may be likened to a grant to himself and wife, for it operates an exemption of the property from the claims of his general creditors; and yet it will not be disputed that where the whole of an estate is mortgaged, and the mortgagor makes subsequent mortgages or sales of specific parcels of it, the subsequent incumbrancers have the right to compel the general mortgagee to satisfy his debt by selling in the inverse order of the sales or mortgages by the owner. *Raun v. Reynolds*, 11 Cal. 20; *Cheever v. Fair*, 5 Cal. 337. Any

other rule would be injurious to the mortgagor himself. For after mortgaging his property for, it might be, an insignificant part of its value, he would be unable to sell or incumber any separate parcel of it. For the purchaser or incumbrancer would have no assurance that his parcel might not be first taken to satisfy the general mortgage.

The interests, then, of both owners and incumbrancers of land require that the equitable rule under consideration should be rigidly adhered to in all cases justly admitting of its application, and with such certainty as to permit reliance upon it as a vested right incidental to and inseparable from the rights created by the mortgage. I can conceive no reason, of justice or policy, why this right, which confessedly existed as between the first and second mortgagees, and which grew out of the contracts of the mortgagor himself, should be destroyed or impaired by the filing by the latter or his wife, of a declaration of homestead.

It is urged that the mortgagee in this case has lost the right to demand the application of the rule, because he had other securities on which he has released his lien, and the proceeds of which, when sold by the mortgagor, have been applied in part only, to the payment of the mortgage debt. And this result it is urged, would ensue even if no homestead had been declared on the property. But this relinquishment by the mortgagee of a portion of the security, its sale, and the application of the proceeds, were done not only with the assent of the mortgagor, but must have been done by him, for he alone could make a title to the purchaser. The proceeds were applied no doubt in accordance with the agreement made when the mortgagee consented to waive his lien. The mortgagor cannot be now heard to object to a transaction assented to and effected by himself. There are no junior incumbrances on the property which it is now asked shall be first sold. These, if they existed, might very possibly invoke the equitable rule under consideration, and demand that the whole proceeds of the property on which the mortgagee has an exclusive lien should be applied in payment of his debt before he can compel the mortgagor prior to himself to sell first the property which is also mortgaged to them. The only subsequent incumbrance on the property covered by either mortgage is that created by the declaration of homestead. The rights acquired under that declaration have already been considered.

It is objected that the first security given was in the form of a deed of trust, which vested the legal title in trustees, and which is, in some respects, distinguishable from a mortgage in the ordinary form. This is true; but I do not see what effect it can have on the rights of the second mortgagee. The trust deed was intended as a security; no right is claimed under it, except to sell the property and execute the trust by paying

the debt. The trustees submit to the direction of the court as to the mode of selling. They do not deny that they are bound by the same equitable rules which would be enforced against an ordinary mortgagee. The fact that the legal estate is in them, does not emancipate them from those rules, any more than an ordinary mortgagee would be released from their operation in those states where a mortgage is held, as at common law, to pass the legal title.

For these reasons I am of opinion that the application of the assignee should be granted.

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ABBOTT, (UNITED STATES v.)

[See United States v. Abbott, Case No. 14, 416.]

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ABBOTT, (WOOD v.)

[See Wood v. Abbott, Case No. 17,938.]

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Case No. 14.

The ABBY.

[1 Mason, 360.]

Circuit Court, D. Massachusetts. May, 1818.

CUSTOMS LAWS—FORFEITURE OF VESSEL—SEIZURE
—ABANDONMENT—JURISDICTION—WAIVER.

1. When the seizure is made within the limits of a judicial district, the district court of that district has exclusive original cognizance thereof. And if brought into another district, the court will remit the property to the proper district. But the cognizance of seizures on the high seas belongs to any district court, into which the property is brought.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867; Waring v. Clarke, 5 How. (46 U. S.) 486; The Washington, Case No. 17,221; U. S. v. The Reindeer, Id. 16,144; The Idaho, 29 Fed. Rep. 192; The Washington, Case No. 17,222.]

[See, also, The Merino, 9 Wheat. (22 U. S.) 391.]

2. If a seizure be abandoned, no jurisdiction attaches to any court unless there be a new seizure. But to constitute such an abandonment, there must be an unequivocal act of dereliction. If after a seizure of a ship, the master agrees to navigate her into port under the direction of the seizer, and then to give her again into the possession of the seizer, this is no abandonment, although in consequence of such agreement the seizer's crew are withdrawn from the ship.

[Cited in The Washington, Case No. 17,221; U. S. v. The Reindeer, Id. 16,144; U. S. v. Ninety-Two Barrels of Rectified Spirits, Id. 15,892.]

3. A party, who means to except to the jurisdiction of the court, in a case of seizure, must plead to that jurisdiction. If he files a claim and plea to the merits, on which the parties are at issue, it is a waiver of any exception to the jurisdiction. On such claim and plea, no question as to the place of seizure is before the court.

[Cited in Two Hundred and Fifty Barrels of Molasses v. U. S., Case No. 14,293; distinguished in Brown v. Noyes, Id. 2,023.]

[4. Cited in The Lewellen, Case No. 8,307, with approval to the point that the execution of

a delivery bond is a waiver of objection to the jurisdiction.]

[5. The part of the sea below low-water mark, and not within the body of any country, is the "high seas," within the judiciary act of 1789, (Stat. 76, § 9.)]

[Cited in U. S. v. Morel, Case No. 15,807; The Harriet, Id. 6,099; U. S. v. Seagrist, Id. 16,245; Gedney v. L'Armistad, Id. 5,294a.]

[See note at end of case.]

In admiralty. Information of seizure against the sloop Abby. 1st. For being engaged in a trade other than that for which she was licensed (i. e. the coasting trade) against the 32d section of the coasting act of the 18th of February, 1793, c. 8. [1 Stat. 316.] 2dly. For unloading goods without a permit, against the 50th section of the revenue collection act [Bioren & D. Laws, c. 128; 1 Stat. 655, c. 22] of the 2d of March, 1799. [Condemned.]

[As stated below by the court, the material facts in this case are the same as those disclosed in the case of The Betsey, Case No. 1,365. In the Betsey Case the libel charged that on the 10th day of September, 1817, a certain ship or vessel, whose name was as yet unknown, laden with a cargo, consisting of various articles of goods, wares, and merchandise, "of foreign growth and manufacture, which were liable to the payment of duties on importation into the United States," the said vessel being then and there bound to the United States from a foreign port, did arrive within four leagues of a district of the United States; and that, after her arrival as aforesaid, on the same day, and before the said ship had come to the proper place for the discharge of her cargo, or any part thereof, a part of the cargo of the said vessel, to wit, 42 pipes of rum, a quantity of logwood, and various other articles, were, without any unavoidable accident, necessity, or distress of weather, unladen out of said vessel, and, being so unladen, were afterwards, on the same day, without any unavoidable accident, necessity, or distress of weather, on the high seas, and "within four leagues of a collection district of the United States," put and received forthwith into the said schooner Betsey, contrary to the form of the statute, etc.]

[The evidence in the Betsey Case showed that the unknown vessel was a Spanish ship, not originally bound for the United States, but captured by a privateer under the flag of the government of Buenos Ayres. She came to an anchor in Huzzy's sound, within a district of the United States. Her prize master was a citizen of the United States, belonging to Portland, and the unloading was with the assent of the prize master, in concert with some inhabitants of Portland, after her departure from the port, where she had anchored for the obvious purpose of having the cargo imported into the United States, and yet avoiding the expense of

alien duties. The court said there was no doubt, under the circumstances, that her destination after capture was really for the United States; and that her arrival off Portland was voluntary, and with an intent, per fas aut nefas, to dispose of the cargo in the United States.]

Bassett & Austin, for claimants.

G. Blake, Dist. Atty., for the United States.

STORY, Circuit Justice. The material facts in this case are the same as those disclosed to the court in the case of *The Betsey*, [Case No. 1,365.] The Abby acted in the character of a salvor, until after the arrival of the Spanish ship, now known to be the *Industria*, in Huzzy's sound; when, having ascertained from the proper authority, that the alien duties and alien tonnage would be payable by the ship and cargo if libeled for salvage, the master of the Abby seems to have relinquished his claim, and to have co-operated with the *Betsey* in another enterprise. I say co-operated, for the *Betsey* and the Abby were lying together in Huzzy's sound, when the Spanish ship went out to sea in the night; and in the morning, the *Betsey* was discovered alongside of the ship receiving her cargo on board, and the Abby was in company. It is true, that the Abby had but a very small quantity of the cargo on board; but she had a great part of the sails, rigging, anchors, and cables of the ship. I believe only one barrel of sugar was found on board; but as this is unaccounted for in any other manner, I must presume, that it was taken from the ship. The ship must, on her arrival in Huzzy's sound, be deemed to have been, to all intents and purposes, in the possession and charge of the master of the Abby and his co-salvors. Her departure in the night, and under the circumstances of this case, was in manifest violation of the provisions of the 29th and 30th sections of the revenue collection act of 1799, [Bioren & D. Laws, c. 128; 1 Stat. 648, c. 22.] There is no reason to suppose, that the master of the Abby was not perfectly consulant of, and a party to, that transaction; and the court must wink very hard, if it did not perceive, that the meeting of the *Betsey* and Abby with the ship was not accidental, but in pursuance of previous concert. The question then comes to this, whether the Abby was at this time engaged in a trade, for which she was licensed. It is immaterial, whether she had on board one bag or one hundred bags of sugar received from the ship. She was licensed solely for the coasting trade; and if she was then employed in assisting in the unloading of the cargo of the ship, within four leagues of our coast, it was a violation of our laws, and without the protection of her license. The evidence certainly does not lay a sufficient foundation for the court to ex-

onerate her from this imputation. There is a possibility of her innocence; but the conduct of her master has been so extraordinary, and there is such a cloud of suspicion hanging over her, that no court, proceeding with proper caution, can pronounce her to be guiltless. Without, therefore, adverting to the evidence as to the second count, on which I do not feel myself called to pronounce, my judgment is, that the Abby is forfeited for having been engaged in an illegal traffic. On the facts, therefore, the decree of the district court ought to be affirmed.

It is, however, objected, that the seizure in this case was actually made in the port of Portland, within the judicial cognizance of the district court of Maine, and therefore, that the jurisdiction of the district court of Massachusetts has not attached. I accede to the position, that the court below had no cognizance of the cause, if the seizure, on which this libel is founded, was in the port of Portland; for the judicial act of 1789, c. 20, § 9, [1 Stat. 76,] gives exclusive jurisdiction to the district court of such district. Concurrent jurisdiction exists in the district courts of other districts, only where the seizure is on the high seas. But the objection here fails in point of fact. The seizure was first made about five miles off Cape Elizabeth, and was therefore on the high seas; since all waters below the line of low-water mark on the sea coast are comprehended within that description; and when the tide flows, the waters to high-water mark also are properly the high seas.² This is not denied by the claimant's counsel; but it is said, that the seizure so made was formally abandoned, and a new seizure afterwards was made in Portland harbour. It is true, that the Abby after the seizure was permitted to go into Portland harbour, navigated by her own crew, the seizer's crew having been removed by the commander of the revenue cutter. But under what circumstances was this done? There were appearances of an approaching storm; and it was thought best by all parties, that the Abby should proceed to Portland harbour for shelter. The revenue cutter was not manned with an extraordinary complement of men. The master of the Abby voluntarily offered to conduct his vessel into Portland, without the presence of the seizer's crew; and agreed there to redeliver her again to the seizer. This offer was accepted; and the seizer's crew was upon the faith of it withdrawn. Upon her arrival at Portland, the Abby was faithfully delivered to the seizer without any delay or objection. I agree, that if there was an absolute abandonment of the seizure, a new seizure might have become necessary. But to constitute such an abandonment, there must be an intention

²Sir H. Constable's Case, 5 Coke, 107.

coupled with an unequivocal act of dereliction. There is no pretence of such an intention; and looking to all the circumstances, there is as little pretence to suggest, that there was any such act. It is like the case of a capture *en prize*. It is not necessary, that a prize crew should be put on board to navigate the ship; the capture still continues complete, although the ship be navigated by her original crew, if there be an agreement to this effect, between the captors and the captured. It is quite another question, whether the original crew are bound to navigate her; but if they do consent, they are not at liberty afterwards to change the character of that act, by setting it up as an abandonment of the rights of prize. The evidence of an abandonment of a seizure ought to be extremely strong to justify a court in coming to such a conclusion. The presumption of such an intention is here repelled by the whole current of the testimony, as well as by the subsequent conduct of the seizing officer in repossessing himself of the Abby, and immediately instituting proceedings to ascertain and enforce the forfeiture.

The question has been thus considered by the consent of the parties, as if the question of jurisdiction were open upon the record. But in strictness, no such question is properly before the court. If the party meant to except to the jurisdiction, he should have filed a declinatory allegation, in the nature of a plea to the jurisdiction. But here he has applied to the court for, and obtained a delivery of, the property on bail; and the very stipulation of bail admits the jurisdiction of the court. He has regularly filed a plea, claiming the property and traversing the allegations of forfeiture in the libel. Upon the pleadings in the cause, the only question put in issue by the parties is forfeiture or not; and the court cannot travel beyond the defence asserted by the claimants. The question then of jurisdiction, not having been put in issue, cannot be properly in proof before the court; for the proof must be according to the allegations; and no party can be called upon to establish, what is not drawn into controversy by the allegations. Nor is this a mere matter of form; but a substantial and important doctrine, regulating the essential rights of parties. If a plea to the jurisdiction had been taken in the court below, no delivery on bail would have taken place, until the jurisdiction had been affirmatively settled. If the court below felt itself ousted of jurisdiction, it would have remitted the cause and the property to the district court of Maine. But after a delivery on bail, how is that possible? The party gets possession of the property, without a trial, from the possession of a tribunal, whose jurisdiction he admits as competent to bail the property; and as soon as it is withdrawn from the grasp of the court, denies its power to institute any in-

quiry into the question of forfeiture. It cannot be admitted, that any party can first affirm the jurisdiction, by taking the property on bail, and then turn round and deny the same jurisdiction, when the court can no longer administer effectual relief to the interests of other persons. The party is estopped by his own acts from such a proceeding. A plea to the merits is an admission, that the jurisdiction of the court is well founded; and a decree on those merits cannot afterwards be arrested, unless the defect of jurisdiction be apparent on the face of the record. Whatever is not controverted is presumed to be admitted.

Condemned.

[NOTE. The waters of havens where the tide ebbs and flows are not properly the "high seas," unless without the low-water mark. *U. S. v. Hamilton*, Case No. 15,290; *U. S. v. Smith*, Id. 16,337. Inlets of the sea which are so narrow that one may readily discern an object from shore to shore are not properly the high seas. *U. S. v. Grush*, Id. 15,268.]

Case No. 15.

The *ABBY WHITMAN*.

[17 Law Rep. 322; 34 Hunt, Mer. Mag. 71.]
District Court, D. Massachusetts. July 31,
1854.

SHIPPING — TITLE TO VESSEL WHILE BUILDING — LIEN OF MATERIAL MEN — WAIVER.

[1. A vessel building under a contract whereby one payment is to be made when she is framed, and the rest when completed, is, until finished and delivered, the property of the builder, and may be subject to the lien given by St. Mass. 1848, c. 290, to one furnishing materials for her construction.]

[2. Materials were sold to a builder at work upon several ships, without any attempt to discover on which ship they were used. The material man's books charged the builder personally, without reference to any of the vessels, and showed no appropriation of payments to any items distinguishing them, and credit was given which might extend beyond the time to which the lien for such materials allowed by St. Mass. 1848, c. 290, was limited by that statute. *Held*, that the material man had no lien, having shown no intention to hold the owner personally.]

[In admiralty. Libel by C. F. Gardiner and others against the Abby Whitman, J. H. Pearson, and others, and George Cannon, assignee, claimants for materials furnished. Dismissed.]

This was a libel against the Abby Whitman, for materials alleged to have been used in her construction, under the Massachusetts statute, entitled an "Act establishing a lien upon ships and vessels in certain cases," St. 1848, c. 290. The claimants contending that under the circumstances of the case no lien existed, even if the materials were so used, a hearing was had to determine this point. The claimants contended that the vessel was built by A. B. for other persons, under a contract with them, by which payments were to be made during her

construction, one when she was framed, and the balance on her completion. That the whole amount due by the contract was paid by them to B., on delivery of the vessel, without notice of the libellants' claim, and that the vessel under these circumstances became, at least on the payment made when she was framed, the property of the persons for whom she was built, on the authority of *Clarke v. Spence*, 4 Adol. & E. 448, and other cases; and that if so, or even if there was no such change in the property of the vessel, still there was no lien, under the case of *Smith v. Eastern Railroad*, [Case No. 13,039.] They also claimed that the materials in question were supplied on the exclusive personal credit of the builder, and that therefore no lien arose; that there was a credit given by the libellants to him for four months, except as to one item, which was claimed to have been paid, and that a credit for such time showed an intention not to rely upon the lien, as it might extend beyond the period to which the lien was limited by the statute; and further, that by applying certain payments acknowledged to have been made by the builder, and receipted for on account, in the order of the debts, and allowing the four months credit claimed, nothing would be due at the date of the libel.

The same builder was constructing other vessels, at or about the same time, in the same yard, and materials furnished by the libellants were employed in such other vessels.

Henry F. Durant and Benjamin Pond, for libellants.

C. B. Goodrich, for Pearson and others.
Geo. S. Hale, for Cannon.

SPRAGUE, District Judge, said that so far as the question of property in the vessel was concerned, she was, and remained, until completion and delivery to the purchaser, the property of the builder; that one material element upon which the English decisions rested, he thought, was wanting here, viz.: the fixing any payment or payments at a specific period in her construction; but if that were otherwise, still the authority of those cases had not been recognized, and the law would probably be otherwise held here; and that this case did not come within that of the *Eastern Railroad*, [Case No. 13,039.] As to the lien claimed on the vessel, however, he was of opinion that it did not exist, because the evidence and circumstances in the case showed an intention on the part of the libellants to rely upon the personal credit of the builder and not upon the vessel. This appeared in the first place from the libellants' own books, in which all the charges were made against the builder personally, without any reference to, or mention of any of the vessels which he was building; again, the materials appeared to have been taken

from the libellants' yard by a teamster employed by the builder, and transferred to his ship-yard, while no exertions appeared to have been made by them to ascertain for what purpose these materials were to be used, as would naturally have been the case if they intended to claim a lien upon the vessels in whose construction they were employed, the right to a lien depending upon their being actually used in the construction of some vessel; and if they looked to any vessel, they ought to have known in which their materials were used, or to which they were hauled, and would naturally have made inquiries at the time; but no inquiries were made, so far as appeared, and no charge to any vessel.

Thirdly, when payments were made by B., the builder, as they were from time to time, to the amount of \$2,500, there was no appropriation by the libellants on their books, or receipts, to any items to distinguish their claim upon the different vessels, as would be proper, if they intended to claim liens upon them, for it would be material to know which was paid for, and which not.

The fourth circumstance bearing upon this matter was the alleged credit of four months. In itself, that was the most material, but it was mentioned last because there was more doubt as to the fact.

His honor reviewed the evidence upon this point, and expressed his opinion that it showed a course of conduct by the libellants, inconsistent with the intention to claim a lien, even if it did not, and he seemed to consider that the weight of the testimony was that it did, show such a credit. He was of opinion that the payments made must be applied to the account generally, and not as the plaintiff had claimed and offered evidence to show that they should be, to other items than those specified in his libel. And he came to the conclusion, upon the whole, that no lien existed, because upon all the evidence, not relying upon any of the considerations mentioned, alone, it appeared to be the libellants' intention to waive it, and rely upon the builder personally. The matter of the four months credit he had considered only as bearing upon the general question of a personal credit, because it was not alleged in the claimants' answers as a substantive ground of defence, although conclusive, when properly alleged and proved, if that credit would certainly extend beyond the time limited by statute, and more or less strong in proportion to the probability that it would extend beyond that time, the weight to be given to it in this case, depending on its force as evidence of an intention not to rely upon a lien. Libel dismissed, with costs for claimants.

ABEEL, (The JOHN H.)

[See The John H. Abeel, Case No. 7,349.]

ABEL, (COBLENS v.)

[See Coblenz v. Abel, Case No. 2,926.]

ABENHEIM, (FUTTERER v.)

[See Futterer v. Abenheim, Case No. 5,164.]

Case No. 16.

The ABERFOYLE.

[Abb. Adm. 242.]¹

District Court, S. D. New York. April, 1848.²

SHIPPING—PASSENGERS—LIABILITY IN REM—
CHARTER-PARTY.

1. A charter-party, sounding wholly in covenant, contained agreements on the part of the owner that the vessel was fit for the voyage,—that she should take in a cargo to be furnished by the charterer, reserving her cabin and room for her crew, water, provisions, &c.,—that the privilege of putting on board steerage passengers should belong solely to the charterer, and that if the ship should be unable to carry cargo and passengers to the stipulated amount, there should be a reduction of freight. On the part of the charterer, it was agreed that he should furnish the cargo—should pay a stipulated freight and demurrage in case of delay in loading, &c. *Held*, that this charter-party, construed under the presumption of law against a change of ownership, and in the light of the acts of the parties under it, was but an affreightment for the voyage, and not a letting of the entire ship, so as to constitute the charterer owner for the voyage.

2. Ships carrying passengers for hire stand upon the same footing in respect to their responsibility in rem for the performance of the passage contract, with those carrying merchandise on freight.

[Cited in Marshall v. Bazin, Case No. 9,125.]

3. Ships carrying passengers for hire are liable in rem for wrongful acts of the master in his capacity as such; but not, it seems, for acts of mere personal private malice or ill-will.

[Cited in Pendleton v. Kinsley, Case No. 10,922.]

4. Where a passenger is put on short allowance by the master, the latter will not be presumed to have acted from personal malice; and if such short allowance be a violation of the passage contract, the ship will be held liable unless it is shown that the master's conduct was malicious and wrongful.

[5. Cited in Donahoe v. Kettell, Case No. 3,980, and Richardson v. Winsor, Id. 11,795, as authority for holding that, if the due attainment of the object sought by the charter-party requires that vessel be absolutely under the control of the charterer, then the services of the master and crew pass as merely accessory to the principal subject-matter of the contract.]

In admiralty. This was a libel in rem, by Peter McDonald, prosecuting for himself and on behalf of his wife and minor children, against the ship Aberfoyle, to recover damages for breach of a contract for the passage of libellant and his family. [The decree rendered herein was affirmed by the circuit court in *The Aberfoyle*, Case No. 17.]

Samuel R. Graves, owner of the vessel,

¹[Reported by Abbott Bros.]

²[Affirmed by the circuit court in *The Aberfoyle*, Case No. 17.]

filed a claim and answer. The cause came on for a hearing upon the merits, and was heard upon an agreed statement of facts, instead of on pleadings and proofs. The facts as stipulated were substantially as follows:—The claimant, Samuel R. Graves, was, during December, 1846, and thereafter, the owner of the Aberfoyle. December 9, 1846, he executed a charter-party of the vessel to one William Quayle, of Liverpool, by which it was mutually agreed, amongst other things, that the vessel should take on board a cargo of general goods and merchandise, together with a full legal complement of steerage passengers, their luggage, water, provisions, fuel, &c.; that being so loaded she should proceed to New York; that the cargo should not exceed what she could reasonably stow and carry over and above her cabin and necessary room for her crew, water, tackle, apparel, provisions, and furniture; that the charterer should load the vessel as aforesaid, and should pay freight to the owner, £485; that the privilege of putting on board steerage passengers should belong solely to the charterer; the entire of the between decks, if required, being reserved for the accommodation of such passengers; that the ship-owner should be satisfied for the payment of head-money. The charter-party contained no provision as to who should man and navigate the ship. After the making of this charter-party, but before the sailing of the vessel, William Quayle let to J. W. Shaw & Co., of Liverpool, the privilege of furnishing all the steerage passengers to be taken by the vessel on her voyage.

December 15, 1846, the libellant made a contract with J. W. Shaw & Co. for the passage of himself and family in the vessel to New York, for which he paid £22, in advance. By the terms of the passengers' contract ticket, executed by J. W. Shaw & Co. to the libellant, they agreed to provide the libellant and the members of his family with a steerage passage to New York, including space for luggage, head-money, &c., and to furnish them with water and provisions, as follows: seven pounds of bread, biscuit, flour, oat-meal or rice, &c., at least twice a week, and three quarts of water per day for each adult. December 29, 1846, the vessel sailed with the libellant and his family on board, and carrying, also, about one hundred and sixty other passengers. For the first twenty-five days of the voyage three quarts of water and one pound of bread were given to each passenger daily, including the libellant and his family. At that time the passengers were put upon an allowance of two quarts of water per day, which continued three weeks; from that time only one quart of water a day was allowed them, which continued until March 9, 1847, at which time the vessel arrived in New York, making the length of her voyage sixty-nine days. For the last ten days before

the ship arrived in port, the passengers were put upon an allowance of half a pound of bread a day; and during the voyage there was great suffering by all the passengers, including the libellant and his family, for want of bread and water. The day before the sailing of the vessel, Wilson, her master, was taken sick, and one Thomas Jones was, by the owner, appointed master, and had command of the vessel during her voyage.

The claim of the libel was to recover \$500 damages.

William M. Allen, for libellant.

I. Upon the facts shown, the owner is liable to the libellant. 1. The charter-party is most clearly a charter of affreightment, sounding in covenant. In order to charge the charterer as owner for the voyage, he must have the exclusive possession, command, and navigation of the ship. Abb. Shipp. 365, notes 1, 2; [Gracie v. Palmer,] 3 Wheat. [21 U. S.] 605; [Chandler v. Belden,] 18 Johns. 157; [Clarkson v. Edes,] 4 Cow. 470; 3 Kent, [Comm., 5th Ed.] 220; [Pickman v. Woods,] 6 Pick. 248; [Hooe v. Groverman,] 1 Cranch, [5 U. S.] 214. The whole instrument must be taken and construed together, in order to determine its effect. [Clarkson v. Edes,] 4 Cow. 470; [The Volunteer, Case No. 16,991.] Here Quayle is described as merchant and freighter. There appears to be reserved the cabin of the vessel, and necessary room for her crew, water, tackle, apparel, provisions and furniture. If she is detained more than twelve working days by the charterer, he is to pay demurrage. He is to pay freight to the owner, £485; and the ship-owner is to be satisfied for payment of head-money for passengers. Moreover, the charter-party does not declare who shall man and navigate the ship. And it is a general rule that the owner is bound, notwithstanding a charter-party, to put the vessel in a suitable condition to perform her voyage, and to keep her in that condition during the voyage, and to victual and man her for the destined navigation, unless there is a contrary stipulation in the charter-party, or the nature and object of the charter-party devolve that duty upon the charterer. Abb. Shipp. 323, note 1, and authorities there cited. This being the fact, it is submitted, that the case of *Parish v. Crawford*, 2 Strange, 1251, cited in *Abbott on Shipping*, 55, and subsequent cases, show the owner in this case to be liable. 2. The putting the libellants on short allowance was not only a breach of the contract, but it was a direct violation of the statute law of England, where the contract was made. 5 & 6 Vict. c. 117, § 6. It was done by the master, who was under the direction of the owner. The common law of England and of this country, except so far as it has been altered by statute, follows the civil law, and holds the owners responsible for the acts of the master

without distinction or limitation. The Rebecca, [Case No. 11,619.] The owner has a remedy against the master. 3. The case of *Chamberlain v. Chandler*, [Id. 2,575,] shows, "that the contract for passengers is not for mere ship-room and personal existence on board, but for reasonable food, comforts, necessaries, and kindness; that in respect to females, it proceeds yet further, and includes an implied stipulation against obscenity, immodesty, or any wanton disregard of their feelings; and that a course of conduct, oppressive and malicious in these particulars, is no less punishable in courts of justice than personal assaults. And they come within Admiralty cognizance. 4. The owner must be liable both upon the consideration of the benefit arising from the ship, which is the equitable motive, and also, as having the direction of the persons who navigate the vessel. Though he did not receive the freight which the passengers paid for their passage, yet he had the benefit of that freight in general, and thus had that equitable motive which renders him liable. The transactions between the owner and Quayle and Shaw & Co. consisted merely in giving them power to put goods and passengers on board. Again, Shaw & Co., in procuring passengers for the ship, acted in the capacity of agents for the owner, inasmuch as the ship was to furnish provisions and water, and not Shaw & Co. The owner was undoubtedly aware that such was the contract, and such the law where the contract was made, and he assumed the obligations thereby devolving upon him, in receiving the passengers on board and undertaking to convey them to New York. 5. It is conceded that the contract with the libellants to furnish them water and provisions was violated, and that they suffered greatly in consequence. There can be no wrong without a remedy. Now what is the remedy of the libellants? Not against the captain, because he is not liable upon the contracts made by the owner. If not against the captain, it must be against the owner.

II. The libellants may proceed in rem. 1. It is an elementary principle, that there is no remedy without the means of enforcing it. How, then, are remedies on contracts enforced in this State? Is it not through the property of the delinquent? And can it make any material difference with him out of what portion of his property the claim is satisfied? It is conceded that the owner lives in Liverpool, in England; and to say that the libellants must return to Liverpool and prosecute a personal action, would be a denial of right. I take it to be law that when a tort, or any other action for which the owner is liable in Admiralty, has been committed, a proceeding in rem will be sustained. The Rebecca, [Case No. 11,619.] 2. The condition of the owner is not made worse by rendering the ship liable. It is immaterial to him whether the satisfaction

for the injury is made from the ship or from his other property. But it is not a matter of equal indifference to the libellant, whether he is allowed or not to look to the ship for reparation, as this is not only his best, but will sometimes be found to be his only security.

III. This suit is sustainable upon the general principles upon which rest the decisions made in the following cases. *Le Caux v. Eden*, 2 Doug. (Mich.) 594; *St. Amand v. Lizardi*, 4 La. 243; *Manro v. Almeida*, 10 Wheat. [23 U. S.] 473; *Dean v. Angus*, [Case No. 3,702.]

R. Emmett, for the claimant.

I. The libel states this to be a cause of ill-treatment and short allowance in water and provisions, civil and maritime. The ill-treatment, if any, consists in the short allowance; none other is alleged. Short allowance of provisions, whether from failure of the owner to put them on board, or from the captain's wrongfully withholding them, does not make a cause maritime, though the failure to provide a passage, or the necessary accommodation on board to a passenger, might be of that character. A passage in a vessel does not, in law or by custom, imply the furnishing of provisions. Passengers frequently provide themselves, and this is a matter of personal contract dehors the maritime engagement, which can embrace the passage only.

II. The libel alleges an agreement under which the libellant and his family embarked as passengers, and by which a certain allowance of water and provisions was to be furnished to them; but as it avers no breach of contract by the owner, or any other party, and does not even state with whom such agreement was made, it is not a proceeding *ex contractu*.

III. The gravamen of the libel is, that the master withheld from and refused to furnish the water and provisions to the libellants, whereby they suffered great want, &c., and for which they claim damages. The charge of withholding implies that the water and provisions so withheld were actually on board, but wrongfully withheld. The proceeding in this case is, therefore, for an alleged tort by the master.

IV. If courts of admiralty have jurisdiction over torts committed by a master of a vessel against a passenger, such jurisdiction is in personam, not in rem. *De Lovio v. Boit*, [Case No. 3,776;] *Chamberlain v. Chandler*, [Id. 2,575.] The torts of the master cannot hypothecate the ship, nor produce any lien on it. 2 Browne, Civil & Adm. Law, 143.

V. This cause, on the face of the libel, presents an action of damage. In actions of damage, the process must necessarily be against the person. 2 Browne, Civil & Adm. Law, 347.

VI. Torts cognizable in admiralty are gov-

erned by the principles of the common law, and the remedy must be against the person who committed the tort.

VII. All claims in rem, not founded on actual contracts of hypothecation, rest on the following principles: That a service has been rendered in rem, as in the case of mariners' wages, salvage, bottomry, freight; or, that an injury has been received ab re, as in case of collision of vessels at sea. These principles entirely exclude proceedings in rem for torts. 2 Browne, Civil & Adm. Law, 142, 143, 396, 397.

VIII. Though Admiralty may have jurisdiction of a contract with a passenger for his mere passage as a maritime cause, it can only be in personam, whether such contract be made by the owner himself or by the captain as his agent, because it does not come within any principle of a lien in rem, either of hypothecation, service to the ship, or legal liability imposed on or incurred by it.

IX. The facts of this case, as agreed upon in the written statement submitted to the court, show: 1. That if any fraud was committed on the passengers by not furnishing the vessel with a sufficient quantity of water and provisions, (which, however true it might be, is neither alleged in the libel nor shown,) the owner of the vessel, who now claims her, was no party to it. He made no contract whatever with the passengers, and had no control over any such contract or its performance by those with whom the passengers made it. 2. That the master was innocent of any connection with such a fraud, as it appears that he was only appointed the day before the vessel sailed, in consequence of the sudden sickness of her regular master. Also, that in reducing the allowance of water and provisions, the master could be guilty of no tort in a legal sense, however much the libellants may have suffered, because that course was pursued by him under circumstances of peril and necessity, for the preservation of all, including the libellants, and was, therefore, under the circumstances, a meritorious duty on his part. In any view of this case, therefore, either as founded on tort or contract, the libel should be dismissed, and the vessel restored to the claimant, and costs awarded to him.

BETTS, District Judge. The contract proved in this case between the owner of the vessel and the charterer was a contract of affreightment for the voyage, and did not amount to such a letting of the entire ship as to constitute the charterer owner for the voyage. The rule of construction of a charter-party, in this respect, is stated by Mr. Abbott to be as follows: "When, by the terms of the charter-party, the master and mariners are to continue subject to the orders of the ship-owner, he retaining through them the possession, management, and control of the vessel, it is to be con-

sidered as a contract to carry the freighter's goods; but where the merchant engages to pay a stipulated price to the ship-owner for the use of his ship, by the month or year,—takes it and them into his service,—receiving the freight actually earned by it to his own use, the master and mariners becoming subject to his orders, and the general management and control of them and of the vessel being given up to him,—it is a demise of the vessel with her crew for the voyage, or the term specified; the charterer becomes owner pro hac vice, entitled to the rights and subject to the responsibilities which attach to that character." Abb. Shipp. 47-52, and notes. The case of *Marcardier v. Chesapeake Ins. Co.*, 8 Cranch, [12 U. S.] 39, drew in question the construction in this respect of a charter-party of the following nature: One M'Dougal, the general owner of the brig *Betsy*, let her to the plaintiff by a charter-party of affreightment, excepting and reserving her cabin for the use of the master and mate, and for accommodation of passengers, as therein mentioned, and so much room in the hold as might be necessary for the mariners, and storage of water, wood, provisions, and cables, for a voyage from New York to Nantes; and M'Dougal, by the same instrument, covenanted to man, victual, and navigate the brig at his own charge during the voyage, and to receive on board and carry any shipment of goods made by the plaintiff. The passengers on board of the brig were to be at the joint expense of the parties, and the passage-money was to be equally divided between them. It was held, upon these facts, that M'Dougal remained the owner for the voyage, upon the general principle that, where the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter-party is considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership. Citing *Hooe v. Groverman*, 1 Cranch, [5 U. S.] 214. And this conclusion, that the owner of the vessel, notwithstanding the charter, remained her owner for the voyage, was derived in part from the fact that he retained the exclusive possession, command, and management of the vessel, and that she was navigated at his expense during the voyage,—and apart from the circumstance that the whole charter-party, except the introductory clause, "hath granted and to freight let," was one sounding merely in covenant.

In the case of *The Schooner Volunteer*, [Case No. 16,991,] the same principles were applied to a case quite analogous to the present. The charter-party there, after naming the parties, proceeded to state that the owner, for the consideration thereafter mentioned, "has letten to freight the whole of the said schooner, with appurtenances to her belonging, except the cabin, which is reserved

for the use of the master, and what room is necessary under deck for provisions, wood, water, and cables," for a voyage specified. It further set forth covenants on the part of the owner and charterers respectively, among which were these:—that the owner should pay all and every charge of victualling and manning the schooner, during the voyage, and should furnish the schooner victualled and manned; and that the charterers should bear all other charges, and should pay a specified freight. It was held that, upon the construction of this instrument, the general owner remained unquestionably the owner for the voyage. Mr. Justice Story remarked: "The vessel was equipped and manned and victualled by him, and at his expense, during the voyage; and he covenanted to take on board such goods during the voyage as the charterers should think proper. The whole arrangements on his part, in these respects, sound merely in covenant. It is true, that in another part of the instrument it is said, that he has 'letten to freight,' which may seem to import a present demise or grant, (and not a mere covenant,) of the whole schooner for the voyage. But this language is qualified by what succeeds. And the whole schooner is not let; for there is an express exception of the cabin, and certain portions of other room under deck. If the whole schooner, then, was not granted during the voyage on freight, how is it possible to contend that the libellant did not still remain owner for the voyage? The master was his master, appointed by him, and responsible to him; the crew were hired and paid by him; and the victualling and manning were at his expense. He also retained the exclusive possession of a part of the vessel for the voyage, and the control and navigation of her during the voyage. Taking, then, the whole instrument together, it seems wholly inconsistent with the manifest intent of the parties that the charterer should be owner for the voyage." In a later case, also decided by Mr. Justice Story, (*Certain Logs of Mahogany*, [Case No. 2,559,]) which arose upon a charter-party substantially analogous, as to all points important to the present discussion, to that drawn in question in *The Volunteer*, that learned jurist, commenting on a discrepancy between the English and American cases, thus restated the American rule: "If the absolute owner does not retain the possession, command, and control of the navigation of the ship during the voyage, and the master is deemed his agent, acting under his instructions for the voyage, though authorized and required to fulfil the terms of the charter-party, the absolute owner must, under such circumstances, be still deemed owner for the voyage, and be liable as such to all persons who do not contract personally and exclusively with the charterer, by a sub-contract with the latter, knowing his rights and character under the charter-party." And it was further held in

the same case, that wherever, upon comparing the various clauses of a charter-party, it remains doubtful whether the charterer was intended to have the sole possession and control of the vessel during the voyage, or to be constituted owner for the voyage, then the general owner must be deemed such; for his rights and authorities over the voyage must continue, unless displaced by some clear and determinate transfer of them. Bearing in mind this presumption against any transfer of the ship to the charterer for the voyage, I proceed, in the light of the foregoing adjudications, to consider what construction is to be placed upon the charter-party proved in this case; and, at the outset, two distinctions may be noticed between the present case and those already cited. In each of the three cases just mentioned, stress was laid in the decision upon the circumstance that the charter-party was, for the most part, one sounding in covenant; but this was adverted to with the qualification that there were also clauses of a contrary import. There is no such cause of embarrassment in the terms of the instrument now before the court. That instrument is one which rests entirely and unequivocally in covenant alone. It contains no words of grant or demise whatsoever. It commences, not by stating that the owner hath "let to freight" the vessel chartered, but by saying that "it is this day mutually agreed" that the ship shall take on board the cargo to be furnished by the charterer; and the remaining clauses of the instrument are not only clearly in the nature of mutual and reciprocal agreements, but are technically so expressed.

The second distinction between the present case and those which have been cited is, that the charter-party now before the court contains no express provision binding the owner to man and navigate the ship during the voyage; a clause which was inserted in each of the charter-parties in the cases referred to. It was contended upon the argument, that the absence of this provision was immaterial, inasmuch as, by a general rule of law, it was said, the owner is bound, notwithstanding a charter-party, to put the vessel in a suitable condition to perform her voyage, and to keep her in that condition during the voyage; and to victual and man her for the destined navigation, unless there is a contrary stipulation in the charter-party, or the nature and object of the charter-party devolve that duty upon the charterer. This rule was stated by counsel on the authority of a note to *Abbott on Shipping*, (Story & Perkins's Ed. 323.) The cases cited in that note probably support it so far as concerns the obligation of the owner to put her and keep her in suitable condition to perform the voyage. One only of those cases, however, (*Goodridge v. Lord*, 10 Mass. 483,) bears upon the question of the obligation to man the ship; and that case, so far from sustaining

the rule contended for, holds directly the reverse. In that case, the owners of the vessel brought suit against the charterers to recover moneys in part paid in settlement of seamen's wages, for which they had libelled the ship. There was, in that case, in the charter-party, a stipulation binding the charterers to pay the charges of victualling and manning the vessel; but the court remarked that an action would, under the circumstances, lie for the owners against the charterers to recover the amount paid, even without an express stipulation in the charter-party, or any proof that the charterers were to victual and man the ship; "for that would be the effect of the contract of charter-party, unless it appeared, by the instrument itself, that a different arrangement was intended." The absence of any provision in the agreement of charter-party requiring the owner to man and navigate the ship is, therefore, a circumstance not without weight, as an indication that the intention of the parties was to vest in the charterer the ownership of the vessel for the voyage. It is not conclusive upon the question of intention, however. That intention is to be inferred, not from a single clause of the instrument or a single fact in the case, but from the whole tenor of the charter-party throughout, construed in the light of all the facts proved, which may be admissible as explaining the intent and meaning of the contract. The *Volunteer*, [Case No. 16,991;] *Certain Logs of Mahogany*, [Id. 2,559.]

The question upon the point now under discussion may, therefore, be stated thus: Does this charter-party, read connectedly and as a whole, and with a proper reference to the circumstances under which it was executed, so clearly show an intent to vest in the charterer the ownership for the voyage, that the presumption of law in favor of the continuance of the general ownership is overcome? I think it clear that this question must be answered in the negative. The charter-party, as already noticed, sounds wholly in covenant. It describes Graves, the claimant, as "owner," and Quayle, the charterer, as "merchant and freighter." It identifies the vessel in part by the words "whereof Wilson is master;" Wilson being the master appointed by Graves before the chartering, and being, as is shown, in fact continued in that appointment until the day before the vessel sailed, when, in consequence of his sickness, a substitute was placed in command. The instrument contains agreements on the part of the owner that the vessel is tight, staunch, and strong, and every way fitted for the voyage; that she shall take on board a cargo to be furnished by the charterer, not exceeding what she can carry over and above her cabin and necessary room for her crew, water, tackle, apparel, provisions, and furniture; that the privilege of putting on board steerage passengers shall belong solely to the charterer,

the entire of the between decks, if required, being reserved for such passengers; and that if the ship shall be unable to carry cargo and passengers to the stipulated amount, there shall be a proportionate reduction in the hire of the vessel. And on the part of the charterer it is agreed that he shall furnish such a cargo as is contemplated; that he shall pay freight, £485, and demurrage, if more than twelve days are occupied in loading; and that the between-decks shall be calked, &c., at his expense. These provisions clearly indicate, upon the whole, the intention of the parties to retain in the owner the general ownership of the vessel, and to secure to the charterer only rights in the nature of affreightment. This construction is also confirmed by the conduct of the parties under the agreement. The facts are far from countervailing the presumption that no change of ownership was made. The remaining questions in the case are, therefore, to be considered on the basis of the general owner remaining owner for the voyage.

Ships carrying passengers on hire stand on the same footing of responsibility, in that respect, with those carrying merchandise on freight,—passage-money and freight being, in legal acceptance, equivalents. The liability of the vessel in specie, upon a contract of affreightment, is not varied by the circumstance that the contemplated subjects of transportation are passengers, instead of merchandise. A passage contract is, in respect to the vessel's liability, only a species of affreightment, in which the passengers constitute the cargo, and the passage-money answers to the freight. This principle was fully discussed in the late case of *The Zenobia*, [Case No. 18,209,] in this court, in which the views of the court, upon this subject, were stated at large. The vessel is also liable in rem for merchandise laden on board by the charterers, (*The Rebecca*, [Id. 11,619;] *Abb. Shipp.* 47, 52,*) as well as upon contracts by the master or the agents of the owners in relation thereto. She is therefore liable in rem upon a contract to carry passengers, equally whether that contract is made with a charterer, or with the master or owners, when the charter-party does not operate to render the charterer owner for the voyage; because, in that case, the charterer acts in the capacity of agent of the owner. She is liable for the conduct of the master as master during the voyage; and for any ill treatment of the passengers by the master, in his capacity as such, a remedy may be had against the vessel herself. She may, indeed, not be liable for mere acts of personal malice or ill-will on the part of the master, not arising out of or connected with the exercise of his duties as master, though for such acts there is clearly a per-

sonal remedy against the master himself. *Chamberlain v. Chandler*, [Case No. 2,575.] If, therefore, it were made to appear that the treatment complained of in this case was prompted by personal malice and ill-will on the part of the master,—if the withholding of provisions and water had been a tortious act on the part of the master, springing from personal spite and vindictiveness, and disconnected from any such circumstance, as a general lack of provisions on board, for which the owners might be responsible,—there would be ground for doubt whether the libellant was entitled to any other remedy than an action in personam against the master himself. But such conduct on the part of the master is not to be presumed. In this case, the answer does not aver that the ship had sufficient supplies; and there being no proof of that fact, the implication is, that she did not have them to serve out.

It was contended, on behalf of the claimant, that the contract to furnish provisions was not a maritime contract, but a mere matter of personal agreement, independent of the contract for passage, and that it therefore could not be enforced against the ship. There may, undoubtedly, be a contract for passage, in which the passenger undertakes to carry his own store of provisions. Where, however, the contract is not of this description, but the maintenance of the passenger, during the voyage, is undertaken, as well as the transportation of his person, the ship is as much bound to supply wholesome and necessary provision and water, as to provide safe shelter and lodging. There is no ground laid in the case for vindictive or punitive damages against the owner or ship. The agents of the owner *pro hac vice*, did not fulfil the implied obligation of the ship, and thus relieve her from performing it in this respect, and for that cause there was no ground for compelling the libellants to pay passage-money; and the libellants having paid it, are, because of such violation of the obligation by the ship, entitled to recover it back, the consideration on which it was advanced having failed.

Decree accordingly, with costs.

Case No. 17.

The ABERFOYLE.

[1 Blatchf. 360.]¹

Circuit Court, S. D. New York. Oct. Term, 1848.²

SHIPPING—PASSENGERS—LIABILITY IN REM.

1. A vessel carrying passengers for hire stands on the same footing of responsibility as one carrying merchandise, the passage mon-

¹See, also, *The Flash*, [Case No. 4,857.]

²See, also, *The Zenobia*, [Case No. 18,209,] to the same effect.

¹[Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

²[Affirming decree of the district court in *The Aberfoyle*, Case No. 16.]

ey in the former case being an equivalent for the freight in the latter.

2. The vessel, as well as her owner, is responsible for a breach of a contract with a passenger in respect to his passage, and for the damage resulting therefrom.

[Approved in *The Pacific*, Case No. 10,643. Cited in *Marshall v. Bazin*, Id. 9,125; *The City of Brussels*, Id. 2,745.]

In admiralty. Peter McDonald and others filed a libel in rem, in the district court, against the ship *Aberfoyle*, alleging that they were not furnished with provisions and water on their passage from Liverpool to New York in that vessel, as they should have been according to the terms of a contract entered into by them with the agent of the owner. After a decree by the court below in favor of the libellants, [*The Aberfoyle*, Case No. 16,] the claimant appealed to this court. [Affirmed.]

Richard S. Emmet, for appellant.
William M. Allen, for respondents.

THE COURT held that a vessel carrying passengers for hire stands on the same footing of responsibility as one carrying merchandise, the passage money in the former case being the equivalent for the freight in the latter; that the vessel, as well as her owner, is responsible for a breach of a contract with a passenger in respect to his passage and for the damage resulting therefrom; that the owner is clearly liable; and that, in analogy to the principles which make the vessel liable for a breach of a contract of affreightment of merchandise, she should also be held liable for a breach of a passenger contract.

Decree affirmed.

Case No. 18.

The ABIGAIL.

[3 Mason, 331.]¹

Circuit Court, D. Massachusetts. May Term, 1824.

CUSTOMS LAWS—PENALTIES AND FORFEITURES—
BURDEN OF PROOF.

The fourth section of the act of 1820, c. 122, [3 Stat. 604,] referring to the act of 1818, [*Story's Laws*, c. 65; 3 Stat. 433, c. 70,] and that referring again to the revenue acts of the United States, as to the mode of suing for, and recovering, penalties and forfeitures &c., does not, by implication, adopt the seventy-first section of the collection act of 1799, [*Bioren & D. Laws*, c. 128; 1 Stat. 678, c. 22,] as to the onus probandi being thrown on the claimant, on seizures under the act.

In admiralty. Information or libel of seizure for importing into Boston, from the province of New Brunswick, certain coal, which was not truly goods or merchandise

of the growth, produce, or manufacture of the said province, contrary to the act of 15 May, 1820, c. 122, § 3, [3 Stat. 604.] At the trial, the principal inquiry was, whether the coal was the produce of the province of New Brunswick; and the evidence on both sides was so contradictory, that the question, on whom the burden of proof rested, became the turning point of the cause.

Blake, for the United States, contended, that the burden of proof rested on the claimant, the act of 1820, c. 122, having in effect adopted the provision of act 1799, § 71, [*Bioren & D. Laws*, c. 128; 1 Stat. 678, c. 22.]

Bliss, for the claimant, argued e contra, that the act of 1820, did not, by its reference, adopt the seventy-first section of the act of 1799, and therefore the cause must be decided by the general principles of the law of evidence.

STORY, Circuit Justice. The evidence in this case is so very uncertain, and in some respects so contradictory, that the question, whether the burthen of proof rests on the claimant to establish the origin of the coal, becomes in fact the turning point of the cause. The seventy-first section of the collection act of second of March, 1799, [*Bioren & D. Laws*, c. 128; 1 Stat. 678, c. 22,] declares that "in actions, suits, or informations to be brought, where any seizure shall be made pursuant to this act, if the property be claimed by any person, in every such case the onus probandi shall be upon such claimant; but the onus probandi shall lie on the claimant, only where probable cause is shown for such prosecution, to be judged of by the court before whom the prosecution is had." The act of 15th of May, 1820, c. 122, [3 Stat. 604,] under which the present prosecution is instituted, declares, "that all penalties and forfeitures, incurred under this act, shall be sued for, recovered, distributed, and accounted for, and the same may be mitigated, or remitted, in the manner and according to the provisions of the act to which this is supplementary." The act referred to is the act of 18th of April, 1818, [*Story's Laws*, c. 65; 3 Stat. 433, c. 70, § 4,] which declares, "that penalties and forfeitures incurred by force of this act shall be sued for, recovered, distributed, and accounted for, and may be mitigated or remitted, in the manner and according to the provisions of the revenue laws of the United States." The act of 1799, c. 128, is certainly a revenue act within the meaning of this clause; and no one denies, that here there was probable cause of seizure; and therefore the true question, arising on the act of 1820, is, whether it adopts, by reference and intentment, the provision of the seventy-first section of the act of 1799, c. 128. If there were no other provisions in this act applicable to the subject matter, it might be difficult to satisfy the exigency of the language in any other

¹[Reported by William P. Mason, Esq.]

manner. But the eighty-ninth section of the act of 1799 provides, in the fullest manner, for the mode of suing for, and recovering, penalties and forfeitures under the act; and, in like manner, the 91st section provides for the distribution of, and accounting for, such penalties and forfeitures. The act of 1797 [Bioren & D. c. 67; 1 Stat. 506, c. 13] provides for the mode of remitting and mitigating such penalties and forfeitures. So that, independently of the 71st section of the act of 1799, the references in the acts of 1818 and 1820 are completely satisfied in their terms, viz., as to the mode of suing for, recovering, distributing, accounting for, mitigating, and remitting penalties and forfeitures.

After bestowing considerable attention to the subject, my mind has at last arrived at the conclusion, that under such circumstances the 71st section ought not to be construed to be adopted by implication. The mode of suing for and recovering penalties and forfeitures does not necessarily include any rules as to the adoption or rejection of evidence, or as to the onus probandi. There is some hardship in extending a rule of this nature beyond the general principles, on which the law of evidence is founded. It may, nay it often must, have the effect of superinducing a forfeiture. The present case exemplifies the justice of this remark. Feeling, therefore, a strong impression, that the court ought not to change the rules of evidence, as to the burthen of proof, without a clear expression of the legislative intention, and perceiving in the present case no such expression, I believe, that my duty is best performed by adhering to the doctrine of the common law. I shall therefore acquit the property seized, upon the ground, that the onus probandi is on the government, and that the evidence leaves the point of the origin of the coal in a state too uncertain and equivocal to found any decree of condemnation.

Decree accordingly.

ABLE v. ONE HUNDRED BARRELS OF SPIRITS.

[See United States ex rel. Able v. One Hundred Barrels of Spirits, Case No. 15,948.]

ABLE, (PAYNE v.)

[See Payne v. Able, Case No. 10,854.]

ABLE, (UNITED STATES v.)

[See United States v. Able, Case No. 14,417.]

ABNER TAYLOR, The.

[See The Gratitude, Case No. 5,704.]

Case No. 19.

ABORN et al. v. MASON.

[14 Blatchf. 405.]

Circuit Court, S. D. New York. Feb. 23, 1878.

BAILMENT—RIGHTS OF THE BAILOR—CONVERSION BY BAILEE—TENDER—MEASURE OF DAMAGES.

A. delivered wool and yarn to O., to be made into cloth, at a specified cost, to be paid by A. The wool and yarn and the goods were to be continuously the property of A. O. began the manufacture of goods from the materials. Thereafter, the property came into the possession of M., as the assignee in bankruptcy of O. At that time, it was in the condition of dyed wool, mixed with shoddy, and woollen yarns in the various stages of manufacture into cloth, and was of small market value, and not salable. A. demanded from M. the specific wool and yarn delivered to O., and the yarns in process of manufacture, and offered to pay all charges on them, if informed of the amount. M. completed the manufacture of the goods, and expended \$300 in finishing them, and sold them for \$3,193 50. A. sued M. in trover, for the conversion of the wool and yarns and goods: *Held*, that it was not necessary for A. to prove an actual tender of an amount sufficient to cover the value of the work and materials supplied by O., but that the offer made to pay the charges was sufficient. *Held*, also, that A. was entitled to recover the avails of the goods, less the cost of the materials furnished by O. and by M., and the expense of manufacture.

[At law. Action of trover and conversion by Robert W. Aborn and others against John W. Mason, assignee in bankruptcy of Louis H. Oberhofer. Heard on motion for new trial. Motion denied.]

Michael W. Divine and Aaron P. Whitehead, for plaintiffs.

John E. Parsons, for defendant.

SHIPMAN, District Judge. On or about May 6th, 1871, the plaintiffs were the owners of a quantity of superfine wool and of inferior wool and of double and twist yarn upon spools, of the value of \$1,737 69, and delivered the same to Louis H. Oberhofer, a woollen manufacturer of Canterbury, Connecticut, to be manufactured by him into cassimeres, at an estimated cost of twenty-one cents per yard, to be paid by the plaintiffs. The wool and the yarn, and the goods which were to be manufactured therefrom, were to be continuously the property of the plaintiffs. It was supposed that this wool would make about 5,000 yards of cloth. Oberhofer received the materials in his factory, and commenced the manufacture of goods therefrom. About May 25th, 1871, all the property in the possession of Oberhofer was attached and remained under attachment, or in the possession of the United States marshal, by virtue of a warrant in bankruptcy, until about August 31st, 1871, when the property came into the possession of the defendant, who had been theretofore duly appointed assignee in bankruptcy of Oberhofer's estate. On this

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date, there was upon the premises neither wool in bags nor cotton yarn upon spools, but the goods which had been sent by the plaintiffs were upon the machinery of the factory, in the form of dyed wool mixed with shoddy, or of woolen yarns in the various stages of manufacture into cloth. The market value of this woolen yarn and wool in process of manufacture was small, as the materials were in such a condition that they were not salable. The assignee estimated, that the unfinished goods were not worth over \$100, and would scarcely bring that sum, if he should attempt to sell them in their unfinished state. Another witness estimated the value at from \$300 to \$500. A few days after September 14th, 1871, the assignee obtained authority from the district court to complete the manufacture of these goods by the purchase of the necessary additional material, and the employment of the necessary labor. On September 15th, 1871, the plaintiffs made a written demand upon the defendant for the delivery to them of the specific bales of wool and spools of cotton yarn which they had delivered to Oberhofer, and offered to pay all charges, expenses and liens which the bankrupt, or the defendant, as assignee, had upon said merchandise, and, as they were ignorant of the amount of such charges and liens, asked to be informed of the amount, that they might tender and pay it. There was also some testimony to the effect that, at the same time, one of the plaintiffs verbally informed the defendant of the fact that the wool and yarn were in process of manufacture, and notified him that they were seeking not only the wool existing in specie, but wool and yarns in process of manufacture. Testimony was also given by the defendant, to show that the plaintiffs were insisting, until the commencement of the suit, that their wool was in the factory in its original form, and was easily distinguishable. The defendant did not comply with the demand, but completed the manufacture of the unfinished goods, at an expense of \$800. The goods were finished about the middle of October, 1871. All the goods which were thus manufactured, and the goods which Oberhofer had finished from other wool, were sold for the defendant, who received the sum of \$3,193 50, therefor.

The plaintiffs brought an action of trover, on December 9th, 1871, against the defendant, for the conversion of the wool and cotton yarns which they had delivered to Oberhofer. The declaration was subsequently amended, so as to allege the conversion of "certain yarns, and goods made from said wools and said double and twist yarn, one or both." Upon the trial of the case to the jury, they were instructed, that, the property having come rightfully into the possession of the assignee, the demand upon him should have been in such terms as to apprise him of what he was claimed to be wrongfully detaining from the plaintiffs, and he should

have been informed in such manner as to enable him to understand the kind of property which was demanded; and that, if the written demand was the only demand which was made, or notice which was given to the assignee, the plaintiffs could not recover. The jury were also instructed, that if, in addition to the written demand, the assignee was informed by the plaintiffs, that they were seeking to obtain from him, and that they demanded of him, the woolen yarns and wool, in the various stages of manufacture, which Oberhofer had been manufacturing for them under his contract, then, if the assignee, after such notice and demand, completed the manufacture, and sold the manufactured goods, he would be liable, provided such goods were made from their yarn.

Two questions of fact were submitted to the jury: 1st. Was such a demand made by the plaintiffs? 2d. Were the goods which were in process of manufacture in the mill of Oberhofer, at the time of the appointment of the assignee, the property of the plaintiffs? If both these questions of fact were found for the plaintiffs, the jury were instructed, upon the question of damages, that the circumstances of the case were peculiar, and that, in the ascertainment of damages, they should deduct from the avails of the manufactured goods the entire cost of the materials furnished by the assignee or by Oberhofer, and the expense and cost of manufacture. The jury returned a verdict for the plaintiffs, for \$2,367 49.

Upon a motion for a new trial, the defendants insist, (1.) that the demand of the plaintiffs was limited to wool and cotton yarn; and that, upon such a demand, the defendant, having come rightfully into the possession of the property, cannot be found to be a wrong-doer, for a conversion of property which did not correspond with the demand, and which he did not know was claimed by the plaintiffs. The jury were instructed in accordance with the principle of law which is claimed by the defendant, but they found, as matter of fact, that the plaintiffs verbally demanded of the defendant woolen yarns which were in process of manufacture. The jury evidently believed that the defendant was apprised by the plaintiffs of the exact property which they claimed he was wrongfully detaining from them.

(2.) It is claimed, that, for the value of the work and materials which were supplied by Oberhofer, the defendant, as his assignee, had a lien, at the time of the demand, upon the property of the plaintiffs; that it was incumbent upon them to make an actual tender of an amount sufficient to cover this lien; and that an offer to pay, or a readiness to pay, did not comply with the necessity of an actual tender of money. Oberhofer had agreed with the plaintiffs to manufacture their wool into cassimeres.

They had agreed to pay him a stipulated price for the labor and the materials which he should furnish. His duty was to deliver the manufactured goods, and their duty was to pay the price of manufacture. These obligations were mutual and concurrent. The payment of the cost of manufacture, and the delivery of the goods, were concomitant acts. In the case of mutual and concurrent promises, "the word 'tender,' as used in such a connection, does not mean the same kind of offer as when it is used with reference to the payment or offer to pay an ordinary debt due in money, where the money is offered to a creditor who is entitled to receive it, and nothing further remains to be done, but the transaction is completed and ended; but it only means a readiness and willingness, accompanied with an ability on the part of one of the parties, to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness. Such readiness, ability and notice are sufficient evidence of, and indeed constitute and imply, an offer or tender, in the sense in which those terms are used in reference to the kind of agreements which we are now considering." *Smith v. Lewis*, 26 Conn. 110; *Adams v. Clark*, 9 Cush. 215; *Tate v. Meek*, 8 Taunt. 280.

The defendant next insists, that the liability of the defendant was limited to the value of the property in its condition at the time of the conversion, and that the uncontradicted testimony showed that such value did not exceed \$500. The general rule of the common law, in regard to title by accession, is, that whatever alteration of form has taken place in personal property, the owner is entitled to such property in its state of improvement, unless the identity of the original materials has been destroyed, or unless the thing has been annexed to and made part of some other thing which is the principal, or its nature has been changed from personal to real property; "but, if the thing itself, by such operation, was changed into a different species, as by making wine, oil, or bread out of another's grapes, olives or wheat, it belonged to the new operator, who was only to make satisfaction to the former proprietor for the materials which he had so converted." 2 Bl. Comm. 404; 2 Kent, Comm. 364; *Silsbury v. McCoon*, 6 Hill, 425; *Woodruff & Beach Iron Works v. Adams*, 37 Conn. 233.

In this case, the property, at the time of the conversion, consisted of woolen yarn and wool in the various stages of manufacture into cloth. The property was, in fact, unfinished woolen cassimeres, and was described to be such by the assignee, in his testimony before the district court, upon his application for leave to complete the manufacture. By the labor and materials which were furnished, unfinished goods became

finished. The species of the property was not changed, and the identity of the materials, as they existed at the time of the conversion, was not lost.

It has frequently been held, that the person whose property has been tortiously taken, is entitled to the enhanced value, until it has been so changed as to alter the title, or to destroy the identity of the property. *Betts v. Lee*, 5 Johns. 348; *Curtis v. Groat*, 6 Johns. 168; *Brown v. Sax*, 7 Cow. 95; *Baker v. Wheeler*, 8 Wend. 505. But courts have not been satisfied with a rigid rule, which would invariably permit a plaintiff to recover the enhanced value, without any deduction for the labor and expenses which, in the absence of fraud, have been bestowed upon such property by the defendant, and have not enforced the rule to its full extent. *Wood v. Morewood*, 3 Adol. & E. (N. S.) 440; *Hilton v. Woods*, L. R., 4 Eq. 433; *Benjamin v. Benjamin*, 15 Conn. 347; *Silsbury v. McCoon*, 4 Denio, 332. Instances can easily be imagined where a rigid enforcement of the rule would work hardship; and, in this case, the plaintiffs did not ask the court to charge that they were entitled to the enhanced value of the manufactured goods, without reference to the expenses of manufacture.

The rule which was given to the jury was adopted in the case of *Morgan v. Powell*, 3 Adol. & E. (N. S.) 278, an action of trespass for digging coals in the plaintiff's mine. The court determined that the value of the plaintiff's coals was the sale price at the pit's mouth, after deducting the expenses of carrying the coals from the place in the mine where they were dug, to the mouth. Under the circumstances of this case, the allowance for the defendant's labor and expenses was eminently just. Wool had been delivered to be manufactured into cloth. It was in a partial state of manufacture when the assignee took possession, labor, skill and materials having been expended upon it by the bankrupt. At this time the materials were in such a condition that they had very little salable value; and, in order to make the property a merchantable article of value, more materials must be purchased, labor must be employed, and time must be expended. The deduction is fully justified by the decisions which have been cited. The motion for a new trial is denied.

ABORN, (UNITED STATES v.)

[See *United States v. Aborn*, Case No. 14,418.]

A. B. PRESTON, The.

[See *The C. Vanderbilt*, Case No. 3,524.]

ABRAHAM, (ISAACS v.)

[See *Isaacs v. Abraham*, Case No. 7,094.]

ABRAHAM LEGGETT, The.
[See The Emilie, Case No. 4,450.]

Case No. 20.

In re ABRAHAMS.

[5 Law Rep. 328.]

District Court, S. D. New York. Aug. 1842.

BANKRUPTCY—PRESENTATION OF PETITION—
PRACTICE.

[The fact that a petition in bankruptcy was attested "nine days before presented" affords no bar to its presentation; and the decree dates back to the application, and property acquired after verification, and before presentation, passes as assets to the assignee.]

In bankruptcy.

Brady, for [Aaron Abrahams,] bankrupt.
Joachemssen, for creditors.

BETTS, District Judge. The court decided that a petition need not be presented to the court simultaneously with its attestation; and its being sworn to, nine days before presented, afforded no bar to it. The decree of bankruptcy retroacts to the time of the application, and if property is acquired by a bankrupt, intermediate the verification and offering of his petition, it would pass to the assignee. That written objections to the sufficiency of the papers, with others to the merits, will not authorize a delay of reference to a commissioner, upon those involving an inquiry into facts, unless there is a plain probable cause for making the legal points. The court will be careful that such a method of procedure, shall not avail to purposes of procrastination merely. The court accordingly refused granting an order now to refer the objections to a commissioner, because of the long delay and laches of the creditors in not pursuing them, and the case being regularly on the docket for a final order, directed a decree of bankruptcy to be entered.

ABRAMS, (ISAACS v.)

[See Isaacs v. Abrams, Case No. 7,095.]

Case No. 21.

ABRANCHES et al. v. SCHELL.

[4 Blatchf. 256.]¹

Circuit Court, S. D. New York. Jan. 5, 1859.

REMOVAL OF CAUSES—REVENUE LAWS—ACT
MARCH 2, 1833.

1. Where a defendant sued in a state court, applied to this court by petition, praying for the removal of the suit to this court, under the 3d section of the act of March 2d, 1833, (4 Stat. 633,) on the ground that the suit was for acts done by him under the revenue laws of the United States, and obtained a certiorari

from this court to the state court, to certify the proceedings on file in that court, and the clerk of the state court returned that there were no proceedings on file in his office in the suit, and the defendant's attorney then entered a rule in this court for the plaintiff to declare in twenty days, and notice of the rule was served on the plaintiff's attorneys, who admitted service of it, but failed to declare, and a judgment as in case of nonsuit was then entered against the plaintiff: *Held*, that such judgment was regular.

2. The admission by the plaintiff's attorney, of service of the rule to declare, waived any informality attending the removal of the cause to this court.

3. All that the statute requires is, that it shall appear, from the petition, that the defendant was sued on account of acts done by him under the revenue laws of the United States. It does not require a statement of the cause of action or the kind of process.

4. The writs of certiorari and habeas corpus provided for by the statute are neither of them required for the removal of the cause to this court.

[See note at end of case.]

[5. Cited in *Fisk v. Union Pac. R. Co.*, Case No. 4,827, to the proposition that the writ of certiorari is merely a mode of notifying the state court, and that, in the absence of certified copies of the proceedings from the state court, the same may be supplied by affidavit.]

[At law. On motion to set aside the judgment. Denied.]

This was an action against the collector of the port of New York. It was originally commenced in the superior court of the city of New York. On the 10th of April, 1858, the defendant presented a petition to this court, which was filed with the clerk, setting forth that he was, prior to the commencement of the suit, collector of the customs for the port and district of New York, that a suit had been commenced against him by the plaintiffs in the superior court of the city of New York, for and on account of acts done by him under the revenue laws of the United States, and as such collector, and that no trial had been had in the cause, and praying that, in pursuance of the 3d section of the act of congress of March 2d, 1833, (4 Stat. 633,) the suit might be removed from the superior court, and be entered on the docket of this court, and be thereafter proceeded with as a cause originally commenced in this court. The petition was duly verified by the defendant, by affidavit, and was duly certified to by an attorney and counsellor, as required by said act, and the suit was thereupon entered on the docket of this court. On the 19th of June, 1858, a rule was entered by the defendant, in the common rule book, in the office of the clerk of this court, requiring the plaintiffs to declare within twenty days after service of notice of such rule, or be non-prossed. On the same day, a written notice of the entry of such rule was served on the attorneys for the plaintiffs, and they admitted in writing service of such notice. The plaintiffs not having declared, the defendant entered a

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judgment as in case of nonsuit against the plaintiffs, and the plaintiffs now moved to set aside such judgment for irregularity.

Welcome R. Beebe, for plaintiffs.
James F. Dwight, Asst. Dist. Atty, for defendant.

INGERSOLL, District Judge. The power to remove into this court a suit which has been commenced in a state court, against any officer of the United States, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority or title set up or claimed by such officer, under such laws, is contained in the 3d section of the act of congress of March 2, 1833, (4 Stat. 633.) That section provides as follows: "That, in any case where suit or prosecution shall be commenced in a court of any state, against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority or title set up or claimed by such officer, or other person, under any such law of the United States, it shall be lawful for the defendant in such suit or prosecution, at any time before trial, upon a petition to the circuit court of the United States in and for the district in which the defendant shall have been served with process, setting forth the nature of said suit or prosecution, and verifying the said petition by affidavit, together with a certificate, signed by an attorney or counsellor at law of some court of record of the state in which such suit shall have been commenced, or of the United States, setting forth, that, as counsel for the petitioner, he has examined the proceedings against him, and has carefully inquired into all the matters set forth in the petition, and that he believes the same to be true, which petition, affidavit and certificate shall be presented to the said circuit court, if in session, and, if not, to the clerk thereof, at his office, and shall be filed in said office, and the cause shall thereupon be entered on the docket of said court, and shall be thereafter proceeded in as a cause originally commenced in that court; and it shall be the duty of the clerk of said court, if the suit were commenced in the court below by summons, to issue a writ of certiorari to the state court, requiring said court to send to the said circuit court the record and proceedings in said cause; or, if it were commenced by capias, he shall issue a writ of habeas corpus cum causa, a duplicate of which said writ shall be delivered to the clerk of the state court, or left at his office, by the marshal of the district or his deputy, or some person duly authorized thereto; and, thereupon, it shall be the duty of the said state court to stay all further proceedings in such cause, and the said suit or prosecution, upon delivery of such

process, or leaving the same as aforesaid, shall be deemed and taken to be moved to the said circuit court, and any further proceedings, trial or judgment therein, in the state court, shall be wholly null and void. And, if the defendant in any such suit be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of habeas corpus cum causa, to take the body of the defendant into his custody, to be dealt with in the said cause according to the rules of law, and the order of the circuit court, or of any judge thereof in vacation. And all attachments made, and all bail and other security given upon such suit or prosecution, shall be and continue in like force and effect as if the same suit or prosecution had proceeded to final judgment and execution in the state court. And if, upon the removal of any such suit or prosecution, it shall be made to appear to the said circuit court, that no copy of the record and proceedings therein, in the state court, can be obtained, it shall be lawful for said circuit court to allow and require the plaintiff to proceed de novo and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said circuit court, and, on failure of so proceeding, judgment of non pros. may be rendered against the plaintiff, with costs for the defendant."

The act of congress provides that the petition for the removal of a suit commenced in a state court, shall be to the circuit court of the United States in and for the district in which the defendant shall have been served with process. It is now urged by the plaintiffs, that the suit was not lawfully removed to this court, for the reason that it nowhere appears in the petition of the defendant where he was served with process; and that, for aught that appears, he might have been served with process somewhere in the northern district of New York, in which case the petition should be to the circuit court of the United States in and for that district. It would not be a very violent presumption, to presume that the process for a suit in the superior court of the city of New York, was served in the district where the defendant dwelt, which is in the southern district of New York. But it is not necessary to dispose of this technical question by a resort to any such presumption; for, by the course which the plaintiffs have adopted in reference to this suit, since it was entered on the docket of this court, to be proceeded with as a cause originally commenced in this court, they have waived this technical question, even if they could once have taken advantage of it. The attorneys for the plaintiffs, by the written admission which they gave, of service of notice of the entry of the rule to declare, admitted the cause to be regularly in this court. They treated it as having been regularly removed. They waived any informality attending its removal. It is now

too late for them to urge the informality upon which they rely. If they had wished to rely upon the informality which they now present, they should have brought it to the attention of the court, before, by their act, they admitted the cause to be regularly in this court.

It is claimed, also, that it should appear, from the petition for a removal, what the particular cause of action was. All that is required by the law is, that it should appear, from the petition, that the defendant was sued for and on account of acts done by him under the revenue laws of the United States, or under color thereof. This expressly appears by the petition. It is also claimed, that the particular kind of writ or process should be stated. This the law does not require.

The cause can be removed from the state court without the aid of the certiorari or the habeas corpus mentioned in the act. Neither of them is required to remove the cause. They are issued by the clerk, and are intended to bring up the record and other proceedings from the state court, and to notify the state court that the cause has been removed, so that no further proceedings may be had in the state court. The cause is first removed, and then, after it has been removed, the certiorari or the habeas corpus issues, for the above-named purposes.

In the present case, after the cause had been removed, the certiorari was issued by the clerk of this court. To it the clerk of the superior court made a return, that there were no proceedings on file in the cause in his office. It then became the duty of this court to require the plaintiffs to proceed de novo, and to file a declaration of their cause of action; and thereupon the law made it the duty of the parties to proceed as in actions originally brought in this court. In actions originally brought in this court, it is the duty of the plaintiffs to file their declaration in pursuance of the rules. In this case, the plaintiffs were required to file their declaration in pursuance of the rules. For failing to file their declaration, a judgment as in case of nonsuit was entered.

It is insisted by the plaintiffs, that the certiorari should be served on the clerk of the superior court by leaving with him a duplicate of the same, and that a service by copy will not answer the requirements of the law. By the return of the marshal it appears that the certiorari was served on the clerk of the superior court by leaving with him a duplicate of the same.

With this view of the subject, the motion to set aside the judgment must be denied.

[NOTE. The recent case of *State v. Sullivan*, 50 Fed. Rep. 593, gave rise to a conflict of opinion and jurisdiction between the circuit court for the western district of North Carolina and the supreme court of the state as to the construction of the statute providing for the removal of prosecutions against revenue officers. Rev. St. § 643. The petition in this

case was duly verified by oath, and by the certificate of counsel, as required by the act. The circuit court was not in session, and the petition was presented to the deputy clerk of that court, who filed it in his office, and thereupon entered the case on the docket. The defendant not being in custody, no writ of habeas corpus cum causa was issued, but the deputy issued a writ of certiorari, which was directed, not to the state court or any officer thereof, but to the United States marshal, commanding him to make known the facts recited. The marshal served the writ by leaving with the clerk of the state court a duplicate copy. The state court, however, refused to surrender jurisdiction, and, against the defendant's protest and exception, a trial was had, and he was convicted. He thereupon took an appeal to the state supreme court, where the judgment was affirmed, (14 S. B. Rep. 796;) that court holding that the proper writ for the case was habeas corpus cum causa, and that the state court was not bound to take notice of the writ actually issued and served; that the law required the clerk to approve the petition before filing it, and that this act was judicial, and not ministerial, in its nature, and therefore must be performed by the clerk himself, and not by his deputy; that the fact of the clerk's approval, as well as the fact that the petition had been filed and the cause entered on the docket, must appear on the face of the writ issued to the state court; that the writ must state in substance the ground of the authority of the federal court; and that because of these omissions the writ in this case was void, and did not deprive the state court of jurisdiction. Thereafter a motion was made in the federal court to proceed with the trial, and on the question of jurisdiction two opinions were delivered by Dick, J., one before and one after the opinion of the state supreme court was called to his attention. In these opinions he held substantially the contrary of all the propositions maintained in the state court, basing his decision on the proposition that the removal is effected, and complete jurisdiction acquired, immediately upon the filing of a proper petition in the clerk's office of the federal court, and that the subsequent issuance of the writ of certiorari or habeas corpus cum causa is but the use of auxiliary process and the performance of a ministerial duty, and concluding therefrom that any defects in the writ were mere irregularities, which should have been disregarded by the state court.]

Case No. 22.

The ACACIA.

District Court, D. Massachusetts.

SALVAGE—WHO MAY BE SALVORS—SALVAGE SERVICE BY STEAMER.

[Cited in 2 Par. Shipp. & Adm. 275, to the point that salvage service performed by a steamer, is no less a salvage service, because she can do it with more safety to herself than a sailing vessel could.]

[NOTE. Nowhere reported; opinion not now accessible.]

Case No. 23.

The ACADIA.

[10 Ben. 482.]

District Court, S. D. New York. June, 1879.

MARSHAL'S COSTS—BONDING VESSEL.

A vessel was seized by the marshal under a monition, and thereafter was released on a

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stipulation for her appraised value. *Held*, that the marshal was not entitled to a commission on such appraised value under section 829 of the Revised Statutes of the United States.

[See note at end of case.]

In admiralty.

J. E. Kennedy, for marshal.
E. L. Owen, for claimant.

CHOATE, District Judge. This is an appeal from taxation of the marshal's costs. The suit was for damages caused by violation of charter party, and the amount of damages claimed was \$25,000. The vessel was seized by the marshal under the monition and has been released on stipulation for her value being appraised at \$3,000. The marshal claims that he is entitled to a commission on the valuation of the vessel under Rev. St. § 829, which gives the marshal "when the debt or claim in admiralty is settled by the parties without a sale of the property," a commission of one per cent on the first five hundred dollars of the claim or decree, and one-half of one per cent on "the excess of any sum thereof over \$500.00," "provided that when the value of the property is less than the claim, such commission shall be allowed only on the appraised value thereof." It is urged on behalf of the marshal that the design of the statute was to give the marshal a commission for his responsibility in attaching and holding the property, in all cases where there is a sale $2\frac{1}{2}$ per cent on the first \$500, and $1\frac{1}{4}$ per cent on the excess, as expressly provided in another part of the fee bill, and in all other cases, that is, where the parties make such disposition of the case that there is or can be no sale by him, one per cent on the first \$500, and one-half of one per cent on the excess. It is argued that the marshal's compensation cannot have been intended to be dependent on the result of the suit; that this would be against public policy, committing the marshal in all cases to the interest of the libellant, and this argument is urged as a reason for the construction contended for. But I think it is clear that what the statute had in view was a final disposition of the cause by agreement of the parties, whereby the suit should be withdrawn or a decree entered without a sale of the property, and does not refer to a case where the vessel is bonded by the claimant without any settlement of the debt or claim. The words of the statute cannot even by a forced construction have the meaning claimed for them in behalf of the marshal. Nor is there any force in the supposed reason of public policy urged in support of his claim. Whatever mischiefs may arise, from having the marshal interested in the result of suits in admiralty, undoubtedly exist under the fee bill as it is, independently of this particular provision. If the marshal attaches a vessel and holds her in custody till the cause is heard, as he may do and often does, and

the libel is dismissed, the marshal has no commission under the fee bill. This consideration of public policy, therefore, cannot have been regarded as one so controlling that the language of the fee bill must be forced to conform to it. It was thought, however, reasonable in providing for the marshal's fees to secure him some comparatively small commission where the parties, by agreement, settle the claim without proceeding to a sale. There is nothing to show that the design was to extend this provision beyond the case thus clearly provided for. If it be true that the risk and responsibility of the marshal is the same, where the vessel is bonded and the suit goes on, as where the claim is settled by the parties and the vessel released, it is true, also, that he has the same or greater risk and responsibility when the vessel is attached and held during the whole pendency of the suit, and the libel is finally dismissed, yet he has no commission. Fee bills are not arranged on a system of giving in every possible case an exact equivalent for service rendered. They are in their adjustment of fees extremely artificial, but designed, in the long run, to give the officer a fair compensation. In this case the marshal may hereafter become entitled to his commission if the claim is ever settled or a decree entered, but till that time he is entitled to nothing. The City of Washington, [Case No. 2,772.]

Taxation affirmed.

[NOTE. In *The Norma*, Case No. 1,626, the district court for Louisiana held that, where a settlement is made before a final or interlocutory decree is rendered, the marshal is not entitled to his commissions. This case was, however, denied by the same court in *The Clintonia*, 11 Fed. Rep. 740, by holding that the marshal is entitled to his commissions, although the property was released on stipulation, the claim compromised, and suit withdrawn, before a final decree was rendered. See, also, to the same point, *Robinson v. Bags of Sugar*, 35 Fed. Rep. 603; *The Vernon*, 36 Fed. Rep. 115.]

Case No. 24.

The ACADIA.

[1 Brown's Adm. 73.]¹

District Court, N. D. Ohio, June, 1859.

TOWAGE—ADMIRALTY—PRACTICE—EFFECT OF GIVING BOND.

1. Towage services are maritime in their character.
2. The giving of a stipulation to answer judgment is a waiver of an illegal service of process.

In admiralty. Exceptions to a libel for services rendered in towing the *Acadia* from Detroit to Lake Huron, in June, 1857. [Overruled.]

The libel alleged that the service was maritime, and that the libellants had also a lien by virtue of the laws of Michigan when

¹[Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission.]

the services were rendered. The warrant of arrest was issued and placed in the hands of the late Marshal Fitch, after his term of office had expired. The vessel, however, was arrested by him, and the owners thereupon gave the stipulation required by the rules to pay any decree that might be rendered against her, and she was thereupon released.

Exceptions were filed to the libel upon the following grounds: (1) That the vessel had never been legally seized, and the stipulation was therefore void. (2) That the service set up in the libel was not maritime in its nature.

Willey & Carey, for libellant.
C. W. Palmer, for claimant.

WILLSON, District Judge. It is too late now to move the dismissal of the libel. The giving of a voluntary bond by the owner is a waiver of any defect in the service of the process. He should have moved the discharge of the vessel before giving the bond. For the purpose of hearing motions the court is always open. The averments in the libel are sufficient, and the service is maritime.

Exceptions overruled.

Case No. 25.

The A. CHEESEBROUGH.

[3 Blatchf. 305.]¹

Circuit Court, S. D. New York. Sept. 1855.

SHIPPING—AFFREIGHTMENT—PRINCIPAL AND AGENT.

1. Where a broker, in fact as agent of the owner of lumber, but in his own name, contracted to have it shipped at a specified freight, but, when the time came for shipping it, refused to ship it in his own name, or to be responsible for the freight: *Held*, that the owner of the vessel had a right to refuse to receive the lumber, and that no action would lie against him, to recover any increased freight which was paid on shipping the lumber by another vessel.

2. Nor could the broker, if he acted simply as agent, in making the contract, maintain such action in his own name.

In admiralty. This was a libel in rem, filed in the district court by Francis D. Fowler and another, against the ship A. Cheesebrough, to recover damages for the breach of a contract of affreightment. After a decree in that court dismissing the libel, the libellants appealed to this court. [Affirmed.]

William M. Evarts, for libellants.
Charles Donohue, for claimant.

NELSON, Circuit Justice. The libel in this case was filed for a breach of a contract of affreightment of a quantity of lumber, from New York to San Francisco, in the fall of 1852; and seeks to recover the

difference between the price contracted for with the owner of the ship, and the price the libellants were obliged to pay to another vessel for the transportation, after the master of the A. Cheesebrough had refused to receive the cargo. The contract price was \$33 per thousand feet, superficial measure. The price paid to the owner of the other vessel was \$50 per thousand—freight, in the mean time, having risen greatly, for the transportation of lumber to San Francisco, in consequence of the great fire at the city of Sacramento. The court below dismissed the libel, on the ground that the libellants had no interest in the suit, or in the subject matter in controversy. The libellants' firm was engaged in the commission and brokerage business connected with ships and shipping, and acted as agents of Ford, the owner of the lumber, in making the contract of affreightment with the agent of the A. Cheesebrough. They had no interest, therefore, in the subject matter of the suit, according to this view, and it should have been brought in the name of Ford, the principal.

It is insisted, however, that the contract was made in their names; that this is averred in the libel, and is not denied in the answer; and that the suit may, therefore, be maintained in their names, for the benefit of their principal. Admitting this to be so, still, I think, it would not help the libellants. They refused to ship the lumber in their own names, and be responsible for the freight; but insisted that it should be shipped in the name of Ford, the owner. This was one of the grounds of dispute between the parties, and one which arose early, as testified to by a witness for the libellants, and arose, also, in connection with the objection that the lumber was of an inferior quality, and might not be a sufficient security for the freight. It was supposed, on the argument, that this was not one of the objections to the receiving of the lumber on board of the ship, in the correspondence that took place between the parties, and in which each sought to put the other in fault. But I think this is a mistake. The shipment in the names of the libellants was there insisted upon, as well as the inferiority of the article.

The position of the libellants is somewhat singular. They insist, that the contract was in their own names, and not as agents, for the purpose of maintaining the suit for an alleged breach of it; but that they had a right to ship the lumber in the name of their principal, and thus avoid any personal responsibility, as it respects the payment of the freight.

In either aspect of the case, I think that the decree of the court below is right. If they acted simply as agents, then they have no interest in the subject matter of the suit, and cannot maintain it. If the contract was made in their own names, and

¹[Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

not as agents, then their refusal to ship in their own names, and their insisting upon the use of the name of Ford, their principal, furnishes a sufficient excuse for the conduct of the owner of the vessel. He had a right to reject the tender of the lumber at the ship's side. The decree of the court below is affirmed.

ACCOUNTS OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the commissioners, etc.; e. g. "Accounts of the Shipping Com'r. See Shipping Com'r of Port of New York, Case No. 12,792."]

ACHILLES, The, (McCLOSKEY v.)

[See McCloskey v. The Achilles, Case No. 8,701.]

ACHSAH, The, (ORR v.)

[See Orr v. The Achsah, Case No. 10,586.]

ACKER, (MARTIN v.)

[See Martin v. Acker, Case No. 9,155.]

Case No. 26.

ACKER v. The RAINBOW.

[4 Amer. Law J. (N. S.) 332; 14 Law Rep. 450.]

District Court, S. D. New York. Oct. 11, 1851.

COLLISION — BETWEEN STEAMER AND VESSEL AT ANCHOR—SPEED OF STEAMER—LOOKOUT—NARROW PASSAGE.

1. The sloop Transport, owned by the libellant, [Samuel Acker,] was anchored in the night-time, near the mouth of Newark bay, and about one hundred and fifty yards from the Staten Island shore. The Rainbow, proceeding from Amboy to New York on a flood tide, with several barges in tow, came in collision with the sloop at about three o'clock, A. M., the 18th of Aug. 1850, and caused serious injuries to her. The evidence was conflicting as to the exact position of the sloop, and also as to the fact of her having a light suspended conspicuously, and burning at the time; although, on these points, the direct and positive evidence from the sloop must outweigh the negative evidence from the steamer. The master and pilot were in the wheel-house of the steamer, directing her navigation, and two men were on the deck, but no one was stationed forward as a look-out. The sky was clear above, and it was moonlight, but there was a haze or fog on the water, preventing the pilot of the steamer seeing the sloop until within about one hundred feet of her. He then endeavored to avoid her by stopping and backing his engine. The steamer was running about six knots by the land, close in to the right bank of the sound, and ported her helm to go inside of the sloop. *Held*, that the steamer was guilty of three faults in her navigation: First, in keeping up so great a speed in that narrow passage, as to be unable to stop and get out of the way of a vessel at anchor, when first in sight of her; second, by attempting to go inshore of her, there being a safe passage outside; and third, especially in running with-

out a look-out stationed on the deck and forward part of the boat. Decree, that the steamer be condemned in the damages sustained by the sloop, and an order of reference to ascertain those damages.

[2. Cited in The J. W. Everman, Case No. 7,591, as to the insufficiency of the look-out.]

[NOTE. Nowhere more fully reported; opinion not now accessible.]

ACKERLY v. VILAS.

[See Akerly v. Vilas, Case No. 119.]

ACKERMAN, The C. F.

[See The C. F. Ackerman, Case No. 2,562.]

Case No. 27.

The ACME.

[2 Ben. 386; 7 Int. Rev. Rec. 149; 1 Amer. Law T. Rep. U. S. Cts. 60.]

District Court, E. D. New York. April, 1868.²

MARITIME LIENS—PRIORITIES—ADVANCES—
FRAUDULENT NATIONALITY.

1. Where a libel was filed against a vessel to recover advances made in a foreign port, on the request of her master, for the purpose of paying off a bottomry bond, and on the return of the process no owner appeared for her, but a mortgagee appeared, and, on his consent, the vessel was sold under a venditioni exponas, and the proceeds paid into court, and thereupon the mortgagee filed a claim and answer, not only joining issue with the allegations of the libel, but setting up his claim as mortgagee, and praying that his claim be paid out of the proceeds, which were insufficient to satisfy both claims.

2. And where, on the proofs, it appeared that the vessel, though nominally a British vessel and owned by a British subject, was really the property of American citizens residing in New York, who thus sailed her under false colors, and with a fraudulent nationality, and, while they were so using her, agreed with the respondent for a loan of the security on their personal obligation and a mortgage on the vessel, to be executed by the fictitious owner, and the latter accordingly executed to the respondent the mortgage under which alone he claimed the proceeds: *Held*, That the proceeding had been made one to effect the proper distribution of the proceeds of a vessel, already condemned and sold at the suit of the libellant, and it was, therefore, subject to the considerations which control courts of admiralty in the distribution of money in the registry.

[Cited in The Hermine, Case No. 6,409.]

3. Before the English admiralty, the claim of the mortgagee would be rejected as founded on a sham title, created in violation of law.

[Cited in The Hermine, Case No. 6,409.]

4. On principles of comity, it is the duty of this court to apply the same rule.

[Cited in The Hermine, Case No. 6,409.]

5. The transaction in question was contrary to public policy, and is not to be upheld under our own laws.

¹[Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

²[Affirmed by circuit court in The Acme, Case No. 28.]

6. The claim of the mortgagee, therefore, must be rejected, and as the facts were sufficient to sustain the libellant's claim against the fund, his claim, therefore, must be paid.

In admiralty. This was originally an ordinary suit in rem, brought to recover of the bark Acme the amount of certain advances made by the firm of M. A. Herrera & Co., of Havana. In the first instance, the libellants filed their libel against the vessel, upon which process was issued, under which the vessel was taken into custody by the marshal. Upon the return of the process, no owner appeared to defend, and default was entered against all persons, except George H. Millington, of Manchester, England, but residing in New York, who appeared by his proctor, and obtained time to file a claim and answer as mortgagee of the vessel. No stipulation for value was, however, given, but, on the contrary, by the consent of the mortgagee, upon the motion of the libellants, a venditioni exponas was then issued in the cause, directing the marshal to sell the vessel, and pay the proceeds into the registry, to abide the further order of the court. The vessel was accordingly sold, and thereupon Millington filed a claim, averring that he was entitled to the proceeds; and, on the same day, he also filed a pleading, designated as a claim and answer, in which he not only joined issue upon the averments of the libel of Herrera, but also set up his own claim to the proceeds as based upon an outstanding mortgage upon the vessel; insisting that by virtue of such mortgage he had a lien upon the vessel superior and prior to the claim of Herrera, and praying not only that the claim of Herrera be rejected, but also that his own claim be paid out of the proceeds of the vessel now in court. The facts in relation to Millington's mortgage were shown to be as follows. The bark Acme was built in Baltimore, Md., in 1855. At some time thereafter she was transferred—whether nominally or not did not appear—to one John Patterson, described as “of Inverness, Scotland, but now residing in the city of Brooklyn, state of New York.” In January, 1866, she, by purchase, became the property of persons residing and doing business in New York, who were not British subjects, and who, in the absence of other proof, the court held must be presumed to be American citizens. These persons, in order to avoid the navigation laws, and to retain for the vessel the British flag, to which, as the property of American citizens, she was no longer legally entitled, caused the title of the vessel to be placed in the name of one Henry James Creighton, described as “of Halifax, Nova Scotia, but now residing in the city of New York,” and who had, in fact, no interest in the vessel, nor any possession thereof; and thereafter, although in reality owned and possessed by American citizens, controlled by them alone,

and used for their sole benefit, the vessel, up to her seizure by the marshal, sailed under false colors, with a fraudulent nationality. While so sailing, the present respondent agreed with the real American owners of the vessel to loan to them the sum of \$12,000 on the security of their personal obligation, and a mortgage upon the vessel, to be executed by the fictitious owner, and, accordingly, in accordance with the forms of the British laws, Creighton then, without interest in or possession of the vessel, executed a mortgage upon her to secure the amount so loaned by Millington, which mortgage was received by Millington with the knowledge that the mortgagor did not own the vessel, but simply held the title for the purpose of giving to her a false nationality. Millington never had taken any possession of the vessel.

The proceeds of the vessel were not sufficient for the payment of the libellant's claim and the respondent's mortgage in full. [Decree for libellants. Affirmed in *The Acme*, Case No. 28.]

C. Donohue and Benedict & Benedict, for libellants.

C. M. Da Costa, for respondents.

BENEDICT, District Judge. The mode of procedure here adopted has made this, in effect, the ordinary case of a controversy between two competing claimants of a fund in court. The position of the respondent before the court is not that of an ordinary claimant of a vessel, who prays no affirmative relief, and simply asks the release of his vessel from custody. Here the vessel has, by the consent of the respondent, been sold upon the demand of the libellants, by the order of the court, and by his claim and answer the respondent requires the court to determine at the same time the respective rights and priorities of these two competing claimants to the fund. I see no objections to this method of procedure, when consented to by a claimant. It gives to the claimant the advantage of protecting himself by the purchase of the vessel, and, at the same time, sheltering the proceeds, by means of the default entered in behalf of the libellants, from any other liens which may be outstanding; but, at the same time, it transforms the proceedings from an action against a vessel looking toward her condemnation and sale, to a proceeding to effect a proper distribution of the proceeds of a vessel already condemned and sold at the suit of the first libellant. As such, they are subject to the considerations which control courts of admiralty in the distribution of money in the registry. There is, then, before the court a fund insufficient to satisfy the two demands which are now presented and the court is called upon to determine the validity and priority of each of these demands as against the other. On the part of the mort-

gagee, while it is not denied that the libellants, Herrera & Co., made the advances for which they sue, and that they were made to relieve the necessities of the vessel in a foreign port, it is contended that the evidence shows that the advance was made upon the personal credit of the owners exclusively, and that, accordingly, no lien was created upon the vessel; which being the case, the fund, it is insisted, should be distributed in satisfaction of the mortgagee's claim. On the other hand, the libellants, Herrera & Co., insist that the credit of the vessel was relied on when they made their advances, and that they then acquired a valid lien upon the vessel under the maritime law, which entitled them to payment out of the fund, or, if it be considered that upon the evidence no lien was created, which could have been enforced against the vessel herself, still, they insist that in a proceeding to distribute a fund in the registry, the court must regard equity, and award the fund to them, for the reason that their advances were in fact for the benefit of the mortgagee, having been made to pay off a bottomry bond, which, if not thus paid, would have absorbed the whole vessel to the exclusion of the mortgage. And lastly, it is contended that the claim of the respondent rests upon an illegal title, made under circumstances which require the court to disregard it, as founded upon a transaction prohibited by law and contrary to public policy.⁵

The transaction disclosed by the evidence, as it regards the title and character of this vessel, was a clear fraud upon the navigation laws of the nation whose flag was thus assumed. By the law of England, the use of the British flag and national character upon vessels owned by other than British subjects, is unlawful, and subjects the vessel to forfeiture. Were this case, then, before the English admiralty, the claim of the mortgagee would be rejected as founded upon a sham title, created in violation of law; and the question is presented, whether it is not the duty of this court to apply the same rule. In determining this question, it should be remarked that it is raised in a court of admiralty, and courts of admiralty are in some sense international courts, charged with the duty of declaring the law applicable to ships and in force upon the sea, which, being the common highway of the nations, requires harmonious rules and laws recognized as such by all. These courts are often impelled to take notice of the rules and regulations which are applied in admiralty courts of other nations. They sometimes even enforce the decrees of such courts. They are courts before which the principles of comity may be invoked with pe-

culiar propriety, and where those principles should be applied with increasing liberality, as year by year the nations are drawn closer to each other by the ties of commerce and of trade. And the nature of the transaction in question, and the effect which such transactions, if upheld, must have upon the mode of use of that most peculiar species of property, the ships, seem to require of a court of admiralty in a case like this to accord effect to the laws of England, in contravention of which the title to this vessel was held. For this is not the case of the assumption of a neutral flag in time of war to cover property as against an enemy, nor yet is it a case of the violation of a revenue law of a foreign nation. The law of England violated in this case has no relation to the revenue, its only object is to prevent the privileges and protections, afforded to the property of British subjects in ships, from being claimed by vessels not entitled thereto. And it is a law which can well be noticed, and, on proper occasions, enforced by the courts of other nations, for the reason that the aid of those courts is necessary to its efficacy, inasmuch as the ship may never visit the ports of the nation whose flag she has fraudulently assumed. Indeed, being owned and controlled elsewhere, it is to be presumed that she will not visit ports where forfeiture awaits her.

Furthermore, the United States have an interest in enforcing this law as well as England, for it is of importance to all maritime powers that the national character borne by a ship should be her true character. And the offence is one which may be perpetrated against every maritime power by citizens of every other such power, and in regard to which the United States may at any time be placed in a position to desire reciprocity of decision for their own protection.

Such being the character of the transaction in question, and the proceeding here being one in regard to a fund, brought into the registry by the consent of the respondent, and the other facts of the case being such that substantial justice, as between the only claimants of the fund, will thus be rather promoted than otherwise, I am of the opinion that it is the duty of this court, upon principles of comity, in this case to apply the rule which would be applied in the English admiralty, and refuse to recognize a claim to the fund, based upon a sham title, created in fraud of the navigation laws of England, for the purpose of giving to this ship a false nationality.

Of this conclusion the respondent can the less complain, because his mortgage, upon which not only his claim upon the fund, but his standing in court, depends, is drawn in the form prescribed by the merchants' shipping act of England. It contains no word of conveyance other than the word "mortgage," nor any power of possession or sale.

⁵ [The opinion, as reported in 7 Int. Rev. Rec. 149, contains at this place a statement of the evidence relating to the title and nationality of the vessel, which in this report is included in the statement preceding the opinion, ante.]

but expressly refers to the merchants' shipping act as the source of the rights intended to be conferred by it. It is a statutory mortgage, apparently dependent for its efficacy upon a statutory power of sale. The respondent, then, invoking the laws of England in support of his claim, cannot well object to the application of any portion of those laws to his demand.

But the transaction here disclosed, and upon which the claim of the respondent rests, may well be considered, in a case like the present, as contrary to public policy, and so not to be upheld under our own laws. If it be not by any statute made a crime against the United States to assume and use a false nationality for a ship owned by American citizens (and I cannot find that it is), still such an act is clearly contrary to the spirit and policy of the registry and navigation laws of the United States. These laws have for their object the encouragement of American navigation and American shipbuilding, to the exclusion of foreign navigation and foreign ownership. And they everywhere look to the disclosure by citizens of the United States, owning in ships, of their ownership therein. To permit an evasion of the duties thus imposed through the device of a nominal title held by a foreigner resident here, would afford plain encouragement to disregard the law. The transaction, moreover, is not without features of fraud upon the public. For the ship is a common carrier, supposed by the public to have and be entitled to the national character which she bears; but, bearing a false flag, she may involve innocent shippers, passengers, or seamen, in difficult and complicated questions, which may be precipitated upon them at any time in foreign ports or at home; as, for instance, in regard to the liability to search, the jurisdiction of the consul of the nation whose flag has been falsely assumed, the rights and remedies of the seamen, and the jurisdiction of our courts in relation thereto, the applicability of the limited liability acts, and acts for preventing collisions, and other similar questions. And lastly, by reason of the peculiarity of property in ships and the legal formalities and restrictions imposed upon its use by our laws, a fictitious title, like the one in question, makes necessary false reports by the master at the custom house, by means of which officers of the revenue may be misled. It has the effect to conceal property which the law intends should be disclosed, and may thus operate as a fraud against creditors. It requires false declarations from the nominal owner and others, as in the present case, where the mortgagor acknowledged himself indebted to the respondent in the considerable sum of \$12,000, when, in fact, he owed him nothing, and declared himself to be the owner of the vessel, when he had no possession or ownership thereof, nor any sort of

interest therein, as both he and the mortgagor then knew. It is a sham, created to avoid disabilities imposed by law, which places all parties connected therewith in a false relation toward the government, the community, and each other, and should, therefore, in a case like the present, be held to be against the policy of the law, and insufficient as a basis of a claim upon the fund, as against the other claimant thereof. Upon these considerations, and without expressing any opinion upon the other questions argued before me, I reject the claim of the mortgagee. There being, then, no other claim to the fund, except that of the libellant, the conceded facts are sufficient to support it, and the fund will be distributed in satisfaction thereof, so far as it may be sufficient therefor. *

Case No. 28.

The ACME.

[7 Blatchf. 366.]

Circuit Court, E. D. New York. June 18, 1870.*

MARITIME LIENS—PRIORITIES—ADVANCES.

1. Where B., not specifically shown to be an American citizen, but a merchant doing business in New York, purchased a British vessel, and caused the title to her to be taken in the name of C., a British subject, residing in New York, and C., having no beneficial interest in the vessel, executed, at the request of B., a mortgage on her to M., to secure a loan of money made by M. to B., and the vessel and the mortgage were registered at Nassau, a British port: *Held*, that, in a suit in rem, in admiralty, brought at New York, by H., against the vessel, to recover for advances made by him in Havana, on the credit of the vessel, subsequently to the making of the loan by M., neither C. nor B. making any objection, M. was entitled to have his claim under the mortgage allowed out of the proceeds of the vessel, after the payment of the advances made by H., and that enquiry into the legality of the transactions between C., B. and M., on grounds of public policy, was irrelevant.

2. On the facts of this case, H. was held to have a lien on the vessel for his advances, on the ground that they were made on the credit of the vessel and of B., and a lien prior to the lien of the mortgage to M.

3. Where an advance is made to relieve a vessel in a straightened condition in a foreign port, the presumption is that such advance is made on the credit of the vessel. This is especially true where the party making the advance has not had such business relations with either master or owners as to render it probable that large sums would be advanced upon credit without security.

4. Where the question to be determined is, whether credit for an advance was given to the owner of a vessel or to the vessel herself, the transaction is to be viewed differently from the case of an advance made by A. to B., on a request by C. to A. to make the advance, on the account of C. In the former case, the testimony of the party making the advance, as to his intent, in making it, in respect to giving

*[Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

†[Affirming decree of district court in *The Acme*, Case No. 27.]

credit, may be considered, while, in the latter case, it is not to be considered.

5. The fact that the party making an advance draws a draft therefor on the owner of the vessel, does not necessarily deprive him of his lien on the vessel.

[In admiralty. Libel in rem to recover the amount of advances made by M. A. Herrera & Co. to the master of the bark Acme; George H. Millington, a mortgagee thereof, appearing as claimant. The mortgagee's claim was rejected by the district court, and a decree entered for the libellants. (Case No. 27.) The claimant appeals. Decree sustaining the lien of both libellants and claimant.]

Robert D. Benedict and Charles Donohue, for libellants.

Charles M. Da Costa, for claimant.

WOODRUFF, Circuit Judge. The case made by the libellants is by no means free from doubt. They assert a lien upon the barque Acme, for advances made in Havana, for the discharge of a bottomry bond payable within three days after her arrival, and for certain supplies furnished at that port. The actual or beneficial owners of the barque were Messrs. Baetjer & De Vertu, of the city of New York. The necessity for the advances, and that the master and owners had no other credit in Havana, and that the advances were actually made, is entirely clear upon the evidence, and is, in truth, not questioned by the counsel for the claimant.

The only claimant and only party appearing in the suit is a mortgagee of the vessel, claiming under a mortgage executed and delivered by the party holding the legal title to the vessel, to secure a loan made to Baetjer & De Vertu long before these advances by the libellants were made. By consent of the libellants and the claimant, the barque was sold by the marshal, and the proceeds were brought into court, and the suit proceeded for the determination of the claims of the libellants and the claimant, as between themselves. Upon the ground that the claimant has no title, by virtue of his mortgage, which the court ought to recognize, his claim was wholly excluded in the district court, and he was even denied the surplus of the proceeds after satisfaction of the alleged lien of the libellants. The claimant being thus excluded, and all others having, of course, been defaulted, a decree was made in favor of the libellants, for the amount of their claim thus standing uncontested, without an examination and decision of the question whether the facts proved establish a lien or not. The Acme, [Case No. 27.]

The proof is, that the barque was a British vessel, and that, being such British vessel, Messrs. Baetjer & De Vertu purchased her, and caused the title to be transferred, by bill of sale, to Henry James Creighton, a

British subject, a merchant, described as of Halifax, Nova Scotia, but then residing in New York, and the claimant's mortgage was executed by the latter. Creighton had no beneficial interest in the vessel, but consented to take the title, and afterwards to execute the mortgage, on the request of Baetjer & De Vertu. The vessel was registered at Nassau, in the British island of New Providence, and there the mortgage was also registered. The vessel was built in Baltimore, and by what course of proceedings she had ceased to be an American vessel prior to her purchase by Baetjer & De Vertu, the proofs do not show, further than that she was owned by one Patterson, and that it is testified she was a British vessel when so purchased. Whether Baetjer & De Vertu are or are not American citizens is not specifically proved. That question is left to inference warranted by the fact that they are merchants doing business in New York and New Orleans.

If I were prepared to say that, under these circumstances, the mortgagee could have no standing in court as against any one and that his mortgage is a nullity. I must affirm the decree made below, upon that sole ground. But I am not satisfied that, as against the mortgagor, or against Baetjer & De Vertu, at whose request he made the advance and received the mortgage, he is not entitled to the benefit of his mortgage; and certainly, in a suit in which he sets up his mortgage and claims such benefit, and in which neither the mortgagor nor the beneficial owners appear or make any objection, his claim should be allowed. If no one who has any title to the vessel or any lien thereupon objects to his title, it is not the duty of the court to enquire whether, under the laws of England, a mortgage would be sustained where the title was in a British subject having no beneficial interest therein, or whether it is against the policy of our laws to entertain a claim made under a mortgage given in that condition of the title. If all persons having any title, legal or beneficial, make default, setting up no adverse claim founded in illegality or otherwise, and no party having a lien on the barque assails the title of the mortgagee, it would seem that his mortgage should warrant his claim. This would, most clearly be true, if such mortgage is good as against the mortgagor and the beneficial owners; for, in such case, he stands in court rightfully contesting the alleged lien of any other party.

It is not claimed on the part of the mortgagee, that, if the libellants, by their advances, obtained a lien upon the barque, such lien is to be postponed to his mortgage, nor is it denied that such lien, duly existing, has priority over all the owners and parties interested in the vessel, whether mortgagee, holder of the legal title, or beneficial owners. Without, therefore, discussing the ground

upon which the decision was placed below, I prefer to enquire whether the libellants have such a lien. And this question confessedly depends upon the answer to another—Was the credit given by the libellants to the vessel, or was the advance made on the credit of Baetjer & De Vertu?

The determination of this question does not depend upon any principles or rules of law peculiar to the law maritime or to courts of admiralty. It is purely a question of fact. There are cases which hold that, where advances are necessary and are made, still no lien is thereby created, because the advances are made on the credit of the master or of the owners, and other cases which hold that a lien is created because such advances are made upon the credit of the vessel. What circumstances, viewed as matter of evidence, warrant the inference that the advance was made not in reliance upon the vessel but on the responsibility of the master or owners, and, on the other hand, what circumstances indicate the converse, is often the subject of discussion, but the matter of fact to be determined is, to whom the credit was given; and, on the ascertainment of that fact, the question of lien or no lien is at once solved.

It must be conceded, that the history of the advance now in question is such, that a finding either way upon this question of fact could not be regarded as without evidence. Indeed, as above already intimated, I regard it as very doubtful. But I regard it as a just presumption, where an advance is made to relieve a vessel in a straitened condition in a foreign port, that such advance is made on the credit of the vessel. This is especially true where it appears that the parties making such advance have not had such business relations with either master or owners as to render it probable that large sums would be advanced upon credit without security.

On the 15th of June, 1866, Baetjer & De Vertu wrote to the libellants, apprising them that they had requested the master of the Acme, then about to arrive in Havana, to consign her to them, stating, among other things, that the master had signed a bottomry bond in Antwerp, payable in Havana, and adding: "Please pay the same for our account, at best possible rates of exchange, use the freight money for this purpose, and draw on us, either at New York, or on our New Orleans house, for the balance, at usual sight, which draft will be promptly protected. If it suits you better, we can make you a remittance from here, to cover the deficit, either in a banker's draft on Paris, or in Havana money. It will depend on the rate of exchange at which the bottomry bond will be payable with you, which way is the most advantageous for us." To this letter the libellants replied, on the 30th of June: "We beg to acknowledge rec't of your valued favor of 15th inst., the contents of which are

attentively noted. The business of the Acme will receive our best attention as soon as she arrives." On the 13th of July, the Acme arrived at Havana, and, according to the testimony of one of the libellants, the master, on her arrival, called upon the libellants and requested them to take up the bottomry bond, "for account of the vessel and owners, within three days, so as to avoid all unnecessary expenses." The libellants paid the bond, and made some further advances for expenses of discharging, ship's stores, procuring cargo for New York, clearing, pilotage, &c., and collected the freight due on cargo to Havana, &c.

On the 14th of July, the libellants advised Baetjer & De Vertu of the arrival of the vessel, and said: "With respect to our reimbursement, we think the best way will be for us to draw on you." On the 25th of July, they wrote to Baetjer & De Vertu, stating that they had paid the principal and premium of the bond, leaving a question of commissions unsettled, and that, by the next opportunity, they should value on them for the approximate amount which would be due. On the 28th of July, they again wrote, advising Baetjer & De Vertu that they had drawn for \$7500, at 60 days, the "approximate amount of your indebtedness to us for paying bottomry bond for Acme, which we place to your credit at 26 per cent., at in., \$5550, craving your entries to agree." The draft arrived and was accepted by Baetjer & De Vertu. On the 8th of September, the cargo of the Acme having been procured, the libellants wrote, advising Baetjer & De Vertu that she had left for New York, adding: "We now enclose disbursements acct. of said vessel, amounting to \$887.06, and extract of acct. closed by our draft, at 60 days, for \$1145.35, which please protect, and we hope will prove correct." The accounts enclosed were an account headed: "Disbursements of Brit. Bk. Acme, Capt. D. A. Wenke," which contained items for sundry expenses of discharging, port charges, advances for ship stores, &c., &c., \$887.06; and an account headed: "Dr. Messrs. Baetjer & De Vertu, in account current with M. A. Herrera & Co., Cr.," in which account were charged all their advances for the payment of the bottomry bond, ship's disbursements, commissions, &c., and in which were credited the inward freights received in Havana, and the two drafts above-mentioned, showing an exact balance of the debits and credits. On or about the 14th of September, the second draft arrived and was presented. Acceptance of it was declined on the ground that Baetjer & De Vertu had then failed. Neither draft has been paid.

Upon the face of the actual transaction thus disclosed, the indication is very strong that it was the intention of the libellants to give a personal credit to Baetjer & De Vertu, and that they did so in fact, without any reliance upon the vessel, or any expectation or

thought of acquiring a lien thereon. But these indications are not conclusive in any such sense as precludes explanation. Nothing has been done in reliance thereon which should prevent proof of the actual intent of the libellants in the transaction. The request of the firm of Baetjer & De Vertu that the libellants would pay the bond for their account, and the assurance of the libellants, in reply, that the business of the Acme would receive their best attention when she should arrive, were not inconsistent with an advance with all the security which a lien on the vessel for reimbursement would furnish. The libellants were, therefore, in a situation to be governed by circumstances appearing on the arrival of the vessel; and it is testified that the master then proposed an advance for account of the vessel and owners. The libellants testify, that, in making the advance, they considered the responsibility of the vessel a sufficient security, and that she was bound for advances made under the circumstances above stated, and that it was not their intention to give credit personally to Baetjer & De Vertu. Their testimony states, with some particularity, their conviction, when they made the advances, that the vessel was liable therefor and their reliance thereon. They explain the manner in which the account was kept as due to press of business, and their unsuspecting confidence that no question of the liability of the vessel could arise.

I cannot say that, if there was any other ground for doubting the sincerity or veracity of these libellants, their explanation of the accounts would be very satisfactory; and yet it is easy to see that the account may have been kept and rendered in the name of Baetjer & De Vertu without any thought that they were thereby indicating an intent to rely upon them solely and waive a lien to which they were entitled if the advance was in fact made according to the request of the master and in reliance on the vessel itself. In judging of this, it is to be remembered, that they regarded Baetjer & De Vertu as the owners; and the case is, therefore, not like an advance made to a third person upon the request of that firm to make it on their account, followed by a charge in account to them, which would be so conclusive in favor of such third person, that he was neither expected nor bound to reimburse them, that, in the absence of proof of his own consent to be either primarily or secondarily liable, no declaration by the libellants of their intentions to look to him would be of any avail. Here, the parties requesting the advance being themselves owners, it is in harmony with the transaction to say, that the libellants were expected and intended to make the advance with all the incidental rights which

appertain to advances made in a foreign port to relieve the pressing necessities of a vessel, when the master has no other means, by his own credit or that of the owners, to procure aid.

The mere fact that bills of exchange were drawn for the reimbursement of the libellants does not deprive them of their lien. This is true upon principles often adjudged at common law as well as in admiralty. Here, there is no such presumption as would arise if the responsibility of a third person had been given for the advance. The reimbursement must have been made in some mode, even though the lien upon the vessel was the libellants' reliance. Why should it not have been by paying their drafts drawn on the owners? See *The Barque Chusan*, [Case No. 2,717,] and cases there cited; *The James Guy*, [Id. 7,195,] affirmed 9 Wall. [76 U. S.] 758. Nor has the form of the account rendered been deemed conclusive. See *The St. Catherine*, 3 Hagg. Adm. 250. The case of *The Grapeshot*, 9 Wall. [76 U. S.] 129, is instructive in its bearing on the principles involved in this branch of the case; but it leaves the question whether, in fact, the advances were made on the credit of the vessel, as a question of fact, to be determined upon all the evidence.

My conclusion is not reached without great doubt. Nevertheless, upon all the proofs, I cannot resist a conviction here, that the master of the vessel and the libellants both of them regarded the loan as made upon the credit of the vessel and her owners. In giving weight to the oral testimony of the libellants, I am not violating the rule that written contracts cannot be altered or varied by parol evidence. The writings here have not necessarily the legal effect to bind the libellants to look to Baetjer & De Vertu. If that was their necessary operation, the rule would, no doubt, apply. But they may have appropriate meaning and effect consistently with the creation and continuance of the lien which the libellants assert.

If the doubts I feel were greater than they are, I should have great satisfaction, nevertheless, in the undeniable fact, that it is due to the advances made by the libellants that anything is saved to the claimant as mortgagee; and, if the case were to be disposed of upon those ideas of what is fair between the former and the latter which the ordinary mind deems equity, the libellants should be first paid.

The decree should award payment to the libellants of the amount due to them, as ascertained and awarded in the district court, with their costs in that court, and payment of the residue of the proceeds of sale to the claimant, without costs to either party on the appeal to this court.

Case No. 29.**The ACORN.**

[2 Abb. U. S. 434;¹ 12 Int. Rev. Rec. 113; 2 Chi. Leg. News, 413; 5 Amer. Law Rev. 563.]

District Court, E. D. Michigan. June Term, 1870.

FORFEITURE—REGISTRY OF VESSELS — RECORD OF NATURALIZATION.

1. The act of April 25, 1866, (14 Stat. 40,)—directing the secretary of the treasury to issue enrollment and license to certain vessels therein named,—is mandatory in its terms; and an oath, in accordance with the provisions of section 4 of the act of December 31, 1792, (1 Stat. 287,) to obtain enrollment and license under the former act, is unnecessary.

2. An oath thus made to procure enrollment is extra-judicial, and of no effect; and though the oath was false, the provisions of law declaring a forfeiture in such cases have no application.

3. Where, in a libel for forfeiture for alleged violation of the registry laws, the claimant is charged with not being the owner of the vessel, and all the evidence relating to the ownership is introduced by the government, which tends to prove rather than disprove such ownership on the part of the claimant, such evidence must be taken as a whole; and the claimant need not introduce evidence upon the subject, to establish his ownership.

4. In a libel for such cause, where the claimant is charged with not being a citizen of the United States at the time of the enrollment, and, in order to refute such charge, he introduces in evidence an exemplified copy of the record of his naturalization under the United States laws in a court of competent jurisdiction, he need not also prove the preliminary proceedings necessary to give the naturalizing court jurisdiction.

[Cited in *Re Coleman*, Case No. 2,980.]

5. The order of a court of competent jurisdiction, admitting an alien to citizenship, is in the nature of a judgment, and, in the absence of fraud, is conclusive as to the question of the requisite length of residence of the naturalized citizen in the United States.

[Cited in *McDermott v. Copeland*, 9 Fed. Rep. 537; *Charles Green's Sons v. Salas*, 31 Fed. Rep. 108.]

6. The distinction between cases in which judgments may and those in which they may not be impeached collaterally, may be stated thus: They may be impeached by facts involving fraud or collusion, but which were not before the court or involved in the issue or matter upon which the judgment was rendered. They may not be impeached for any facts, whether involving fraud or collusion or not, or even perjury, which were necessarily before the court and passed upon.

In admiralty. Hearing on a libel of information. This was a libel of information and seizure for forfeiture for alleged violation of the registry laws. The libel alleged as cause for forfeiture, that the oath taken by David Muir, the claimant, to obtain enrollment and license of the bark, was false in the following particulars:

1. That at the time of taking the oath the said David Muir was not a citizen of the United States, as in said oath alleged. 2.

¹[Reported by Benjamin Vaughn Abbott, Esq., and here reprinted by permission.]

That he was not the true and only owner of the vessel. 3. That there were subjects of a foreign prince or State, directly or indirectly, by way of trust, confidence, or otherwise, interested in the vessel, or in the profits or issues thereof.

The libel in the second article also alleged the fraudulent use of an enrollment and license for the bark, to which she was not entitled.

The claim, answer, and exceptions of David Muir, 1st, alleged his ownership of the vessel; 2nd, excepted to the jurisdiction of the court; but as this ground of defense was abandoned at the hearing as untenable, no notice was taken of it by the court; 3rd, admitted that claimant took the oath as alleged in the libel, but denied its falsity, and alleged the truth of the statements contained in it; 4th, denied the fraudulent use of an enrollment and license, as alleged in the second article of the libel; also contested the forfeiture, and claimed costs. The proofs taken, and the facts of the case, sufficiently appear in the opinion of the court.

A. Russell, for the United States.

Newberry, Pond & Brown, for claimant.

LONGYEAR, District Judge. By an act of congress approved April 25, 1866, (14 Stat. 40,) the secretary of the treasury was directed to issue an American enrollment and license to the bark Acorn, among a large number of other vessels named in said act, and accordingly the bark was enrolled and licensed at Chicago, July 11, 1866. The enrollment purports on its face to be in pursuance of the act of April 25, 1866, and also of the general acts of congress providing for the enrollment and license of ships or vessels, and for the regulation of the foreign and coasting trade on the northern, northeastern, and northwestern frontiers of the United States.

The forfeiture is claimed in this case under section 4 of the act of December 31, 1792, (1 Stat. 287,) the provisions of which, as to forfeiture, have been held by the supreme court, in the case of *The Mohawk*, 3 Wall. [70 U. S.] 566, to apply to enrolled and licensed as well as to registered vessels. It is contended, however, on behalf of the claimant, that the act of April 25, 1866, directing the secretary of the treasury to issue an enrollment and license, is mandatory, and that under it section 4 of the act of 1792 has no application; that the questions of citizenship of the owner and the ownership of the vessel do not arise, and that no oath could be lawfully required as a preliminary requisite, as required by said section 4, and that therefore the oath which was made to procure the enrollment, as alleged, was extra-judicial, and no forfeiture could be claimed, even if the same was false.

First, then, as to the effect of the act of

April 25, 1866. It is true, as claimed, that the act is mandatory in its terms. The language is: "The secretary of the treasury is hereby directed to issue American registers, . . . or enrollment and license, to the following named vessels, that is to say;" and then follows a long list of vessels, including the said bark Acorn. No conditions are imposed, and no preliminary steps are prescribed by the act. The attention of the court is challenged to the fact that in other acts of congress, for a like purpose, conditions are imposed, and preliminary steps are prescribed, as an evidence that in this instance congress intended the enrollment and license to issue absolutely and immediately.

Looking at these acts alone, the court would have no doubt that the construction claimed is the correct one. But in view of the general laws of congress upon the subject of registry, enrollment, and license, and of the objects and purposes to be accomplished thereby, viz: to build up and foster a commerce purely American, and to protect the revenue, serious doubts were suggested, and the court felt it an imperative duty to seek for some other construction of the act than that contended for, and more in keeping with the object and purpose of the registry laws. Thirty-one vessels in all are covered by the act, and it is difficult to conceive that congress could have intended so important and dangerous an innovation upon its established system as it would be to give the act the effect suggested, and the court would not do so, only as it might feel compelled to, by force of the clear and unmistakable meaning of the words of the act.

As my brother, Judge Withey, of the western district, has a case before him, *U. S. v. The Advance*, [Case No. 14,425,] precisely like this one, and was therefore directly interested in a correct decision of the questions of law arising in this case, I suggested to him my doubts upon this question, and after consultation with him, and mature deliberation, I see no escape from the conclusion that the act, by its own force, admits the vessels named in it to registry, or enrollment and license, peremptorily, and without any prerequisites or conditions whatever. After turning the question over and over, and viewing it on all sides and in all aspects, I have found myself unable to come to any other conclusion at all satisfactory to myself, without the necessity of interpolating into the act words of material import, which of course the court cannot do.

The act is mandatory in its terms. "The secretary of the treasury is hereby directed to issue American registers, . . . or enrollment and license." &c. Now, in order to hold that the requisites and conditions prescribed by the general laws must exist and be complied with before the secretary of the treasury can be called upon to obey the man-

date, it is necessary to interpolate an entirely new element into the act; because the act is absolute, unconditional, and immediate in its operation and effect, and to hold as above indicated, would make it conditional and contingent, and would postpone its operation until other acts, not mentioned or referred to in terms or by necessary implication, have been complied with. Foreign vessels cannot be registered or enrolled and licensed under the general laws, but there can be no doubt that congress has the power, by special act, to nationalize such vessels, and confer upon them all the rights of registry, and enrollment and license, independent of the general laws. In the case of *The Acorn*, and of all the other thirty-one vessels named in the act of 1866, except three which are described as "Canadian built," no reason whatever is assigned, or can be deduced from its language or recitals, why the act was necessary, or why it was passed. We may presume that it was to cure or remove some disability or disabilities under which the respective vessels labored, and on account of which they could not be registered, or enrolled and licensed under the general laws. But if we are to resort to presumptions, we must presume that all disabilities were intended to be cured or removed, where none are specified. The act is plain, direct, positive, and peremptory in its language. There is no ambiguity in its provisions, nor room for construction. It is not based upon any requisite, qualification, or condition, or upon any want of them, relating to the vessel, its owner, master, or persons interested, at least so far as *The Acorn* is concerned, but is independent and regardless of all requisites, qualifications, or conditions. It is a simple command to an officer of the government to do a certain thing. Now, to say that he need not do the thing commanded, or only in case certain requisites and conditions exist and are complied with, among which is the oath to obtain enrollment and license here in question, is clearly to interpolate into the act what is not there in terms, and what cannot be inferred from the language used, by any fair or satisfactory construction of it. I hold, therefore, that no oath to obtain enrollment and license was necessary in this case, and hence that the oath which was made, and upon the alleged falsity of which a forfeiture is predicated, was extra-judicial, void, and of no effect. The provisions of law, therefore, declaring a forfeiture in such cases, have no application to this case. In this view of the first branch of the case, a consideration of the remaining points is unnecessary to its disposition. But in view of the importance of the questions involved, and in order to show that, regardless of the conclusions arrived at upon the first point, the result must have been the same, a consideration of the remaining points may not be unprofitable.

2. The second point involved, regards the ownership of the vessel. In cases of this sort the burden of proving that the ownership of the vessel and the persons interested in her are not as stated in the oath, is upon the United States. It was contended, however, that it is only necessary, in the first instance, for the United States to show probable cause, or a reasonable suspicion, and then the burden of proof changes. Without stopping now to inquire into the soundness of this position, we will proceed at once to examine the evidence upon this point.

The testimony of Austin A. Smith, and that of John S. Clark, taken by commission in Canada, on behalf of the United States, comprises all the proof in the case upon the question of ownership. Smith testifies that for three years previous to July 1, 1867, he was book-keeper and clerk, and a part of that time was employed by Muir Brothers, at Port Dalhousie, in Canada; that the business of the Muir Brothers, when he was in their employ, was ship-builders, ship-owners, and ship-chandlers. The witness then proceeds as follows: "Previous to the transfer of the vessels to Bryce Muir, one of the brothers, they owned the barks Alexander, Acorn, Advance, and Niagara, and the schooners Arctic, Ayr, and Asia. I do not recollect the date of the transfer, but believe it was somewhere during the year 1866. I was acquainted with the bark Acorn, and the Muir Brothers owned her up to the time of the transfer mentioned in last answer. Up to the said transfer all of the parties in the firm of Muir Brothers, consisting of Alexander Muir, Bryce Muir, William Muir, David Muir, and Archibald Muir, were interested in the profits of the said bark, and that they were solely so interested. The said partners, up to the time of the transfer to Bryce Muir, were equally interested in the said bark Acorn, and from the date of the said transfer, the said Bryce Muir was solely interested up to the time of another transfer thereof to David Muir; after the last transfer the said David Muir was solely interested. The Muir Brothers, before the transfer to Bryce Muir, were the owners of, and kept the books of the accounts of the said bark, and Bryce Muir afterwards up to the time of the transfer to David Muir, and after the transfer last mentioned, the said David Muir. The said firm had nothing to do with the profits after the said first transfer."

Clark testifies that he is a collector of canal tolls, (for what canal or where is not stated,) and then proceeds as follows: "During the year 1866, David Muir was the owner of the bark Acorn. I do not know who was or were interested in her profits in the said year. I never received any information from David Muir on the subject. My knowledge as to his ownership is derived from the fact that the said bark in passing through the canal that year was reported to me, and en-

tered on my books as owned by the said David Muir."

This comprises all the proofs made or offered on either side as to the ownership of the vessel, and as to the persons interested in her profits. On this proof, it is contended, on behalf of the United States, that, having shown that the vessel once belonged in part to other owners, it is incumbent on the claimant to show that, at the time he made the oath for enrollment, the interest of the other owners had been sold and duly transferred to him; that the bills of sale, or other conveyance, by which the same was transferred, should have been produced, and that their nonproduction raises a presumption against the claimant's title, and that the statements of the witnesses, above quoted, as to transfer to and ownership by David Muir, are not competent to prove such transfers and ownership. Such would, undoubtedly, be the rule as applied to evidence offered by the claimant to prove his title after a case had been made against him, making such proof necessary. But it must be borne in mind that all the testimony there is in this case in regard to a transfer from the other former part-owners to Bryce Muir, and from him to David Muir, the claimant, is produced on behalf of the United States, and although it is somewhat indefinite as to time, it is as definite, direct, and positive, as the other portions of the same testimony tending to prove that other persons were once interested in the vessel. It is a part of the case for the government, as made by its proofs, and it cannot be rejected by any known rule of law. The testimony upon the subject of ownership, as above recited, must be taken as a whole, and being so taken, if it proves anything, it proves that David Muir was the sole owner, and was solely interested. To say the least of it, it fails to make out such a case as makes it incumbent upon the claimant to make any proof upon the question of ownership.

Therefore, the allegations of the libel that said David Muir, at the time of making the oath for enrollment "was not the true and only owner of the vessel," and that "there were subjects of a foreign prince or state, directly or indirectly, by way of trust, confidence, or otherwise interested in the said bark," &c., are not sustained.

3. As to the citizenship of the claimant David Muir. For the purpose of sustaining the allegation of the libel that David Muir was not a citizen of the United States, as alleged in his oath for enrollment, testimony was introduced on behalf of the United States, tending to show that for several years previous to the year 1866 (the year in which the vessel was enrolled), the said David Muir had resided in Canada, and was assessed and paid taxes there, and that he was registered as a voter there as late as the year 1863. To meet the case thus made

against him, the said David Muir introduced in evidence an exemplified copy of the record of his naturalization, under the laws of the United States, in the superior court of the city of Chicago, being a court of competent jurisdiction, January 27, 1866. This record was offered and admitted in evidence without objection, but on the final argument, counsel for the United States took the following exception to its sufficiency: That the preliminary proceedings necessary to give the naturalizing court jurisdiction, viz.: the petition, declaration of intention, and oath of allegiance, are not proven. It is recited in the record that such proceedings were had, but it is contended that such recitals are not evidence, but that the proceedings themselves should have been proven. It is doubtful whether this objection does not come too late, but even if in time, the weight of authority is decidedly against the position that such preliminary proceedings must be proven, and I see no reason for holding otherwise in this case. See *Ritchie v. Putnam*, 13 Wend. 524-526; *Stark v. Chesapeake Ins. Co.*, 7 Cranch, [11 U. S.] 420.

It is contended also on the part of the United States, that inasmuch as the order of naturalization could be made only on proof of continued residence in the United States for five years immediately preceding, it must in this case, in view of the evidence on behalf of the United States, above mentioned, have been made upon false testimony as to the fact of such residence. This presents the question—Is the order admitting an alien to citizenship conclusive as to the question of the requisite length of residence in the United States, or is that question open to inquiry collaterally? The proceeding to obtain naturalization is clearly a judicial one. A hearing is required to be had in open court, and the right can be conferred only by the judgment of the court, and upon satisfactory proof. It, therefore, has all the elements of a judgment. That it has the character and attributes of a judgment, and is equally conclusive, the authorities are entirely uniform. See *Spratt v. Spratt*, 4 Pet. [29 U. S.] 393, 407; *McCarthy v. Marsh*, 5 N. Y. 263, 279, 284, and authorities cited; *In re An Allen*, 7 Hill, (N. Y.) 137, 138; *In re Clark*, 18 Barb. 444; *Ritchie v. Putnam*, 13 Wend. 524-526.

The question of the requisite length of residence of the applicant is a question of fact, and, as appears by the record, was directly before the court and acted upon. Proofs were taken, and the court made a decision upon them. This court is now asked to decide that the superior court of the city of Chicago, before which the naturalization proceedings were had, erred in deciding as it did, or, in other words, that the fact in question is not as there found. It does not appear what the particular proofs or statements of the witnesses before the naturaliz-

ing court were, but, whatever they were, they were satisfactory to that court. Neither does it appear by the proofs in this court that the testimony here adduced to show that the fact of residence was not as there found, was or was not before that court. But concede, as was probably the case, that it was not, then it comes here in the nature of newly discovered evidence, and this court is asked to allow it to impeach the naturalization, and as to a fact, too, which was directly before and acted upon by the naturalizing court. This is contrary to all precedent and all authority. To allow it would tend to unsettle the sanctity of the final adjudication of judicial tribunals, and render them of no more binding or conclusive effect than a simple contract. The question here is, not whether the particular evidence here adduced was or was not before the naturalizing court, but was the fact which this evidence is intended to prove or disprove before that court. The proofs in this case do not raise the question of fraud or collusion in the naturalization proceedings, but simply the question of fact as to the requisite length of residence of the claimant in the United States, before he was admitted to citizenship. Many authorities may be found (although they are by no means uniform), holding that a judgment may be impeached for fraud or collusion; but the court has not been referred to a single case, neither can one be found, in which it has been held that a judgment may be impeached for any matter which was necessarily before the court and involved in the decision, as the fact of residence was in the case under consideration. On the contrary, the authorities are uniform, that a judgment cannot be impeached for any such matter.

The distinction between cases in which judgments may and those in which they may not be impeached collaterally, as derived from the authorities, and founded in common sense, may be stated thus: They may be impeached by facts involving fraud or collusion, but which were not before the court or involved in the issue or matter upon which the judgment was rendered. They may not be impeached for any facts, whether involving fraud or collusion or not, or even perjury, which were necessarily before the court and passed upon.

See *McCarthy v. Marsh*, 5 N. Y. 284; *Mason v. Messenger*, 17 Iowa, 261, 272; *White v. Merritt*, 7 N. Y. 352, 355; *Sidensparker v. Sidensparker*, 52 Me. 481, 489; *Parkhurst v. Sumner*, 23 Vt. 538; *Lewis v. Rogers*, 16 Pa. St. 18, 21; *Warburton v. Aken*, [Case No. 17,143;] *Demerit v. Lyford*, 7 Fost. (N. H.) 541, 546-549; *Dilling v. Murray*, 6 Ind. 324; *Peck v. Woodbridge*, 3 Day, 30, 36; *Homer v. Fish*, 1 Pick. 435, 439-441; *Smith v. Lewis*, 3 Johns. 157, 168; *Smith v. Lowry*, 1 Johns. Ch. 322-324.

It was objected on the argument on be-

half of the United States, that the record shows that the oath of the applicant was allowed to prove his residence, contrary to the express provision of the naturalization laws, and that the record is therefore a nullity. The record states as follows: "And it appearing to the satisfaction of the court, as well from the oath of the said applicant as from the testimony of Charles Old and Jesse Coe," and then follows a statement of all the prerequisites to naturalization, viz.: residence, good moral character, attachment to the principles of the constitution, &c. The oath of the applicant is prohibited by the act only as to his residence. By implication, therefore, such oath may be allowed to prove any of the prerequisites other than that of residence; and this court will, in support of the validity of this record, refer such oath to such prerequisites only as could be lawfully proven by it, and will presume that the finding of the court, as to the residence of the applicant, was based upon the other testimony mentioned in the record, and not upon the oath of the applicant. It is a well-settled rule that when a record, or other writing, admits of two constructions, one of which will give it force and validity, and the other of which will render it a nullity, the court will adopt the former. I hold, therefore, that the objection is not tenable.

It was suggested by the learned counsel for the United States that naturalization proceedings, as usually conducted, are virtually ex-parte, and with but little, if any, circumsppection or attention on the part of the court before which they are had, and that the court is liable to be imposed upon by false testimony and otherwise; and that, therefore, the rule ought to be more liberal in allowing them to be impeached than in the case of ordinary judgments. There is undoubtedly some force in the suggestion, but a little reflection will show that the inconvenience and hardship which would inevitably result to individuals from its adoption, would be vastly greater than the slight inconvenience resulting occasionally to the government by adhering to the strict rule.

The government favors naturalization; and, owing to the liberality of its laws upon that subject, is no doubt liable to occasional imposition; but if every naturalized citizen must always be prepared with his proofs to maintain the grounds upon which he obtained his papers, in all courts and places in which they may be brought in question, the boon of citizenship which is so liberally bestowed would be barely worth possessing. No proof was adduced to sustain the second article of the libel, other than what has been already considered. The libel must be dismissed.

[From 12 Int. Rev. Rec. 113:] I am authorized by Judge Withey, of the western district, before whom the case of *The Advance* [Case No. 14,425] is pending, to state that he concurs with me in the above result.

Case No. 30.

The ACORN.

The SPEEDWELL.

[21 Law Rep. 99.]

Circuit Court, D. Massachusetts. May Term, 1857.

SALVAGE—COLLISION—EXERTION OF CREW TO AVOID.

Successful exertions by the crew of one vessel to avoid an impending collision with another cannot be considered salvage services rendered to the latter.

In admiralty.

G. G. Thomas, for libellants.

J. A. Abbott, for the Acorn.

W. G. Russel, for the Speedwell.

CURTIS, Circuit Justice. These are libels for salvage service alleged to have been rendered to vessels detained in the ice in the manner stated in the preceding [following] case of *The John Perkins*, [Case No. 10,252.] The libellants were two of the crew of the steamer *Acorn*, and remained on board some hours after the rest of the steamer's company had gone on shore. They allege that while they were so remaining on board, the schooner *Speedwell*, whose officers and crew had also gone on shore, was forced by the action of the sea towards the steamer's stern; that they put out fenders, whose effect was to lessen the force of the shock when the two vessels came in collision, and also to cause the schooner to slide round the stern of the steamer and go clear, without doing any damage to either vessel. I do not deem it necessary to make an extended statement of the facts alleged and denied, or of the deductions proper to be made from the proofs. I am of opinion that the cases must be governed by the same principles already announced in the case of *The John Perkins*. I find no facts sufficient to distinguish these cases from that case. I consider that while the libellants remained on board the steamer they were not absolved from their contract, and were under an obligation to do all they allege was done for its safety; that they must be deemed to have acted for its preservation, and cannot claim as salvors of the other vessel, because they interposed to relieve both from the effects of a collision which occurred without fault. I desire to be understood as not intending to express any doubt of the gallantry and merit of the services rendered by these libellants. If not prevented by a rule of law, I should agree readily to the compensation awarded by the court below to be paid by the steamer. But in my judgment this is a matter which must be left to the discretion of the owners and underwriters, who, it is to be expected, will not be unmindful of any just claims which these men may have, upon their liberality.

These cases involve questions of great interest and importance, and it would have

been highly satisfactory to me if they had been open to an appeal; especially as I find myself unable to concur in opinion with the very learned judge by whom these cases were decided in the court below. I have therefore considered them with great attention; and upon the points of law involved in them, they have been twice argued by counsel, from whom I have derived valuable assistance.

The decrees of the district court must be reversed and the libels dismissed, without costs.

ACORN, The.

[See Nickerson v. The John Perkins, Case No. 10,252.]

Case No. 31.

ACOSTA et al. v. The HALCYON.¹

District Court, S. D. Florida. Sept. 1877.

SALVAGE—SEVERAL SALVORS—PRIORITY OF ARRIVAL.

[Under wrecking rule 4 in salvage cases prescribed by the district court of Florida, requiring that licensed wrecking vessels shall be admitted to assist at the wreck in the order in which they arrive, a vessel is deemed to have "arrived" when she is in reasonable hailing distance, ready to receive and obey orders; and a subsequent change in the position, by standing off and on, although she might be further from the wreck than another vessel just arriving, will not forfeit her right.]

In admiralty. Petition of Thomas Blake for a distributive portion of salvage.

LOCKE, District Judge. This is a petition under the fourth wrecking rule of this court, which requires that licensed wrecking vessels shall be admitted to assist at the wreck in the order in which the vessels themselves arrive. This rule was made for the purpose of preventing the practice at one time in vogue of several masters of vessels going to wrecks in large boats, forming consortships among themselves, in behalf of their vessels and crews, and excluding all who came afterwards, without regard to the whereabouts of their vessels. This case comes under this rule, and depends upon a construction of the language used as well as questions of facts. The petition alleges that the schooner "Wallace Blackford" arrived at the bark Halcyon before the schooner "Mary Matilda," which had been admitted to the consort; this the answer denies. It appears that the Mary Matilda was approaching the Halcyon considerably in advance of the Blackford, although in rather a different direction, she being on the outside of the reef, while the Blackford was on the inside; that her master and a part of her crew left her in a boat, and pulled on board the Halcyon, where they were permitted to go

to work some half or three quarters of an hour before either vessel arrived; that the Mary Matilda was in the vicinity of the bark, had communicated with her, and received orders to come alongside, but was standing off from her shortly before the arrival of the Blackford, but that they both came to anchor within three or four minutes of each other, the Mary Matilda somewhat nearer the bark than the Blackford. As to the exact moment at which the two vessels came to anchor the witnesses do not agree; some of them state that the Blackford anchored from three to five minutes first, while one who appears to have been the best situated to observe both vessels is very positive that, although the Blackford hauled down her jib first, the Mary Matilda let go her anchor first. If the question depended upon the moment of anchoring, the evidence would be unsatisfactory and far from conclusive; but in my opinion it does not depend upon that, but upon the time of arrival. The crew of the Mary Matilda, leaving her, and coming on board in a boat, can have no effect or influence in the question, for they gained thereby no rights as against the Blackford, provided that it is considered that she arrived first; nor does their having left their vessel prove that she was not ahead of the Blackford at the time of her arrival.

The arrival of a vessel does not necessarily imply anchoring, nor is it necessary that a vessel should be at anchor before she can be considered as having arrived, as the first anchoring might be at a much greater distance from a given point than the other at that time, or indeed the other not anchoring might be alongside the wreck. There is no exact distance from a wreck at a point within which a vessel must have reached before she can be considered as having arrived. There are no actual bounds within which a vessel must come, and no arbitrary distance can be determined in feet, yards, or fathoms, which might not very soon be proven unreasonable and inexpedient. Were it a boat coming to a vessel where she is accustomed to lie alongside, or a vessel coming to a dock where she is to be made fast, the term might be more easy of construction; but that is not the usual position of vessels at sea, nor would it be safe or reasonable to demand or require it. What construction, then, can be reasonably placed upon the term "arrived?" What were the needs of the rule? What want did it supply? What is the practical importance of having a vessel arrive before her services can be accepted? The former practice oftentimes, in theory, if not in fact, admitted vessels still so far absent as to be unable to render any service to property in distress, while others ready, willing, and able, on account of being present, to assist, were excluded, while the peril to the property was continuing or increasing, and it was to this

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point that such a rule is directed. All that an actual presence demands is that the vessel shall be sufficiently near to render assistance at a moment's notice,—receive and obey orders; to be within a communicating or reasonable hailing distance. When she is within such distance it is all that can practically be demanded, and it seems to me reasonable to consider that the rule has been complied with. I know of no fairer construction that can be placed upon the term "arrive," or better rule to accept or establish in regard to the distance of a vessel than that she must be within such a distance that orders may be readily and easily given and understood, so as to be acted upon, and so that she can obey them by coming alongside or rendering assistance in any other way without delay; or, in other words, she must be, wherever the circumstances will permit, within a reasonable hailing distance. When she has once reached such a point, a changing of her position by standing off and on, although she might be further from the wreck than another vessel just arriving, will not forfeit her right.

The question, then, in this case is, had the *Mary Matilda* arrived at or within a reasonable hailing distance of the bark before the *Wallace Blackford*? The testimony of Capt. Blake that before he came to anchor he saw her standing away from the bark; of Mr. Fagan, also, that she was standing off, and was about as far off as the *Blackford*; of Albury that she was within hailing distance, luffed up when he sent a boat for the other men, and with orders for her to come alongside; of Parks, in charge, that when word was brought to come up on the port side he didn't anchor, but stood off to come round,—unexplained, show that the *Mary Matilda* was standing off from the bark when the *Blackford* was coming up; that she had been within hailing distance, and had received orders to come alongside, and therefore had not come to anchor; that she had arrived at the bark, under a reasonable construction of that term, before the *Wallace Blackford*, and the petitioner has not sustained the allegations of his petition to the contrary, namely, that the *Wallace Blackford* arrived at the bark before the *Mary Matilda*. The burden of proof having been upon him to show this, and he having failed, the petition must be dismissed; each party having his own costs.

Case No. 32.

ACOSTA et al. v. The HALCYON
District Court, S. D. Florida. Sept. 1877.
SALVAGE—AGENCY.

[A salvor agent for the property cannot be allowed salvage, but, where he acts bona fide, may have agent's commission.]

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[In admiralty. Libel by Manuel Acosta and others against the bark *Halcyon* and cargo for salvage. Decree for libelants.]

LOCKE, District Judge. This bark, laden with a miscellaneous cargo, bound from New York to New Orleans, went ashore on Looe Key, an exposed and dangerous shoal, about twenty miles from this port, on the morning of the seventeenth of July last, at about high water. She was boarded in the morning by libellant Acosta in the pilot boat *Telegram*, although at the time of his boarding her both Acosta and the master say that they considered the bark in great danger, and, as Acosta says, in his testimony, "both came to the conclusion that she would bilge." Acosta tendered the services of his vessel and crew to the master for him to come to Key West to make arrangements about storing his cargo, if any might be saved. This the master accepted, and left libellant Acosta to do what he could towards saving the property. Other vessels arrived in a short time, when the libellants commenced discharging cargo, consisting of bundles of cotton ties, and continued so doing until they had taken out some over three thousand, weighing in the aggregate about eighty six tons. When the tide was up that night, at about twelve or one o'clock, a heavy anchor having been carried out during the day, the bark was hove off, anchored, and the next day brought into this port. The reef upon which the vessel lay was of sharp coral rock, and was one of the most exposed and dangerous ones on the coast. While ashore she labored and ground on the bottom until the forward part of the keel had been nearly cut away, and the garboard streak and several planks badly worn and chafed. The salvors were engaged in the service of discharging and floating the ship about twelve hours, and worked with force and energy and all the skill and ability which the case demanded, or gave an opportunity to exhibit. The weather was good during the time, so calm in fact that the *Telegram* in which the master came to Key West, although having a fair wind, was from twelve o'clock noon, until after sunset in coming the distance, about twenty miles; although there was quite a swell of the sea coming in which increased her risk somewhat. The work was successfully accomplished, but there are some matters which cannot consistently be passed without comment. The vessel struck at about half-past twelve in the morning, at high water. About six the master sounded, and found fourteen feet of water, she drawing sixteen and a half when afloat. At half past twelve the next morning she was hove off.

These facts, taken together, show conclusively that, instead of its being a falling tide or even full tide when the master wrecker first boarded her, it lacked some over two hours of high water. Under these

circumstances it would be presumed that an active energetic salvor, with a sufficient vessel at his command and others near at hand, if anxious to rescue the property from the peril it was in and float the vessel from the bottom, would have endeavored to get out an anchor at once, and, if possible, float the vessel at the first high tide. But in this case it was assumed the vessel would bilge, and the procuring a safe place for storing the cargo was deemed of more importance than prompt action in her behalf. It is alleged that the vessel was in imminent peril, and that she was so considered by both master and master wrecker; as Acosta says, "He (referring to the master) and I both came to the conclusion that she would bilge." What may have been the opinion of a person at a particular time is better indicated by his conduct and acts at that time than by subsequent declarations or explanations.

I am not here to criticize the conduct of the master, only so far as it is influenced by or connected with that of the salvors; but is it to be presumed that a master whose ship was in such peril as this ship is alleged to have been in would abandon her, taking with him the only vessel present of sufficient size to render any assistance, and leave the property entrusted to his charge in the care of a stranger, while he came to a port to secure a place to store his cargo, when by enquiry he could have ascertained that ample storage could easily be secured at a moment's notice, should the result demand it? Judging therefore, from the conduct of both master and master wrecker, we must conclude that the danger to the property was by no means considered so immediate as has been represented. Upon a careful examination of the testimony, this coming to Key West may be partially, if not satisfactorily explained. Capt. Acosta says, "The master didn't ask to come down." "I asked him what would be done with the cargo, and told him about the merchants at Key West." Again, "The master did not ask for the Telegram to come to Key West." In view of this testimony it can but be concluded that he, although the master wrecker, was more anxious to secure a consignment for his owner than to rescue the property from the distress in which it was placed; and to this end was willing to sacrifice the services of a large and efficient vessel, and permit the property to remain in its perilous condition. Under these circumstances, had the vessel bilged before the high tide at which she was floated, it would have been considered such a neglect of prompt and energetic action as would have forfeited any salvage earned by the parties guilty of such laches.

The favorable circumstances of the case have, however, rendered such a severe decision unnecessary; but the facts certainly detract from the merits of the service. With this exception the service was well

performed, and the vessel relieved from a considerable degree of danger. The master could not have relieved her without making a jettison of certainly as much, and probably considerably more cargo than was taken out by the salvors, and incurring the risk of longer delay which might have caused her loss. The vessel was so damaged that she has been discharged, repaired, and the cargo subjected to large expenses in the shape of labor, and wharfage and storage, which diminish the fund from which the salvage is to be paid, and will therefore diminish any salvage in that proportion. Were there no other questions connected with this case, a salvage of fifteen per cent. would under the circumstances not be unreasonable. But other matters demand our attention. F. J. Moreno, Esq., the resident agent of underwriters, has by petition, under the fifth rule of practice of this court, come in as *amicus curiae*, and alleges that the master of this bark has consigned his vessel and cargo to Messrs. A. F. & C. Tift, as agent, to assist him in transacting his business, they at the same time being interested in the salvage, and libellants of said vessel and cargo, and therefore prays that any salvage they might otherwise earn be refused them or diminished.

In answer to this petition it is not denied that the facts are as stated; but it is urged that a forfeiture of salvage should not follow unless fraud is alleged and proven. These pleadings, the petition and answer, are somewhat informal, the parties having appeared and submitted the matter without argument, in person, all members of the bar being otherwise engaged or unable to appear in the suit, but they are sufficient to bring the question before the court. No issue is joined, but the answer must be taken in the nature of a demurrer, or exception, to the petition. The records of the court show that A. F. & C. Tift were the owners of the *Cora*, *Telegram*, and *Elida*, and they do not deny the fact of agency.

The question is, whether a party interested in the salvage can legally become consignee of vessel and cargo, and thereby agent of the owners; and if he accepts such trust, what effect such accepting will have upon his claim as salvor against the property. Perhaps a brief expression of my opinion upon this question would be sufficient; but it having been undecided heretofore in this court, and as far as I can find, elsewhere, it demands an examination of the character of the question and the legal principles which determine it. When a master whose vessel has been assisted on this coast arrives in port, he is generally a stranger to the people, and, in some degree, ignorant of the new duties and responsibilities that devolve upon him through the disaster. He needs both advice and assistance. His ship is attached upon a claim of salvage, and he requires the help of

some one to enable him to properly protect the property. He is unacquainted with the proctors of the court where he is called upon to answer, and needs information to guide him in his selection. Under these circumstances he is authorized to employ some person to aid him by his advice and give him general assistance. This person so employed is not a consignee within the general meaning of the word, but an agent for general purposes for the time being; not an agent of the master only, but of the owners of the property, whoever and wherever they may be; and the relations between him and the property and its owners are influenced and controlled by the general principles of law upon the subject of agency. What these principles are has been so fully declared that no mistake can be made. Judge Marvin in an elaborate opinion upon the question of agents, their compensation, &c., in the cases of *The Marathon*, [Case No. 9,058,] and *Scotsman*, [Id. 12,515,] in this court, reviewed the subject so fully as to assist materially in deciding this point. He says: "To entitle a person to act as agent, he must have no interest in conflict with the interest of the owners of the property." "That the agent must have no interest hostile to the interests of his principal is a general principle of law. This rule is founded upon the plain and obvious consideration that the principal bargains, in the employment, for the exercise of the disinterested skill, diligence, and zeal of the agent, for his exclusive benefit." Story, Ag. §§ 210-217. "The same person cannot be agent of two contracting parties in the same transaction where their interests are in conflict, still less can he act as such where he has a personal interest in the matter adverse to that of one of the parties." *Florance v. Adams*, 2 Rob. (La.) 556. After citing numerous authorities, Judge Marvin says in the opinion referred to: "The law in my opinion is clear that a person entitled to a share or portion in the salvage has an interest in conflict with the interest of the owners of the property which legally disqualifies him from acting as the master's agent. If he conceal this interest from the master, such concealment the law pronounces to be a fraud; if he make it known, then the master, in the language of the supreme court, "knowingly betrays the interests of his owners." However efficient, impartial, or honest the agent may be, the law steps in and prohibits his assuming a position where his duty and interest are in conflict. Chancellor Kent says: "An agent, acting as such, cannot take upon himself an incompatible duty. He cannot have an adverse interest or employment." 2 Kent, Comm. 618; 4 Kent, Comm. 438. It is true that, in the opinion of Judge Marvin before cited, the only remedy for the wrong stated is that "a person thus having an interest in the salvage cannot earn com-

missions." But that opinion was entirely upon the question of costs, expenses, and commissions. The question of salvage was not before him. Neither of the cases under his consideration were cases of this character, and his decision cannot be accepted therefore as conclusive upon the point under examination. But it cannot be doubted what would have been his decision had the question arisen, as is plainly intimated by such positive language as the following. He says: "If he conceal his interests the law presumes a fraud, and if he makes it known the master knowingly betrays the interests of his owners." And in his work on *Wrecks and Salvage* (section 94) he adds to the statement that "he can earn no commissions," and, if a salvor, "he may forfeit his salvage." In the well known case of *Houseman v. The North Carolina*, 15 Pet. [40 U. S.] 40, the only fraud charged appeared to have been presumed from the fact that *Houseman*, while interested in the salvage, became an agent.

The master had a right to settle his salvage by arbitration or agreement if he considered time and expense could be saved thereby, if he did it fairly and honestly; and the question of amount of salvage, when submitted to arbitration, did not necessarily establish or even raise the presumption of fraud, but was a question of judgment, and would at the most but entail a diminution. The decision of the court plainly declares that placing the business of assisting in defending a claim for salvage in the hands of a party himself interested in "pushing it to the highest possible amount" was a fraud, and tainted the entire proceeds of the service. Judging from the language of the court in that case, there is no question in my mind what its decision would have been had the question of *Houseman's* interests and his peculiar relation with the property been before it unconnected with other suspicious circumstances. It is nowhere alleged that *Houseman* did anything improper in the matter further than accepting the agency. It is not alleged that he attempted or endeavored in any way to prevent the master's coming to Key West, or that he used any influence either in naming the arbitrators or in inducing a high rate of salvage. The question seems to have turned entirely on the presumption of fraud on account of the position occupied by him, and that the court deemed sufficient. It is not alleged that the arbitrators were either interested in the result or dishonest, nor could any court not knowing the testimony before them, or the manner in which the case was presented, declare that they had not acted in good faith.

The question of amount of salvage to be given under different circumstances is a delicate and difficult one; varying much with the condition of the case, and influenced greatly oftentimes by what might appear

under other circumstances to be trivial matters. Very seldom is the value of the cargo taken out of a vessel a limit to a salvage compensation. A slight difference in describing the course or force of the wind, or in giving the depth of water, the character of the bottom, or the time or height of the tide, the direction of a current, or the position of an anchor, make a vessel appear to have been exposed to great danger or in comparative safety; or show that the conduct of the salvors was praiseworthy and entitled to liberal reward, or that it was improper, fraudulent, and liable to censure, instead of compensation. Under a false or misstated showing of a case, an able and honest court, as well as a board of arbitrators, may be misled, and decree an exorbitant and unjust salvage. Upon this account, if on no other, the law does, and should demand and require, not only apparent good faith, but disinterested zeal, in all parties pretending in any way to represent the absent owners of the property.

This of all classes of agency should be treated with the strictest construction of law, and the positive prohibitions against any one's occupying inconsistent, incompatible, and illegal positions should be enforced. Agents of this class are appointed *ex necessitate rei*. The owners of the property are forced by disaster into entrusting their interests to strangers whom they are unable to meet personally, whose characters they are unacquainted with, and of whose peculiar connections or relations with the property through the same disaster they are uninformed and unaware. Certainly no proctor of this or any other court would be permitted to defend a suit in which he had a direct interest as plaintiff or libellant. And if such a position was accepted and acted upon unknown to the court, would any court, when informed of his peculiar relations to the property, give judgment in his favor as against the parties he had been representing and pretending to defend in their absence? But the relation of an agent or consignee in such a case as this is fully as confidential as that of an attorney or proctor, and if there is any difference, he stands in a more delicate position. He is the master's adviser in all things, his opinions are constantly sought and listened to, and his opportunities for influence far greater than those of a proctor or attorney. The master is under the advice and influence of the agent from the time of his arrival in port; while frequently the proctor is not seen or consulted for weeks, and then but perhaps for a short time, on special occasions and technical points. In reality the proctor is recommended and employed by the agent, and therefore is more or less directly under his influence and control.

The ease with which a plausible, agreeable and affable agent may, if so disposed, imperceptibly and without fear of detection,

through constant association, satisfy a master, that the rescue of his vessel was most meritorious, that the danger in which he was placed was imminent, and that the peril was most certainly impending, so that he can listen to a highly colored and exaggerated statement of the facts of the case without perceiving their unfair character, or even upon the witness stand himself, give unintentionally a coloring to the circumstances of the disaster prejudicial to the interests of the property he represents, plainly declares that justice should interpose and protect property and absent owners from the influence of those whose interests are opposed to them. The education, life, and experience of a mariner fit him rather to combat successfully the danger of the elements than to resist the subtle influence of designing associates. The *esprit de localite*, the public sentiment of this community, is so strong in behalf of the salvors as against wrecked property, that the master stands especially in need of a disinterested agent. The fact that the property, from the commencement of the suit, is within the legal custody and control of the court, can in no way change or affect the confidential relations existing between the master and his agent, or the duties due from the agent to the owners of the property. The court never assumes to instruct or advise the master about defending a salvage suit, or interfere in those duties which belong particularly to the agent. The question is not whether in this case, the special consignee has not acted in good faith towards the property, and even sacrificed his own interests for its benefits and its behalf. Such questions the law does not permit to be raised, but at once declares positively against accepting the position he occupies. No matter how well I may be satisfied of the personal integrity of the parties, salvors and agents in this case, the position in which they have placed themselves compels me to accept the presumption of law under which they rest and the positive prohibition enforced by its principles. It is unnecessary to consider the matter further to decide that the principle of the law is too well established and determined to admit a doubt that a person having an interest in the salvage is legally disqualified from accepting an agency, and not only disqualified, but prohibited; and the law presumes bad faith towards the owners of the property from one accepting and holding such relation.

A positive presumption of the law admits no contradiction, and no application of equitable doctrine is requisite to establish it. In view of such a legal principle, what is the remedy? Wherever the question of commissions only has been raised, the courts have unhesitatingly declared that no commissions can be earned; because ordinarily commissions constitute the entire gain, profit or compensation of an agent. Does not the law go further and declare that all gain, profit

or compensation, in any shape or form, earned by one occupying prohibited relations to property, shall be forfeited? That one can take nothing by his own wrong? If the prayer were that all compensation to the agent in the shape of wharfage and storage as well as commissions should be refused, it would demand serious attention. The remedy must be co-equal with the wrong, and as nearly as possible sufficient to prevent it, or the law ceases to be remedial, and becomes a dead letter. The question now is how shall such a relation as is alleged and not denied, affect the question of salvage? Is the cutting off commissions a sufficient remedy, and would such a rule suffice to enforce the legal prohibition? The question of salvage is the great question pending, and on account of which the inconsistent and incompatible relations exist. A dishonest agent might willingly sacrifice what commissions might be coming to him, or indeed in many cases any compensation whatever for the privilege of influencing the question of salvage. Rules of law are established to prevent and control the acts of men interested as it were against themselves; and if they ever affect strictly honest and upright men, it is because such honest men are in positions which could be taken advantage of by dishonest ones to the injury of others without fear of detection. If the rule of presumption of fraud touches any man who would not be guilty thereof, it is only because he occupies a relation towards others in which one of less integrity might perpetrate fraud with impunity, or could be detected only with difficulty. Where there is a positive prohibition against a person's occupying inconsistent and incompatible relations, the law presumes bad faith in one who accepts such relations, and it is unnecessary to allege or prove such bad faith to subject him to legal consequences. Bad faith is only presumed where one has placed himself in a position where misconduct is most difficult to prove.

Salvage is a gratuity beyond a quantum meruit, above a compensation pro opere et labore, a tax upon commerce for the benefit of commerce, to encourage meritorious action, and requires and demands entire good faith towards the property during the entire connection with it. The law exacts "entire good faith" in every one connected with the service, and declares that a salvor, in order to entitle himself to a compensation, must come into court with clean hands. No one violating a well-established principle or rule of law can, in justice, then, demand its interposition to award him a gratuity for honest and meritorious service. "The compensation to be awarded presupposes entire good faith, meritorious service, complete restoration, and incorruptible vigilance on the part of the salvors." Salvage is declared to be a gratuity given in the interest of commerce. May it not be reasonably

declared that it would be rather for the interest of commerce that salvage should be constantly denied or refused, than that property should be placed for the purposes of defense of such a claim in the hands of those whose interest it is to increase the salvage to the highest amount? The amount of interest in the salvage of one at the same time acting as agent is the true measure of the conflict between interest and duty. By abandoning a claim for salvage at the acceptance of a consignment, no inconsistent relations are assumed; but no abandonment of the entire compensation to be earned by an agent could qualify a salvor for such position. This, being the true measure of the conflict between interest and duty, should indicate the remedy.

In the case of *The Prairie Bird*, [Case No. 11,365,] the question of the influence of a salvor's interest upon agency commissions was raised and briefly considered. The question of forfeiture or refusal of salvage was not raised, and although briefly considered, was not so ruled upon as to establish a precedent. The facts and circumstances in that case differed so materially from those in this that there could be no similarity of questions raised. In that case the consignment was made and the agency established before any salvage service was rendered. The agents used what means were within their power to save the property entrusted to their keeping, and thereby became entitled to a compensation. Also in *The City of Houston*, [Id. 2,755,] the permanent agents sent their vessels to assist the property of their principals, which was in distress from a disaster subsequent to the establishment of their agency. In neither of these cases was there any impediment in the way at the time of accepting the agency which either disqualified the party from accepting it or argued bad faith in so doing. In each of those cases the agents became salvors, if so it might be considered, or earned a meritorious agency at least, but in this case the salvors became agents. In an opinion in that case the following language was used: "There seem to be three classes of connections or relations existing between property and salvors acting as agents that may more or less affect the service rendered. First. Where the relations of principal and agent antedated the disaster, and related entirely to different matters than the saving of property, or assisting in defending a salvage cause. Second. Where the salvor has been appointed as an agent for the special purpose of saving property. And, third, where the relation of agent is accepted subsequent to the salvage service, and a part of the duties of the agency consists in advising and assisting in defending the suit.

There is no inconsistency in an agent assisting the property of his principal when in distress; but there is a palpable and de-

clared inconsistency in a party who has a salvage claim against the property becoming an agent when a part of his duty as such agent is to assist in defending the property against that very claim. There is an impropriety of conduct which, not being considered gross or willful, does not demand an entire forfeiture of salvage, but still may reduce the compensation to a quantum meruit.

A compensation pro opere et labore or quantum meruit, being determined by fixed and established limits, and not liable to vary with exaggerated statements of the case or interested influence, may frequently be given where a salvage reward would be unquestionably refused. This being the first time to my knowledge that the settlement of this question has been directly required, and it not having been alleged or shown that the conduct of the parties in this case has been in absence of the presumption of law dishonest or unfair, I shall consider this as one of that class of cases which permits a quantum meruit, and while I cannot award what can be considered a salvage compensation, will decree what may be considered a liberal compensation for the actual services rendered.

I consider that the prohibition against a person interested in a claim for salvage, accepting and occupying at the same time the position of agent, is positive, and its enforcement mandatory upon me; that one voluntarily accepting and acting in that forbidden position does it in opposition to the declared principle of the law, and forfeits any rights that he might otherwise have against the property; that if he continues to act as agent, and claim any portion of the compensation resulting from such occupation, he may reasonably be presumed to have voluntarily abandoned his rights in a claim for salvage. The law presumes bad faith towards property by his assuming to do for it that which his interests prevent him from doing fully, and such presumption of bad faith brings with it its legal consequences. A salvor accepting such relations to the property can receive nothing more than a quantum meruit for any services rendered, under the most liberal construction of his rights, and a more strict one might entirely forfeit any claim. In this case I consider five hundred (\$500) dollars a liberal compensation to be decreed for the services of the "Telegram," "Cora," and "Elida." Decree will follow accordingly. Although I shall at no time shrink from enforcing the principles of the law as understood by me, let the effect be what it may, yet it is much more satisfactory to feel that such enforcement works neither hardship nor injustice to those in interest. In this case I consider that from the combined salvage and agent's service Messrs. A. F. & C. Tift are amply and fully compensated for all services rendered the vessel, although

salvage has been refused. This refusal of a salvage compensation to the owners of the "Telegram," "Cora," and "Elida" can in no way affect the other salvors either by increasing the other vessels' portions or diminishing the shares of the crews of those vessels, as no bad faith can be presumed to attach to the crew on account of the conduct of their owners.

There are still other questions which arise in the consideration of this question, among which is that of agents' commissions in the present condition of this case. Having decided, as I have, that a party accepting an agency under the circumstances is presumed to have abandoned those antagonistic interests in his claim for salvage which disqualify him from acting in such capacity, and, if not, has forfeited any rights he has under such claim, and being satisfied that the question of salvage is the true measure of the conflict between interest and duty, which, if once disposed of, leaves no objection to an agent acting and receiving full compensation for such services, I will allow the usual agency commissions. There may appear reasons for refusing commissions in this case, as all of the time he has been acting as agent he has at the same time been prosecuting a suit against the property in his charge, and has not been able as such agent to do his whole duty, but when it is once determined that under such circumstances no salvage can be earned the interest of the agent ceases at once.

In this case, although the question has not been raised, argued or considered, so as to give any decision herein the value of a precedent, the salvage having been refused, and the interest of the agent thereby disposed of, full commissions will be approved and allowed. The circumstances of a case might be such, and the relations of agent and salvor so different, as in the case of *The Prairie Bird* and *The City of Houston*, where compensation in the character of salvage is given, that in justice commissions should be denied; where there is a bona fide interest of the agent that conflicts with his duty, and yet there has been no bad faith or presumption of it in accepting the relations, and the interest is determined and decreed in the shape or character of salvage, no commissions can be earned, but in cases of this class I do not consider the law requires the enforcement of such a rule. Wherever a vessel is repaired in this port, the carpenters' bills, &c., form a proportionately large amount of the expenses upon which the consignee is entitled to his commissions; but in order for him to earn this it is necessary that he should have such a supervising interest in the contracting of the bills and keeping the time of the employees as would enable him of his own knowledge to certify to the correctness of the accounts and the necessity for the charges. It is not assumed but what a master carpenter may be as

honest, trustworthy and capable as the consignee, but the consignee is the party to whom the court or absent owners look to prove and explain all such charges as well as others; they assume the responsibilities, receive the commissions, and will be expected to be able to furnish time books and substantiate any charges made for repairs, as well as in other division of expenditures.

ACTIEN GESELLSCHAFT APOLLINARIS
BRUNNEN v. SOMBORN.

[See Apollinaris Brunnen v. Somborn, Case No. 496.]

Case No. 33.

The ACTIVE.

[Deady, 165.]¹

District Court, D. Oregon. March 12, 1866.

CUSTOMS DUTIES—FORFEITURES—LIBEL—EXCEPTIONS.

1. In a suit for forfeiture of a vessel under section 50 of the collection act (1 Stat. 665), it is not necessary to allege or prove that the goods unladen were of foreign growth or manufacture, but simply that they were brought in such vessel from a foreign port or place.

2. An allegation in a libel that goods were unladen from a vessel within the collection district of Oregon, is equivalent to an allegation that they were unladen within the United States; it being judicially known that such district is a part of the territory and within the limits of the United States.

3. In such suit, an allegation that the goods unladen were worth \$5,000, without saying at what place, port or district, is not sufficient; but it is not necessary to allege that the unloading was at a port; any place or district within the United States is sufficient.

4. An exception, that a libel does not state facts sufficient to constitute a cause of suit or forfeiture is too general; it should state in what particular the facts are insufficient.

5. Section 50 of the act aforesaid does not apply to an unloading of goods brought from a foreign port, within the limits of the United States, but unladen before the vessel has arrived at any port or place within a collection district; such a case falls within section 27 of said act.

[In admiralty. Libel to enforce forfeiture of vessel. Dismissed.]

Joseph N. Dolph, for libellant.
David Logan, for claimant.

DEADY, District Judge. This suit is brought against the steamship Active, to enforce an alleged forfeiture thereof for a violation of section 50 of the act of March 2, 1799 (1 Stat. 665). The libel was filed October 26, 1865, and alleges that the vessel was seized by the collector of customs on that day at Portland, for the cause following: That on or about October 1, aforesaid,

¹[Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

the Active cleared from the foreign port of Victoria for the port of Portland, in the district of Oregon, "and on said voyage was laden with and imported and brought from the said foreign port of Victoria into the United States, as part of her cargo," goods, etc., of the value at said district of \$5,000; and that after the arrival of the Active on said voyage, so laden as aforesaid, within the limits of the collection district of Oregon, to wit: the Columbia river, below the port of Astoria, on October 3, aforesaid, a part of the cargo of said vessel, of the value of \$5,000, "was unladen and delivered out of said steamship before she had come to the proper place to discharge her cargo, or any part thereof," or had been authorized to unlade the same by a permit from the proper officer. On December 4, the claimant—the California Steam Navigation Company—filed exceptions to the libel for insufficiency, and upon the questions raised upon these, the case has been argued and submitted. The exceptions to the libel are five in number. All but the first one are merely technical, being founded upon the alleged insufficiency of the language of the libel to completely and absolutely express, what is apparently thereby intended.

The second exception is to the effect that the libel does not allege that the goods, etc., "were brought from any foreign port or place." The language of section 50 of the collection act, is "goods, etc., brought in any ship or vessel, from any foreign port or place." The language of the libel is—"On said voyage was laden with and imported and brought from said foreign port of Victoria," etc. Omit the words "laden with and imported," and this allegation of the libel is not only in effect the same as the language of the statute, but is actually identical with it. The addition of these words does not change the sense or force of the phrase or clause, "brought from said foreign port," but only strengthens and makes it more explicit. It is not necessary to allege that the goods are of foreign growth or manufacture, or that they should be so in fact. It is sufficient if it appears that the vessel brought the goods from a foreign port, and even, whether she first took them on in such port, is, I think, immaterial. The primary objection [object] of this and other sections of the act is to prevent frauds upon the revenue, rather than to punish persons for committing them; and to accomplish this, many acts, indifferent in themselves, but which, if permitted, might be made the means of committing, or facilitating the commission of such frauds, are prohibited under penalties. A vessel arriving in the United States from a foreign port, may have dutiable goods on board, and, therefore, she is not allowed to unlade any part of her cargo, without a permit from the proper officer of the customs. This exception is disallowed.

The third exception makes the objection,

that the libel does not allege that the "goods, etc., were unladen or delivered within the United States." Admitting that the libel does not contain this specific allegation, as it properly should, it contains its legal equivalent. It is alleged that the illegal unloading and delivery took place "within the limits of the collection district of Oregon, on the Columbia river, below the port of Astoria." Of whatever is established by law the court takes judicial notice, and the same need not be shown by either pleading or proof. The "collection district of Oregon" is established by act of congress, and includes the state of Oregon, which is a part of the territory, and within the limits of the United States. The allegation of the libel is therefore equivalent to a specific averment, that the unloading and delivery took place within the limits of the United States. This exception is disallowed.

The fourth exception is, that the libel does not allege that the "goods, etc., were of the value of \$400 at the port or district where landed." This exception is based upon the provision in section 50, which forfeits the vessel in case the goods unladen are of the value of \$400, according to the highest market price of the same, "at the port or district where landed." The libel does allege that the goods brought from the foreign port on the voyage in question, were of the value of \$5,000 "at the district of Oregon," while the value of the goods illegally unladen in the district, is alleged to be worth \$5,000, but without stating at what port, place or district. These allegations concerning the value of the goods do not directly, nor by necessary implication, amount to an averment as to the value of the goods unladen "at the port or district where landed." Admitting that the goods brought from the foreign port were of the value alleged, at the district of Oregon, it does not follow that the goods unladen were of such value at such district, because it is not alleged that all the goods brought into the district were unladen in it, nor can it be so presumed. The allegation, then, as to the value of the goods unladen is not helped by the one as to the goods brought, and must stand by itself; and standing alone it states the value generally and at no particular place. It may be said, however, that this general averment of value includes the particular one, that the goods unladen were of the value of \$400 at the district of Oregon, and is therefore sufficient to admit the proof of the fact on the trial, or support a decree of condemnation if uncontroverted by the claimant. But this conclusion seems to be open to the objection, that of two constructions, the least natural and most favorable one to the pleader is adopted, or that an allegation which only argumentatively or by inference states the fact as to the value of the goods unladen at the port or district where unladen, is held to be equivalent to a direct and ex-

PLICIT averment to that effect. With these suggestions this exception is passed over.

The fifth exception is, that the libel does not allege that the "goods, etc., were landed at any port or district within the United States." That the libel does sufficiently state that the goods were landed at a district within the United States, is shown in the opinion on the third exception. But admitting that it appeared from the libel that the Active arrived within the limits of the United States, counsel for the claimant maintains that the allegation concerning the unloading of the goods does not show a delivery in contemplation of law from the vessel. The language of the act is—"shall be unladen or delivered"—and the allegation of the libel is equally explicit and comprehensive—"were unladen and delivered out of said steamship." Nothing plainer or more certain than this is necessary. It is true that the libel does not allege that the goods were unladen at any port within the United States or elsewhere. But it is not necessary that it should. It is sufficient if it appear that the unloading was at any place or district within the United States.

The first exception is the mere general objection—"that said libel does not set forth facts sufficient to constitute a cause of action or forfeiture." As a matter of form this exception is not well taken. It is a general objection, like a general demurrer at law, that the facts stated in the libel are not sufficient to cause a forfeiture. The libellant is not informed by the exception in what the insufficiency consists—what fact is lacking—and must wait until the hearing, to learn from the argument what the particular objection is, without any opportunity in the meantime to confess it, if well taken, or to meet it on the hearing by argument and authority. But for the purposes of this case, the exception may be considered sufficiently explicit. No objection has been made to it by the libellant. Besides, I remember that when this cause was before me for some purpose, I intimated to counsel for the claimant that this form of exception would be deemed sufficient. Upon this suggestion, hurriedly and inconsiderately made, the exception was doubtless drawn. Since then I have examined the elementary books on the subject, and I find the rule to be that an exception must state with reasonable certainty, the particular fact, matter, thing or omission relied on, as the case may be. With this rule reason and convenience concur. Upon the argument of this exception, counsel for the claimant made the point, that the unloading described in the libel falls within section 27 of the collection act, (1 Stat. 648,) and not within section 50 thereof. Section 27 provides for a case where goods are unladen after the vessel has arrived within the limits of a collection district of the United States, or within four leagues of the coast thereof, and before she shall

come to the proper place for the discharge of her cargo or some portion thereof, and be there duly authorized by the proper officers of the customs to unlade the same. The punishment prescribed for a violation of this section is a forfeiture of the goods so unladen, and a penalty of \$1,000 against the master and the mate of the vessel; but the vessel itself is not forfeited.

The facts stated in the libel bring the case exactly within the terms of section 27; and the same may be said as to section 50, which provides, "That no goods, etc., brought in any ship or vessel from any foreign port or place, shall be unladen or delivered from such ship or vessel, within the United States, but in open day, * * * except by special license, * * * nor at any time without a permit * * * for such unloading or delivery." The punishment prescribed for a violation of this section includes the forfeiture of the vessel "when the goods at the port or district where landed are of the value of \$400." Did congress intend that section 50 should be cumulative, or only to apply to the subject after the vessel had arrived at a port? Ought the two sections be construed so that the first one should apply exclusively to all illegal unloadings prior to the vessel's arriving at a port, and the second one exclusively thereafter. The case turns upon the determination of this question. If section 50 is to have effect according to the natural meaning of its terms, then it overlaps section 27, and covers all cases of illegal unloading within the United States, and therefore the Active would be subject to forfeiture. But, if this section is to be restrained by construction, to an unloading which takes place after a vessel arrives at some port, upon the presumption that congress did not intend it to be cumulative and thus impose additional and different punishments for the same offence, then this case comes within section 27 alone, and the Active is not subject to forfeiture for the illegal unloading complained of.

Of the authorities cited on the argument only one is directly in point, and that is *The Hunter*, [Case No. 15,428.] In that case the libel alleged that the vessel "being bound from a foreign port to the United States, after her arrival within the limits of the United States, and before she had come to the proper place for the discharge of her cargo or any portion thereof, and before she was authorized to do so by the proper officer of the customs, did unlade six puncheons of distilled spirits, which were landed at a place within the jurisdiction of the court, without a permit," etc. In the district court, the facts being found to be as alleged, sentence of condemnation passed against the vessel. On appeal to the circuit court the decree was reversed, on the ground that the case fell within section 27, and that while it was also within the letter of section 50, it did not come within the purpose or inten-

tion of such section. Mr. Justice Washington delivered the opinion of the court, and in the course of it he says: "Does section 50 meet the case laid in the libel, or refer to a vessel after her arrival at her port of discharge? The words are certainly general and broad enough, because it is stated that *The Hunter* had arrived within the United States. But ought not the law to be so restrained in its construction as to apply only to vessels in port? If it be not restrained, then there are two sections of the same law, on the same subject, giving double penalties for the same offence, viz: \$1,000 under section 27, and \$400 under section 50. The legislature may certainly do this if they please, but it is very improbable that such should be their intention. The law is then open to construction. The whole of this law previous to section 30, relates to vessels before their arrival in port, and it is clear that section 27 applies to them only in that situation. Section 30 considers them as arrived, and from that to section 49, the act regulates the conduct of the master, and the officers of the government, as to the steps preliminary to the last act to be done, viz: the permit to land the cargo. Section 49 states that the duties being paid or secured, the proper officer is authorized to grant a permit to land the cargo, which had before been reported or entered. Immediately after, and in its proper place, follows section 50, inflicting a penalty on the master and a forfeiture of the goods unladed without such permit or special license. Now, this permit cannot be granted unless a vessel has arrived at her port, nor until the previous steps required by law have been taken. * * * Section 50, then, which constitutes the crime of landing without a permit, must necessarily be confined to a landing after the vessel has reached her port of discharge, because to obtain a permit she must be in port." The case of *The Hunter* [Case No. 15,428] is the only direct adjudication of this question that I am aware of, and the opinion of the court contains all that can be urged in support of the defence of the claimant in this case.

Some expressions in the opinion of Mr. Justice Story in *The Industry*, [Case No. 7,028,] decided in 1812,—six years after *The Hunter*,—are in conflict with the construction given to section 50 in that case. The case was this—*The Industry* being bound from Havana to New York, put in to the port of Edgartown, in Martha's Vineyard, in the district of Mass. While lying there, goods exceeding \$400 in value were unladen in the night from the vessel, without a permit, and put on board the brig *Hannah*, then lying at the same port and bound to Boston. *The Industry* was seized and libeled as forfeited under section 50. In the district court a decree of condemnation passed, from which an appeal was taken to the circuit court where the sentence of

condemnation was affirmed. The material difference in the facts in the case of *The Industry* and the one before the court is this: In the latter the illegal unloading took place after the vessel had come within the limits of the United States, but before she had arrived at any port therein, while in the former such unloading took place after the arrival of the vessel at a port within the United States, although not her port of destination and discharge. The question before the court was, should section 50 be so construed as to apply to an unloading at any port within the United States, or only at such port as might appear to be the port of ultimate destination and discharge. The court held that the case was within the terms and purview of section 50—that such section covered all cases of illegal unloading at any port within the United States, whether such port was the port of final destination and discharge or not. On the argument, it appears to have been maintained on behalf of *The Industry*, that the case fell within section 27, and therefore it ought not to be held to come within section 50, because that would be construing the act so as to inflict double and different punishments for the same offence. In noticing this argument, Mr. Justice Story assumes for the sake of the argument, that his conclusion was equivalent to deciding that in some cases at least, sections 27 and 50 were cumulative—applied to the same act—but denies that such conclusion ought not to be maintained for that reason alone. He says: "Nor is it sufficient to authorize a court to extract a case from the express prohibitions of one section of an act that already the same offence is punished by a different penalty in another section. If the wording of both sections clearly embrace the same case, which is to be held nugatory? I know of no principle of law that would enable me to reject either. If, therefore, it should be proved that section 50 might embrace some cases (for clearly it cannot reach all) within the prohibitions of section 27, I am not aware how I would get over the express language. I should be obliged to hold the forfeitures cumulative in such cases, unless the legislature had enabled me, by direct or constructive exceptions, to escape from such a conclusion." But how far, if at all, these sections are cumulative, the court did not expressly decide. The decision of the case turned rather upon the question whether the word "port" in section 50 should be construed to include any port within the United States at which an illegal unloading might take place, although the same was not the port of final destination or discharge. The court in *The Industry* not only maintains what the court in *The Hunter* admits, that the legislature may impose cumulative penalties upon the same act or offense, but goes farther, and, as I think, correctly, and asserts that a court is not authorized to pre-

sume that cumulative penalties were not intended by the legislature against the express words of the statute to that effect.

If, upon a consideration of the act, it satisfactorily appeared that both these sections necessarily applied to an illegal unloading within the United States, before arriving at the port of discharge and obtaining a permit, as in this case, it would be the duty of the court to enforce the law as it found it, without seeking to lengthen or shorten it by an arbitrary construction, founded upon fanciful conjectures as to what the legislature may have intended, or reasons of public policy or ideas of abstract justice. As has been shown, section 50, by its terms, expressly includes this case, which is also provided for in section 27, and the act contains no "direct exception," limiting or qualifying the force or effect of these terms. In the reason of the thing, is there to be found what in the case of *The Industry* the court denominated a "constructive exception" to the apparent intention of congress to make these sections cumulative? The arguments drawn from matters extraneous to the words of the statute, for and against this exception—such as public policy, the object intended to be accomplished, the impropriety of double punishments, and the like are pretty evenly balanced. The object of these and other sections of the act is to prevent frauds upon the revenue. The remedy should be broad enough to meet all cases within the mischief intended to be guarded against. Now, it is manifest, that by fixing a certain point in the voyage—as a port—where the force of section 27 is to absolutely terminate, and that of 50 only to begin, it will sometimes be so difficult to determine under which of these sections an illegal unloading should be punished, that no punishment whatever would be inflicted. When a vessel has reached a port and where she is just without it, as a matter of fact, is not always susceptible of certain proof. *Astoria* is near twelve miles from the bar of the Columbia river, but how far the port extends from the wharf or usual anchorage abreast of the village, is uncertain. Indeed, it may be said that as section 27 first applies to a vessel arriving within the limits of the United States, it does not cease to apply until she is not only in fact in a port, but also at the proper place for the discharge of her cargo, and has a permit so to do. The language of the section appears to be such in effect. But if section 50 does not apply until this point in the progress of the vessel is reached, then there is nothing left for it to apply to, for there is no prohibition against unloading after a permit for that purpose, unless it be in the night season, for which a special license is necessary. If these sections are to be construed as not cumulative, which is to be allowed to operate according to the ordinary

signification of its terms, and which is to be restrained or shortened so as to apply only to the cases not covered by the other?

The only consideration in favor of giving to section 27 the unrestrained operation, is the fact that in the nature of things it first applies to the subject—meeting the vessel as it does four leagues beyond the coast. But by its terms it follows the vessel until she has reached a port of discharge and obtained a permit to land her cargo. After this, as has been shown, there is practically nothing left for section 50 to apply to, and unless section 27 be restrained in some degree, the former is construed out of the statute. It follows that section 27 must be confined to cases of illegal unloading occurring between the shore line and a point four leagues at sea, or that these two sections overlap between such line and the port of discharge, or that section 50 does not apply at all—is excluded by section 27.

The matter standing thus I feel constrained to follow the authority of *The Hunter*, which is the only direct adjudication upon the question within my knowledge. That case was in all respects parallel to this—an illegal unloading within the limits of the United States, and before arrival at any port within such limits; and the court decided that it fell within the provisions of section 27 and not 50. The expressions of opinion in the later cases referred to,—*The Industry*, [Case No. 7,028;] *The Betsey*, [Id. 1,365;] *The Harmony*, [Id. 6,081.]—I think are against the soundness of that decision. But these cases were not similar to this upon the facts, and do not expressly decide the question here involved. Such expressions must be considered as only the dicta of the learned judges, made in the course of argument, and therefore not authoritative and binding precedents.

Decree, that the libel be dismissed; and an order that a certificate of reasonable cause of seizure be allowed. The facts being insufficient to cause a forfeiture according to the decision of the court this order is not granted on account of reasonable cause in fact, but the seizure being within the letter of the act, it is a case wherein a certificate ought to be granted on account of the doubt in the law. *U. S. v. Riddle*, 5 Cranch, [9 U. S.] 311; *The Friendship*, [Case No. 5,125.]

Case No. 34.

The ACTIVE.

[Olcott, 286.]¹

District Court, S. D. New York. March, 1846.

MARITIME LIENS—SUPPLES—WAIVER—PROMISSORY NOTE.

1. The mere giving of a promissory note by the debtor for supplies furnished a ship, is no

satisfaction of the debt, nor is accepting it a waiver of the lien the creditor may have had therefor.

[Cited in *The Bird of Paradise v. Heyneman*, 5 Wall. (72 U. S.) 561; *The Eclipse*, Case No. 4,268; *The Napoleon*, Id. 10,011. Questioned in *Harris v. The Kensington*, Id. 6,122.]

[See *Sutton v. The Albatross*, Case No. 13,645; *Moore v. Newbury*, Id. 9,772.]

2. Nor will the principle be varied, although the credit was given to the agent, or his note taken for the debt, unless it be proved that the principal had settled with the agent, and his rights would thereby be prejudiced.

[Cited in *The Napoleon*, Case No. 10,011.]

3. A ship built in the United States for alien residents abroad, becomes their property without any documentary title. It passes like any other chattel.

4. The right of lien for supplies against a foreign vessel rests on the maritime law, and is not affected by local legislation.

5. The departure of such vessel from the state before her arrest does not bar the lien or remedy upon it in admiralty.

[See note at end of case.]

[In admiralty. Libel to recover for supplies furnished. Decree for libellant.]

A. Nash, for libellant.

H. Nicoll, for claimants.

BETTS, District Judge. This was a suit in rem to recover the sum of \$156.98, for supplies furnished the schooner before her departure from this port. She was built in this city, in the year 1845, for and on account of the claimants, who are allens, resident in South America. She was never documented as an American bottom, and was cleared and went to sea as the property of the claimants. Owing to some disaster, she shortly after returned to this port and was arrested by the libellant on this demand. The libellant, a provision dealer, sold to Rodriguez, the agent of the vessel, and for her use, provisions for her contemplated voyage, and had them stowed on board. He accepted the promissory note of Rodriguez for the amount, \$156.98, and gave a receipt for the note as payment of his bill for beef and pork supplied the Active. The proctor of the libellant produced the note in court, and offered it to the proctor of the claimants to be cancelled, and has left it in court for that purpose. Rodriguez had dealt on his own account with the libellant previously, and was in good credit; but immediately after giving this note, he absconded, and was found to be insolvent.

The mere giving of a promissory note by the debtor for an existing debt is no satisfaction of the debt. [*Hughes v. Wheeler*.] 8 Cow. 77; *The Chusan*, [Case No. 2,717;] *Story*, *Prom. Notes*, §§ 104, 404. Nor is it more so if given by an agent, unless the principal proves he subsequently settled with his agent, and was damaged by allowing

¹[Reported by Edward R. Olcott, Esq.]

the amount of the note as cash paid by him. Story, Ag. § 434. No such evidence is given in this case. Upon these principles it is clear the debt remains valid and subsisting against the principals, notwithstanding the absolute credit given their agent, in this instance, also the ship's husband.

Nor do I conceive that taking a promissory note was a waiver of the lien the libellant originally had on the vessel for those supplies as against the claimants, whatever might be the effect of that act in respect to third parties bona fide acquiring rights or interests in the vessel. Whilst the note remained in circulation, or outstanding, it operated as a suspension of the lien; but on its surrender, or the offer to surrender it, the libellant was remitted to his original privilege, and could proceed in rem against the vessel, unless barred because of her domestic character. The General Smith, 4 Wheat. [17 U. S.] 438; Ramsay v. Allegre, 12 Wheat. [25 U. S.] 611; Peyroux v. Howard, 7 Pet. [32 U. S.] 324; Andrews v. Wall, 3 How. [44 U. S.] 568; The Chusan, [Case No. 2,717.]

It is argued that the schooner being built in this state is necessarily subject to the local law as a domestic vessel, and that she cannot acquire the character of a foreign bottom, until documented conformably to the laws of the United States, or of the domicile of her foreign owners. I apprehend the law is otherwise. The property in a vessel under our laws is acquired and disposed of the same as any other chattel, (3 Kent, Comm. 130,) and there is no evidence that the law of the owners' domicile is different, if that fact could vary the rights and remedies of the parties. To give her the privileges and benefits of our navigation laws, she must be documented pursuant to the provisions of those laws. The absence of such documents does not prove her to be a domestic vessel; on the contrary, it subjects her to be treated as a foreign one under our revenue laws, and, by parity of reason, in all other respects. That she left the state before the demand was preferred against her, does not accordingly bar the rights of the libellant to this remedy in rem in Admiralty, because the Court takes cognizance of the demand under the marine law, and not by force of the State statute.

I shall, therefore, pronounce in favor of the libellant for \$156.98, with interest from November 28, 1845, the date of the note, and his costs to be taxed; the note to be delivered to the claimants, or cancelled at their election.

[NOTE. Waiver of the lien must be by express agreement, otherwise libel in rem can be maintained, on the surrender of the note. The Eclipse, Case No. 4,268; The Nestor, Id. 10,126; The Gate City, Id. 5,267. But not where the note is outstanding, and it does not appear that it has not been negotiated. Ramsay v. Allegre, 12 Wheat. (25 U. S.) 611.]

Case No. 35.

The ACTIVE.

[1 Paine, 247.]¹

Circuit Court, D. Connecticut. April, 1809.²

REGISTRY OF VESSELS—LICENSE—FORFEITURE—EMBARGO.

1. A vessel licensed for the cod-fishery under the 32d section of the act for enrolling and licensing vessels, during the embargo laws took on board a quantity of goods without inspection at a wharf in New London, to transport about five miles to Mystic river, in the same district, but was seized when a mile and a half on her way. *Holden*, that although she had not violated any of the provisions of the embargo laws, she was forfeited for being employed in another trade than that for which she was licensed.

[See note at end of case.]

2. It seems, that no penalty was intended to be inflicted by the 2d section of the additional embargo law of the 25th of April, 1808, [2 Stat. 499,] for loading a vessel without inspection, but that the penalty for leaving the district without a clearance, which could be obtained only on inspection, was thought by the legislature to be alone a sufficient sanction to secure an inspection.

3. It seems, that the penalties there mentioned were intended to apply to the inspecting officers.

[In admiralty. On appeal from district court. Libel to enforce a forfeiture for violation of the act of January 9, 1808, entitled "An act supplementary to the act entitled 'An act laying an embargo on all ships and vessels in the ports and harbors of the United States,'" (2 Stat. 453;) and also for violating section 32 of the act of February 18, 1793, for enrolling and licensing vessels, (1 Stat. 316.) The district court condemned both vessel and cargo. Affirmed. This decree was affirmed by the supreme court, in 7 Cranch, (11 U. S.) 100.]

D. Daggett, for appellants.

H. Huntington, Dist. Atty., for respondents.

Before LIVINGSTON, Circuit Justice, and EDWARDS, District Judge.

LIVINGSTON, District Judge. About the facts which produced this prosecution, there is little or no controversy. It appears that the sloop *Active*, being regularly licensed to carry on the cod-fishery, and owned by Henry Billinger and William A. Morgan, who now appear as claimants of the vessel, on the 5th of July last, while lying at a wharf in the port of New-London, took on board the articles mentioned in the libel, for the purpose of transporting them to Mystic river in Groton, in the same district, about five miles from said wharf. That Gates, who claims the principal part of the cargo, never was an owner, master, or mariner of said sloop. That the cargo was put on board without the knowledge, and not under the inspection of any of the revenue

¹[Reported by Elijah Paine, Jr., Esq.]

²[Affirmed by supreme court in 7 Cranch, (11 U. S.) 100.]

officers of the district of New-London. And that the vessel, being then on her way to Mystic river, was seized about one mile and a half below the town, by a boat belonging to a revenue cutter.

The first objection taken to this proceeding of the sloop Active, and urged as a cause of condemnation, is the manner in which the cargo was put on board, which it is insisted ought to have been done under the inspection of a revenue officer. This, it is thought, is rendered necessary by the 2d section of the supplementary embargo law, passed 25th April, 1808, [2 Stat. 430.] taken in connexion with the 27th and 50th sections of the collection law. By the first, no vessel of this description could, during the continuance of certain acts, receive a clearance, (which had been considered necessary by the preceding section,) unless the lading were made under the inspection of the proper revenue officers, subject to the same regulations and penalties as are provided by law for the inspection of goods imported into the United States.

If the legislature by this clause, intended to subject a vessel and cargo to forfeiture for the omission of a regular inspection previous to her lading, it must be allowed that they have not been very happy in the choice of their expressions. If there be any ambiguity in a penal act, and consequently considerable doubt whether a forfeiture has accrued, it will always be a very good reason to acquit the property. It cannot be the duty of a court, by nice discriminations and constructions, to bring within the operation of a penal statute any case which is not very obviously within the plain provisions of it. The court, so far from being of this opinion, is inclined to think that the only purpose for which an inspection was to be undergone, was to entitle the vessel to a clearance, without which, she could not depart from any district of the United States, without subjecting herself to forfeiture, which was a sufficient security for the observance of that ceremony.

On looking into the sections of the collection law which have been referred to, the court does not perceive one word said of inspection, or any penalty imposed for not submitting to one. The one inflicts a penalty for landing goods without proper authority; and the other for landing them at night, or without a permit. All the clauses of the act which relate to inspection, are directory to the public officers; and should a collector neglect to put an inspector on board, or grant a permit to land without that formality, whatever penalties he might incur himself, neither goods or vessel would be forfeited. As no forfeiture, therefore, arises from the mere circumstance of goods which are imported not having been inspected previous to their landing, how can this court undertake to say, without some more explicit declaration, that the bare putting them on board

without such ceremony, shall work a confiscation of them? Besides, she was still within the district, and might have applied for a clearance, when it would have been the collector's duty to have the lading inspected. But if he had granted a clearance without that form, it can hardly be supposed that his negligence or omission would have occasioned a forfeiture. The only way in which this section of the embargo law can be understood, and which is also its grammatical construction, is that the officers of the revenue, in performing the inspection, are to be subject to the penalties, &c. there referred to.

It would be highly gratifying to the court, to obviate with as much facility and as much satisfaction to itself, the other ground which is stated in the libel as a cause of condemnation, which is that this vessel has been employed in a trade other than that for which she was licensed. The 32d section of the act for enrolling and licensing vessels is very express on this point. [1 Stat. 316.] If any licensed ship or vessel shall be employed in any other trade than that for which she is licensed, she and the cargo found on board of her are forfeited. If the act which has been under consideration were liable to the charge of ambiguity, there appears no room for any uncertainty here. But to avoid the force of terms so plain, and which seem to admit of but one meaning, it is insisted, that here was no employment of the Active in any trade; and that if there was, it was not such trade as the legislature contemplated.

As to the fact of employment, it appears that the Active was stopped in her passage from New-London to Mystic river; and she was taken in the very act of transporting goods from the one place to the other, or in other words of trading between those two places. And whether a freight was to be had or not, made no difference, because it is the employment of her that way that constituted the illegality of the transaction. If then this was the kind of trade that was prohibited to her, one single act in violation of the prohibition, and whether she had reached her destined port or not, is sufficient to produce a forfeiture. Being actually employed or engaged in a trade for which she was not licensed, while she was going to Mystic river, there could be no necessity to wait until the voyage was ended.

But this cannot be the trade intended to be interdicted. It is only foreign trade, or such whereby the revenues of the United States may be defrauded. This is said with some plausibility, and it was supposed on the argument that such were the terms of the license, and of the condition of the bond given to obtain it. But on looking at the license and the law, it will be found that the first, besides declaring that the Active shall not be employed in any trade whereby the public revenue shall be defrauded, con-

tains also a declaration that the owner had sworn that she should not be employed in any other way than is therein specified. The condition of the bond likewise contains a security against both these violations. It is true that the 33d section has a provision in favour of a bona fide importer of goods on which the duties have been secured, but this is only an exemption in the particular case from the operation of the preceding section which takes in the whole cargo, and is no proof that no other than foreign trade was intended. It seems to be the policy of the legislature to confine every vessel within its proper sphere; but whatever may have been the intention here, the language is too plain to indulge any latitude of construction; and when that be the case, a court should resist, which it is always easy to do, those inclinations to liberality of construction which often border on legislation, and which are too apt to arise from the supposed hardship of the case. This may be one of that description, but from the impression made, I feel it my duty, after mature consideration, and for the reasons stated, to affirm the sentence of the district court.

[NOTE. This cause was carried to the supreme court,—7 Cranch, (11 U. S.) 100,—which held that there was no forfeiture under the embargo acts because the vessel was seized in port, and a departure from port without a clearance was necessary to consummate the offense; that the vessel and a portion of her cargo were forfeited under section 32 of the registry law, 1 Stat. 316, but that the remaining portion of the cargo, which was shown to belong to one Gates, was excepted from the forfeiture, as coming under the provision of section 33, which declares “that in all cases where the whole or any part of the lading or cargo on board any ship or vessel shall belong bona fide to any person or persons other than the master, owner, or mariners of such ship or vessel, and upon which the duties shall have been previously paid or secured, according to law, shall be exempted from any forfeiture under this act, anything therein contained to the contrary notwithstanding.”]

ACTIVE, The, (ROSS v.)

[See Ross v. The Active, Case No. 12,071.]

ACTIVE, The (UNITED STATES v.)

[See United States v. The Active, Case No. 14,420.]

ACTON, (BANCROFT v.)

[See Bancroft v. Acton, Case No. 833.]

Case No. 36.

The ACTOR.

[Blatchf. Pr. Cas. 200.]¹

District Court, S. D. New York. July, 1862.
PRIZE — EXAMINATION OF MASTER AND CREW AS WITNESSES—SECONDARY EVIDENCE.

1. The rule of the prize law is, that the master and some of the crew of the prize vessel

must be brought in to be examined as witnesses to the facts attending the seizure.

2. The rule will be dispensed with in a case where there is no physical means of complying with it on the part of the captors.

3. Where the personal production of the ship's company is satisfactorily excused, the court will suspend proceedings in the cause, or admit secondary evidence.

4. In this case none of the ship's company being produced as witnesses, and there not being sufficient evidence to condemn the vessel under the practice of the English prize court, the court allowed the libellants time, not exceeding a year and a day from the institution of the suit, to produce proof that the vessel was arrested in fact and was lawful prize of war, and that the more direct testimony usually produced to that end was not legally at command of the libellants.

In admiralty.

BETTS, District Judge. This vessel, with her lading, was captured in Pamlico river, [sound] North Carolina, March 6, 1862, by the United States steamer Ceres, and was remitted to this port for adjudication, and was here libelled by the libellants as prize of war. The attachment issued on the libel was served on the vessel June 17, 1862, and was returned as ground for the proclamation in court July 8 thereafter, and no person appearing thereon, judgment by default was entered against the vessel and her lading.

The general practice of the prize court requires, in cases of vessels seized, that the master and others of his crew on board at the time of the capture shall be brought in with the vessel, to be examined as witnesses to the facts attending the seizure. Wheat. Mar. Capt. 280. So vigorously in its terms is this doctrine laid down in the books, that it is denounced as fatal to the enforcement of the arrest by the court if the captors fail to produce in the prize court those members of the captured vessel. The Dame Catharine de Workeem, 1 Hay. & M. 244; Introduction Godol. Adm. Jur. 25, 26; The Henrick and Maria, 4 C. Rob. [Adm.] 47.

The ordinary rule in prize cases is, that, in the first instance, the evidence shall be drawn from the claimants. The Haabet, 6 C. Rob. [Adm.] 58, note. The requirement must, however, be subject to the necessities of the case; and it is only imperative that this rule of proof be fulfilled when there is physical means of complying with it on the part of the captors.

Commodore Rowan, who remitted the prize to the charge of the court, advised the court by letter that no persons present at the capture were sent with the vessel because she sank after her capture, and those persons were no longer present to be forwarded. The evidence is not made clear or precise as to the facts which transpired. It is stated, in the papers coming before the court with the vessel, that she was driven from her anchorage after her capture, and was sunk in North Carolina waters, and that the vessel's company were thus separated from her.

¹[Reported by Samuel Blatchford, Esq.]

There is no full testimony as to these intimations, nor as to what circumstances have, in fact, kept the crew away; but the distance to the place is so considerable as to excuse some delay in collecting explanatory proofs if the law demands them in this condition of the case. If the ship's company are destroyed in battle on the capture, or abandon the vessel and escape, or other reasonable cause prevents or excuses their personal production by the captors as witnesses in court, then, unquestionably, it is within the competency of the court to suspend proceedings in the cause, or admit secondary evidence, provided a delictum is charged which justified the arrest of the vessel. The papers brought in as belonging to the vessel indicate that she was documented by Confederate authority in a blockaded port for another blockaded port, and was thus palpably enemy property; and no doubt the American prize rules, strictly carried out in practice, excuse further proof, after a regular default in court and adequate evidence given aliunde of actual capture made. No claimant has intervened for the vessel or cargo, and evidence sufficient to authorize her condemnation, under the practice of the English prize court, not having been laid before this court, a respite of sentence in the case may be made, to enable the libellants to offer further proofs showing that the vessel was arrested in fact, and was, at the time of her capture, lawful prize of war, the more direct testimony usually produced to that end not being legally at command of the libellants. A final decree in the cause will, accordingly, be deferred to such convenient period as may be asked for by the district attorney, not exceeding a year and a day from the time of the institution of this suit, to enable the libellants to produce further proofs as to the facts upon which they seek the condemnation and forfeiture demanded by the libel.

[On final hearing the vessel was condemned for violation of the blockade. *The Actor*, Case No. 37.]

Case No. 37.

The *ACTOR*.

[Blatchf. Pr. Cas. 215.]¹

District Court, S. D. New York. Sept. 1862.

PRIZE—VIOLATION OF BLOCKADE.

Cargo condemned, on further proof, for a violation of blockade by the vessel.

In admiralty.

BETTS, District Judge. This vessel and cargo were captured early in March, 1862, in Pamlico sound, North Carolina, by the United States gunboat *Ceres*, and were brought to this port and here libelled as prize, June 17, 1862, and on return of the

¹[Reported by Samuel Blatchford, Esq.]

monition and notice, no one appearing to defend the property seized, the case was submitted to the court for decision. On examination it was found that no legal proof was furnished of the capture of the vessel and of the cause of it; and on motion of the United States attorney, July 18, 1862, a year and a day were allowed to the captors to bring in further proofs.

On such proofs being taken and submitted to the court, it is made to appear that the vessel and cargo were seized in Pamlico sound, and belonged to residents within enemy territory; that after the capture the vessel and cargo were sunk at Hatteras inlet in a gale of wind, and were subsequently raised by pilots and brought by them to this port for the captors; and that the crew found on board at the time of the capture had left the prize, and have not been brought into this port for examination. No defense having been interposed, and it appearing satisfactorily to the court, on the evidence of witnesses present at the seizure, that the vessel and cargo were enemy property, it is ordered that a decree of condemnation for that cause be entered in the suit.

Order accordingly.

[For a prior hearing in this case on a question of evidence, see *The Actor*, Case No. 36.]

Case No. 38.

The *ADA*.

[2 Ware, (Dav. 407,) 408.]¹

District Court, D. Maine. Sept. 12, 1849.

ADMIRALTY JURISDICTION—SHIPPING ARTICLES—CONSTRUCTION—SEAMEN'S WAGES—FORFEITURES.

1. In suits in rem, the locus rei sitae gives the jurisdiction for it is only in the courts of that country that a jus in re can be directly enforced.

[See *The Bee*, Case No. 1,219.]

2. Every contract is binding on the parties in the sense in which it is mutually understood by them at the time when it was made.

3. The meaning of the contracting parties is generally to be collected from the words in which the contract is expressed. But when the language is ambiguous, or the words have a popular sense more or less extensive than that which they naturally import, we may look beyond the words to ascertain the intent of the parties.

4. When the meaning of the language is obscure or uncertain, the construction is to be against the party in whose words it is expressed. This general rule of interpretation applies in all its force, against the owners, in the construction of shipping articles.

5. When, in the shipping articles of an English vessel, the voyage was described to be from Liverpool to Savannah, and any port or ports of the United States, of the West Indies, and of British North America, the term of service not to exceed twelve months, it was held, that the voyage intended was confined to the ports on the eastern shore of the continent, and that

¹[Reported by Edward H. Daveis, Esq.]

the articles did not authorize a voyage to San Francisco, on the north-west coast.

[6. Where, by reason of a vessel being short-handed, and the seamen refuse to proceed on the voyage, their subsequent consent to do so is a sufficient consideration for the release by the master of claims for deductions from their wages of fines, imposed on them at a port for breaches of the peace and paid by him.]

[7. Under St. 7 & 8 Vict. c. 112, § 7, providing that no forfeiture of seamen's wages for willful absence from the ship shall be incurred unless the fact of the seaman's absence shall be entered on the ship's log book, claims for wages cannot be reduced by forfeitures for absences which, though admitted by the seaman, were not noted in the ship's log to show that the master regarded them as willful.]

[In admiralty. Libel by William Reynolds and others against the ship *Ada* for wages. Decree for libellants.]

This was a libel for wages, and was heard on the following statement of facts, agreed by the parties:

'The libellants shipped on board the barque at Liverpool, according to the shipping articles, which are to be exhibited to the judge at the hearing. From Liverpool the ship came to the port of Savannah, where she arrived about the 20th of May. She lay there about ten days, and discharged her cargo. She then ran in ballast to Calais, Maine, where she arrived about the 20th of June. She discharged ballast immediately, and in the course of three or four weeks began to fit up on her present voyage. The libellants asked their discharge of the master several times after they ascertained the destination of the ship. The first time was about three weeks prior to the commencement of their proceedings before the magistrate. They also, through their proctor, F. A. Pike, made a demand, about a week before commencement of proceedings, upon the master for their discharge, and for their wages. In asking for a discharge, the reason given was, that they did not wish to go to California, two of the men (Reynolds and Clanahan) stating in addition that they wished to go back to Liverpool as their clothes were there. The crew was not furnished with lime-juice on their passage from Savannah to Calais, although they asked it of the steward, who said there was none for them. No complaint was made to the master on this account. The ship is now loaded for California, and has engaged fifteen or twenty passengers for that destination, but intends going to St. Andrews, in the province of New Brunswick, first, for the purpose of clearing out for San Francisco. The first mate was discharged in Savannah; the second mate was discharged in Calais about the 10th of August. Reynolds was absent three times from the vessel without leave; the first time, he was gone about an hour during dinner; second time, absent from eleven o'clock till evening; the third time, was absent about thirty-six hours to Eastport, to see the British consul about

this matter. Hughes was absent with Reynolds from eleven o'clock till evening, and again at the time Reynolds went to Eastport. Clanahan was absent the same as Hughes. Miller was absent with the others from eleven till evening, and again about two hours. After each of the above times the men returned to the vessel and went to work as usual. The vessel had been coppered and an extra passenger-house built upon deck, and two of the men had asked their discharge, before any of the above absences. They remained on board the ship doing duty as usual, until the day of trial before the magistrate, when they refused to go on board, and have not since been on board.

'The respondent claims a forfeiture, of the several libellants, for absence without leave from the vessel as aforesaid, under the provision of the shipping articles as follows:

William Reynolds, three times absent,	£6.
Hugh Clanahan, twice "	£4.
Robert Hughes, " "	£4.
John Miller, " "	£4.

The accounts annexed against the libellants are correct, except that they claim that the charge against each of them for amounts paid in Savannah for fines, for breach of the peace, should be deducted; for this reason, after the master paid the fines, three men and two boys left the ship, and, on account of his being short handed, these men refused to get the ship under way and go to sea, and to induce them to do so the captain promised to remit those charges, and the men came with the vessel, short handed, to Calais.'

(Signed) F. A. Pike, Proctor for Libellants.
George M. Chase, for Respondents.

Deblois, for libellants.

W. P. Fessenden, for respondents.

WARE, District Judge. This is a suit on a foreign contract, in which all the parties are foreigners, and is to be governed by the laws of the country where it was made, and to which the parties belong. The libellants proceeding on their lien against the ship herself, and that being within the jurisdiction of this court, whatever scruples may be entertained by courts of admiralty in other countries, there is no doubt according to the decisions of our courts, and in my opinion there is none on general principles, that this court, notwithstanding the alienage of the parties, may take cognizance of the case, and enforce the lien, if by law the libellants are entitled to it. Conk. Pr. Adm., pp. 24-37. The Jerusalem, [Case No. 7,293;] The Bee, [Id. 1,219.] In suits in rem, the locus rei sitae necessarily gives the jurisdiction, because it is only in the courts of that country that a jus in re can be directly enforced, though in foreign contracts the law of the place, where the contract was made, furnishes the rule of decision. The libellants shipped at Liver-

pool, April 4th, 1849, for a voyage, which is described in the shipping articles to be from the port of Liverpool 'to Savannah, and any other port or ports in the United States of America, and any port or ports in British North America, and any port or ports in the West India Islands, at the discretion of the master, or consignees, as freight or cargo may offer, and back to her final port of discharge, of Great Britain and Ireland; term of time on the voyage not to exceed twelve months. The vessel's complement of officers, seamen, and apprentices, eleven in number, and any over or above the number of said complement to be considered as extra hands.' The vessel performed her voyage to Savannah, and having discharged her cargo there, went in ballast to Calais. There the libellants, having learned that the master was preparing for a voyage to San Francisco, in California, refused to go on that voyage, and demanded their discharge and wages. Four and a half of the twelve months, to which the time of service was limited, had then expired.

The master contends that the refusal of the libellants to proceed on that voyage was a breach of their duty, by which they have forfeited all right to the wages they had earned for their past services. The libellants, on the other hand, say that this new voyage to California was a deviation from that originally contemplated and for which they engaged themselves, and amounted to a breach and dissolution of the contract, and released them from its obligations; that they might, therefore, well demand their discharge, and to be paid their wages, for the time they had served.

The right of the libellants to their discharge, and to be paid their wages, has been ably vindicated by their counsel on several grounds; but they may perhaps all substantially be resolved into one, at least in the view that I take of the case, it will be necessary for me to consider only one, and that is this, admitting, what is denied by the counsel, that San Francisco is properly a port of the United States, not having been made such by any laws, whether it can in any just sense be deemed to be one of the ports contemplated by this contract. Every contract is morally binding on the parties in the sense in which it is understood by them at the time when it is made; and it is to the same extent, and no further, binding on them in law, when this sense can be clearly ascertained. 'Whatever,' says Paley, 'is expected on one side, and is known to be so expected on the other, is to be deemed a part or condition of the contract.' Moral Philosophy, bk. 3, pt. 1, c. 6. This proposition I hold to be as sound in law as it is in morals. All the rules for the interpretation of contracts have for their object to ascertain what this common understanding of the parties is, and when it is discovered,

the law comes forward and applies itself to their mutual and common intention, and holds the parties bound by their agreement thus far and no farther. It is commonly said that the intention of the parties is to be collected from the words in which the contract is expressed. This, as a general proposition, is perfectly true; but it is not universally true that we are to look at the words alone. The greatest of the Roman jurisconsults has told us that, *In conventionibus contrahentium voluntatem, potius quam verba, spectari placuit.* Dig. 50, 16, 219; *Papinianus, Lib. 2, Responsorum.* It is the intention that is sought. The language may be ambiguous and susceptible of two interpretations; or it may have a popular sense, in local usage, or in its application to the subject-matter of the particular contract, more or less comprehensive than the words naturally import when taken by themselves. In these cases we are obliged to look beyond the words. Now I think that the case before us is one to which the latter distinction may apply. Within the words of the description of this voyage, the master might carry his crew to any port in British North America. But the British possessions extend across the whole breadth of the continent, and without going beyond the literal sense of the language of the contract, he might carry them on a voyage to the extreme north-west coast. Can it be imagined that the owners, when they prepared this shipping paper to be read to the crew, supposed, unless some verbal explanations were given at the time, that the men would understand that they were binding themselves to go a voyage to the mouth of the Columbia river, or to Vancouver's island, if the master chose to carry them there. The description would naturally suggest to them a voyage to those ports which were familiar to the commerce of their country, and which were frequently and ordinarily visited for the purposes of trade, and in the popular and usual sense, they would suggest nothing more. That is, it would be taken to be a voyage in which the vessel might visit any of the American or British ports on the eastern shore of the continent. This is the interpretation that I should have given to the contract, if the description of the voyage had terminated with merely naming the ports which might be visited, in the order in which they stand in the shipping articles. They would, without some further explanations were given, suggest to the seamen a voyage embracing the ports on the eastern shore of the continent and nothing more. It was justly urged, by the counsel for the libellants, that, if there is a fair and reasonable doubt as to the true meaning of the articles, the seamen are on every principle entitled to claim a construction favorable to themselves. It is the owners who give the description of the voyage, and on general principles applying to all contracts, if the language is ambiguous or

uncertain in its meaning, the construction shall be against the party who uses it, because he is bound to express himself clearly, and this principle applies with all its force to contracts between owners, who are always men conversant in business and shrewd and watchful in looking to their own interests, and seamen, who are proverbially careless, improvident, and ignorant. The disparity in the condition of the parties imposes on the court the duty to take care that the improvidence of seamen is not entrapped, by the superior watchfulness and sagacity of owners, into engagements that they did not intend to make.

In the present case, this construction of the contract is forfeited by another clause in the articles, which appears to me to be entirely decisive. It is the limitation of time. The whole period of the service was not to exceed twelve months. The first port the vessel was to make was Savannah, and if a voyage around Cape Horn to the north-western coast of the continent had been contemplated, it is incredible that the time should have been limited to twelve months. The decisions of the high court of admiralty in England, referred to in the argument, though not in cases precisely parallel in their facts with those of the present case, bear considerable analogy to them, and from the tone and language in which they were pronounced, I cannot entertain a doubt that an English court would hold, that the voyage to San Francisco was such a deviation from the voyage contemplated by the shipping articles, as to discharge the seamen from their contract; that the voyage was broken up as to them, and that they are entitled to their wages. *The Countess of Harcourt*, 1 Hag. [Adm.] 248. *The Minerva*, Id. 347. *The George Home*, Id. 370. *The Cambridge*, 2 Hag. [Adm.] 243. If wages are decreed, the master contends that there are equitable deductions to be made from the amount due; in the first place, certain sums which he paid for the libellants in Savannah, for fines imposed on them by the local authorities of that place, for breaches of the peace. The payment of these sums is admitted, and it is not denied that they constitute an equitable set-off against their wages, unless the claim of the master has, for a valid consideration, been released, and in my opinion it has. When the vessel was ready to be got under way to leave Savannah, she was found to be short-handed, three of the men, and two of the boys having deserted. The vessel's complement was eleven hands, including the officers, so that she had but barely more than half her complement left. In this state of things, the crew refused to proceed on the voyage, and to induce them to forego their determination, the master promised to release this claim against them. I should not be inclined to hold the master bound by

this engagement, if it had been extorted from him under the pressure of necessity, without any reasonable or colorable pretext. But this can hardly be considered as a mere wanton refusal to do their duty, on the part of the crew. Whether, on the requirement of the master, they might have been bound to proceed on the voyage, with half a crew, being then in a port where additional hands might be obtained, I do not think it necessary to decide. By going with half their complement of men, they subjected themselves to do double duty, and if the weather should prove boisterous, to increased danger, and at the same time relieved the owners from the expense of nearly half the ordinary crew. My opinion is that their consent thus to proceed on the voyage, under the circumstances, was a sufficient consideration to uphold this release. The master also claims a deduction of the amount of certain forfeitures, alleged to have been incurred by the libellants. These, if any have been actually incurred, arise under St. 7 & 8 Vict. c. 112, § 7, (Sept. 5, 1844), not for desertion, as they seem to be considered by the master, but for temporary absence without leave. This statute provides that a seaman shall forfeit, for every willful absence from the ship, without leave, or refusal to do his duty, two days' pay, and for every twenty-four hours' absence six days' pay, or, at the option of the master, the expenses necessarily incurred in hiring a substitute; provided always, that no forfeiture shall be incurred, unless the fact of the seaman's absence, or neglect, or refusal to do his duty shall be entered on the ship's log-book. These absences were for short periods, the longest but half a day, except one of thirty-six hours for the purpose of consulting the British consul on the subject of this deviation from the original voyage. This was a very proper and prudent act on their part, and could in no sense be called a willful absence. But, with respect to all of them, there is this fatal defect in the evidence. It is not mentioned, in the agreed statement of facts, that the absences were noted in the ship's log. The admission of the absences, in the statement of facts, is not sufficient to cure this defect. This entry is not required merely as a medium of proof, but for the purpose of showing that it was regarded, at the time, as a criminal act on the part of the seamen, and to prevent the master, on any subsequent difficulty with the seamen, from bringing forward past absences, and creating forfeitures, when, at the time, they were considered, if not entirely venial, as not deserving to be punished by statute forfeitures. Decree for libellants.

ADAIR, (WALKER v.)

[See Walker v. Adair, Case No. 17,064.]

Case No. 38a.

Ex parte ADAMS.

[3 App. Comr. Pat. 410.]

Circuit Court, District of Columbia. Dec. 20, 1860.

PATENTS FOR INVENTIONS—PATENTABILITY—HYDROMETERS.

[On appeal from the refusal of the commissioner of patents to grant a patent for an hydrometer consisting of a metal stem, in combination with a vulcanized rubber or gutta-percha bulb, it was shown that hydrometers made wholly of metal or wholly of rubber were well known, but that in the former the bulb was necessarily made so thin that a blow or fall would indent it, and destroy the utility of the instrument, while in the latter the stem could not be graduated with the necessary accuracy and minuteness, owing to its color and substance. It was further shown that appellant's device was free from each of these defects, and also that it was less subject to corrosion by acids than the metal hydrometers. *Held*, that this device is a new and useful invention, and therefore patentable.]

Appeal [by James Adams] from the decision of the commissioner of patents refusing to grant him letters patent for his improvement in hydrometers. [Reversed.]

MORSELL, Circuit Judge. He states his claim thus: "What I claim as my invention and desire to secure by letters patent is the construction of a hydrometer or other instrument for ascertaining the specific gravity of liquids substantially as herein described by combining with its bulb and lower part made of hard vulcanized India rubber, gutta-percha or any other analogous substances, a graduated upper-stem made of metal." The specification states the nature of the invention to be one which consists in the construction of a hydrometer or other instrument for ascertaining the specific gravity of liquids with its bulb and lower part of hard vulcanized India-rubber, gutta-percha or analogous substances, and its stem of silver or other metal, by which construction, the instrument is made to possess advantages over one made wholly of metal, or one made wholly of India-rubber or gutta-percha, inasmuch as the bulb is less liable to have its form changed by being carelessly laid or thrown down or let fall, than the metal bulb, and the stem is capable of finer and more accurate graduation and less liable to have its graduation defaced, and less liable to be bent than the India-rubber or gutta-percha stem. On the 8th of October, 1860, the commissioner adopted for his decision the report of the examiners, dated the 6th of the same month, which is in substance as follows: "It is admitted upon all sides that hydrometers have been made entire of metal and gutta-percha; indeed they have been made of glass and of ivory or bone. This applicant has made one part of metal and part of gutta-percha, the stem upon which the scale is placed being of silver, or other metal, and the bulb of gutta-

percha; in other words, he takes a metal hydrometer, and in place of its bulb substitutes one made of gutta-percha. By doing this his bulb effects nothing more than has been done by the gutta-percha bulb when connected with a gutta-percha stem, and his metal stem effects nothing more than has been done when a metal stem has been connected with a metal-bulb. Viewed then in this light there is no invention involved in this application. Suppose an application should be made for a gutta-percha stem and a metal bulb—shall a patent be granted for that? This application is but the converse of that, so to speak; we do not think that this interchange of material clothes the application with anything which can be regarded as patentable. We must therefore recommend its final rejection, which was accordingly done by the commissioner."

From this decision as before stated, Adams appealed, and filed three reasons of appeal.

The first is: Because every requisite of the statute was complied with, and all these conditions, to entitle him to claim his right to a patent.

Second. Because commissioner fails to show or even assert that the invention (the combination claimed) is not sufficiently useful and important as required, &c.; whereas it appears fully, clearly, and incontestably from the specification and the evidence in the case that the applicant by his combination of an India-rubber bulb with a metal stem, produces a better and more perfect instrument than is attainable by making it all of India-rubber or all metal and that such varied elements have never before been combined in a hydrometer.

Third. In asserting that the applicant's invention is a mere interchange of material, devoid of new or improved results, and while failing to show that a hydrometer ever before had been made combining an India-rubber bulb with a metal stem to be the converse of the former, inasmuch as the first named combination obviates defects which the last named would possess in a larger degree than is incidental even to hydrometers as heretofore made of one and the same material.

The commissioner's report in reply to the foregoing reasons is as follows: The claim of the appellant was to the combination of a metallic graduated stem with a bulb of gutta-percha vulcanized rubber or any other analogous substance for a hydrometer or other instrument for ascertaining the specific gravity of liquids. This the office regarded as but a double use of a familiar combination. The metallic stem is necessary for extremely nice graduation and is perfectly familiar when united to a metallic bulb, but such could not be used under all circumstances with economy, as with acids, for example, nor could the combined one claimed be safely relied on under the same circumstances. It is familiar also to make the whole instrument of

the rubber, but in this the stem is not susceptible of the nice graduation. The commissioner says: "I am still * * * of opinion that the applicant has effected no patentable invention in taking a familiar stem and a familiar bulb and uniting them in one hydrometer. He has effected no new result thereby, nor any improvement in the instrument. Like the metallic pen and rubber handle with which I write, his instrument constitutes but another example of a combination of metal and rubber that, in the absence of any new result, constitutes but a double use. These are the only remarks I desire to submit in addition to those of the office decision of the 8th of October last."

Accompanying the foregoing proceedings were sundry testimonials of practical mechanics, consisting of a mathematical instrument maker having charge of the United States hydrometers, a member of the analytical and consulting chemists, two other mathematical instrument makers, an ex state inspector of domestic liquors, New York, and of other respectable skillful mechanics. The instrument is spoken of as an important novelty that will be a valuable acquisition to distillers, inasmuch as it combines the advantages of both the rubber and silver hydrometers without their defects. This feature all intelligent inspectors of distilled spirits will soon discover. And as an essential improvement, these, together with the decision, reasons of appeal, report of the commissioner, and all the original papers and vouchers according to previous notice given of the time and place of hearing, were duly laid before me by the commissioner. The appellant appeared by his attorney, and filed his written argument and submitted the case.

The present is a claim presented for a combination of parts of two well known machines or instruments by which the defects existing in each of said machines are entirely avoided, and by which a more useful and perfect instrument is made. The office rejected it upon the ground of a double use of a familiar combination. The two referred to are one entirely of silver, the other wholly of the rubber; none is shown like the present one, with a metal stem and a rubber bulb. In point of form then the proposed change must be admitted to be new. Is it substantial and useful? If it is, then there is invention; otherwise not. In order to understand its nature it will be stated that it is essential to the perfection of the hydrometer that when left to float freely in the liquid, and for the displacement of a bulk of that liquid which shall be just equal in weight to the entire instrument and rendered accurately, it must stand perfectly vertical. The defects alleged to exist in the instruments alluded to in the report are as to the entire metal instrument. Its bulb, in order to be of the proper weight and to

avoid too much expense, must be made very thin. Therefore, a fall, a slight blow, or other accident will cause an indentation that will destroy its accuracy; the effect thus produced would destroy the essential requisite just before stated. Besides, as stated by the commissioner in his report relating to the metal instrument, it is admitted that "such bulb could not be used under all circumstances with economy, as with acids, for example." If he could have been satisfied that the combined one could, it is probable this opinion would have been different.

As to the other, the hard rubber. Its color renders it difficult to distinguish the marks indicated upon its graduated scale. If painted white, when employed even for testing the strength of alcoholic liquid, the incisions which have been painted white soon become filled with substances of another color, and when used as a saccharometer there will be evident additional causes which will obscure the white color, and render the whole so nearly of one hue as to prevent the degrees upon the scale from being easily read. Besides, the degrees cannot be marked in white with the same nice accuracy with which they are cut upon the stem, whereas in a silver instrument the marking of the scale can not only be made with the greatest accuracy, but use will render them even more legible. With respect to this also the commissioner admits that, where the whole instrument is of hard rubber, "the stem is not susceptible of the nice graduation." This must therefore be admitted to be important. Again, the hard rubber instrument when immersed in hot liquids, the stem is liable to spring or bend, which, of course, would render the instrument defective; and, again, hard rubber, being a non-conductor, is liable to be materially affected by electric influences.

It is contended that the great desideratum to obtain an instrument which will unite the advantages of each of those before mentioned, and avoid the objections to both, has been effected by the appellant's improved instrument.

In forming my opinion in this case, I have been desirous duly to appreciate the argument which has led the commissioner to the conclusion to which he has been brought. After allowing it all the strength it can claim, drawn from the source which I suppose it has been I feel bound to yield to the preponderating weight of a practical knowledge from skillful mechanics and others who have tried the instruments, and from persons accustomed to the use of instruments of that kind, and who speak of this instrument in the most decisive and strong language as accomplishing the purpose and end claimed for the improvement by the appellant, and under such circumstances, I think the case referred to by the office does not apply.

There is therefore error in the decision of

the commissioner, and the same is hereby reversed and annulled, and it is ordered and directed that patent issue as prayed.

Case No. 39.

In re ADAMS.

[2 Ben. 503; 2 N. B. R. 95, (Quarto, 33;) 36 How. Pr. 51.]

District Court, S. D. New York. Sept. 10, 1868.

APPLICATION FOR EXAMINATION OF BANKRUPT.

Where an application was made to a register verbally, by a creditor who had proved his debt, for an order for the examination of the bankrupt, and was not supported by petition or affidavit, and the register held that the application was insufficient: *Held*, That such application ought to have been made on petition or affidavit, duly verified, showing good cause for the granting of the order.

[Cited in *Re McBrien*, Case No. 8,665; In *re Adams*, Id. 40; In *re Bellis*, Id. 1,276; In *re Solis*, Id. 13,165.]

In bankruptcy.

BY THE REGISTER. In the course of the proceeding in this cause before me, at the chambers of this court, the following question arose in relation to the way and manner in which application should be made for an order requiring the bankrupt to appear before this court under section 26 of the bankrupt act. The question is pertinent to the proceedings, and its decision will settle the practice in this and other judicial districts. The petitioner has been duly adjudicated a bankrupt. Henry N. Morgan, of the late firm of Shook & Morgan, has duly proved his claim against the estate. T. D. & G. R. Pelton, as attorneys for Henry N. Morgan, apply, under section 26 of the bankrupt act, verbally for an order compelling the attendance of the bankrupt at the chambers of this court before me, and also for the usual subpoena requiring the petitioner to appear at the same time and place to be examined as a witness in these proceedings under section 26 of the bankrupt act. The creditor having duly proven his claim has a standing in court, and both the order and subpoena when applied for in due form should be granted upon proper cause shown. This proceeding in bankruptcy is a suit in the district court of the United States, and must be governed by the rules and practice of the United States and state courts, by the bankrupt law, the general orders, and the rules, orders and regulations in bankruptcy. Since the act of congress July 16th, 1862, it is generally the practice of the United States circuit and district courts, to follow the rules of the respective state courts in

regard to form and manner of practice, as well as all questions of evidence and examination of witnesses. There is much diversity of opinion among the registers, as well as the legal profession, as to the way and manner of applying for an order and subpoena for the examination of the bankrupt; some claim that a mere verbal request to the register is a full compliance with section 26 of the bankrupt act; others say that a petition duly verified is sufficient, while the more experienced lawyers, those most familiar with the practice in the United States courts, and the late court of chancery of this state, are of the opinion that the application should be in the nature of a motion, founded upon an affidavit giving some good and sufficient reason why the order should be granted and subpoena issued, setting forth grounds for the application similar to those set forth in the petition and affidavits in special proceedings under the statutes of this state, and that such an application is properly termed "an ex parte motion for an order."

After a full and careful examination of the practice of the courts and in similar statutory proceedings in this state, the United States and in England, I fully concur with the latter view, and am of the opinion that the verbal application of the creditor, unsupported by either a duly verified petition, or affidavit showing sufficient cause for the granting of the order, is insufficient, and does not entitle the creditor to the order asked for. The counsel for the creditor then asked to have the question certified to your honor, which I herewith set forth, and the reasons and authorities upon which I have formed my opinion are most respectfully submitted to your honor. The theory of the law is that when the petitioner files his petition, &c., he, by the operation of the law, surrenders into court his effects, and also virtually his person, thereby giving the court jurisdiction of both. It is absolutely necessary to the proper administration of the bankrupt law that the court should have the jurisdiction of the person of the petitioner so far as is necessary to the proper administration of the law; such jurisdiction is merely nominal. As soon as an adjudication of bankruptcy is had, the bankrupt is at liberty to commence business on his own account, and if he afterwards obtains his discharge, all his earnings or profits since such adjudication are his. No restraint whatever is placed on the bankrupt, but until he is discharged he is at all times subject to the order of the court.

Upon the proper application of a creditor who has proved his claim, a chamber order is issued, requiring the bankrupt to appear on a certain day, also a subpoena requiring the bankrupt to appear and to be examined as a witness; both of these "process" are issued by the court, signed by its clerk under

¹[Reported by Robert D. Benedict, Esq., and here reprinted by permission. Opinion of the register reprinted from 2 N. B. R. 95. (Quarto, 33.)]

the seal thereof. Various enactments have, from time to time, been passed in this state, in relation of parties in actions and special proceedings as witnesses. In 1818, an act was passed authorizing the examination of the plaintiff as a witness, &c. In 1820, an act was passed making plaintiffs competent as witnesses, &c. In 1835, an act was passed whereby, the plaintiff was entitled to examine the defendant as a witness, and the defendant was also entitled to the testimony of a co-defendant as a witness. In 1847, an act was passed authorizing parties in civil suits, at their election, to obtain the testimony of the adverse party. Chapter 462, p. 630, Laws 1857. Sections one and three of said act are as follows: "Any party in any civil suit or proceeding, either in law or equity, had before any court or officer, may require any adverse party, whether complainant, plaintiff, petitioner or defendant, or any one of said adverse party, any and every person who is beneficially interested in said suit and proceedings, though not nominally a party, to give testimony under oath in such suit or proceeding, and such adverse party may be examined orally, or under a commission, in the same manner as persons not parties to such suit or proceedings, and who are competent witnesses therein, and such parties may be subpoenaed and his attendance as a witness compelled or he may be examined by a commission, or conditionally, or his testimony perpetuated in the same manner as any competent witness."

Section 3: "Any party in any suit or proceeding, as aforesaid, shall be required, to entitle him to examine the adverse party as a witness in any suit or proceeding, to summon such adverse party to attend the trial or hearing in such suit or proceeding, to give testimony therein in the same manner as the attendance of witnesses in ordinary cases."

In 1849, the Code of Procedure was enacted. By section 292, a judgment debtor could be examined in the same manner as any other witness, by that act.

Section 27 of insolvent laws of this state, commonly called the "Two Third Act," provides, "that the insolvent may be examined on oath at the instance of any creditor, touching his estate or debts, or any matter stated in his schedule." Section 26 of the bankrupt act, is as follows: "The court may, on the application of the assignee in bankruptcy, or of any creditor or without any application, at all times require the bankrupt, upon reasonable notice to attend and submit to an examination, on oath, upon all matters relating to the disposal or condition of his property, to his trade and dealings with others, and his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate, and the due settlement thereof, according to law."

It is plain to be seen that section 26 of the bankrupt law, was compiled from the legislative enactments of this state, of 1818, 1820, 1835, 1847, from section 27 of the insolvent laws, from section 292 and other sections of the Code, from section 4 of the act of congress of 1841, Gen. St. Mass. c. 118, § 66, and of 12 & 13 Vict. c. 106, § 17. Consequently, the same rules as to the bringing of the parties to an action or proceeding into court, in order to procure his or their testimony, which has heretofore been adopted, should now be followed by this court, in order to bring the bankrupt before it for his examination as a witness, at the instance of a creditor. The words of section 26 of the act, are as follows: "The court may," &c., (not must,) thus leaving the granting or refusing of the order in the sound discretion of the court. [Blanchard v. Young,] 11 Cush. 341. Such discretion should be carefully exercised. The granting of such orders is not by any means "as a matter of course;" but only to be done in a proper case, on application of a creditor, and when good cause is shown why such order should be granted. Cause should be shown in the same manner as would be required upon the granting of any chamber order in any judicial proceedings in court.

I hold that such an order should be granted upon the creditor showing any of the facts set forth in section 26 of the act. The application of the creditor, under section 26 of the bankrupt act, for an order requiring the bankrupt to attend and submit to an examination under oath, upon all matters, &c., is analogous and similar to the proceedings authorized by section 22 of the act of voluntary assignments known as the two-third act, and other laws of the state of New York; also similar to the proceedings allowed by sections 292, 388, 369, 390 and including 397. By this proceeding, the creditor seeks to obtain facts sufficient by the examination of the bankrupt to enable him (the creditor) to prepare the specification, as authorized by section 44 of the bankrupt act, to oppose the petitioner's discharge in bankruptcy, and also to discover property and effects of the petitioner, which the petitioner owns, but which he has not set forth in his schedules of assets attached to his petition. The register has jurisdiction of the cause and also of the person of the bankrupt, and has the authority to grant the order in this case, the same as the district judge would have; and in granting the order must be governed by the rules and practice of this court, and by the practice of the courts of record of this state. In granting these orders an apparent necessity for the examination of the bankrupt should be shown, (2 Story, Eq. Jur. §§ 1497, 962; [Nieury v. O'Hara,] 1 Barb. 484; [Moore v. McIntosh,] 18 Wend. 529) similar to the practice under section 292 of the Code. The creditor applying should

set forth in his petition verified, or affidavit, some particulars of the discovery he seeks to make, or some fact he thinks he can establish in order that the court may judge whether there is any probable cause for granting the order. [U. S. v. Buchanan,] 8 How. [49 U. S.] 92. Section 26 of the bankrupt law gives the right to any creditor who has proved his claim to have an order for an examination of the bankrupt. This order is designed to accomplish all the purposes of a bill of discovery, including the examination of the bankrupt himself, and should, in a proper case, be allowed by the court. 1 Monnell, Pr. 515; [Ex parte Christy,] 3 How. [44 U. S.] 303; [Erwin v. Dundas,] 4 How. [45 U. S.] 60; [Carpenter v. Insurance Co.,] Id. 190; Poll. Prod. Doc. pp. 14, 22, 46; [Stanten v. Insurance Co.,] 2 Sandf. 662; [Moore v. Pentz,] Id. 664. The right, upon a proper cause shown, in granting such orders is given by section 26 of the bankrupt act, and is also in the inherent powers of the court to exercise an equitable jurisdiction over its suitors as well as the subject matter of the action in proceedings before it. [People v. Oneida,] 18 Wend. 652; [Swift v. Collins,] 1 Denio, 659; [Pangburn v. Ramsay,] 11 Johns. 140; 1 Graham, Pr. (3d Ed.) 671-675. Such an order is not an "intermediate order," it is a "proceeding in the cause," neither can it be reviewed on appeal from the district to the circuit court. The granting of the order is in the discretion of the court, and gives summary control over the bankrupt. [Fort v. Bard,] 1 N. Y. 43; [Dunlop v. Edwards,] 3 N. Y. 344; [Rowley v. Van Benthuysen,] 16 Wend. 369.

The order becomes an imperative mandate, and must be obeyed unless set aside on motion or stayed by order of the court. Disobedience to such an order is a contempt of the court, "and for neglect or refusal to obey such order, the court may issue a warrant directed to the marshal, commanding him to arrest the person disobeying such order, and bring him forthwith before the court," such bankrupt may then be committed and punished as for a contempt of court. The commitment and punishment are in the nature of criminal proceedings, (Tayl. Bankr. 80,) and when a court commits a party for contempt, their adjudication upon the matter is a conviction—operates the same as, and is in effect, a judgment, and the warrant for their commitment becomes by operation of law an execution. The command contained in the warrant, the marshal must execute. With the execution of the warrant for commitment, the power of the court ceases, it has become an offence against the United States. The president alone, can by article 2, § 2, subd. 1, of the constitution of the United States, pardon or relieve the person convicted of the contempt.—See opinion of Blatchford, J., in the case of Goodyear v. Mullee, [Case No. 5,578,] district court,

southern district of New York; also, Ex parte Kearney, 7 Wheat. [20 U. S.] 38, 43; also, 3 Op. Attys. Gen. 622. I consider it absolutely necessary that the rules and practice of this court in regard to the manner of issuing orders for the examination of bankrupts and witnesses therein, should be clearly set forth; and, in order to do so, I have carefully examined the bankrupt act, the general orders, and the rules and orders, and general regulations in bankruptcy, the rules and practice of this court upon the granting of any chamber order in any judicial proceedings; also, the practice of the state courts in special proceedings, and in special cases, such as habeas corpus, certiorari, mandamus and prohibition in proceedings as for contempt to enforce civil remedies, and also in other proceedings commenced by the issuing of either a writ, warrant, or process of the court, which by law are required to be issued, and find that they now and for years have been founded upon "papers" such as a petition, or complaint duly verified, or upon affidavit.

If an order or process of the court is founded upon a complaint, petition or affidavit, such complaint, petition or affidavit should be duly verified, as an order or proceeding in a cause founded upon an affidavit, petition or complaint not verified would be void, and may be treated as a nullity. [Laimbeer v. Allen,] 2 Sandf. 648. See the forms of petitions and affidavits in the courts of England and in the United States. Gray, Pr. (N. Y.) 106, 518; 2 Bouv. Law Dict. 260; 1 Burrill, Pr. 45, 453; [Jackson v. Stiles,] 3 Caines, 128; [Haff v. Spicer,] Id. 190; [Jackson v. Virgil,] 3 Johns. 540; [Field v. Goodman,] 3 Wend. 310; [People v. Stryker,] 24 Barb. 649; [Laimbeer v. Allen,] 2 Sandf. 648; 2 Rev. St. p. 569, § 25.

The direction or requirement by the court that the petitioner "do attend and be examined," &c., is "an order," by the law of the state of New York. Code, § 401. By the uniform practice of all the courts in this state, such "ex parte applications" or "non-enumerated motions," are only granted upon duly verified affidavits or petitions, which affidavits or petitions, as well as the order, become part of the proceedings in the cause, and are usually served with the order. It is the practice of the United States district courts to follow the rules of the state courts, when there is no rule of the district court upon the subject. The same proceedings should be had as are now authorized in the courts in respect to the manner of compelling the attendance of witnesses on examination before an examiner or commissioner of any of the courts of the United States, or before a judge at chambers of a witness, *de bene esse*, or upon the examination of a debtor under the state law in supplementary proceedings under section 292, Code. To obtain an order for the examination in any of the cases

above cited, on affidavit or petition duly verified setting forth facts sufficient to authorize the issuing of an order for the examination of the party or witness, an affidavit or sworn petition is necessary. It has invariably been the practice of our state courts, in relation to the examination of a witness, *de bene esse*, to require an affidavit, and the same practice prevailed in regard to the examination of insolvents under the law of this state. The Two Third Act; Madd. Ch. Pr. 155; [Luling v. Stanton,] 2 Hilt. 539. After a careful perusal of the different English and American laws, and of proceedings in statutory or special proceedings, and the decisions of the courts, both state and national thereon, from all of which section 26 of the bankrupt law was compiled, I am irresistibly forced to the conclusion that the proceedings provided for by section 26 of the bankrupt law "are proceedings in the action," and must be taken in strict conformity with the rules and practice of this court, especially so as disobedience to the order is a contempt of the court and is to be punished accordingly. Proceedings for contempt in the courts of this state are provided for. Title 13, c. 8, pt. 3, p. 534, Rev. St. They are always proceedings in the case, entitled in the action and are used as a part of the machinery of the court to aid in enforcing its orders. All process in proceedings for contempt, either by attachment or commitment, are founded upon affidavit. *Pitt v. Davison*, 34 How. Pr. 355, and cases there cited. In *Re Carpenter*, [Case No. 2,427,] now pending before me, certain creditors, by Mr. Sawyer, their counsel, made a motion for the usual order and subpoena, under section 26 of the act, for the examination of the wife of the petitioner. The motion was founded upon an affidavit. The counsel for the petitioner claimed that the affidavit upon which no motion was made was insufficient, and I held that the affidavit was sufficient, "both in form and substance," and granted the order. I learn that the petitioner made a motion at chambers, before your honor, to set aside the order, &c., on the ground of the insufficiency of the affidavit upon which I granted the order, and that your honor held that the affidavit was sufficient and denied the motion.

I have regarded this decision as a special term decision that an affidavit setting forth facts sufficient to found such an order, &c., upon, was the proper way of proceeding, and have followed it accordingly. First, I hold that the creditor of the bankrupt in this, in order to avail himself of the provisions of section 26 of the act, must apply to the register (court) upon affidavit, or petition duly verified, showing some good and sufficient reason why the order should be granted, also summons issued, and that a

mere verbal request is not sufficient, not being in accordance with the rules and practice of this court. Second. That upon such reason being shown, the register (court) should, as a matter of course, grant the order &c.

John Fitch, Register.

BLATCHFORD, District Judge. The creditor in the present case, to obtain an order according to form number forty-five, for the examination of the bankrupt under section 26 of the act, must apply for such order by petition or affidavit duly verified, and show good cause for the granting of the order.

Case No. 40.

In re ADAMS.

[3 Ben. 7; 2 N. B. R. 272, (Quarto, 92;) 36 How. Pr. 270; 1 Chi. Leg. News, 107.]

District Court, S. D. New York. Nov. 12, 1868.

BANKRUPTCY—PROTECTION OF BANKRUPT—EXAMINATION BY CREDITORS.

The fact that one creditor of a bankrupt has examined him under the 26th section of the bankruptcy act is no reason for withholding the same privilege from another creditor. But the register must regulate such examination so as to protect the bankrupt from annoyance, and oppression, and mere delay.

[Cited in *Re Vogel*, Case No. 16,984; In re *Frizelle*, Id. 5,132; In re *Bellis*, Id. 1,276.]

In bankruptcy. In this case an examination of the bankrupt, [Julius L. Adams,] at the instance of one creditor, under the 26th section of the bankruptcy act, had been concluded. Another creditor obtained an order for a similar examination, on the return of which order the bankrupt objected to being examined, claiming that, after one examination had been concluded, the other creditors were estopped from examining him further. The register held that they were not so estopped.

BLATCHFORD, District Judge. Every creditor has a right, under section 26, to examine the bankrupt on oath as to the matters specified in that section. Such examination enures to the benefit of all creditors. But the fact that one creditor has examined the bankrupt is no reason for withholding the privilege from another creditor. Yet the register must, in the exercise of a sound discretion, so regulate the time, and manner, and course of the examinations, as to protect the bankrupt from annoyance and oppression and mere delay, while at the same time full and fair opportunity is allowed to the creditors to inquire as to the matters specified in the 26th section.

¹[Reported by Robert D. Benedict, Esq., and here reprinted, by permission.]

Case No. 41.

In re ADAMS.

[5 Ben. 544.]¹District Court, S. D. New York. March,
1872.**BANKRUPTCY—NOTICE TO CREDITORS—MARSHAL'S RETURN.**

A return of the marshal that he had "sent written or printed notices to the creditors named on the schedules, and herewith returned, which schedules were made up by him on the best information he could obtain in respect thereto, after diligent search," is sufficient.

In bankruptcy. The marshal, as messenger in this case, made return to the warrant, that he had "sent written or printed notices to the creditors named on the schedules, and herewith returned, which schedules were made up by him on the best information he could obtain in respect thereto." At the meeting of creditors, one of them objected to the return, as being insufficient, in the absence of any statement that the bankrupt had not delivered to the marshal a schedule of his creditors, or had refused to deliver such schedule, or that any proceedings had been taken ineffectually to compel him to deliver such schedule, and in the absence of any statement showing the sources of the marshal's information. The register certified the question to the court, with his opinion that the return was sufficient.

BLATCHFORD, District Judge. I concur in the view of the register.

Case No. 42.

In re ADAMS.

[6 Ben. 56.]¹

District Court, S. D. New York. April, 1872.

EXAMINATION OF WITNESS—FORM OF OATH.

An attorney, who is called as a witness in a proceeding in bankruptcy, is not entitled to add to the oath which he takes a reservation of a right to refuse to answer any question on the ground of privilege as the attorney or counsel of the bankrupt.

[See note at end of case.]

In bankruptcy. On the application of the assignee in bankruptcy in this case, a summons was issued to an attorney to appear as a witness. He appeared before the register on the 16th of March, 1872, and was sworn in these words: "I do solemnly swear that I will make true answer to all such questions as may be proposed to me respecting all the property of the said James M. Adams, the bankrupt above named, and all dealings and transactions relating thereto, and will make a full disclosure of all that has been done with the said property, to the best of my knowledge, information and belief; and that I will make true answers

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to all questions which may be put to me relating to the disposal or condition of the said property of the said bankrupt, to his trade and dealings with others, and his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate, and the due settlement thereof according to law, reserving my right to refuse to answer any question in regard to such matters on the ground of privilege as the attorney and counsel of said Adams, which I may not be able to answer except in consequence of my retainer as such attorney and counsel, and from information derived from my client as such." The examination was adjourned till the 18th of March, when the witness appeared. The assignee refused to proceed with the examination of the witness under the oath which he had taken. The witness then proposed to take an oath in the following form: "I, being duly sworn in regard to the matters now pending before the said register, say, &c." To this the assignee objected. The register certified the question to the court.

BLATCHFORD, District Judge. The proper form of oath is the first, without the reservation added to it. The assignee was right in declining to proceed with the examination of the witness under the oath administered March 16th, 1872, and in objecting to the witness being sworn in the form proposed by the witness.

[NOTE. The attorney of a bankrupt cannot refuse to be sworn, on the ground of privilege, nor can he object till some question is asked which invades such privilege. In re Woodward, Case No. 17,999. For instances in which certain questions were held to be proper, see In re Aspinwall, Id. 501.]

Case No. 43.

In re ADAMS.

[3 N. B. R. 561, (Quarto, 139.)]

District Court, D. Massachusetts.

BANKRUPTCY—DISCHARGE—FRAUD—EVIDENCE.

[A debtor, carrying on business through agents in the country at large, made, in January, several conveyances to his wife, and, in the following May, filed his voluntary petition in bankruptcy. He was insolvent at the time of the transfers to his wife, but claimed that he did not know it, as he had not then settled with his agents. *Held*, considering his duty to know the state of his affairs, the short time that elapsed between the conveyances and the filing of the petition, the great improbability of his story, and the fact that he and his wife had not attempted to repair the error, that he was not entitled to a discharge.]

[Cited in Re Rainsford, Case No. 11,537.]

[In bankruptcy. Application by Reuben A. Adams, a bankrupt, for discharge from his debts. Denied.]

E. Avery, for the bankrupt.
J. D. Ball, for the creditors.

LOWELL, District Judge. The proceedings in bankruptcy were begun by the voluntary petition of the debtor, May 19, 1868. In January of that year, he conveyed two parcels of land at Provincetown, and a fractional share in three several schooners, to his wife, Caroline M. Adams. The bankrupt has carried on for many years a rather peculiar kind of business, which he called a general auction and commission business, and which consisted of buying goods at wholesale and sending them to various country towns, large and small, to be disposed of by his travelling agents by auction. He usually called in his accounts and made an examination of the state of his affairs in January of each year; but he swears he did not do so in the year of his failure until the report of his insolvency had been spread abroad, and his creditors had become alarmed and attached his property, which was in the month of May, and that when he then called upon his agents for their returns, he found to his surprise that his creditors were right, and that he was deeply insolvent. He explains the transfers to his wife by saying that she owned a large estate which he had tried and intended to keep separate from his own, and that by some mistake this property was put into his name, though in equity and justice it was always hers. The time chosen for the conveyances he accounts for by its being January, which he says is settling time, and that he wanted to know how he stood, as he was about to change the nature of his business.

The evidence shows that in 1855, Adams settled upon his wife all his interest in his father's estate, and there is nothing to impeach this transaction, which was done under the advice of counsel. But the indenture of trust contained a power to Adams and his wife to revoke the uses, which they did in the following year; and since that time the title of the wife must depend upon the general law of Massachusetts regulating the property of married women. Some of the shares of bank stock, and perhaps other evidences of property, have always remained in Mrs. Adams' name, and I do not see that the present creditors of her husband can lay any claim to these, it not appearing that the transfer was illegal or fraudulent when it was made. But it is otherwise with the property conveyed by the husband to the wife in January, 1868. Whatever may have been the supposed equitable right of the wife to this property as against her husband, there is nothing, so far as appears, to mark it as hers, or even to show that any specific money or estate of hers had been

used to buy it. There was no trust, express or implied, impressed upon it, and it was part of his apparent capital. The transfers, therefore, must be examined upon their merits as gifts from the husband to the wife at that time, and the case has very properly been so argued on both sides. As such they cannot be sustained. In arriving at this conclusion it is not necessary to inquire into any doubtful or contested points of law. Granting that a bona fide settlement upon a wife will be upheld, excepting when the husband is actually insolvent at the time—which is a good deal more than has ever been decided in Massachusetts—still it is clear that Adams was insolvent when these transfers were made. This is not denied. But it may be said that he was not aware of his situation, and therefore ought not to suffer by a refusal of his certificate, though the assignee should be entitled, upon the facts as they now appear, to avoid the transaction, as a technical fraud upon the creditors. If the bankrupt and his wife had surrendered this property as soon as the mistake was discovered, the case would stand very differently; but as he has not done so, nor made any attempt to repair his error, I find it the more difficult to believe that it was a mere mistake. His conduct since his admitted insolvency, and the character of his answers to the interrogations propounded to him in his examination, the great improbability of his story, the short time before his actual failure, all go to show that the conveyance was made after, and not before his suspicions of his solvency had been aroused. There cannot be a doubt that he has committed a fraud on the act, and that he ought to have known the state of his affairs, and he has failed to show to my satisfaction that he did not know it. Whether, if he had persuaded me that he simply made the deeds without inquiry, or even with good reason to suppose himself solvent, he could still be discharged, unless he made restitution, I need not decide; nor need I inquire whether he kept proper books of account, nor whether the loss of his books is chargeable to him, because upon the main and most important part of the case I decide that the discharge must be refused.

ADAMS, (The BEN.)

[See The Ben Adams, Case No. 1,289.]

ADAMS, (BAILEY WRINGING-MACH.
CO. v.)

[See Bailey Wringing-Mach. Co. v. Adams,
Case No. 752.]

Case No. 44.

ADAMS et al. v. BANCROFT.

[3 Sum. 384;¹ 1 Law Rep. 319.]

Circuit Court, D. Massachusetts. Oct. Term, 1838.

CUSTOMS DUTIES—PROPERTY SUBJECT TO DUTY—ACT OF 1833—FRENCH SILK GLOVES—LAWS IMPOSING DUTIES STRICTLY CONSTRUED.

1. By the act of congress of 1833, c. 54, § 4, [4 Stat. 630, c. 55, § 4,] French silk gloves are free of duty upon importation.

[Cited in *Whiting v. Bancroft*, Case No. 17,575.]

2. Laws imposing duties are not construed beyond the natural import of the language, and duties are never imposed upon the citizens upon doubtful interpretations.

[Cited in *Hartman v. Wiegmann*, 7 Sup. Ct. Rep. 1240, 121 U. S. 609; *Devereaux v. City of Brownsville*, 29 Fed. Rep. 754; *Hedden v. Iselin*, 31 Fed. Rep. 266; *Swayne v. Hager*, 37 Fed. Rep. 783.]

[3. Cited in *Sixty-Five Terra Cotta Vases*, 18 Fed. Rep. 510, to the point that one of the best-settled rules of interpretation is that articles grouped together are to be deemed to be of a kindred nature, unless there is something in the context which repels that inference.]

[See *U. S. v. Ullman*, Case No. 16,593; *Powers v. Barney*, Id. 11,361.]

[At law. Action of assumpsit by Charles F. Adams and others against George Bancroft, collector of the port of Boston and Charlestown, for money had and received.] The parties agreed upon the following statement of facts:—"The plaintiffs, in November last, imported a quantity of silk gloves from France. The defendant, who is collector of the port of Boston and Charlestown, in this district, refused to permit them to be entered free of duty, and required the plaintiffs to pay thereon a duty of twenty-three and a half per centum ad valorem. The plaintiffs protested against this claim as not authorized by law; but as they could not otherwise obtain possession of their property, they paid to the collector the sum of two hundred and ninety dollars, being the amount of duties claimed by him on the said merchandise, at the same time requesting him not to pay over that money to the United States, as they intended to commence an action against him to recover it back." [Judgment for plaintiffs.]

The cause was argued by Smith, in the absence of the district attorney, for the collector, and by C. P. Curtis, for the plaintiffs.

STORY, Circuit Justice. This is an amicable action to ascertain, whether by the tariff act of 1833, chapter 54, [4 Stat. 630, c. 55, § 4,] French silk gloves are free of duty upon importation. By the 4th section of that act, it is among other things enacted, that there shall be admitted to entry free from duty, "worsted stuff goods, shawls, and other manufactures of silk and worsted, manufactures of silk, or of which silk shall be the

component material of chief value, coming from this side of the Cape of Good Hope, except sewing silk." That these silk gloves came from France, and of course from a place this side of the Cape of Good Hope, is admitted; and that they are manufactures of silk is perfectly clear, so that they seem to fall within the descriptive words of the section, and as such are free of duty. Unless there be some other section in the act of 1833, or in some other act, which qualifies or modifies this general exemption, there would seem to be an end of the matter. But it is contended on behalf of the United States, that such a qualification or modification results by implication of law from the provisions of the tariff act of 1832, chapter 224, [4 Stat. 583, c. 227.] The argument is in substance this, that in the second paragraph of the second section of the act of 1832, mitts and gloves are made subject to a specific duty of twenty-five per centum, and silk gloves fall within this description; and that the fifteenth paragraph of the same act, which lays a duty "on all manufactures of silk, or of which silk shall be a component part, coming from beyond the Cape of Good Hope, ten per centum ad valorem, and all other manufactures of silk, or of which silk is a component part, five per centum ad valorem, except sewing silk, which shall be forty per centum ad valorem," was intended to cover other manufactures of silk, excluding silk gloves; and that the act of 1833 repealed the duty only on manufactures of silk, which are within the fifteenth paragraph.

It appears to me, that the argument is not well founded upon the true construction of the act of 1832. The second paragraph of the second section of that act appears to me to refer entirely to goods composed wholly, or in part of wool. It lays a duty "on all milled and fulled cloths of which wool shall be the only material, &c., five per centum ad valorem, on worsted stuff goods, shawls, and other manufactures of silk and worsted, ten per centum ad valorem, on woolen yarn four cents per lb., and fifty per centum ad valorem, on worsted, twenty per centum ad valorem, on mitts, gloves, bindings, blankets, hosiery, and carpets and carpeting, twenty-five per centum (with certain exceptions, not necessary to be named), on flannels, bockings, and baizes, sixteen cents the square yard, and upon merino shawls made of wool, all other manufactures of wool, or of which wool is the component part, and on ready made clothing, fifty per centum ad valorem." Now, construing this clause according to the ordinary rules of interpretation of statutes of this sort, it seems to me difficult to maintain that any other articles were within the scope of the paragraph, than those, which are wholly of wool, or of which wool is a component part. Every other article, except mitts, gloves, and bindings, would certainly fall within that pre-

¹[Reported by Hon. Charles Sumner.]

dicament. Mitts, gloves, and bindings, may be of that material; and the closing words, "all other manufactures of wool, or of which wool is a component part," afford a very strong presumption that this must have been the intent of the legislature, as they grammatically, as well as logically, mean "other" than the preceding enumerated articles.

One of the best settled rules of interpretation of laws of this sort is, that the articles, grouped together, are to be deemed to be of a kindred nature, and of kindred materials, unless there is something in the context which repels that inference. *Noscitur a sociis*, is a well founded maxim, applicable to revenue, as well as to penal laws. But the fifteenth paragraph of the same act still more fully demonstrates that this must have been the intent of the legislature. That paragraph declares the duty "on all manufactures of silk, or of which silk shall be the component part, coming from beyond the Cape of Good Hope, ten per centum ad valorem, and on all other manufactures of silk, or of which silk is a component part, five per centum ad valorem, except sewing silk, which shall be forty per centum ad valorem." Now, this paragraph plainly in its terms includes all manufactures of silk, except sewing silk. Upon what ground, then, can the court say, that all manufactures of silk are not to be deemed included in the sense of that statute, when they fall within the terms? Certainly it is incumbent upon those, who insist upon any exception, to establish, that it unequivocally exists. It is not sufficient to show, that it might possibly exist inconsistently [consistently] with the words. It must be shown positively to exist. If the legislature had intended to except silk gloves, the exception ought to have been found in the paragraph. "sewing silk" is excepted; and in such a case the exception of one thing is equivalent to an affirmation of the exclusion of all other manufactures of silk in the same paragraph. *Exceptio probat regulam de rebus non exceptis*. Besides, if the second paragraph is to be construed as including silk gloves, under the denomination of mitts and gloves, it becomes repugnant to the generality of the fifteenth paragraph. If, on the other hand, it be construed to apply only to mitts and gloves, of which wool is a component part, then the paragraphs are in perfect harmony with each other. In this way, all the language used has its fit and due application and meaning; and it is certainly the duty of courts of justice to give such an interpretation to every statute, as, if possible, will make all its provisions consistent with each other. I may add in this connection, that laws imposing duties are never construed beyond the natural import of the language; and

duties are never imposed upon the citizens upon doubtful interpretations; for every duty imposes a burthen on the public at large, and is construed strictly, and must be made out in a clear and determinate manner from the language of the statute.

But even supposing, that the act of 1832 would admit of the interpretation contended for, so as to include silk gloves under the denomination of "mitts and gloves" in the second paragraph, still it would by no means follow, that the act would not be repealed by the act of 1833. The fourth section of this act declares, that "worsted stuff goods, shawls, and other manufactures of silk and worsted" shall be free of duty; thus directly repealing the duty on the very articles contained in the second paragraph of the second section of the act of 1832, above cited. Then follow the words "manufactures of silk or of which silk shall be the component material of chief value from this side of the Cape of Good Hope, except sewing silk," which are also declared free of duty. Now, these words plainly, in their natural and obvious meaning, repeal all duties on manufactures of silk, except sewing silk. How, then, can the court say, that other exceptions shall be ingrafted on the words of the act? If silk gloves are still to pay duty, what manufactures of silk are not to pay a duty? No exception is made by the legislature, but of sewing silk. What ground is there for the court to create other exceptions? How can the court say, that it was not the policy of the legislature to repeal the duty on silk gloves, as well as on other manufactures of silk? The act makes no such exceptions, and implies none. I profess myself utterly unable to comprehend what authority the court have to insert a positive exception into the language of the act, not necessary to its sense, or to its declarations.

My judgment is, that "silk gloves" are by the act of 1833 free of duty, and, consequently, that the plaintiffs are entitled to recover back the duties paid by them.

I wish only to add, that this action, being between citizens of the same state, would not have been within the jurisdiction of this court from the character of the parties. It is, however, brought within the jurisdiction of the court in virtue of the second section of the act of the second of March, 1833, chapter 56, which extends the jurisdiction of the circuit courts of the United States "to all cases in law and equity arising under the revenue laws, for which other provisions are not already made by law." I have not thought it necessary, therefore, to examine into the form of the declaration, because the statement of facts, agreed to by the parties, clearly brings the case within the statute.

Case No. 45.

ADAMS v. BARNARD.

Circuit Court, S. D. New York. 1846.

[Nowhere reported; opinion not now accessible.]

ADAMS v. BEACH.

[See *Adams v. Board of County Com'rs of Douglas County*, Case No. 52.]

ADAMS, (BENNETT v.)

[See *Bennett v. Adams*, Case No. 1,316.]

Case No. 46.

ADAMS et al. v. BLODGETT et al.

[2 Woodb. & M. 233; 10 Law Rep. 69; 17 Hunt, Mer. Mag. 79.]

Circuit Court, D. Massachusetts. Oct. Term, 1846.

ASSIGNMENT FOR BENEFIT OF CREDITORS — CONSIDERATION—CONSENT OF CREDITORS — TRUSTEE PROCESS.

1. If the creditors of a failing debtor meet and agree to take an assignment of all his property towards paying the debts of all, and to have him continue responsible for any balance; and this is carried into effect by taking such assignment and possession of the property; it is valid against one of the creditors, who was not present, and brings a trustee process against the agent of the creditors, who has charge of the property.

2. The consideration is good, on account of the trust or contract, and the presumed assent of those creditors not expressly dissenting. But here it was clearly good, as the creditors actually assenting had claims exceeding in value all the property assigned.

3. A conveyance to a portion of one's creditors for a full consideration is valid at common law, and a fortiori, a conveyance to all of them.

4. Such a conveyance, the debtor agreeing still to be liable for the balance, is better for them than the insolvent law, and cannot be considered a fraud upon it. The insolvent laws have repealed the prior act in Massachusetts as to preferring creditors, but do not abrogate all conveyances like this at common law.

5. The present creditor can now come in and obtain his pro rata share of the property assigned for the benefit of all, or can, for the usual reasons, have the case put into insolvency under the statute, and the property thus distributed. But the proceedings already had are valid till this is done.

At law. This was an action of assumpsit [by Franklin Adams and others] against [Joseph F.] Blodgett, the principal, for \$945.75, money had and on an account annexed. The principal was defaulted. One of the defendants, summoned in as a trustee, viz., F. Wells, denied having any goods or credits of Blodgett in his hands, and was discharged. The other, O. Libby, disclosed the following general facts in his answer to the interroga-

tories put by the plaintiff. Joseph F. Blodgett, the principal, failed in business, in the latter part of March, 1846, and a meeting of a large portion of his creditors was held, and several others not present agreed to follow the course which those present should agree on. They finally and mutually contracted, that J. Blodgett should give up to his creditors all his property and credit; and what of his debts these did not pay, he stipulated in writing to discharge at some future time. He further agreed, that his brother, H. Blodgett, to whom had been sold his goods and other interests in Robbinston, Maine, should surrender them and the amount collected on them, upon restoring to him the note executed therefor. It was further stipulated, that some one of the creditors, in behalf of all, should go to Robbinston and take possession of the property and effects of Blodgett there, and O. Libby was selected for that purpose. On the 2d of April, 1846, Blodgett gave to Libby a written order to have the charge of all his property, books, and notes, "at R. and elsewhere," and to dispose of them "for the benefit of all his creditors." Libby went accordingly and took possession of them, H. Blodgett conveying or assigning to him in writing all he had received, and taking back from Libby his note given therefor to J. F. Blodgett. O. Libby disclosed next, that he had collected from this property about \$350 in potatoes. He further stated, that in September last, and since this suit was instituted, Libby and his partner agreed with J. F. Blodgett to release their debt to him, if his other creditors would do the same for \$30, but the arrangement had not been completed.

The amount of the claims of those creditors, present or represented in March, 1846, was testified to be greater than all, which O. Libby had collected from the accounts and the value of the other property which he received. In answer to additional interrogatories, Libby says that he has collected, beside the potatoes, since the suit,.....\$350.00
for sale of goods in the store,..... 217.47
from wood, &c..... 160.00

\$727.47

and has a sled worth \$10, and barrels empty, 1400 in number.

On this disclosure, the plaintiff moved to charge Libby for the whole sum of \$727.47.

P. W. Chandler, for plaintiff.
Brown, for Libby.

WOODBURY, Circuit Justice. The proceeding in this case, so far as regards Libby, the garnishee, is an equitable one. The form of the process is not a *capias* against the body, or an attachment of his property; but is a mere subpoena as in chancery to appear and answer. The plea, when appearing, is not one as at common law, but an answer to interrogatories, and usually verified by his

¹[Reported by Charles L. Woodbury, Esq., and George Minot, Esq. 17 Hunt, Mer. Mag. 79, contains partial report only.]

oath only, and his liability is not put to the jury except in peculiar cases, but tried by the court. If charged, also, it is on principles rather of equity than law, as it is on the ground that he holds something in trust for the debtor, and something which, on the principles applicable to trustees, he ought not to retain from the creditors of the cestui que trust; something, in short, which, *ex aequo et bono*, the special statute governing those proceedings considers that a creditor should be allowed to draw out of his hands. 2 Bac. Abr. "Customs of London," H; Evans v. Eaton, [Case No. 4,559;] [Wells v. Banister,] 4 Mass. 514; [Whiting v. Earle,] 3 Pick. 201; [White v. Jenkins,] 16 Mass. 62. The chief or leading question then here is, whether Libby holds any such property of Blodgett—property which he ought in justice as well as law to surrender entirely to this plaintiff, as one of the creditors of Blodgett? I am very readily conscious of many cases somewhat like this, where property ought to be thus surrendered or accounted for to one creditor. Such are several of those cited at the bar for the plaintiff, and chiefly resting on some fact, that the prevailing party then was prior in time in making his attachment; or the other party in possession had been guilty of fraud.

In an analysis of the principles involved in those cases, I apprehend they will all be found to contain some important elements which do not exist here, and which rendered it illegal or inequitable, there to let the property remain in the hands of the respondent. Thus if the plaintiff made his attachment before the conveyance was completed, the rule, *prior tempore, potior jure*, well applies at common law. [Keech v. Hall,] 1 Doug. 21; [Dearle v. Hall,] 3 Russ. 20. So, where a debtor in falling circumstances, conveys property to a third person, or a creditor, for an inadequate consideration, there, whether the proceeding is by attachment of the property, or by a trustee process, the conveyance is held to operate as an injury or fraud on other creditors, as it lets the property go to a stranger, or a single creditor, without an adequate consideration. It prevents the other creditors from getting as much from the property of the debtor as ought to be got from it, and thus defrauds them; and hence the conveyance is considered void. See cases of this character. Kimball v. Fenner, 12 N. H. 248; Everett v. Read, 3 N. H. 55.

Again, if a debtor, when failing, assigns his property to a portion of his creditors, to the exclusion entirely of others, who will not come in and release him, either for a share in that property, or for some reduced percentage on their claims, it has been held, that such a conveyance ought not in justice to stand, as it attempts to force other creditors to compound or relinquish a part of their honest claims, on the penalty of losing the whole. Jewett v. Barnard, 6 Greenl.

383; Halsey v. Fairbanks, [Case No. 5,964;] [Copeland v. Weld,] 8 Greenl. 411; 2 Kent, Comm. 420; Bradford v. Tappan, 11 Pick. 78; Brewer v. Pitkin, Id. 298. But if such a conveyance was to a part of one's creditors, as a mere preference of them on account of the favored character of their claims, and for an adequate consideration, it would not at common law be void. There a man may honestly pay any one of his creditors in full, in the usual course of business, though he has not enough left to pay all. [Russell v. Woodward,] 10 Pick. 408; [Brooks v. Marbury,] 11 Wheat. [24 U. S.] 78; Halsey v. Fairbanks, [Case No. 5,964;] Haven v. Richardson, 5 N. H. 113. But then he must sell or convey for its fair value, and no secret trust must exist to the injury of others, or to the special benefit of the debtor. [Coburn v. Pickering,] 3 N. H. 415; [Russell v. Woodward,] 10 Pick. 412. So if the creditors have not in truth assented to the assignment, in sufficient numbers and value to cover the property assigned, it has been held in this state that the consideration may be deemed inadequate and void as to the creditors who have not assented, though good as to those assenting. Russell v. Woodward, 10 Pick. 408; [Bradford v. Tappan,] 11 Pick. 78; [Brewer v. Pitkin,] Id. 298; [Ward v. Lamson,] 6 Pick. 358. In the first of these cases, also, the debtor was left in possession of the property, which is always a badge or evidence, slight or otherwise, of fraud. Clark v. Morse, 10 N. H. 236; Deshon v. The Medora, [Case No. 3,820;] Coburn v. Pickering, 3 N. H. 415; [Griffin v. Bixby,] 12 N. H. 454; [Bartlett v. Williams,] 1 Pick. 238. So any evidence of a secret trust or confidence tends to vitiate the deed. [Widgery v. Haskell,] 5 Mass. 144; [Paul v. Crooker,] 8 N. H. 288. It has been held, likewise, that if a surplus exist, after satisfying the creditors assenting, or those for whom the property was conveyed, it can undoubtedly be reached by a trustee process. [Bradford v. Tappan,] 11 Pick. 78; [Borden v. Sunner,] 4 Pick. 265; [Andrews v. Ludlow,] 5 Pick. 28; [Widgery v. Haskell,] 5 Mass. 144; Jewett v. Barnard, 6 Greenl. 385; [Com. v. Green,] 17 Mass. 552; 2 Kent, Comm. 420; Leeds v. Sayward, 6 N. H. 83. The assent of preferred creditors will usually be presumed, (Copeland v. Weld, 8 Greenl. 411; [Brooks v. Marbury, 24 U. S.] 11 Wheat. 78;) while that of others, it is said, must generally be expressed, (Id., [Russell v. Woodward,] 10 Pick. 408; [Jewett v. Barnard,] 6 Greenl. 384.) But where the assignment confers on them as great or greater security and privileges as going into insolvency would, (e. g., conveys all the property of the debtor for all, and asks no release of the balance, as here,) it seems highly equitable and useful to presume the assent of creditors not present, and not afterwards dissenting. Copeland v. Weld, 8 Greenl.

414; Halsey v. Fairbanks, [Case No. 5,964.] See, also, [Marbury v. Brooks,] 7 Wheat. [20 U. S.] 556, 578; [Brooks v. Marbury,] 11 Wheat. [24 U. S.] 78. It will not be necessary, however, to give a decisive opinion on this presumption under the circumstances in this case, as the creditors actually assenting here had more due to them than all the value of the property.

The present case will be found essentially unlike any of those which have been declared to be void. It is to be decided on the disclosure alone as if true; and though the transaction, as there represented, was rather inartificial in form, and some parts of it without the writings usually resorted to on such occasions; yet it is a very natural arrangement, to be honestly made between creditors and a debtor on his failure, and is in parts of it reduced to writing, and is throughout consistent with the peculiar situation of these parties. It seems to be conceded, that the debtor failed at Boston or Somerville in this state; that most of his property was in a remote part of Maine, and had been conveyed to a brother, and the note of the latter taken therefor; that the creditors had no remedy but to attach the property conveyed in Maine to the brother, as if conveyed in fraud of the creditors of the vendor; or sue the brother as trustee, and thus attempt to charge him on account of fraud, or some other defect in the proceedings; or take an assignment of the note against the brother, if J. F. Blodgett was willing to make it, and collect something on that towards satisfying their demands. Under these circumstances, there seemed to be no object nor benefit to the creditors as a whole in resorting to attachments or trustee actions to try the validity of the title, at some expense and risk, when J. F. Blodgett, the debtor, was willing to convey to them the note taken for the property in Maine, and agree, as far as he could effect it, that his brother should hand over to them the property and its proceeds on their returning to him the note; and that they might sell the property for the benefit of all his creditors, and he stand accountable to pay the balance of their debts at some future time. While the creditors as a whole could have no possible motive not to accede to this proposition, it indicates on the part of the debtor, (whatever suspicion might otherwise have rested on his conveyance to his brother,) a willingness to have all his property of any description go to the benefit of his creditors, and of all his creditors rather than a few, and to pay them any remaining balance, if able, at any future period. This was perfectly fair. *Pickstock v. Lyster*, 3 Maule & S. 371; *Halsey v. Fairbanks*, [Case No. 5,964.]

It is a mistake to suppose the assignment was not for the benefit of all, and the promise to pay the balance, not applicable

to all, whether present or absent. What possible ground, then, is there in this arrangement with the creditors for imputing, so far as regards that, either a fraudulent design in the debtor, or a fraudulent injury to any creditor? The debtor relinquishes every thing, and renews his promise for the balance not then paid, and the creditors get every thing, and without conditions or restrictions. See further, in respect to this, [*Holbird v. Anderson*,] 5 Durn. & E. [Term R.] 235; [*Estwick v. Caillaud*,] Id. 420; [*Meux v. Howell*,] 4 East, 1; [*King v. Watson*,] 3 Price, 6. The debtor, it is admitted, may prefer at common law a part. Then why not treat all equally, when it is fairer? Again, the possession of the property was at once changed to the agent of the creditors, and without proving or presuming the assent of absent creditors, enough, as before stated, and particularly disclosed in the answer, were present here to equal by their debts the whole amount of property. These are facts shown with distinctness and not impugned, and which vary this case essentially from others which have been cited. *Russell v. Woodward*, 10 Pick. 412; [*Stevens v. Bell*,] 6 Mass. 342; *Widgery v. Haskell*, 5 Mass. 144. The old objection against these conveyances in trust, that no way existed to enforce them, there being no court of chancery in Massachusetts, is now entirely overcome by the extended chancery powers since vested in her courts of law, as well as overcome here by such powers existing fully in this court. [*Copeland v. Weld*,] 8 Greenl. 414; [*Brown v. Minturn*, Case No. 2,021,] [*Scribner v. Hickok*,] 4 Johns. Ch. 531. See, also, *Foster v. Saco Manuf'g Co.*, 12 Pick. 451, 454, in point as to the present case.

It is questionable whether, looking at the matter in equity rather than at law exclusively, as was the practice here for some time, there is not always consideration enough to support the conveyance in the trustees undertaking to sell and distribute the proceeds. *Halsey v. Fairbanks*, [Case No. 5,964.] But that need not be decided here; for on the principles settled in the old cases in this state, this conveyance, as before shown, was on ample consideration. Indeed, it was pursuing almost the precise course pointed out by law under the present insolvent system, instead of doing something to thwart or defeat it. It secured, in addition to what that does, the debtor's future liability, and saved all the legal costs of going through the forms of that system. The last circumstance was probably a strong inducement for the parties here, who defend where the estate was small and the debtor willing to surrender every thing, to make this arrangement voluntarily, and save cost and expense to all concerned. Nor was the insolvent system needed to be resorted to, with a view to avoid under it any sale to third per-

sons, as might be proper for that purpose, in some cases, [Foster v. Saco Manuf'g Co.,] 12 Pick. 453-455; [Penniman v. Cole,] 3 Metc. [Mass.] 496, 500. For here the third persons were willing to relinquish the sales previously made, and did relinquish them on request, and on the return of the note given for the consideration. But while this course was so manifestly beneficial to the creditors as a whole, paying them pro rata, equally, and applying to their debts all the proceeds of the debtor's property, without cost or expense of the insolvent system, and under the management and sales of one of their own number; and while they, as a whole, could have no interest in treating this proceeding as illegal or fraudulent, and could not so treat it, so far as they acquiesced or engaged in it, those creditors, not present, or not represented at the meeting in March 1846, like the plaintiff, were not obliged to sanction it. They might at their pleasure, attach the property in Maine, or trustee the brother, or even the respondent, one of the creditors, after receiving the property from the brother for the whole creditors. They might thus attempt to rip up all the proceedings for fraud or other defect, and if successful, secure the whole of their debts, instead of taking a pro rata share; though they might be liable, before judgment is entered up, and possibly after, if before any levy or seizure of property, to have the debtor put into insolvency by some other creditor, and their special lien thus dissolved, and that same general distribution compelled, which is now voluntarily going on.

It is not a little singular, as an illustration of the real character of the present suit, and of the transaction it seeks to avoid, that the suit, if successful, may end in a proceeding of insolvency as to Blodgett's estate, which would distribute it precisely as is now doing, except with an amount reduced by costs instead of any addition or advantage; and that the present plaintiff would not then realize so much on his debt as now, by the deduction of his proportional amount of cost, nor would he then have any remedy left, as now, for the balance. There can be no surer or better test, perhaps, of the propriety of not withdrawing this property from the respondent, than that it is now in his hands, accomplishing more to fulfil the social and moral purposes of the laws, than it would if withdrawn. Nor is the arrangement doing this in the teeth of any statute, or any provision of the common law. The statute in this Commonwealth, passed in 1836, prohibiting conveyances to creditors, was to prevent a conveyance to preferred creditors or a favored few. That is not this case; and besides, that statute is repealed by the insolvent act of 1838. Carter v. Sibley, 4 Metc. [Mass.] 298. Nor does that insolvent act in terms prohibit any such conveyance as

this; nor can it be implied from the fact, that the two courses are exactly the same. They differ materially and unfavorably to the debtor. This trust dispenses with several forms and considerable expense, and holds the debtor still liable for the balance. Whereas that course releases the debtor from liability for the balance, and subjects him to go through with the statutory course, in order to entitle himself to be released. Nor are the two courses inconsistent and incompatible any more than identical. Nor is one mode imperatively a substitute for the other. The present mode is more favorable to the creditors, and hence is not presumed to be forbidden by the other. The debtor or the creditors may prefer either to the other, and if they do so unitedly, or if the debtor and most of the creditors do, neither the insolvent statutes, nor any public policy in it seem violated, or require a forced construction to abrogate this trust.

The insolvent statute of 1838 was held to repeal the assignment statute of 1836, because it substituted one statutory system for another statutory system, alike in substance, but different in form. Carter v. Sibley, 4 Metc. [Mass.] 298. But here, the act of 1838 does not repeal the present trust by an implication of this kind, because it is not a trust made under the act of 1836, and differs in some particulars in substance from both of those statutes. Nor is there any principle of the common law opposed to this conveyance. Had it been made honestly and for an adequate consideration, even to a part only of the creditors, it would have been valid at common law. (See cases before.) And nobody ever doubted at common law that a conveyance to all one's creditors to secure their honest debts, if they assented, or if there was sufficient consideration, was valid. [Carter v. Sibley,] 4 Metc. [Mass.] 300, semb.; [Russell v. Woodward,] 10 Pick. 412; Stevens v. Bell, 6 Mass. 342. It is the very design and wish of the law, that the property should all go to them. This is also the refinement of the modern bankrupt or insolvent system to have it go equally as here. In aiding this, you aid justice rather than defeat it. You benefit rather than injure the creditors as a whole. You are guilty of no fraud, either in fact or law, as to all or any portion of them. Certainly not in fact, when all the property is placed in the hands of all, or of a part for all; and certainly not in law, where none are excluded, and none required on any terms whatever, to execute releases or accept as final payment less than all their claims.

Under this analysis of the subject, no fraud whatever seems to exist between the parties, whatever may have been contemplated originally between the two brothers. How that may have been is not material here, as their contract must be considered either as rescinded, or the property sold by

the brother to the creditors themselves, towards the payment honestly of all their debts, and for the original consideration, the note, so as to purge away any fraud that might have been once contemplated against others. It is now held in trust for all, and hence the old sale injures or defrauds none. Nor is it any objection to the present agreement between the creditors and J. F. Blodgett, that it was not all put in writing. It is clearly proved, part by parol and part by writing, and is not required to be shown by writing, either by the statute of frauds or any common law principle. The consideration for it is, also, as full and good as the consideration of the original debts of the several creditors, and the validity and amount of the debts of each is to be settled in the same way, as in all cases of assignments and trusts. If not done by the debtor and each creditor under the inspection of the agent or trustee, so as to be satisfactory, it may be tested in a suit like this, and the trustee, on motion, be allowed to defend for the debtor. So the whole administration of the trust can be revised by a bill in chancery, if any debtor chooses. Nor is there any difficulty as to the creditors not present, and who do not choose to come in and take their dividend with the rest. They are left, like the present creditor in this action, to a suit against the original debtor, and may seize any property they can find unassigned, or subsequently acquired, or his body, if liable. They stand like creditors, who do not choose to prove their debts under a bankrupt commission, and may resort elsewhere to any remedy or property which exists. But in this case, as no dividend has yet been awarded, the plaintiff could probably claim one out of the property, finding it has been legally assigned to pay him as well as the rest, so far as it goes, after deducting all reasonable costs and expenses.

I see no objection to a continuance of this action, to see what the dividend to each creditor applying is, and how the trustee conducts, and to put further interrogatories, if his behavior should require it. But he cannot be charged with the whole property, or enough to pay the plaintiff's debt, on the disclosure as it now stands; though in due time he may be liable to account for a pro rata share to the plain..., if desiring it. All which need be said now definitely on that, or the costs in this suit is, that the defendant, summoned as trustee, cannot be charged in the manner and to the extent claimed, and seems entitled to his cost. But it may become proper for him, at some ensuing term, to pay over to the plaintiff his proportionate share under the conveyance; or if the principal is forced by his creditors to go into insolvency under the statute of 1838, the trustee may be liable to account and deliver over what he holds to the statutory assignees. [Insurance Co. v. Chandler,]

16 Mass. 275; [Borden v. Sumner,] 4 Pick. 265. How that may be, can probably be settled by the next term; as also what the share of the plaintiff may be, if the estate is settled finally under the present conveyance. Let the case, therefore, stand continued, if the plaintiff desires it, before any formal judgment is entered.

Case No. 47.

ADAMS v. BOSTON, H. & E. R. CO.

[Holmes, 30; 4 N. B. R. 314, (Quarto, 99); 5 Amer. Law Rev. 375; 18 Pittsb. Leg. J. 154.]

District Court, D. Massachusetts. Dec., 1870.*

BANKRUPTCY—"BUSINESS CORPORATION"—ACT OF 1867—RAILROAD COMPANIES.

A railroad corporation is a "business" corporation, within the meaning of the thirty-seventh section of the bankrupt act of 1867.

[Cited in Alabama & C. R. Co. v. Jones, Case No. 126; In re California Pac. R. Co., Id. 2,315; Winter v. Iowa, M. & N. P. Ry. Co., Id. 17,890; In re Oregon, B. P. & F. Co., Id. 10,560; New Orleans, S. F. & L. R. Co. v. Delamore, 5 Sup. Ct. Rep. 1011, 114 U. S. 501.]

In bankruptcy. Motion to dismiss a petition in bankruptcy filed against the Boston, Hartford, and Erie Railroad Company, for want of jurisdiction. [Overruled.]

[Enoch G. Sweatt, another creditor, afterwards presented a petition for review to the circuit court, which petition was denied. Sweatt v. Boston, H. & E. R. Co., Case No. 13,684.]

B. R. Curtis and B. F. Brooks, for the motion.

B. F. Butler, C. S. Bradley, W. G. Russell, and T. K. Lothrop, for petitioner.

SHEPLEY, Circuit Judge. This is a motion to dismiss the petition in this case, upon the ground that railroad corporations are not included within the provisions of the thirty-seventh section of the bankrupt act, and not subject to the process provided by the act, and that therefore this court has no jurisdiction in bankruptcy to entertain this petition.

The first ground of objection to the jurisdiction of the court is, that a railroad corporation is a public corporation, created for a public purpose, and bound to the state for the performance of a public duty. The thirty-seventh section of the bankrupt act provides as follows: "The provisions of this act shall apply to all moneyed, business or commercial corporations and joint-stock companies." Section 58 enacts: "The word 'person' shall also include corporations." Section 58 is not, however, to be construed as applying the word "person" to include any

*[Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

[Affirmed by circuit court, in Sweatt v. Boston, H. & E. R. Co., Case No. 13,684.]

other corporations as subject to the provisions of the act than those described in the thirty-seventh section. Public corporations, created for municipal or political purposes, and such private corporations as are ecclesiastical, or eleemosynary, or established for the advancement of learning, are clearly not made subject to the provisions of the act. Private corporations are divided into ecclesiastical and lay. Lay corporations are divided into civil and eleemosynary. Civil corporations are created for an infinite variety of purposes; such as affording facilities for obtaining loans of money, the making of canals, turnpike roads, and the like. The words of the thirty-seventh section, "moneyed, business or commercial corporations," would seem to have been intended to embrace all those classes of corporations that deal in or with money or property in the transactions of money business or commerce for pecuniary gain, and not for religious, charitable, or educational purposes. Accordingly, district courts of the United States in various districts have treated manufacturing, mining, and similar corporations, and in one circuit at least, railway corporations, as subject to be dealt with under the provisions of the bankrupt act. But it is contended that the public purposes for which railways are created, and the public duties they are bound to perform, make them public corporations; and therefore such a construction should be given to the words of the statute as would exclude them from its operation. In the popular meaning of the term, nearly every corporation is public, inasmuch as they are created for the public benefit. But if the whole interest does not belong to the government, or if the corporation is not created for the administration of political or municipal power, the corporation is private. "Strictly speaking," says Mr. Justice Story, in *Dartmouth College v. Woodward*, 4 Wheat. [17 U. S.] 669, "public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder or the nature and objects of the institution. . . . A bank whose stock is owned by private persons is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases the uses may, in a certain sense, be called public; but the corporations are private, as much so, indeed, as if the franchises were vested in a single person."

The case of *Treadwell v. Salisbury Manuf'g Co.*, 7 Gray, 393, 404, cited as an authority in support of the position that this is a

public corporation, is not, in fact, in conflict with the opinion of Mr. Justice Story just quoted. In the learned opinion of Judge Bigelow, in that case, he does refer to "corporations established for objects quasi public, such as railway, canal, and turnpike corporations;" but he does not describe them as public corporations, but only as corporations established for objects quasi public. Neither upon principle nor authority can this corporation be properly classed among public corporations, or on that ground exempted from the operation of the bankrupt act. It is further contended, however, that the legislature of Massachusetts, in creating this corporation, has subjected it to certain duties and liabilities; that these liabilities are not transmissible, that these duties cannot be delegated, that the corporation cannot divest itself of the power it has of performing those duties; "that it is a Massachusetts corporation, a creature of the laws of Massachusetts, placed under the supervision of the authorities and the courts of Massachusetts, and liable to perform certain duties which, by the laws of Massachusetts, cannot be performed by any person to whom its property may be transferred or its franchises delegated." The force of this argument, which seems to apply solely to Massachusetts corporations, and to claim the application to Massachusetts railroad corporations of a special exception from the operation of the bankrupt act, independent of and distinct from any rule which may apply to railway corporations existing under the laws of other states, is somewhat impaired by the fact that the duties of this corporation have been delegated, and are now delegated, by the action of the supreme court of Massachusetts, to a board of receivers; that by the action of the same distinguished tribunal this corporation has been and now is in fact divested of the power of performing its public duties, and that it is not now, by reason of the action in the premises of the highest judicial tribunal in the commonwealth, in the possession or exercise of its franchises, so far as those franchises confer upon it the power to build, operate, and control the railroad. And we look in vain into the legislation of Massachusetts for any indication of public policy to exclude the property of railroad corporations, or such of their franchises as are in their nature assignable and transmissible, from the liability to be taken by due process of law and applied to the payment of corporate debts.

East Boston Freight R. Co. v. Hubbard, 10 Allen, 459, note, is a case where the Grand Junction Railroad and Depot Company became insolvent, and George W. Gordon, a creditor, recovered judgment; and the sheriff levied his execution upon the franchise, and sold the same, with all the rights and privileges so far as related to the receiving of tolls for the term of ninety-nine years. The title of the purchaser at

the sheriff's sale was upheld by the court. A corporation, created for the purpose of constructing, owning, and managing a railroad, cannot, it is true, make any alienation of its general franchise to be a corporation, or its subordinate franchises to manage and carry on its corporate business, without distinct legislative authority. Such is the law in England. *Winch v. Birkenhead R. Co.*, 13 Eng. Law & Eq. 506; *South Yorkshire Ry. Co. v. Great Northern R. Co.*, 19 Eng. Law & Eq. 513; *Shrewsbury & B. Ry. Co. v. London & N. W. Canal Co.*, 21 Eng. Law & Eq. 319; and in Massachusetts, *Hendee v. Pinkerton*, 14 Allen, 381; *Richardson v. Sibley*, 11 Allen, 65; *Com. v. Smith*, 10 Allen, 455. This distinct legislative authority for the alienation of the assignable and transmissible franchises of railroads to carry on their business of managing a railroad and taking tolls has been freely accorded in Massachusetts; and the public policy of the commonwealth embodied in its legislation allows a creditor to sell these franchises on execution, and permits the corporations, within prescribed limits, to alienate them for the payment of debts or the security of creditors. Gen. St. Mass. c. 63, § 120 et seq.; Id. c. 68, §§ 25, 26.

It is contended that the authority given in the Massachusetts statute to attach and levy on "the franchise of a turnpike or other corporation authorized to take tolls" does not include railroad corporations; that the words "authorized to take tolls" are only applicable to turnpike, canal, lock, and bridge corporations, and not to railroads. An examination, however, of the legislation of Massachusetts will show that "an authority to take tolls" is given as one of the franchises of railroad corporations, and that similar words of description of such a franchise are found in all the general and special laws relating to such corporations. Similar words are also used as apt words of description in the judicial decisions of Massachusetts and other states, and in the decisions of the courts of the United States. Section 112, c. 63, Gen. St. of Massachusetts, relating to railroad corporations, provides, "Each corporation may establish, for its sole benefit, a toll upon all passengers and property conveyed or transported on its road." This form of expression is found in all the early railroad charters in this country; and has been continued in use, so far as we are able to discover, to the present time. Section 5 of the act to establish the Boston and Lowell Railroad corporation enacts "that a toll be and hereby is granted and established, for the sole benefit of said corporation, upon all passengers and property of all descriptions which may be conveyed or transported upon said road." The same right to take toll is conferred in the charter of the Boston and Providence Railroad, and continued in use in the charters granted to other railroads until embodied in the general legislation respecting railroad corpora-

tions; after which the charters of many railroad corporations, and among others of those whose franchises have been since transferred to the Boston, Hartford, and Erie Company, contained provisions conferring upon them the rights and subjecting them to the liabilities provided in the thirty-ninth and forty-fourth chapters of the Revised Statutes. Section 83, c. 39, Rev. St. 1836, provides, "Every such corporation may establish, for their sole benefit, a toll upon all passengers and property," &c. If, therefore, the questions had not been previously decided by the supreme court of Massachusetts, whose decision this court would adopt on a question of the construction of a statute of the state, we should have no hesitation in deciding that railroad corporations were subject to the provisions of the twenty-fifth and twenty-sixth sections of the sixty-eighth chapter of the General Statutes of Massachusetts, as "corporations authorized to take tolls." The supreme court of the state has so considered the law in the cases before cited. But it is not believed that the question, whether railroad corporations are subject to be dealt with under the provisions of the bankrupt act, is one the solution of which is dependent upon the special provisions of the statutes of the several states regulating the transfer of the corporate property or franchises, or the mode of applying them to the payment of the corporate debts.

The grant of constitutional power to congress to establish uniform laws on the subject of bankruptcies throughout the United States is general in its terms and unlimited. It was not doubted, at the argument on this motion, that it applied as well to corporations as to natural persons. The only question which can arise is, whether congress has, by appropriate legislation in the exercise of its powers conferred by the constitution, rendered railroad corporations subject to the provisions of the act. As the system of bankruptcy is to be uniform throughout the United States, the solution of this question must depend upon the construction of the terms of the act itself, and not upon the particular legislation of the several states. "The provisions of this act shall apply to all moneyed, business or commercial corporations." To attempt to limit the word "business" in this clause of the statute, so as merely to be synonymous with "trading," would deprive it of any meaning beyond that included in the other words "moneyed and commercial." A trading corporation is a commercial corporation. The word "business" has a broader meaning as applied to corporations. *Harris v. Amery*, L. R. 1 C. P. 154. A railroad corporation is chartered to conduct the business of a common carrier of passengers and merchandise. Is there any principle of public policy which would require that the plain provisions of the statute should receive such a

judicial construction as would exclude this class of corporations?

We have already seen that the public policy of the state in which this corporation exists allows the alienation of the franchises and property of railroad corporations for the payment of their debts. The inconveniences attending such alienations are obvious. But as the argument ab inconvenienti has not been sufficiently strong to prevent the state from allowing these franchises to be sold, and the proceeds of the sale applied in payment of the debts of the first attaching creditors, it certainly does not apply with greater force to a statute providing for the more equitable division of the proceeds among all the creditors. The franchise which authorizes a number of persons to be incorporated and subsist as a body politic, with power to maintain perpetual succession, is not alienable or transferable without direct and positive legislative authority. This is the franchise to be a corporation. It is the life of the corporation. Coupled with the grant of this franchise of corporate existence are the grants to the corporation of those franchises to carry on the corporate "business;" which are grants of valuable privileges, and which, in the case of most private corporations, may be transmitted (as the history of this corporation shows they have been transmitted repeatedly) from one corporation to another, or to individuals, without great detriment to any public objects for which they were created. This distinction between those franchises of a corporation which are inalienable without a positive provision of law, and those possessing nothing in their nature inconsistent with their being transferred or assigned, has never been more clearly defined than in the learned opinion of Mr. Justice Curtis, in the case of *Hall v. Sullivan R. Co.*, [Case No. 5,948.] "The franchise to be a corporation is therefore not a subject of sale and transfer, unless the law, by some positive provision, has made it so, and pointed out the modes by which such sale and transfer may be effected. But the franchises to build, own, and manage a railroad, and to take tolls thereon, are not necessary corporate rights: they are capable of existing in and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable."

The grantee of the franchises of a corporation to operate a railroad can acquire no greater rights than the corporation itself has by the terms of the charter. The purchaser must take his title subject to all the conditions of the original grant, and subject to all duties and liabilities to the state, the public, and individuals, none of whose rights can be impaired by the transfer. It does not appear to us that there are any such inherent difficulties in the way of the sale and transfer of the property and

franchises of a railroad, subject to these conditions and limitations, as would require us to give such a construction to the statute as would exclude the corporations from the operation of that clause of the bankrupt act, a literal construction of which clearly renders them liable to be dealt with under its provisions.

Motion to dismiss the petition overruled.

[The circuit court denied a petition to review this decree at the instance of Enoch G. Sweatt, another creditor. *Sweatt v. Boston, H. & E. R. Co.*, Case No. 13,684.]

Case No. 48.

ADAMS et al. v. BRADLEY et al.

[5 Sawy. 217.]¹

Circuit Court, D. Nevada. Aug., 1878.

STATES AND STATE OFFICERS — ACTION AGAINST STATE—RES JUDICATA.

1. A state cannot be sued in its courts without its consent.

[Cited in *Spring Valley Waterworks v. Bartlett*, 16 Fed. Rep. 622, and in *State v. Columbus & X. R. Co.*, 48 Fed. Rep. 628. See, also, *Railroad Co. v. Tennessee*, 101 U. S. 339.]

[See note at end of case.]

2. The appearance of the district attorney, or the attorney-general of the state, on behalf of the state, without express authority of law, does not give jurisdiction over the state as defendant in the action.

[See note at end of case.]

3. Comp. Laws Nev. § 2778, does not authorize the attorney-general to so appear for the state generally in an action against its officers in their individual capacity, as to make it a party to the action, and conclude it by the judgment.

4. Treadway sued Slingerland, in his individual capacity, to recover possession of lands upon which the Nevada state prison is situated. Slingerland, who was at the time lieutenant-governor of the state and ex officio warden of the state prison, set up as a defense title in the state, and that he was in possession under the state as warden of the state prison, and not otherwise. R. M. Clarke, who was then attorney-general of the state, appeared as attorney for the defendant without using his official designation in the signature to the pleadings. Treadway recovered judgment. In a subsequent action by the successors in interest of Treadway against the governor, warden—the successor in office to Slingerland—and other officers of the state, to recover the same land: *Held*, that the judgment in said case of *Treadway v. Slingerland* did not conclude the state or affect its title.

[At law. Action to recover possession of land, tried by the court upon submission of facts agreed on. Judgment for defendants.]

This is an action brought against L. R. Bradley, governor, James D. Minor, secretary of state, and John R. Kittrell, attorney general of the state of Nevada, constituting the board of state prison commissioners, and Milton R. Elstner and P. C. Hyman, wardens of the state prison, to recover posses-

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sion of the lands upon which the state prison of Nevada is situated. In 1870, one A. D. Treadway brought an action in a state court against J. B. Slingerland, in his individual capacity, to recover the same land. The complaint was in the usual form where one citizen brings an action against another to recover land, alleging title in the plaintiff, and an unlawful eviction and detention by defendant. Slingerland answered denying the title of plaintiff and ouster by defendant. He then set up as a separate affirmative defense title in the state of Nevada; that the premises were possessed and occupied by the state of Nevada as a state prison; that the defendant was warden of the state prison, and that he was residing upon the premises, and in charge, with other officers, under the authority of the laws of Nevada as such warden, and not otherwise. The answer was signed, "Robt. M. Clarke, defendant's attorney," without any official designation. Slingerland was in fact, at that time, lieutenant-governor of the state, and ex officio warden of the state prison, and in immediate charge of the premises as such; and Robert M. Clarke was attorney-general of the state. The court found the legal title to the premises to be in the plaintiff, and that the state had the equitable title; but rejected the state's equitable title on the ground that it had not been pleaded as a defense; and rendered judgment in favor of the plaintiff for the possession of the premises. In the course of the proceedings Clarke filed a brief on behalf of the defendant, signed, "Robt. M. Clarke, attorney-general, for defendant." This is the only instance in which he used his official designation. Subsequent to the rendition of said judgment, and before the commencement of the present action, the title of Treadway became, by proper conveyances, vested in the plaintiffs, Adams et al., and Slingerland and his co-state officers went out of office, and the defendants in this case succeeded to the several offices named in the title. Upon the trial of the case the plaintiffs, to show title, offered in evidence the judgment-roll in said case of Treadway v. Slingerland, relying upon it to show that the question of title is res adjudicata. The defendants objected on the ground that the suit was between private parties, to which the state was not, and could not be made a party; that the defendants hold under the state, and are not in privity with Slingerland; and that the state's title is in no way affected by that judgment. After full argument the circuit judge sustained the objection, the district judge dissenting, and the testimony was thereupon rejected under the statute—the opinion of the presiding judge for the time being prevailing. As the district judge had, on a previous occasion, ruled differently, the plaintiff's counsel had relied upon this judgment-roll as conclusive, and were not prepared to try

the case on their original title. Upon their application upon the ground of surprise, a juror was allowed to be withdrawn, and the case continued. At the present term, a jury having been waived, the cause was submitted to the court upon stipulated facts, embracing simply the said judgment-roll, and other facts necessary to make it applicable—the plaintiffs concluding to rely upon it without putting in and re-litigating their original title. The question, therefore, is precisely the same as that upon the former trial as to the effect of the said proceedings and judgment in the case of Treadway v. Slingerland. Section 2778 of the Compiled Laws of Nevada provides that, "whenever the governor shall direct, or in the opinion of the attorney-general, to protect and secure the interests of the state, it is necessary that a suit be commenced or defended in any court, it is hereby made the duty of the attorney-general to commence such action or make such defense."

R. S. Mesick, for plaintiffs.

J. R. Kittrell and R. M. Clarke, for defendants.

SAWYER, Circuit Judge. After a careful review of the question, with deference to the opinion of the district judge, I am compelled to say that I am still satisfied with the conclusion reached and announced at the former trial. The oral decision then delivered was taken down by a shorthand reporter, and as it sufficiently presents my views upon the point, I shall adopt it without re-writing. It is as follows:

"With reference to the admissibility of this record, the only question in my mind is, whether the judgment in that case can, under any circumstances, be binding upon the state of Nevada. If not binding upon the state of Nevada, it can have no relevancy to the issues in this case. It is a well-settled principle that the state cannot be sued in its own courts without its express consent given by law. Upon that question there is no conflict in the authorities. *The Davis*, 10 Wall. [77 U. S.] 19; *The Siren*, 7 Wall. [74 U. S.] 153, 154. But the exact point which arises in this case has never been determined by any court that I am aware of. That is to say, it has never been decided that, if an officer of the government is a trespasser, and is sued in his individual character for the trespass, and a judgment rendered against him, although the state may be affected by such judgment, it is concluded by the adjudication. There is no decision to which my attention has been called, or so far as I am aware, determining the effect of such a judgment as against the state—whether it adjudges or conclusively determines its rights.

"If the state can be bound by the judgment against Slingerland, it must necessarily have been substantially and in fact, though not in form, a party to the action. And yet

it cannot be sued without its express assent given by law. And where the state cannot be sued, the decisions are to the effect that the fact of its having been sued, and the state's attorney having in fact appeared, does not change the phase of the question at all. It has been decided in at least two cases by the supreme court of the United States, that the appearance by the United States attorney, without authority, does not give jurisdiction over the United States. In the case of the *U. S. v. McLemore*, 4 How. [45 U. S.] 286, an action was brought in relation to certain moneys, and 'the district attorney of the United States answered the bill, and the matter of payments was referred to a master, who reported a balance against the United States after paying the judgment. On this report the district judge, holding the circuit court, decreed a perpetual injunction, and that the United States should pay the costs. The supreme court held that there was no jurisdiction of this case in the circuit court, as the government is not liable to be sued except with its own consent, given by law. Nor can a decree or judgment be entered against the government for costs.'

"So that notwithstanding the fact that the attorney of the United States appeared without making the objection in the court below, and the case went to judgment, the judgment was held to be void for the want of jurisdiction. That decision is affirmed in the case of *Hill v. U. S.*, 9 How. [50 U. S.] 386. In that case a bill was filed on the equity side of the court by Hill and the other complainants against the United States, to enjoin a judgment obtained against the complainants by the United States. The United States attorney at first answered fully to the merits, thus appearing and giving the court all the jurisdiction that could be given by a voluntary appearance. A motion was afterwards made by the United States attorney to dissolve the injunction and dismiss the bill as to the United States, for want of jurisdiction as to them. In the decision of this case the supreme court says:

"The question here propounded, without any necessity for recurrence to particular examples, would seem to meet its solution in the regular and best-settled principles of public law. No maxim is thought to be better established or more universally assented to than that which ordains that a sovereign cannot, *ex delicto*, be amenable to its own creatures or agents employed under its own authority for the fulfillment merely of its own legitimate ends. A departure from this maxim can be sustained only upon the grounds of permission on the part of the sovereign or the government, expressly declared, and an attempt to overrule or to impair it on a foundation independently of such permission must involve an inconsistency and confusion, both in theory and practice,

subversive of regular order or power. * * * Without dilating upon the propriety or necessity of the principle here stated, or seeking to multiply examples of its enforcement, we content ourselves with referring to a single and recent case in this court, which appears to cover the one now before us in all its features. We allude to the case of *U. S. v. McLemore*, 4 How. [45 U. S.] 286, where it is broadly laid down as the law, that a circuit court cannot entertain a bill on the equity side of the court, praying that the United States may be perpetually enjoined from proceeding upon a judgment obtained by them, as the government is not liable to be sued, except by its own consent given by law.'

"Unless consent is given by the law in a suit against the state or government the court under these decisions has no jurisdiction, and the fact that the state's attorney appears voluntarily to contest it does not give the court jurisdiction where it was before without jurisdiction. The supreme court in these cases declares the judgments to be void for want of jurisdiction, notwithstanding the fact that the attorney of the government assumed to appear for it. It is held by other authorities that the officer may be sued in his individual capacity. The case of *Osborn v. U. S. Bank*, 9 Wheat. [22 U. S.] 738, affords as good an illustration as any other upon this point. There the treasurer was sued and an injunction applied for restraining the defendant from disposing of the money seized by him on behalf of the state. Pending the action there was a change in the treasurer. Counsel were evidently aware of the effect of this change upon the case, because a supplemental bill was filed making the successor in office a party in order to bind him, thus recognizing the principle that he would not have been bound by a judgment against his predecessor.

"But in that case the money had not been mingled with the funds of the state. It had been kept separate in bags by the former treasurer, was transmitted by him in that manner to, and was kept separate by, his successor. They were sued individually, and it was held that the action could be maintained. Now, undoubtedly, if a judgment had been recovered against the treasurer he would have been personally responsible for that money; he had committed a breach of the law, the statute under which he acted having been declared unconstitutional. He would have been personally responsible for the trespass. But the court sustained this bill for an injunction, on the ground that the money was kept separate in his control, and could be identified as the specific money seized. It is said in the decision that it might have been reached by an action of detinue. The identical money could be reached in the hands of these parties. If the money had been mingled with the money of the state, and had so lost its identity,

there is nothing in the decision to indicate what the effect of the judgment against the treasurer would have been upon the rights of the state. At all events there is nothing to indicate that the judgment against these parties would have been a bar in an action by the state, if the state had afterwards sued the bank for the amount of the tax. Of course, if the state had afterwards sued the bank for the money, the adjudication upon the law would have been authority upon the law of the case. But the facts, I apprehend, would have been open to re-examination. There was a question of fact discussed in the case as to whether the testimony was sufficient to show that the money went into the hands of the second treasurer, and the court held that it was. But there is nothing to indicate that the matter would have been res adjudicata in an action by the state against the bank. In this case, if the state cannot be sued, as it cannot be, I do not see how it is possible that a judgment against one of its officers sued in his individual capacity can be conclusive upon the rights of the state, even though the state happens to be interested in the subject-matter of the action, and the attorney-general, in consequence of that interest, appears for the officer, and assumes to defend him as his individual attorney or otherwise. The court still fails to get jurisdiction of the state. Where the officer is sued in his individual capacity, and the state cannot be made a party, I do not see upon what principle a judgment against the officer can be binding upon the state as a matter adjudicated between the state and the plaintiff. A matter can be res adjudicata only between the parties to the action and their privies. The case read by counsel for plaintiff from 16 Wall. [83 U. S.] giving a synopsis of what was determined in *Osborn v. U. S. Bank*, it seems to me indicates that there could be no valid judgment against the state. It is said by the court: 'In deciding who are parties to the suit, the court will not look beyond the record. Making a state officer a party does not make the state a party, although her laws may have prompted his action, and the state may stand behind him as the real party in interest. A state can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put into that relation to the case.' *Davis v. Gray*, 16 Wall. [83 U. S.] 220.

"If in an action against a state officer in his individual capacity for a trespass committed under color of his office, the state cannot be considered a party for the purpose of defending an action on the ground that the state cannot be sued, it seems absurd to hold that the state is, nevertheless, a party for the purpose of having its rights conclusively determined by the judgment rendered.

"The case of landlord and tenant cited does not seem to me to be in point, because there the landlord is liable to be sued without his consent. If he appears and defends the suit, it is his own act. He, substantially and voluntarily, becomes a party to the suit, and the court having jurisdiction of the subject-matter and the party, by his voluntary assumption of the defense, is bound by the result. The state cannot be made a party at all, without its consent, and the assumed appearance of the district attorney or attorney-general, without express authority of law, does not constitute a consent. I do not think the provision in the statute of Nevada, in regard to the duties of the attorney-general, touches the question. It might be the duty of the attorney-general to appear and make the objection that the state cannot be sued, and even to conduct the defense for the benefit of the state. But it is a general law, such as exists in most if not all the states defining the duties of the attorney-general, to appear and defend the interests of the state in those cases where the state may be rightfully sued. And it may be desirable that he should appear and defend officers of the state, or even others where the interests of the state may be affected, although the decision against the parties to an action might not be an adjudication conclusive upon the rights of the state. It may be a short, easy, and, if successful, convenient way of protecting the state interest, and, as such, a proper course for him to pursue. However this may be, it is clear that this section of the statute does not in terms, or by any reasonable implication authorize private parties to sue the state; and we have seen from the authorities cited, that where there is no authority of law for suing the state, an assumed authority of an attorney of the state to appear does not confer jurisdiction over the state. A fortiori, his assuming to appear unofficially for the defendants in defense of actions brought against private parties in their individual capacities who happens to be officers of the state, and to which the state is not and cannot be made a party, cannot confer jurisdiction to conclusively determine the rights of the state as against the state. If such could be the effect of the judgment, it must be on the ground that the state can indirectly in substance and fact be made a party, when the law forbids her being made a party in form; and her rights may be determined in a case over which she has no control, for the defendants must have authority to control their own defenses, even if the defense is conducted by the attorney of the state.

"Under the view I take of the case, this is not an adjudication binding upon the state, and as the state is not concluded, I do not see how the present officers can be in privity with the prior warden, or how the state can be in privity with him. They

'took nothing from him and the state got nothing from him. The rights of the state upon which the defendants rely depend upon its own title, not derived from Slingerland, the former warden. In my judgment the record is of no effect and inadmissible. If plaintiffs have a title they ought to recover their land. The point which they make is that the state is estopped from showing that they have not any title. They will be permitted to show their title, if they have any. I will say to counsel that my associate, the district judge, does not concur in the views I have expressed. There is a division of opinion between us. But as the law now stands, the opinion of the presiding judge prevails for the time being."

The very elaborate opinion in *Lee v. Kaufman*, recently decided by Judge Hughes, cited by plaintiffs' counsel on the present trial, only goes to the question of jurisdiction over actions against officers, and does not in my judgment touch the question of the effect of this judgment. [Case No. 8,191.] For the purpose of this decision, I assume that the court had jurisdiction of the action against Slingerland individually, without discussing the point or formally deciding it.

There must be a judgment for the defendants, with costs, and it is so ordered.

[NOTE. Without an act of congress no direct proceedings will lie at the suit of an individual against the United States or its property; and no officer of the government can waive its privilege in this respect, nor lawfully consent that such a suit may be prosecuted so as to bind the government. *Carr v. U. S.*, 98 U. S. 433; *James v. Campbell*, 104 U. S. 359; *U. S. v. Lee*, 1 Sup. Ct. Rep. 240; *Cunningham v. Macon & B. R. Co.*, 3 Sup. Ct. Rep. 292, 609; *Poindexter v. Greenhow*, 5 Sup. Ct. Rep. 903, 962; *Hagood v. Southern*, 6 Sup. Ct. Rep. 608; *Avery v. Fox*, Case No. 674.]

ADAMS, (BROWN v.)

[See *Brown v. Adams*, Case No. 1,986.]

Case No. 49.

ADAMS v. BURKE et al.

[3 Sawy. 415.]

Circuit Court, D. Oregon. Aug. 20, 1875.

PUBLIC LANDS — GRANT IN PRAESENTI — OREGON DONATION ACT — ADVERSE POSSESSION.

1. The donation act is a grant in praesenti to the settler thereunder, subject to the conditions of residence and cultivation required by the act; and until such conditions are performed the estate granted is defeasible, but when performed it becomes indefeasible.

[Cited in *Wythe v. Haskell*, Case No. 18,118; *Bear v. Luse*, Id. 1179. Distinguished in *Maynard v. Hill*, 8 Sup. Ct. Rep. 731.]

[See note at end of case.]

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2. Upon the receipt and acceptance by the commissioner of the register and receiver's certificate, the right of a settler to a patent is perfect; but such patent does not pass the estate, that having been done by the act, and is only record evidence furnished by the government for the security of the donee, of the settlement and performance of the conditions annexed to the grant, and the partition of the same, where the settler is married, between himself and wife.

[See note at end of case.]

3. Upon the death of a settler or his wife intestate, after compliance with the act and before patent issues, the estate of the intestate vests as directed by the act in the survivor and children or heirs of the decedent, but, quere? Do the persons in whom it vests take a new title from the government or only succeed under the act to the title of the intestate?

4. To render a possession adverse it must be hostile in its origin and hostile in its continuance.

[Cited in *Stanley v. Schwalby*, 13 Sup. Ct. Rep. 424, 147 U. S. 508.]

5. The party through whom the defendants derive whatever interest they possess in this case went into possession asserting that the title was in the United States, and the defendants during their possession, commenced a suit in one of the state courts to compel a transfer to them of the legal title to the premises from the heirs of one Lownsdale, to whom a patent of the United States had been issued, and through whom the plaintiff traces his title, asserting in a verified complaint that the legal title was in such heirs and had been acquired by them by alleged settlement of their ancestor and the patent of the United States, and setting forth sundry acts and agreements by which it was contended that the heirs were bound to hold the title in trust for the defendants, and asking a decree that the heirs be declared trustees for their benefit; *Held*, that the complaint in that action, being verified, was an admission that the defendants did not hold the premises by a claim of title hostile to the title of the plaintiff, but with a recognition of that title in another, and an assertion of an equitable right to have that title transferred to them, and that there was therefore no such adverse possession by them as was contemplated by the statute.

[Cited in *Adams v. Lewis*, Case No. 60; *Stanley v. Schwalby*, 13 Sup. Ct. Rep. 424, 147 U. S. 508.]

At law. Action to recover land, tried by the court without a jury. [Judgment for plaintiff.]

E. C. Bronaugh, for plaintiff.

Charles B. Upton and W. T. Trimble, for defendants.

FIELD, Circuit Justice. Two actions of ejectment were brought by the plaintiff, each for a portion of the demanded premises, against the tenants in possession. The landlords having appeared in both, the actions have been consolidated. The premises constitute the west half of lot four of block eighteen in the city of Portland. The plaintiff deraigns title to them from the children and grandchildren of Daniel H. Lownsdale, who had in September, 1852, by previous settlement upon land which includes the premises, and continued residence thereon, and cultivation, acquired a right to a patent of the United States under the act of congress

of September 29, 1850, [9 Stat. 496,] known as the "Donation Act." The defendants controvert the claim of title by the plaintiff, and assert an adverse possession of twenty years under claim and color of title, in bar of the action.

By the fourth section of the donation act a grant of land was made to every white settler or occupant of the public lands in Oregon above the age of eighteen years, who was a citizen of the United States, or had made a declaration according to law of his intention to become a citizen, or should make such declaration on or before the first day of December, 1851, and who was at the time a resident of the territory, or might become a resident on or before the first day of December, 1850, and who should reside upon and cultivate the land for four consecutive years and otherwise conform to the provisions of the act. The grant was of 320 acres of land if the settler or occupant was a single man, but if a married man, or if a married man, or if he should become a married man within a year from the first of December, 1850, then the grant was of 640 acres, one-half to himself and the other half to his wife to be held by her in her own right. The surveyor-general of the United States was required to designate the part of the land thus granted inuring to the husband and the part inuring to the wife, and enter the same on the records of his office; and the act declares that in all cases where such married persons complied with the provisions of the act so as to entitle them to the grant, whether under the preceding provisional government or subsequently, and either should die before the patent issued, the survivor and children or heirs of the deceased should be entitled to his or her share or interest in equal proportions, except where the deceased should otherwise have disposed of the same by will.

At the time of the passage of this act, Daniel H. Lownsdale was of the class of persons designated who were entitled to the benefit of its provisions; he was a settler in Oregon, and had been for years, and he was a citizen of the United States; and he was either a married man or became so within a year from the first of December, 1850. He had settled upon land now covering a large portion of the city of Portland, and he at once became a claimant under the act dating the commencement of his settlement on the twenty-second of September, 1848. This settlement was followed by his continued residence and cultivation up to September 22, 1852, the period of four years prescribed by the act. Due proof of this residence and cultivation was made to the surveyor-general and by him the land was assigned to the husband and wife in equal proportions, the east half to the husband, and the west half to the wife. The premises in controversy lie within the portion assigned to the husband.

In October, 1860, a patent certificate was issued in favor of Lownsdale and wife by the register and receiver of the land office in Oregon, in the usual form, and containing recitals of the claim asserted by Lownsdale of a donation right, and that proof had been made of the commencement of the settlement, and of the subsequent continued residence and cultivation required by the act. The certificate, accompanied by evidence of the facts recited, was forwarded to the commissioner of the general land office at Washington in order that a patent might issue thereon, if no valid objection was made to it. No objection, so far as we are informed, was made to the certificate, or to the sufficiency of the accompanying evidence, and in June, 1865, a patent of the United States was issued to Lownsdale and wife, in terms granting to them the property claimed, the east half to Lownsdale and the west half to his wife. Both husband and wife died intestate, before the patent issued; the wife in April, 1854; the husband in May, 1862.

Where, as in the present case, there had been a previous settlement, the act of congress vested the title in the settler immediately upon its passage. The act is a grant in praesenti; its language is, that there "shall be and hereby is granted" to the settler or occupant, language which imports an immediate transfer of the interest of the grantor, not a promise to transfer that interest at a future period. But it is a grant subject to the conditions of continued residence and cultivation of four years from the settlement: if these conditions had not already been performed on the passage of the act they were to be performed subsequently. Until performed, the estate granted was defeasible; when performed, the estate became indefeasible.

When the certificate of the register and receiver was received by the commissioner, and accepted by him as satisfactory, the right of Lownsdale and of his wife to a patent was perfected. The estate as already observed passed by the act; the patent which the United States subsequently issued was record evidence on the part of the government, furnished for the security and protection of the donees or their successors in interest, of the settlement of Lownsdale and of the performance of the conditions annexed to the grant, and of the due assignment to him and to his wife of their respective portions; but it had no other or greater operation upon the title. "In the legislation of congress," said the supreme court in a recent case, "a patent has a double operation. It is a conveyance by the government when the government has any interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition

and confirmation. The instrument is not the less efficacious as a record of previously existing rights, because it also embodies words of release or transfer from the government." *Langdeau v. Hanes*, 21 Wall. [88 U. S.] 529.

Upon the death of the wife in 1854, intestate, she not having previously transferred her interest, her portion of the land—that is, the west half—vested under the act of congress in the surviving husband and her children in equal shares. No patent had then issued, and the act declares who shall in such case succeed to the estate of the deceased. Upon the death of the husband intestate, he not having previously disposed of his interest, his portion of the land—that is, the east half—vested in his children, under the act, in equal shares. The estate took this course by the express direction of the act.

But whether the children thus took a new title from the government, or only succeeded under the statute to such title as the wife in the one instance, and the husband in the other, had acquired, is one of the questions controverted in the case. The plaintiff contends that the children took a new title as donees under the statute on the death of their father, in May, 1862; and if this be the case, there can of course be no adverse possession sufficiently prolonged to bar the action. The statute requires such possession to be continued for twenty years. The defendants contend that the children only succeeded to the estate of the deceased, and that an adverse possession commenced against him whilst living can be tacked on to the subsequent adverse holding, so as to make the statutory period of twenty years. It is not important for the decision of the present case which view of this question be correct. As the district judge and myself have differed in opinion, in another case, upon the question whether a conveyance by a donation claimant after he had acquired by his settlement, residence, and cultivation, a right to a patent and, before the patent was issued passes the estate (a decision of which would determine the question here involved), and that case will be certified to the supreme court, I refrain from expressing an opinion upon the point raised here. This case, as already said, can be determined without passing upon that point.

The defendants show a continuous possession of the premises, open and notorious, since 1851, but that possession has not been, in my judgment, during this period, or for twenty years, adverse to the title of the plaintiff. To render a possession adverse it must be hostile in its origin, and hostile in its continuance. The entry upon the premises must be made, and the possession must be accompanied with the claim of title against the whole world. In other words, the occupant must assert ownership in himself. An entry by permission of another,

or, with an admission of another's title, will not set the statute running, and the recognition of another's title after the statute has commenced running, at any time within the twenty years, no matter for how brief a period, will destroy the continuity of the hostile possession, and avoid the bar of the statute.

In the present case *Pettygrove*, the party through whom the defendants derive whatever interest they possess, went into possession not claiming title in himself, but asserting, as was the fact, that the title was in the United States; and neither he nor his grantees have at any time since pretended that the fact was otherwise, or that they have ever acquired that title. On the contrary, the defendants, one of whom, *Burke*, has occupied the premises by himself or tenants for the greater part of the last twenty years, instituted legal proceedings as late as January, 1871, in one of the state courts to compel a transfer to them of the legal title to the premises from the heirs of *Daniel H. Lownsdale*, asserting in the complaint in the case verified by the oath of *Burke*, that such legal title was in the heirs, and had been acquired by their ancestor, *Daniel H. Lownsdale*, by the proceedings taken upon his alleged settlement and the patent of the United States; and setting forth sundry acts and agreements by which they contended that the heirs were bound to hold the title in trust for them, and asking a decree that the heirs might be declared trustees for their benefit.

That complaint is an admission of the highest character—a sworn statement—that the defendants did not hold the premises by a claim of title hostile to the title of the plaintiff, but with a recognition of that title, and an assertion of some equitable right to have that title transferred to them. It is too plain for argument that there was here no such adverse possession of the premises as is contemplated by the statute. If the defendants have any equities which should control the legal title, they must seek to enforce them in some appropriate form. The state court, it would seem, did not think they had any. Be that as it may, a possession with a claim of an equitable right to another's legal title to the premises, is not a possession adverse to the existence of that title; but a possession with a continued recognition of its validity.

A general finding must be had for the plaintiff, and judgment entered thereon for the possession of the premises, with costs.

[NOTE. In *Hall v. Russell*, 101 U. S. 503, it was held that, under section 4 of the donation act, "there was no grant of the land to a settler until he had qualified himself to take as grantee by completing his four years of residence and cultivation, and performing such other acts in the meantime as the statute required in order to protect his claim and keep it alive. Down to that time he was an authorized settler on the public lands, but not a grantee. His rights in the land were statu-

tory only, and cannot be extended beyond the just interpretation of the language congress has used to make known its will."]

Case No. 50.

ADAMS v. BURKS.

[Holmes, 40;¹ 4 Fish. Pat. Cas. 392; 1 O. G. 282.]

Circuit Court, D. Massachusetts. March 6, 1871.²

PATENTS FOR INVENTIONS—BONA FIDE PURCHASER—USE OF PATENTED ARTICLE—RIGHTS OF TERRITORIAL ASSIGNEE.

1. When a patented product passes lawfully into the hands of a purchaser without condition or restriction, it is no longer within the monopoly conferred by the patent or under the protection of the patent law.

[Cited in Hill v. Whitcomb, Case No. 6,502. Followed in McKay v. Wooster, Id. 8,847; Hobbie v. Smith, 27 Fed. Rep. 662; Hobbie v. Jennison, 40 Fed. Rep. 891.]

[See note at end of case.]

2. The purchaser of a patented article lawfully manufactured and sold within his territory, without condition or restriction, by a territorial assignee of the patent, may use or sell it in another territory for which another person holds an assignment of the same patent.

[Cited in McKay v. Wooster, Case No. 8,847; Hill v. Whitcomb, Id. 6,502. Limited in Hatch v. Adams, 22 Fed. Rep. 437. Followed in Case No. 8,847; Hobbie v. Smith, 27 Fed. Rep. 662; Hobbie v. Jennison, 40 Fed. Rep. 891.]

[As to the right to sell in another territory, see note at end of case.]

In equity.

Bill in equity [by James Adams against Alpheus Burks] for an injunction to restrain alleged infringement of letters-patent [No. 38,713] for an improvement in coffin lids granted James S. Merrill and George W. Horner, May 26, 1863, and for an account. The defendant filed a plea to the whole bill. The pleadings and facts are stated in the opinion.

E. H. Pierce, for complainant. L. S. Dabney, for defendant.

SHEPLEY, District Judge. The complainant in this case is the assignee of a territorial right, for the towns of Natick and Sherborn in Massachusetts, in the patent issued to Merrill & Horner, for a new and useful improvement in coffin lids. The defendant is charged in the bill with an infringement of the complainant's rights under the patent, in the town of Natick. The defendant by plea sets out in defence that Merrill & Horner have assigned to Lockhart & Seelye of Cambridge, all their right, title, and interest in the invention secured by the letters-patent, for, to, and in a circle whose radius is ten miles, having

the city of Boston as its centre. (Such a circle would not, upon any construction of the terms of the grant, include the towns of Natick and Sherborn.) Defendant's plea further sets out that he is an undertaker, and that in his business as an undertaker he has used and sold no coffins containing the invention secured by the letters-patent, except such coffins containing said invention as have been manufactured by Lockhart & Seelye, within a circle whose radius is ten miles, having the city of Boston as its centre, and sold within said circle by said Lockhart & Seelye, without condition or restriction. The case is set down for hearing on bill and plea; the facts in the case for the purposes of this hearing being admitted, and not in controversy.

The only question presented in the case is this: Does the purchase of a patented article, lawfully manufactured and sold without restriction or condition within his territory, by the territorial assignee of a patent right, convey to the purchaser the right to use or sell the article in another territory for which another person has taken an assignment of the same patent? When a patented product passes lawfully into the hands of a purchaser without condition or restriction, it is no longer within the monopoly or under the protection of the patent act, but outside of it. Chaffee v. Boston Belting Co., 22 How. [63 U. S.] 217; Bloomer v. Millinger, 1 Wall. [68 U. S.] 350; Alken v. Manchester Print Works, [Case No. 113.] In Goodyear v. Beverly Rubber Co., Id. 5,557, Mr. Justice Clifford, commenting upon the cases of Bloomer v. McQuewan, 14 How. [55 U. S.] 549, and Wilson v. Rousseau, 4 How. [45 U. S.] 646, says: "Both of those cases affirm the rule, that when the patented machine rightfully passes to the hands of a purchaser from the patentee, or from any other person by him authorized to convey it, the machine is no longer within the limits of the monopoly, and is no longer under the peculiar protection granted to patented rights." It is clear that by such a sale the purchaser acquires an absolute title to the manufactured product which is the subject of a patent, and may deal with it in the same manner as if dealing with any other kind of property. He may use it, repair it, improve upon it, or sell it. Subsequent purchasers acquire the same rights as the seller had, and may do with the article, or its materials, whatever the first purchaser could have lawfully done if he had not parted with the title. Undoubtedly, the assignee or licensee of the right to make and vend the patented product is bound by his contract, and cannot exceed it.

In this case, the assignee of the territorial right for Boston and its vicinity was fully authorized to make the patented article and sell it in the market. When, therefore, he sold the patented coffins, the royalty upon

¹[Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

²[Affirmed by supreme court, 17 Wall. (84 U. S.) 453.]

them was paid, and the purchaser took the property discharged of the peculiar privileges secured by the patent. If this were not so, the purchaser of a manufactured patent article of wearing apparel might be liable for the use of the patented article in every town and city through which he might travel, in which there might be an assignee of a district [distinct] territorial right, although he had purchased it of one having a lawful right to make and sell it, so as to convey an absolute and unrestricted title. Defendant's plea adjudged good.

[NOTE. On complainant's appeal, this decree was affirmed by the supreme court. Mr. Justice Miller, in delivering the opinion of the court, said: "It seems to us that although the right of Lockhart & Seelye to manufacture, to sell, and to use these coffin lids was limited to the circle of ten miles around Boston, that a purchaser from them of a single coffin acquired the right to use that coffin for the purpose for which all coffins are used; that, so far as the use of it was concerned, the patentee had received his consideration, and it was no longer within the monopoly of the patent. * * * The right to manufacture, the right to sell, and the right to use, are each substantive rights, and may be granted or conferred separately by the patentee. But, in the essential nature of things, when the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use, and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly, (*Bloomer v. McQuewan*, 14 How.—55 U. S.—549; *Mitchell v. Hawley*, 16 Wall.—83 U. S.—544:) that is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentees. If this principle be sound as to a machine or instrument whose use may be continued for a number of years, and may extend beyond the existence of the patent, as limited at the time of the sale, and into the period of a renewal or extension, it must be much more applicable to an instrument or product of a patented manufacture which perishes in the first use of it, or which, by that first use, becomes incapable of further use, and of no further value. Such is the case with the coffin lids of appellant's patent. A careful examination of the plea satisfies us that the defendant, who, as an undertaker, purchased each of these coffins, and used it in burying the body which he was employed to bury, acquired the right to this use of it, freed from any claim of the patentee, though purchased within the ten-mile circle, and used without it." Mr. Justice Bradley filed a dissenting opinion, taking the ground that the right of the territorial assignees "consisted of the exclusive right to make, use, and vend the improved coffin lid within the limited territory described, but did not include any right to make, use, or vend the same outside of those limits. As the assigned right to make the lids was a restricted right limited to the territory, so the assigned right to use them was a restricted right limited in the same manner. Each right is conveyed by precisely the same language." *Adams v. Burks*, 84 U. S. (17 Wall.) 453.

[In *Hatch v. Adams*, 22 Fed. Rep. 434, the issue was as to the right of a purchaser of a patent bed bottom from the territorial assignee of the patentee to sell the bed bottom, in the "course of trade," outside the territory

granted to such assignee. The complainant, in seeking to enjoin such sales, contended that, although the sale of a patented article "for use in the ordinary affairs of life" withdrew it from the monopoly of the patent, the sale of the right to "sell the article" was a conveyance of a portion of the franchise. In disposing of the case, Judge McKennan distinguished *Adams v. Burks*, Case No. 50, remarking that, although Judge Shepley's opinion in that case is "broad enough to cover the right to sell, as well as the right to use, a patented article outside of a restricted locality, only the latter right was involved in the case, and what was said by the learned judge touching the right to sell was clearly obiter; and, when the case reached the supreme court, that court expressly treated the right to manufacture and sell and the right to use a patented article as distinct substantive rights, and decided the law only as it related to the exercise of the latter right."

[In *McKay v. Wooster*, Case No. 8,847, it appeared that the assignee of the territory east of the Rocky mountains, for the manufacture and sale of a patented case for the transportation of eggs, sold cases to dealers in Iowa, who filled them with eggs, and shipped to the Pacific coast, where the eggs were sold, and the cases disposed of for what they would bring. The assignee of the Pacific coast territory sought to restrain this alleged infringement of his rights, but the bill was dismissed by Judge Sawyer, who held that the sale of the case by the territorial assignee removed it from the monopoly of the patent, and that the purchaser or those claiming under him could use it until worn out. This decision was afterwards affirmed by the supreme court, at the October term, 1873, but no opinion was filed.

[Concerning the right to sell, the circuit courts have decided that one who purchases a patented article from the owner of the patent right for a certain territory has no right to sell the same, "in the course of trade," in the territory for which another owns exclusive rights. *Hatch v. Adams*, 22 Fed. Rep. 434; *Hatch v. Hall*, Id. 433, 30 Fed. Rep. 613; *Standard Folding-Bed Co. v. Keeler*, 37 Fed. Rep. 693, 41 Fed. Rep. 51; *Graff v. Boesch*, 33 Fed. Rep. 279, 10 Sup. Ct. Rep. 378. Judge Hawley, in *California Electrical Works v. Finck*, 47 Fed. Rep. 583, held that the sale of a patented article by a territorial assignee within his own territory does not confer upon the purchaser of such articles the right to carry the same into the territory of another assignee, and there sell them, "in the usual course of trade," without the consent of the latter assignee.

[Another aspect of the question arose in *Hobbie v. Jennison*, 40 Fed. Rep. 887, where the assignee of the right to manufacture and sell a patented steam pipe for the state of Michigan sold a quantity of the pipe to a Detroit firm, knowing that it was to be resold and used in territory belonging to another. In considering the case, Mr. Justice Brown, at that time district judge for the eastern district of Michigan, said that he was strongly inclined to hold that one who sells a patented article for the "purpose of or knowing that it will be resold * * * in territory belonging to another is equally amenable to suit as if the sale were made in such other territory," as in line with the cases which hold that where a party makes one or more elements of a patented combination, with the intent that they shall be used in the completed combination, he is liable as an infringer; but upon the authority of *Adams v. Burks*, 17 Wall. (84 U. S.) 453, affirming Case No. 50, which involved the right of the assignee "to sell the patented article, to be used outside of such limited district," and which, the learned justice remarked, seemed not to be distinguishable from the present case, it was held that the sale

of the pipe within the vendor's territory carried the right to use it within territory owned by another, "notwithstanding the knowledge of both parties that a use outside of the territory is intended." From the report of the case, the question as to whether or not the resale of the pipe by the Detroit firm was a "sale," and in the "usual course of trade," as distinguished from the use, does not seem to have been presented. This case was afterwards affirmed by the supreme court, on the ground that the sale of the pipe was completed at Bay City, within the state of Michigan. *Hobbie v. Jennison*, 40 Fed. Rep. 887; s. c. 149 U. S. 355, 13 Sup. Ct. Rep. 879.]

ADAMS, (BURNHAM v.)

[See *Burnham v. Adams*, Case No. 2,173.]

ADAMS, (CHILD v.)

[See *Child v. Adams*, Case No. 2,673.]

ADAMS, (CODRINGTON v.)

[See *Codrington v. Adams*, Case No. 2,937.]

ADAMS, (COTTRELL v.)

[See *Cottrell v. Adams*, Case No. 3,272.]

Case No. 51.

ADAMS v. DE COOK et al.

[McAll. 253.]¹

Circuit Court, D. California. Jan. Term, 1858.*
COURTS—PROBATE JURISDICTION—WILL BEFORE
PROBATE—EVIDENCE.

1. In England, the validity of a will of real estate is exclusively within the jurisdiction of the ecclesiastical [common-law] courts. Such is the rule in such of the states of the Union where the distinction between wills of realty and personalty prevails.

2. Under the probate laws of California, no such distinction exists.

3. General rule, that a party cannot give in evidence and claim title under an unprobated will in the ordinary judicial tribunals, cannot be applied to this case, upon the ground, "lex non cogit ad impossibilia."

4. The act of the legislature of this state in relation to probate of wills, has been declared, by the supreme court of this state, not to apply to a will executed in California prior to the passing of the act.

5. There is reason to believe that in the most remote provinces of the Spanish government, there was some interposition of judicial authority necessary to authenticate the execution of a will, although there may have been no special tribunal like the probate court.

6. The will before probate is not a nullity, is the foundation of title; and under the circumstances of this case evidence may be received to prove the execution of it.

[Cited in *Brooks v. McComb*, 38 Fed. Rep. 320.]

[7. A custom authorizing the execution of wills in the presence of two witnesses, exist-

ing in California under the Mexican government, and prevailing for such time and so uniform and notorious that the assent of the authorities might fairly be presumed, operated as a repeal of the previously existing law requiring three witnesses.]

[8. Where an attesting witness and the testator were ignorant of the language in which the will was written, so that neither could understand the disposition of property made by it, and no interpretation of it was made to them, such witness cannot be considered competent.]

[9. Declarations of a testator which are merely general, and may comport with the existence of any will other than that in controversy, are not competent to prove the execution of such disputed will.]

[10. A codicil, executed in California while it was under the Mexican government, was attested by one R. as "syndic." The office of syndic was merely ministerial, and conferred no authority to authenticate the codicil. *Held*, that such official description might be disregarded, and R. be considered as one of the witnesses.]

At law. This was an action of ejectment. The plaintiff having closed, the defendant offered as the foundation of his title a document purporting to be the will of Ellab Grimes, who died on the 7th day of November, 1848, and proffered to prove the execution of the same. This document and the proof offered were objected to, on the ground that it had not been proved as a will before any judicial tribunal or functionary, and being unprobated it and the evidence offered to sustain it were inadmissible as evidence.

[Judgment for defendant was affirmed, on appeal to the supreme court, under the title of *Adams v. Norris*, 23 How. (64 U. S.) 353.]

Hall McAllister and E. M. Gould, for plaintiff.

Crockett & Crittenden, for defendants.

McALLISTER, Circuit Judge. In England the validity of a will of real estate is a question exclusively for the adjudication of the common-law courts; and such is the case in some of the states of the Union, where the distinction exists which prevails in that country between the probate of wills of real estate and personalty. In this state, where the general power of proving all wills is vested in a special jurisdiction known as the probate court, the jurisdiction of that tribunal is as conclusive in regard to the probate of wills of real and personal estate, as is that of the ecclesiastical courts in England in relation to wills of personalty. If, therefore, there had been a probate of this document as a will by the appropriate tribunal in this state, such action if final would have been conclusive. As a general rule, a party cannot give in evidence and claim title under an unprobated will in the ordinary courts; and under that rule, this document must be rejected as evidence. But under the peculiar circumstances of this case, that rule cannot be applied, and we must resort to the maxim, "Lex non cogit ad impossibilia." It is true this document never has been admitted to

¹[Reported by Cutler McAllister, Esq.]

²[Affirmed in *Adams v. Norris*, 23 How. (64 U. S.) 353.]

probate, and under the rulings of the supreme court of this state it could not be. Professing on its face to be a will, if executed it was so prior to the passing of the act of the legislature regulating the probate of wills; and the supreme court of this state have decided, that the statute does not apply to wills executed prior to its passing.

"Not only (they say) does the statute fail to require wills executed before its passage to be probated; but on examination of the different sections of it, we are forced to the conclusion that this was not a *causis ommissis*, and that the legislature actually intended to exclude them from the operation of the statute, leaving their validity to rest upon the laws under which they were made." This exposition of the statute by the highest judicial tribunal in this state, is conclusive on the point.

The next inquiry is, whether the fact that the document offered to be proved, has never been probated under the Mexican law, which existed at the time when it was made, invalidates it to such an extent as to deprive defendants of the right now to prove its execution before this court?

The supreme court in this state, in the case of *Castro v. Castro*, 6 Cal. 158, say: "It does not appear that there ever was a court of probate in this country; and from what we have been able to gather from our limited sources of information on this subject, such a proceeding was unknown to the laws and customs of California." If, by these expressions, the court intend to convey simply the idea that no such special tribunal as a court of probate existed in California, as would exclude the jurisdiction of another tribunal, in relation to wills, we concur in their conclusion. But there is reason to believe that, in the most remote provinces under the Spanish government, there was some interposition of judicial authority necessary to secure, in an authentic form, the proper execution of wills.

In the case of *Panaud v. Jones*, 1 Cal. 488, in the supreme court of this state, where the validity of a will was sustained, it had been dictated by the testator, and the act was stated to have been done in the presence of the judge, and the whole signed by that functionary, who certified he was present and gives faith he knew the testator, who, to appearance, was of sound mind, and, in testimony thereof, he signed the document. As early as 1792, in Louisiana, we find a will proved before an *alcalde*, after the death of the testator; proof of execution was made to the *alcalde*, who made a decree which was in effect a probate of the will. The supreme court of the United States so treated it. They say: "That question is closed by the decree of the *alcalde*; that decree declares the will to be valid and subsisting, and decrees its execution. We are obliged to treat this decree as the judicial order of a court of competent jurisdiction. In fact, it was

the only judicial authority in the province of Louisiana, except the governor." *Fouvergne v. City of New Orleans*, 18 How. [59 U. S.] 471. Now, it is an historical fact, that there were *alcaldes* and justices of the peace in California. The paper offered in evidence alludes to their existence, and to the absence of two *alcaldes* at the time of its execution, as a reason for their non-attendance. We think that, although there may have been no probate court, or special tribunal, analogous to that known to us, still, that neither in California, nor in any country where the civil law obtained, there was not some connection between the judicial authority and the execution of wills.

This will being unprobated under the laws of this state, for the reasons heretofore stated, and not having been proved before any judicial authority under the Mexican law existing at the time it was executed, the inquiry is, how is it to be considered by this court? The only reason assigned for the repudiation of all jurisdiction of the probate of wills, by the ordinary tribunals of justice is, that exclusive jurisdiction over them is given to the probate courts by statute. We are unable to detect in the civil jurisprudence the delegation of exclusive jurisdiction over the probate of wills, to one tribunal, to the exclusion of all others; nor can we find any time within which the will is invalidated if not proved. There is a requisition under the Mexican law, that a publication of a will shall be made by a representation to a judge, within one month after the date of the testator's death. But suppose this requisition to be applicable to both kinds of wills known to the Mexican law, "secret and open," the failure to prove the will does not avoid it under that law. The provision of the law requiring the publication within a limited time, seems to have for its object to stimulate the executor to prompt action in the proof of the will; for the only penalty prescribed, is the forfeiture of the legacy or bequest left to him by the will, and in case there be none, he is liable for the damages incurred by his neglect.

What, under the common law, is the position of a party claiming under an unprobated will? It certainly conveys an interest to him, which he should be permitted to vindicate.

In *Ex parte Fuller*, [Case No. 5,147,] the learned judge asks, in referring to the Revised Statutes of Maine, "Do they make any alteration in the operation of the common law, as to probate of wills?" The 25th section of one of the statutes of Maine declared: "No will shall be effectual to pass real or personal estate, unless it shall have been proved and allowed in the probate court; and the probate of such will shall be conclusive as to the due execution thereof."

Judge Story comments upon that legislation: "The argument is (he says) that under this clause the will is a mere nullity before

probate, that the probate gives it life and effect from that time, and not retroactively. It appears to me that this section is merely affirmative of the law as it antecedently stood." "The will before probate is in no just juridical sense a nullity." "The will must still be the foundation of the whole title,—inchoate and imperfect if you please, until its validity is ascertained by the probate,—but still, a will and not a nullity." "The probate ascertains nothing but the original validity of the will as such. The act of the testator gives it life, his death consummated the title derivatively from himself; and the probate only ascertains that the instrument in fact is what it purports on its face to be. It might as well be said, that a will of real estate at the common law, is a nullity until a jury has ascertained its validity, whereas the verdict ascertains only the fact that the title under the will is perfect; because it was executed by a competent testator, and therefore took effect by relation from the death of the testator."

The foundation, then, of a title in the devisee is the will; the probate of it is but the authentic means which the law provides for the ascertainment of the facts which prove its validity. Under our law, the exclusive power is given to a special jurisdiction to perpetuate those facts, whose final action is conclusive on all other tribunals. This statutory reason for the exclusive jurisdiction of the probate court operates to so great extent that in the case of *Gaines v. Chew*, 2 How. [43 U. S.] 645, it is said, "that in cases of fraud, equity has a concurrent jurisdiction with a court of law; but in regard to a will charged to have been obtained by fraud, this rule does not hold. It may be difficult to assign any very satisfactory reason for this exception; that exclusive jurisdiction over the probate of wills is vested in another tribunal, is the only one that can be given." That the will is the foundation of the whole title of the devisee—that the will is in no just judicial sense a nullity—that its existence is owing to the living act, and the death, of the testator—that the acts of legislation which provide for their probate, are acts not of creation but merely of evidence,—are not to be doubted. This document could not, nor can be, admitted to probate in this state under our law; it cannot be proved by any Mexican functionary in this state, for none such exists.

The complainant, therefore, is remediless unless proof of the execution of this document, now offered, is admitted. He should have that right. In the case of *Bagwell v. Elliott*, 2 Rand. [Va.] 195, 198, 199, a kindred point was discussed. That court, after deciding that the act of the legislature of Virginia had vested in the probate court of that state jurisdiction generally over the probate of wills of real and personal estate, and made its action conclusive proof of their validity, say—

"But it does not follow from the fact that it was necessary either to the validity of the

will of a real or personal estate, or that no other proof was admissible as to a will of lands."

"Nor does the recognition of an authority to compel the production of the will, or the direction that the original will shall remain amongst the records, lead to the inference, that a probate was necessary to the validity of a will of lands."

Again, they say: "The various acts on the subject being made only to provide a tribunal for granting probates in this country as a substitute for the ecclesiastical courts in England, a probate was not necessary here but for the purpose for which it was necessary there, to wit, to enable the executor to sue; and that for all other purposes without probate in England the will was valid; and so the acts of the legislature, making the probate of the will conclusive as to lands, but without requiring such probate as a prerequisite to the validity of the will as to lands, left it, if not proved, to the court of probate, to have the same effect as if the acts had not been passed; that is, that the effect given to the probate of the will, which was given for the benefit of those claiming under it, no longer existed. If the effect of the acts of the legislature was to declare the will invalid if not proved in a court of probate, then those acts, in many cases, would have been prejudicial to those claiming under the will."

"The only effect of the probate is to afford one mode of proof that the will is genuine; but the mode of proof allowable before these statutes, is not abolished by them,—that is, by evidence on the trial. If a will had been offered for probate and rejected, this might be used thereafter as the decision of a competent tribunal, and would condemn it forever." If it be admitted that the law which prevailed in California when the will offered in evidence was executed, prescribed a proceeding for the proof of wills, such proof could constitute no more than a probate under our law would; unless some law of Mexico had declared them void without such proof, of the existence of which this court is not apprised.

After the fullest consideration the court has been able to give this question, it is [has] arrived at the conclusion, that the evidence offered is admissible, and that the complainant may submit, under the instructions of the court, the evidence on which he relies to prove the execution of the document offered as the will of Eliab Grimes.

The evidence objected to having been submitted to the jury, which, with the other testimony, occupied several days, the following instructions were given to the jury:

1. A will executed under the Mexican government, as the one in controversy was, in the presence of only two witnesses, was invalid; but under the decision of the su-

preme court of this state, desirous to conform to the decisions of the highest state court in relation to the law which regulates the transfer of real estate within the limits of the state, I instruct you, if you shall be satisfied from the testimony that a usage or custom had prevailed in California uninterruptedly for the space of ten years, so uniform and notorious that it may fairly be presumed to have received the tacit consent of the country, which authorized the execution of wills in the presence of two witnesses only, the clear proof of the existence of such usage will operate a repeal of the previous existing law, and two witnesses will be sufficient. If such proof has not been afforded, and if three competent witnesses have not attested the codicil "C," given in evidence in this case, it is a nullity.

2. The witnesses (whether two or three) must be competent. Should you be satisfied from the proofs that the said codicil "C" was written in Spanish, that any of the attesting witnesses was ignorant of that language, that he could neither read nor speak it, that the testator was unacquainted with it, and could not understand it when read, or that neither he nor one of them could understand the disposition of the property made by the will, and no sworn interpretation of the will was made to them, then I instruct you that such witness or witnesses cannot be considered as competent.

3. The signature of each and every witness, and of the testator, must be satisfactorily established. The proof of one or any number less than the whole, will only prove that, so far as each of them is concerned, it is well executed; but will not tend to establish the document as a will.

4. In relation to the verbal declarations of the testator, they cannot be considered as competent to prove the execution of the will. They are general declarations, the truth of which comport with the existence of any will other than that in controversy. These declarations, made under the circumstances, are proof simply of the existence of a will.

5. If the signature of each and every witness of the number sufficient be proved, and the signature of the testator, then I instruct you the satisfactory proofs of those facts afford evidence from which you may presume a due execution of the codicil ("C"), in the absence of what you may deem counteracting testimony.

6. That this presumption is sometimes termed "an intendment," at others "an inference," it is in fact only "prima-facie" proof, and exists only so long as there is no evidence to counteract it. If, therefore, it has been proved to your satisfaction that the

codicil ("C") was written in the Spanish language, that on its face it professes to be executed before Mexican functionaries, which it was not, that one or more of the witnesses did not "speak" or "read" the Spanish language, that the testator was equally ignorant of it, that no other proof than the legal presumption to which I have alluded has been given to show a communication of the contents of the will had been made between the testator and the witnesses,—then I instruct you, if these facts have been proved, they must be duly considered by you; and if, in view of all the other testimony, they counteract the presumption arising out of the proof of the signatures of the testator and witnesses,—in that case, the legal presumption will be rebutted. To conclude, if the facts in this case induce you to believe, that if the attesting witnesses were alive and present, they could not testify to the dictation or nuncupation of his will by the testator to the witnesses, or that it was read in his and their presence, and understood by them,—then I instruct you, the proof made at this trial of the signatures to the document ("C") cannot establish it as the last will of Ellab Grimes. On the contrary, if the facts of the case do not thus influence you, the presumption to which I have alluded must control your action.

7. The codicil ("C") is attested by one Robert T. Ridley, as syndic; such office under the Mexican government, being a mere ministerial office without judicial functions, gave him no authority to authenticate the codicil. His act as an official act was void; but he signed with the declared intention to testify to the contents of the will; and his official prefix may be disregarded, and he considered as one of the witnesses.

The jury returned a verdict for the defendants.

[NOTE. This case was heard in the supreme court on writ of error, and the judgment was affirmed, Mr. Justice Campbell delivering the opinion. It was held that the admission of evidence showing a custom in early California as to the manner of making wills was proper, for the reason that the acts of individuals in accordance with such custom were legitimate, if it was so prevailing and notorious that, according to the principles of Spanish jurisprudence in force in California at the time, the assent of the authorities to such custom could be presumed. The will was held valid, although it did not show on its face that the witnesses were present during the whole time of its execution, and heard and understood the dispositions it contained, since the observance of necessary formalities might be shown by testimony dehors the instrument. *Adams v. Norris*, 23 How. (64 U. S.) 353.]

ADAMS, (DICKINSON v.)

[See *Dickinson v. Adams*, Case No. 3,896.]

Case No. 52.

ADAMS v. DOUGLAS COUNTY.

ADAMS v. BEACH.

[McCahon, 235; 1 Kan. 627.]

Circuit Court, D. Kansas. May Term, 1868.

CIRCUIT COURTS — JURISDICTION — INJUNCTION — RAILWAY AID BONDS — CONSTITUTIONAL LAW — CORPORATIONS.

[1. A circuit court cannot take jurisdiction, on the ground of diverse citizenship, of suits by a nonresident taxpayer to enjoin county officers from issuing county bonds, and from levying a tax to pay the coupons thereof, unless the bill shows that the tax to be paid by complainant, or his liability, determined by the ratio of his taxable property to all the taxable property in the county, exceeds \$500.]

[2. Allegations in such suit that complainant sues "on behalf of all others similarly situated and interested, to wit, all persons owning property subject to taxation in said county," do not show an amount in dispute sufficient to give the circuit court jurisdiction, as the amount of the interests of the parties so associated is not alleged; and, if the interests of such other persons be admissible on the question, residents, who could not be associated as complainants, must of necessity be included.]

[Cited in King v. Wilson, Case No. 7,810.]

[3. An issue of county bonds in aid of a railroad was authorized by a vote of the people, in the manner prescribed by law, with a condition that the railroad track should be completed and in full operation by a certain date, and that the road should run to Lawrence. The track was completed, but not equipped with turntables, water tanks, etc., by the date fixed, and came within only a quarter of a mile of Lawrence. *Held*, on application to enjoin the issue of the bonds and a tax levy to pay the first coupons, that there had been a substantial performance.]

[4. A nonresident taxpayer cannot maintain a suit to enjoin the issue of coupon bonds, and a tax levy to pay the coupons, unless he has some interest other than that common to the whole community.]

[5. A temporary injunction may be dissolved before the respondent answers when he is not charged with any particular knowledge of the facts alleged, and when the complainant's legal right is doubtful, and the continuance of the injunction unnecessary for his protection, and injurious to respondent.]

[6. Under the judiciary act of 1789, (1 Stat. 34,) as amended by 2 Stat. 418, authorizing district and circuit judges to grant injunctions in vacation, they have power to dissolve injunctions in vacation.]

[7. A temporary injunction granted in the unavoidable absence of the respondents, with the intention of hearing the whole case as if no injunction had been allowed, should be dissolved, even in vacation, as soon as lack of jurisdiction appears.]

[8. Const. Kan. art. 12, § 1, provides that corporations shall be created only by general laws. A company was incorporated prior to the adoption of the constitution by an act of the territorial legislature, which was continued in force by the constitution. *Held*, that the state legislature had power to amend the charter by special act. *City of Atchison v. Bartholow*, 4 Kan. 124; *Smith v. Swormstedt*, 21 Curt. Dec. 141; and *Dodge v. Woolsey*, 59 U. S. (18 How.) 331,—limited.]

[In equity. Bills by Phineas Adams to enjoin the county commissioners of Douglas

county from issuing certain bonds, and Melancthon S. Beach, the county treasurer, and other county officers, from levying a tax to pay the coupons first due. On motions to dissolve temporary injunctions. Granted.]

DELAHAY, District Judge. These two suits concern, substantially, the same subject-matter. The first is instituted for the purpose of enjoining the county of Douglas, through its corporate authorities, from issuing certain bonds to the amount of three hundred thousand dollars, to the Leavenworth, Lawrence and Galveston Railroad; the second is to enjoin the treasurer, and other officers of the county, from the collection of a tax imposed by the commissioners, for the payment of the coupon due January 1, 1869, upon a bond for three hundred thousand dollars already issued, and from the application of the proceeds of such tax to the liquidation of the coupon. The facts in brief are, that the question of issuing bonds to the amount of three hundred thousand dollars to this company was submitted, by an order of the board of county commissioners, to the voters of the county, by virtue of an act of the legislature of the state as far back as the 8th day of February, 1867.

The terms and conditions upon which the issuance of the bonds was to be made are expressly stated in the submission, as follows: "Shall the county of Douglas subscribe three hundred thousand dollars, in full paid stock, to the capital stock of the Leavenworth, Lawrence and Galveston Railroad Company, and issue bonds of the county therefor, in bonds payable thirty years after date, bearing interest at the rate of seven per cent. per annum from the date of delivery, to be issued to said company when twenty-four miles of said railroad track shall be completed and in full operation from Lawrence, Douglas county, via Baldwin City: provided, that no greater amount of bonds shall be issued than the amount of stock issued by the railroad company to the county of Douglas.

"2 The conditions of the above is with the express understanding and agreement, that the said company shall relinquish all claim to the bonds for subscription of stock heretofore voted to said company, to wit, on the 12th day of September, 1865." The vote was taken with this result: Two thousand one hundred and seventy for the proposition, and four hundred and twenty-four against, a majority of little less than five-sixths of the entire vote.

The board of commissioners, by resolution, on the 15th day of April, 1868, reciting the above submission, the vote and the result, declared that, the company having complied with all the requirements, stock to the amount mentioned should be subscribed, and the bonds issued. Since this time, a series of suits in the state courts, some of which

(though by no means pertinently) were recited in the second bill, have been instituted for the purpose of restraining, by injunction, the said board from issuing these bonds and thus subscribing to the capital stock of the company. Now, for the first time, the same species of litigation is proposed in the federal courts. Phineas Adams, a non-resident of the state of Kansas, and a resident of the state of New Hampshire, as the complainant, has filed, on the equity side of the circuit court of the United States for the district of Kansas, the several bills mentioned, for the purpose of obtaining an injunction as already stated.

It will be seen, from this review of the facts, that the cases affect very large pecuniary interests, and the nature of the work, the early completion of which may much depend upon the aid contributed by the subscription for its stock, shows that the interests other than those merely pecuniary must be even greater. Not to introduce into this opinion the ordinary speculations as to the advantages to arise to the state, and especially to that region through which the proposed road will pass, it will suffice to call attention to the vote of the people of Douglas county, in illustration of their own estimate of these advantages. But in a country where railroad intercommunication commands so large a share of public interest, and elicits such immense outlays of capital, I might feel myself justified in enlarging upon this subject, were it not that, holding the scales of justice, and performing the duties of her minister, I am not allowed to be swayed from her dictates by any consideration of the character of one or the other of the litigants in her courts. The complainant is entitled, small though his interest may be in comparison to that appertaining to the other parties in this proceeding, to have that interest protected, provided he brings himself within the class of persons and exhibits an interest over which this court has jurisdiction. The respondents have moved for a dissolution of the injunctions which had been temporarily issued in the two cases, and insist, as grounds for their motion, from the showing of the bill and the papers filed in the cases: First. That this court has no jurisdiction. Second. That there are not such equities disclosed as entitle the complainants to a continuation of this relief. These propositions will be disposed of in their order.

The jurisdiction of the courts of the United States is prescribed by law, that of the circuit court included. Its jurisdiction is derived from the nature of the subject in controversy in some cases, and in others from the character of the parties, and in some from the union of those several elements. The latter is the case in the present instance. It must appear in the bill that the complainant is a non-resident of the state, to enable him to invoke the aid of this court,

otherwise he is remitted for redress to the courts of the state. In addition to this, it must appear in the bill that there is in controversy, or in jeopardy by the action of the respondents, whom he desires to restrain, an amount exceeding five hundred dollars. Judiciary Act 1789, c. 20, § 11, [1 Stat. 78.] The non-residence of the complainant sufficiently appears, and the respondents make no point to the contrary. Whether the bill shows more than the sum of five hundred dollars to be involved in the proceeding is another question. The respondents say, as one of their grounds of motion, that it does not. The complainant insists that it does. If, in any proper sense, the sum of three hundred thousand dollars, the amount of bonds the issue of which is asked to be enjoined, may be said to be in controversy, then of course, in the first case, no question can exist. There is a sense in which this amount may be said to be in controversy. But is it a sense which will determine the question in favor of the complainant? To be in controversy certainly can not, properly, be understood in any other sense than as being in an attitude to be decided in favor of, or against, the party who asks the interference of the court. While that amount is really the subject of which the court is asked to adjudicate, it is not the amount which the complainant claims that he is in jeopardy of losing by the respondents unless they are restrained.

We do not see how any other test of jurisdiction can be maintained, than that when more than five hundred dollars are required as the basis of jurisdiction, it must mean an amount exceeding five hundred dollars which the plaintiff is liable to lose or gain by the result of the suit. It could never have been intended by the act of congress, that because a subject matter may have been involved in the proceeding, worth more than five hundred dollars, therefore any non-resident may have brought his suit in the circuit court, even although his own interest may have been a very small amount of the item of property. The result of such a doctrine would be, or might be, to throng these courts with proceedings in which a mere trifle might be claimed by the complainant, simply because that trifle comprised a part—a small part—of some large interest. A single stockholder in a banking or any other corporation, to the amount of fifty dollars, might thus gain in the circuit court a foothold for litigation, merely because the capital stock of the company was a million. Thus all the safeguards, whether of protection of the courts against the annoyance of numerous petty litigations, or of parties against being burdened with the more inconvenient and expensive proceedings of courts of the United States, would be effectually destroyed. We understand the act of congress to mean, not that the party must litigate in reference to something worth

more than five hundred dollars, but that he must bring into court, to be adjudicated by it, an interest exceeding five hundred dollars in something, which interest he shall claim to have as against his adversary, or, in case of injunction, which interest his adversary is about to put in jeopardy by his action, against which he invokes the protection of the courts. This doctrine, besides being well established by the course of decisions in the supreme court, (see [Green v. Lister,] 8 Cranch, [12 U. S.] 229; [Gordon v. Longest,] 16 Pet. [41 U. S.] 97; [Childress v. Emory,] 8 Wheat. [21 U. S.] 642,) was recognized at a recent term of the circuit court for this district, Judge Miller presiding, when, in the case of Jewett v. Treasurer of Leavenworth County, [Case No. 7,312,] the suit was dismissed because it did not appear that, in a proceeding to enjoin the treasurer, the complainant's tax exceeded five hundred dollars. Now, by this test, we think it is clear that in neither of the cases does the complainant show himself to be entitled to a status here. In the first case, there is no allegation whatever as to any particular amount of interest he may have to be jeopardized by the issuing of the bonds; the allegation in this respect being simply that he is the owner of real estate liable to be taxed. In the second, he alleges that the amount in controversy exceeds five hundred dollars. This is not the phraseology of the statute; "matter in dispute," not amount in controversy, is the language. But while this language may mean something very different from that used in the statute, let us suppose it to be of synonymous import. Is the difficulty thereby avoided? Shall the question of jurisdiction be settled by the assertion of the complainant? We think not. Certainly it cannot be so settled when, as in this case, the showing of the bill is, that the bonds are proposed to be issued by a county to a corporation, and his interest can, upon the face of the bill, arise only from the fact of being as a taxable person subject to a liability, unless by further showing that he has an amount of property, of such a ratio to the whole property of the county as would raise his liability to more than five hundred dollars. But suppose that his right to sue were apparent from the bill, by the exhibition of an interest fully large enough to confer jurisdiction, or suppose the views hitherto expressed to be unsound, and that jurisdiction may arise simply upon the magnitude of the subject of litigation, without reference to that of his interest in the subject, still, upon authority, it is not only necessary that he should be competent to maintain this suit, but it is equally necessary that all other parties complainants should be so competent. "When the jurisdiction of the circuit court depends on the character of the parties, and such party consists of a number of individuals, every one must be competent to sue in the courts of

the United States, or jurisdiction cannot be entertained." Wood v. Arredondo, [Case No. 17,148;] Mandeville v. Cookenderfer, [Id. 9,009.] Now the complainant sues as well for himself, he alleges, "as on behalf of all others similarly situated and interested," and claims that, if not himself sufficiently interested to make the amount exceeding five hundred dollars the basis of jurisdiction, he, along with the large number similarly situated, would certainly so be. This, however, he does not allege as a fact, and while we may admit the presumption to be a strong one, we cannot concede it, even if free from objection, to be sufficient to create the necessary "amount in dispute." But the attempt is open to several serious difficulties. The first is, whether a complainant may thus, without some special authority thereto, associate other parties with him; a second question is, whether, if allowed so to do, there is really any other party until he comes in, under the privilege accorded him, and is duly made a party. But a third, and yet more grave difficulty is, that this introduction of others, if admissible, is absolutely fatal to the status of the complainant. It would not be so, but might aid him, if he had stopped with the allegation as a moment ago herein incorporated, but this he does not do, but after claiming to sue, in the language quoted, for others as well as himself, he adds, "to wit, all persons owning property subject to taxation in said county," not all non-resident persons, but all persons. Of course, therefore, he sues alike for non-residents like himself and for residents. The authority a moment since alluded to requires all the complainants to be competent to sue, "or jurisdiction cannot be entertained." All persons liable to taxation must, of necessity, include residents who cannot be associated with him as complainants. Being so associated with him, all lose their right to the redress they ask. Thus, besides that there is not an affirmative showing of an amount in dispute sufficient to confer jurisdiction, there is no statement of facts from which this interest in him, making such amount in dispute, may be inferred. If this be true of the first case, how much more true is it of the other, when the object is to enjoin the collection of a tax of twenty-one thousand dollars, to pay the first coupon due upon a bond for three hundred thousand dollars heretofore issued. Evidence before me at the hearing tends to show that his interests, tested by his liability for taxes, does [do] not exceed five dollars. Not having in either case presented such an amount in dispute, this court has no jurisdiction to grant the relief prayed.

This view disposes of the case, and here this opinion might very well close, yet I do not think that I ought to leave the case without some review of the second proposition of the respondent, that the bill does not disclose such a case of merit as would

justify this court in granting the relief prayed. The legislature of the state of Kansas, in 1865, passed a law authorizing the counties, in the way therein pointed out, to subscribe stock for the purpose of advancing the public improvements of the class in question. Under that law, the board of commissioners of Douglas county submitted to the legal voters of that county the proposition, whether the sum of three hundred thousand dollars should be paid to the Leavenworth, Lawrence and Galveston Railroad, for which stock to this amount should be issued by the company to the county. A very large majority, as has already been said, was cast in favor of the proposition. Who are legal voters is defined by our constitution and laws. The complainant, by his showing in the bill as a groundwork of being admitted to prosecute the suit in this court, was not a legal voter. The constitution and laws of no state in this union confer the right of suffrage upon property, any more than do those of this state.

The law, therefore, and constitution of Kansas, have not given to the complainant in these suits any say whatever upon this question. In so far, this law may be unconstitutional. I do not propose to say that it is. I do not think that it is, but I have not reviewed, and do not propose to decide that question. I will remark only in passing that the law is certainly not so, as being against the constitution of the state. If there be any qualification of voters unconstitutional, it is that both the constitution and the law are so, as being in conflict with the constitution of the United States. The affirmative of this proposition would be so comprehensive as to affect the constitution and laws of every state in the union. These constitutional and legal questions may well suggest the inquiry, whether the complainant in this suit can have anything to do with the subject of these bills. He was not allowed, as a non-resident, to vote upon the question of authorizing the issuing of the bonds. Can he come into the courts of the United States, under any circumstances, claiming to exercise any control over this subject? With never so large an interest, the complainant might find himself embarrassed by this peculiar state of things. It is not made necessary by any presentation of the point to decide this question, and I shall, therefore, not do more than observe that, if to recognize such a barrier to his enforcement of a claim here should be said to present an exception to the rule that there is no wrong without a remedy, all that need be said in reply is, that the public policy of every state must, and does, sometimes give rise to similar anomalous conditions.

At all events, it may be safely said that, to lay a foundation of right in a case of this description, there should be distinct allegations, either of fraudulent collusion against complainant's interest or clear departure from

the line of imposed duty. There are no such allegations in either of these bills.

Every one owning land in a state holds it subject to the constitution and laws of the state. Not willing so to hold it he may sell, or, preferring to hold it and not satisfied to be denied any privilege of citizenship in regard to it, he may relieve himself of the disability by becoming a citizen. But a few observations are due in reference to the allegations of the bill, relied upon particularly to show merits. They are, that, at a meeting alleged to be informal, certain values, consisting of other bonds and moneys, and stocks of other companies, were issued without sufficient consideration, and to give a controlling influence against the interests of Douglas county; that the road was not constructed and equipped, by reason of the want of turn tables, water tanks, etc., by the 1st of January, 1868, as by the terms of the submission of the question to the people it was provided it should be. It is supposed the court will take judicial notice of the necessity of these, as equipments of the road. It may be well questioned, on the contrary, whether a provision of water tanks, turn tables, etc., the want of which is alleged in proof of noncompliance by the company with the terms of the submission, was necessary to constitute a compliance. The language of the submission is, that the "railroad track shall be completed, and in full operation." While it is true that a railroad is, in one sense, incomplete without these appendages, in a more limited sense it is not so. Certainly a railroad track may be complete, literally, without any one of these, while it is not complete only when we make railroad track to mean something more than it literally does. But besides this, may not the requirement have been thus restricted, for the reason that it was not intended to exact more of the company than simply to construct the railroad track, literally, by that time, leaving those appendages necessary for its absolute completion, in a more extended sense, to follow, as of course they must to make it practically useful and valuable? Besides, time is not necessarily of the essence of an agreement, and particularly in proceedings in equity. The most that could be claimed is, that the board of commissioners might, or if it be preferred ought, to have forborne the issuing of the bonds, and submitted the question again to vote. But they are entrusted with the management of the interests of the county, and have a right to the exercise of a fair and honest discretion, and, if, in the exercise of this, they do what a fair man under the same circumstances might do, I can not see any just cause of complaint. The charge of an undue motive in issuing the values above mentioned is not sustained. Motive may be inferred and judged from circumstances, but is not very well capable of direct proof; a mere assertion, or even an assertion sustained

by affidavit amounts generally to no more than an opinion. But the same remarks may be made in reference to this as to the last matter, that the board of commissioners, being constituted by the law the guardians of the interests of the county, were the proper judges of the fairness of the transactions of the company, or they might, indeed, well think that, the county having voted in favor of the bonds and subscription, they had but the simple duty to perform to issue them. It is further alleged that, it being a part of the terms of the submission that the road should run to Lawrence, the company failed to comply, because the road only came within a quarter of a mile of that city. It is a very nice adherence to words to deny that this is a compliance with the requirement. "Qui hærit in litera, hærit in cortice." It would have been little, if any, more to exact that it should have come to the center of the city. A few hundred yards more or less, in a question of termination of a railroad, can not present, generally, a very grave doubt as to whether or not similar terms have been complied with. The intervention of a river, or other great natural impediment, between the terminus as made and such as a literal compliance with the language would have made, might present such a doubt. But nothing of that kind exists in this case. Whether the company owns the intervening space or proposes to acquire the title to it is not of importance.

There remain two other questions, to which some reference should be made before dismissing the second point of inquiry. First. May any and every individual non-resident tax payer institute such a proceeding against the corporate authorities of a county? While on the one hand, individual rights are entitled to protection, on the other, great public interests ought not lightly to be subjected to delay and annoyance. Whether any principle can be stated, that would be capable of application without possible hardship, may be doubted; to deny all redress to individuals in such cases would be apt, sometimes, to result in injustice. To recognize the right of every one to arraign public servants of the description under consideration is full of inconvenience and danger. High authorities have held that, unless the individual has some interest other than that which is common to the whole community, he can not maintain a proceeding in such cases. *Doolittle v. Supervisors of Broome County*, 18 N. Y. 155, and *Roosevelt v. Draper*, 23 N. Y. 318, are leading cases in a large class in support of this doctrine; and the following are a few, of many, by which they are sustained: [*O'Brien v. Norwich & W. R. Co.*] 17 Conn. 372; [*Smith v. City of Boston*.] 7 Cush. 254; [*Mayor, etc., of Georgetown v. Alexandria Canal Co.*] 12 Pet. [37 U. S.] 91; [*Hale v. Cushman*.] 6 Metc. [Mass.] 425; [*Pratt v.*

Bacon.] 10 Pick. 123; 3 Daniell, Ch. Pr. 1768-1770. With this doctrine I am much inclined to concur, as far more reasonable and just than that which would recognize every one, in a community of common interest, as entitled to arrest the onward progress of great public concerns. It may be that legislative wisdom might well direct itself to this subject, and, while amply protecting personal rights, provide more fully than now seems to be done the proper safeguards against ill advised invocations of judicial protection.

As a ground of equity interference, not only well established by authority but expressly provided by statute, for the government of the courts of the United States, redress rests upon the want of adequate remedy without it. "Suits in equity shall not be sustained in either of the courts of the United States, where plain, adequate and complete remedy may be had at law. Act Cong. 1789, ch. 20, § 16, [1 Stat. 82.]

While the equity jurisdiction of the courts of the United States is independent of the local law, and therefore no objection to their jurisdiction may arise from the fact of a remedy under the local law, as decided in *Gordon v. Hobart*, [Case No. 5,609;] 3 Cranch, C. C. 267, [*Mandeville v. Cookenderfer*.] Id. 9,009;] yet, if such redress may be had at law in the courts of the United States, the equity jurisdiction now invoked plainly can not be entertained. Why may not such redress be had in these courts? There can be little doubt that, either in resistance of an unjust exaction or by proceedings to correct an evil suffered, redress at law might be successfully sought. This suggests another inquiry, which might well be somewhat elaborately considered, were the other propositions differently decided; that is, how far the equitable remedy by injunction is dependent upon the irreparability of the threatened wrong, and whether, judged by this standard, these suits are maintainable. But in the views I have taken this inquiry is rendered unnecessary. I will but ask, is there any evil, not to say irreparable, to be inflicted by the proceedings proposed to be enjoined, or on the contrary, are they not, however regarded by the complainant, of the highest advantage to him? If, indeed, some additional tax be the result, is it not likely to redound in a largely increased value of his property? Assuredly those to whom the proposition was submitted, and by whose votes it was determined, expect to reap large advantages from the outlay. It is inevitable that the complainant shall enjoy these as largely as others. In such a case he can not claim to be injured, had he a right to the position of complainant. The courtesy and ability with which the views of the learned counsel for the complainant have been presented will not permit me to close without noticing some of the leading authorities relied upon by him upon some other points. He objects to the dissolution in

these cases that no injunction can be dissolved until the coming in of the answers of the respondents, and in support refers to 3 Abb. Nat. Dig. p. 45, §§ 255, 256. [Read v. Consequa, Case No. 11,606; Robinson v. Cathcart, Id. 11,946.] That these authorities present this as the general rule is true, but the rule is not without exceptions. While it is recognized as the usual course, in injunction cases, that all parties shall answer, it is added, in a case of high authority, "But that rule may be dispensed with under peculiar circumstances, as when the party not answering is not charged in the bill with any particular knowledge of the facts alleged." *Ashe v. Hale*, 5 Ired. Eq. 55. There is no such allegation in the bills under consideration. Again, injunction was dissolved, the plaintiff's legal title being doubtful, and the continuance of the injunction being unnecessary for the protection of complainant and injurious to defendants. [*Shrewsbury & B. Ry. Co. v. London & N. W. Ry. Co.*,] 1 Eng. Law & Eq. 122. The doubtfulness of plaintiff's title in that case is fully met by the lack of complainant's legal status in this, while the want of necessity of protection to himself, and the injury to respondents, are quite as glaring here as they could have been there. Another qualification of the rule is, that "it is applicable only to an injunction properly issued." [*Mallett v. Weybossett Bank*,] 1 Barb. 217.

It is objected again, that dissolution can not be made in vacation. Brightly, Dig. p. 256, § 5. The power in injunctions, as conferred upon the judges of the district courts, is peculiar and ample. It is as follows: "The judges of the district courts of the United States shall have as full power to grant writs of injunction, to operate within their respective districts, in all cases which may come before the circuit courts within their respective districts, as is now exercised by any of the judges of the supreme court of the United States, under the same rules, regulations and restrictions as are provided by the several acts of congress establishing the judiciary of the United States, any law to the contrary notwithstanding: provided, that the same shall not, unless so ordered by the circuit court, continue longer than to the circuit court next ensuing; nor shall an injunction be issued by a district judge in any case where a party has had a reasonable time to apply to the circuit court for the writ." 2 Stat. 418.

This, it will be seen, confers upon the judges of the district courts, not the courts themselves, the same power as have the judges of the supreme court. The power of these latter is derived from the judiciary act, (1 Stat. 34.) "Writs of ne exeat and of injunction may be granted by any judge of the supreme court, in cases where they might be granted by the supreme, or a circuit court." Whence it follows, that the judges of the district courts, to the extent

of their territorial jurisdiction, have in these matters the full power of the supreme and circuit courts. This carries as well, in vacation, the power to dissolve as to grant, the former being incident to the latter. The act of the 23d August, 1842, (5 Brightly, Dig. p. 257, § 6, [5 Stat. 517, § 5,] is amply confirmatory: "And it shall be competent for any judge of the court, upon reasonable notice to the parties, in the clerk's office or at chambers, and in vacation as well as in term, to make, direct, and award all such process, commissions, and interlocutory orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court." But besides this view of the law of the question, the attitude of these cases is such as, itself, to make an exception to the rules ordinarily governing the dissolutions of injunctions, whether it respect the doing so without answer or the exercise of the power in the vacation. When applied for, a time was fixed for a hearing. The respondents were hindered by circumstances not under their control from attending, and the hearing was adjourned to Thursday, December 17, 1868. In the meantime the injunction was granted, temporarily, but it was not intended that the respondents should thereby be placed in any worse, or the complainants in any better situation, but, on the contrary, it was understood that the whole cases were to be heard as if no injunctions had been allowed. Under such circumstances, I cannot hesitate to treat them as of themselves exceptional, and not properly to be circumscribed by what, under other circumstances, might be not a too rigid rule, but, in addition to all this, is it not abundantly clear that, if the views expressed as to the question of jurisdiction are sound, a dissolution ought to be allowed? I understand the doctrine to not need to be sustained by accumulating authorities, that so soon, at whatever stage of a cause, as a want of jurisdiction shall be disclosed, the further entertainment thereof shall cease.

The complainant's counsel insists further that the Leavenworth, Lawrence and Galveston Railroad Company has no corporate existence, and relies upon article 12, § 1, Const. Kan.: "The legislature shall pass no special act conferring corporate powers; corporations may be created under general laws, but all such general laws may be amended or repealed." This company was incorporated under a territorial law of 1858, before the adoption of the constitution. Under the fourth section of the schedule that law was undoubtedly continued in force. It was amended by act of 1864, and it is claimed that, under the decision of the supreme court of the state of Kansas, in the case of the City of Atchison v. Bartholow, 4 Kan. 124, the last named act is unconstitutional. That the provision first cited is to be construed as denying to the legislature the

power to regulate and control franchises theretofore granted, is a doctrine to which I cannot assent. To regulate and control are essentially different from creating. The direct consequence of such a construction would be that, however pernicious privileges before granted might be found in their exercise, no remedy in legislative control would exist. I may safely, therefore, assume, without presenting the differences of the two cases and particularly analyzing the opinion of the supreme court, that they did not intend their decision to reach to the extent claimed, but based it upon the fact that, in that case, the law reviewed by them created corporate power. Nor, for the same reason, do I deem it necessary to indicate some very material differences between an incorporate company and a municipal organization known as a city.

Complainant's counsel refers to several authorities to sustain the right of the complainant to seek redress as he here does, the most prominent of which are *Smith v. Swormstedt*, 21 Curt. Dec. 141, and *Dodge v. Woolsey*, 18 How. [59 U. S.] 331. The first was an application for a division of a common property of the Methodist Episcopal Church, the complainants averring that the bill was brought by authority and under the direction of the general and annexed conferences of the church south, which had been erected into a separate ecclesiastical organization under an ordinance of a general conference and the subsequent action of certain annual conferences. That the supreme court recognized the complainants as competent parties in such a proceeding does not furnish support to the complainant in this suit. The case in 18 How. [59 U. S.] does not seem to me to be any more influential in this direction.

This opinion has already grown too long to permit me to feel at liberty to more particularly review the last mentioned or other authorities cited in opposition to the conclusions I have reached. The injunctions heretofore issued in these causes are dissolved, with costs.

NOTE, [from original report.] An injunction may be granted to enjoin the illegal levy of any tax charge or assessment, or the collection of any illegal tax charge or assessment, or any proceeding to enforce the same; and any number of persons whose property is affected by a tax or assessment so levied, may unite in the petition filed to obtain such injunction. *Dass. Comp. Laws*, § 3781. Mere irregularities cannot be inquired into. *Parker v. Challiss*, 9 Kan. 155; *Smith v. Leavenworth Co.*, Id. 296; *Kansas Pac. Ry. Co. v. Russell*, 8 Kan. 553; *Lawrence v. Killam*, 11 Kan. 499; *Challiss v. Atchison Co.*, 15 Kan. 49; *Stebbins v. Challiss*, Id. 55; *Hagaman v. Cloud*, 19 Kan. 394. Who may join in the action. See *Gilmore v. Norton*, 10 Kan. 491; *Gilmore v. Fox*, Id. 509; *Wyandotte & K. C. Bridge Co. v. Wyandotte*, Id. 326; *Hudson v. Atchison*, 12 Kan. 140. Who cannot maintain the action. *Missouri R., Ft. S. & G. R. Co. v. Wheaton*, 7 Kan. 232; *Wyandotte & K. C. Bridge Co. v. Wyandotte*, 10 Kan. 326; *State v. McLaughlin*, 15 Kan. 228.

He who seeks equity must do equity, applies to actions under this section. *Missouri R., Ft. S. & G. R. Co. v. Morris*, 7 Kan. 210; *Lawrence v. Killam*, 11 Kan. 499.

Case No. 53.

ADAMS et al. v. EDWARDS et al.

[1 Fish. Pat. Cas. 1; Merw. Pat. Inv. 650.]¹

Circuit Court, D. Massachusetts. Nov., 1848.

PATENTS FOR INVENTIONS—UTILITY—APPLICATION—ABANDONMENT.

1. Extensive use is evidence of utility.
2. Two structures are "substantially" the same when they are of the same material, if material is important; of the same thickness, if thickness is important, or of the same form, when form contributes to the result.
3. The "invention" is the conception of the idea, not its final development. The law does not mean, by invention, maturity.
[Cited in *National Filtering Oil Co. v. Arctic Oil Co.*, Case No. 10,042.]
4. Where an inventor perseveres in his application for a patent, from first to last, although he may file several successive applications, some of which are withdrawn, his patent can not be defeated, unless upon proof of public use, or sale, for two years before his application.
[Cited in *Blandy v. Griffith*, Case No. 1,529; *Goodyear Dental Vulcanite Co. v. Willis*, Id. 5,603; *Wickersham v. Singer*, Id. 17,610.]
5. The use of a safe, made by one man for himself, and kept by him in his counting-room, or cellar, is a private and not a public use.
6. A patentee may, from patriotism, generosity, despair, or other cause, abandon his patent and invention to the public.
[Cited in *Zinsser v. Kremer*, 39 Fed. Rep. 114.]
7. Patentees are not bound by their opinions upon legal questions relating to their patents.
[Cited in *Bevin v. East Hampton Bell Co.*, Case No. 1,379.]

8. Fitzgerald claimed "the application of plaster of Paris, in the construction of all iron safes, in the manner above described." *Held*: That this was a claim for double safes, with a filling of plaster of Paris, three inches thick, poured, in a liquid state, between the double sides of the safe, including the doors, and could only be anticipated by proof of the prior use of a similar combination.

[Distinguished in *Bevin v. East Hampton Bell Co.*, Case No. 1,379.]

In equity. This was an action on the case, [Adams & Hammond against Edwards & Holman,] tried before Mr. Justice Woodbury and a jury, for the infringement of letters patent [No. 3,117,] granted to Daniel Fitzgerald, June 1, 1843, and conveyed by mesne assignments, to plaintiffs. The nature of the invention consisted in interposing plaster of Paris between the inner and outer chests of fire-proof iron safes, after the manner described in the specification.

¹[Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Only partially reported in Merw. Pat. Inv. 650.]

S. P. Staples and B. R. Curtis, for plaintiffs.

R. Choate and Dana & Jewell, for defendants.

WOODBURY, Circuit Justice, charged the jury as follows:

The plaintiffs sue on a patent, which was taken out June 1, 1843, by Daniel Fitzgerald, and assigned to the plaintiffs in that year. Discriminate that, if you please, from every other patent (as many have, on the trial, been mentioned), in order to understand the case thoroughly—a patent issued in 1843, and assigned to plaintiffs, by Benj. G. Wilder, who obtained it from Enos Wilder, who obtained it from Fitzgerald. Now, that patent being so obtained, and assigned to the plaintiffs, no person has a right to use what is described in it, without their permission. They say, that they did not give any permission to the defendants to use it; but that the defendants did use it from 1843 to 1847, and the claim they lay before you is for damages for this use. In order to understand what is in controversy, you will start with the fact, that a patent was taken out in June, 1843.

The next point is, that the defendants have manufactured, used, and sold safes, similar to those described in this patent, for three or four years. That is not in controversy. It is proved by several witnesses, and is not in dispute. Now, that, gentlemen, in point of law, would entitle the plaintiffs to recover for the damages they have sustained, *prima facie*. They bring here a public document, or grant, made correctly in point of law. Patents are not now issued indiscriminately; and, on the face, it is good, if there is nothing shown against it, and a *prima facie* case cannot be made out against it. The case becomes narrowed down very much, by the defense, which rests on two great points. These are—First, that notwithstanding the defendants have used this invention, yet, for various reasons, they had a right to use it. And secondly, even though they had not a right to use it, under the law, yet they used it under such circumstances that there should not be any damages given. These defenses you must look into.

Had the defendants a right to use this patent? For if they had, they should not be held responsible; if they had not, they should. Now, gentlemen, as a general principle of law, although a patent thus obtained and thus offered in evidence, as I have said, is *prima facie* evidence for the plaintiff to recover; yet it is competent for the defendant to show he has a right to use the invention, and he may sustain his defense on various points. He may show that he had a license to use from the party who obtained the patent, and in such a form that he had a right to use the invention. He may show that he has purchased the right—that is, supposing the patent is good; or he may show something to prove that the patent is not good—

as by showing that some other person is the inventor, and not the patentee; or by showing that the thing patented had been in public use for two years before the patent was applied for; or by showing that it had been on sale for two years before, with his consent; or by proving that, from patriotism, generosity, or in despair, or from some other cause, he had abandoned it, so that the other party has a right to use it, and any one may take it up, as a sort of waif, or derelict property. And I mention these points, because they are all relied on for the defense; and being relied on, you must start with the principle of law, that the defendant should, on these, make out his defense, just as you originally started with the principle that the plaintiff must make out his position, or a *prima facie* case, against the defendants. If the defendants impugn the testimony which the plaintiffs offer, as to the legality or correctness of the patent, you must see how the scale preponderates.

The first argument to prove that this patent is bad, is, because it is for a matter not considered patentable. Now, gentlemen, in order to judge of that, we must first inquire what it is for. I shall instruct you, as a matter of law, that such things are patentable as the discoverer undertakes to apply, in combination, or separately, so as to produce new and beneficial results. We must make some broad and general distinctions of that kind. It need not be a new material. It need not be an entire new machine. It need not be, wholly or throughout, a new application. But when it is a combination, as it is here, it must bring some new feature into the combination, and produce new and beneficial results. And if it does that, it is of no matter how slight is the change. If there is a novelty in the application and in the machine, and if it produces new and valuable results, it is patentable, whether the combination is new, or an important part only, is new. There must be something new in relation to it, and it must produce better results than what were produced before. And when you get novelty in parts or in combination, and novelty in results, and beneficial results, you get what the constitution and laws were enacted to protect: that is, something newly invented, which benefits mankind. It must not be a frivolous object, like the invention of an improvement in making playing-cards, which has been driven out of court because the object was bad.

But in this case the object was laudable—to insure safety to the most valuable articles of property. It was patentable, then, if new and useful.

Next, then, did it produce new and beneficial results? It must have some superior advantages over that which existed before, or it could not produce such results, as to have resisted severe fires, such as consumed former safes, and their contents, without injuring these. Now, gentlemen, in testing

what is a new combination, as I have said, you may not have a new material, but you must have something different, in form or system, from what was used before, and so different as to cause new and better results. Now, as I understand it, safes have long existed before; and such as are called double safes. There had long been some opening between the chests, at some times to be occupied by air, and at other times by substances of various kinds, supposed to be non-conductors—some without and some with the application of such substances to the doors. But what Fitzgerald claims to be new, if I understand it, is, not the use of plaster of Paris to repel fire entirely, in some modes and in some articles, but that it had not been used before in combination with these double chests, applied to both doors and sides, to the thickness with which he used it, in the liquid state, for the purpose of repelling fire. He says, in the patent, it may be used, dry or liquid; but what he expressly relies upon and describes in detail, is the liquid state, and of a certain thickness. As you will see, this has an important bearing upon the result. He uses it for the doors, too, as well as the sides. This patent, then, requires that the safe shall be constructed, under his invention, so as to leave a space of two or three inches—a wider space than has been generally employed before. The preparation shall not be put on merely as a wash, or nailed on like a sheet of mica, or zinc, but it shall be poured in, in a liquid state, to that thickness. I have the impression that this pouring in, in a liquid state, in accordance with the answer to a question which I put to a scientific gentleman on the stand, is a peculiarity in filling all the holes and cracks better, which is essential. For, those acquainted with fires, and their operation upon safes, are aware that one great danger of burning up papers, is in consequence of the external heated air, not flame, being communicated through some small fissures of joints; and that one great means of preventing fire from destroying the contents of the safe, is by reducing the preparation to the liquid form, and pouring it in as a thin paste, so as to be more sure of filling the smallest spaces between the two chests. There may be some advantages from the moisture which comes out during the melting, which may serve to protect the safe from the fire. But it strikes my mind that this result has been brought about, under this invention, not only by using plaster of Paris—which is a good non-conductor, and imbibes, after it is calcined, much water—but by using it in this liquid state, so as to fill up all the crevices; and by having it so very thick, two or three inches, as Fitzgerald had it, instead of (as in the safes which existed before, which you have seen described, and some of which you have seen here) having a mere coat of plaster, half an inch thick. You will at once

see, from your experience, that a coat of two or three inches of matter, thus non-combustible, will resist the progress of a fire much better than a mere wash, or a mere coating of half an inch, or a quarter of an inch. However that may be, he claims it of a certain thickness. He describes the moist state, particularly, for its use, and he applies it to the doors as well as to the other parts. If the doors are not secured, as well as the other parts, it renders the contents quite unsafe. It is, therefore, this new combination of plaster, for this purpose, in this thickness, in the moist state, and applied all around, to the doors as well as to the other parts, which seems to constitute the gist of this discovery—producing such different results as have been shown here—of resisting the largest fires. It could hardly be justifiable, I think, for the court to say that it is not patentable, for want either of importance, apparent novelty, or usefulness. I shall soon, however, suggest something more, for and against its novelty, when considering the special testimony against it under that aspect. I may have said enough as to what is meant by a patent being useful. It must not be frivolous or unimportant. I hardly need dwell upon this. It is a question of fact, as to what is useful, after instructing you, as a question of law, that the patent must be useful. And a jury will have no great difficulty about that. If they find the invention introduced extensively into use, they will conclude that it is useful; for the people will not throw away old articles when old ones are as useful as new, and particularly when they are for the protection of such valuable articles as papers and money. The utility comes home, therefore, to everybody, if the extensive use is made out.

Passing by these you come to the next important part of the defense, and the evidence in relation to which has occupied the greater portion of the trial, and that is: was the improvement, as I have described it to you, made originally by Fitzgerald, or by some other person? This is the special defense, just referred to, against the novelty of this patent. Was there such a machine of the description contained in his specification—was there such a machine invented, or matured, before he did it? If there was, the law says, and says properly, that he cannot succeed, because the world then had the benefit—if it pleased. Another person was entitled to protection on account of it, and to aid the invention it was not necessary to issue this patent. But, in order to test this point, the prior invention must have existed before, with these qualities, with this combination, with this description, substantially. And I do not say, as one of my brethren upon the bench has said, that there is no definite signification to the word "substantial." When we say a thing is substantially the same, we mean it is the same

in all important particulars. It must be of the same material, when the material is important; it must be of the same thickness, when thickness is important; it must be applied in the same way, condition, and extent, to the doors as well as the sides, when either of these circumstances makes an essential difference. If some other machine had all this, as in Fitzgerald's, then it was substantially the same. It is not a matter of moment to make the chest, itself, of one substance, or another, if there is no difference in the period at which they melt, and if they are alike impenetrable to heated air. It may be made of tin, or iron, or brass. It is of no consequence whether it is in form a square or a parallelogram, or whether there is a small mixture with the plaster, which neither vitiates nor improves it. But it must be the same in power to resist heat and exclude heated air, and then, in this particular, it is substantially the same. Change of form is not material, when the form does not contribute toward the new result. When it does, the forms must be alike in all important particulars. As other inventions must have been not only substantially like this, but prior in time, in order to vitiate it, it will be necessary for you to find when Fitzgerald invented this, in order to determine whether he, or others, invented it first. The law means, by invention, not maturity. It must be the idea struck out, the brilliant thought obtained, the great improvement in embryo. He must have that; but if he has that, he may be years improving it—maturing it. It may require half a life. But in that time he must have devoted himself to it as much as circumstances would allow. But the period when he strikes out the plan which he afterward patents, that is the time of the invention—that is the time when the discovery occurs.

Now, it is contended, on the part of the respondents, that there were discoveries, like this, even earlier than in 1830. But in 1830, some of their witnesses say, and others in 1831 and 1832, there were clear discoveries of the use of plaster in this way, and before Fitzgerald started this idea, which he afterward matured and patented. Now, gentlemen, fixing the time of Fitzgerald's invention, you will see whether there were any of that description or not. The plaintiffs contend that this time was in 1830, and they give you the whole history of it, from various sources; among others, from the patentee upon the stand. What led him to the discovery—the experiments he made—the progress in his own mind, and what disabled him—the want of means—from maturing his idea, has been detailed to you. But his attempts continued after making the discovery. By various experiments on the power of plaster, in this way—applied in this form, put on moist, by balls, more in the form of plaster than of paste—

he found that it would stand fire better than anything else. And in this, one of his brothers unites with him, and the testimony shows that he thought early of using it with a safe. He certainly, in 1831, not only made these experiments, but made them with a small box; and he speaks of thinking then that he would get a patent as soon as he could get some person who would assist him. Another brother unites in testifying as to what took place in 1831, and Mr. Loring unites with them in the same. In 1832, he tried it with larger boxes, or safes, with the idea of safes in his mind. And Post, the son—the witness of that name who testified upon the stand—confirms what has been said by others, as to what took place at his father's at that time. The invention was exhibited at the office or house of his father, in New York, in 1832; to Ireland and Yerrick, in 1833. These last testify, with regard to the facts then occurring, of Fitzgerald desiring aid, and wanting to get it, to obtain a patent. In 1834, Mr. Kelsey testifies to experiments, and also in 1835. He says that he made experiments in 1836; and, especially, early in 1836, after the great fire, he went on more extensively in tests, and tried to get persons to unite with him. Mr. Sherwood united with him on that occasion, and did make experiments, which he has detailed here, under oath, with great clearness. The question is then presented, on this evidence, did he strike out this idea, which he afterward got patented, as early as 1831, and did he follow it up to 1836, till maturity, and follow it up, too, in various ways, and with reasonable diligence, considering his means? If you believe that he did, then the question will recur, whether there was any thing earlier of this kind, and to this extent, by others. The first thing that is offered to prove this, is the Conner safe. And here you come, at once, to the thickness of the material used.

You will see its thickness in that safe here before you, and can judge whether it is as well calculated to confer security against fire; and you will next go to the door of it, and see if the door was at all secured against fire; and if neither of these securities existed, as in Fitzgerald's, you will determine whether this would be all the improvement which Fitzgerald accomplished by thickening the material threefold, and applying it to the doors as well as to the sides. But there is another objection to it. It was not made until October, 1830, and Fitzgerald made his experiments previously in that year; in fact, some witnesses say that it was not complete until 1831 or 1832. Passing from these to the French safes—nobody swears that they were here before 1832; some do not swear that the French safes were in this country before 1833 or 1834. The evidence proves them to look ten years old at that time. Although, according to the appearance of them, they

may have been made some years before, were they, in fact, so made, or only much exposed at sea? And were they the same in substance? This is the important inquiry on the point now under consideration. It is very important, under another head, to consider whether their previous use occurred abroad or in this country.

Looking at the similitude, or difference: Were not the nails driven through them—through the plaster and all? Again, as to the substance between the chests: Was it plaster? And was it as thick as this? And were the doors secured like this? All these are considerations which affect the question at issue, and must be made reasonably clear and certain. And that is the reason why you are to decide what Fitzgerald's invention was: for others cannot compete with it, unless they were substantially like it.

I then suggest to you, the safe of Marr, in England. That was not in existence in 1834. And, gentlemen, is there any evidence that Marr's was used with plaster? That was spoken of, in the specification, with feathers and cotton, and almost every non-conductor in existence. If he placed no more reliance upon it than upon feathers and cotton, it would hardly be an invention like this. But it is for you to say whether it was the same, and whether it was used with plaster, liquid or powdered, or ever used with plaster at all. That is a question for you to decide, which I leave entirely in your hands. I do not know of any other safes which, it was contended, interfered with Fitzgerald's, till you come down to where I stop in the examination—to 1836. And then, if you believe he made an application for this patent, which was not afterward abandoned, no other invention would deprive him of priority, made after 1836, or within the two previous years. But if he had made an invention which he abandoned utterly, and did not try to get a patent for, after it was once rejected, and did not resume the attempt after the first trial, by a new application, then his priority, by the first application, fails, and you must look to other applications which were duly followed up, and to other inventions, within two years of them. What did he do, under these circumstances? For there must be an invention by others before his application—there must be a discovery by some other person, before he applied—in order to destroy his originality. You have in evidence, how he did apply in 1836, and what his specifications were. And then you have in evidence—how his first application was rejected in 1836 or 1837, and why it was rejected; how he renewed it again in 1837; how he applied, also, for the desk safe, and succeeded in 1838; and how, after a second rejection of the present claim, he applied again a third time, and how he failed; how it was continued in 1839, and

was amended and kept up, till he, finally, by an appeal, obtained his patent in 1834, [1843.]

The great question is, whether he made an application in 1836, by a specification which was afterward substantially embodied in his patent of 1843; and whether he ever meant to abandon it, after his original application? I instruct you, in point of law, with reference to the rejection, that the proof of abandonment of his application would depend upon two circumstances: whether he meant to give it up—to give all up, with regard to it—or whether, being needy, he gave up, during a short time, for want of funds. You would not trip up a man of genius, who had made a discovery, in consequence of a want of means to prosecute his labors to their final consummation, if you thought he intended to persevere. And even if the application was withdrawn—if he kept it up in his own mind, and meant to keep it up before the patent office, if you think he did not intend to abandon it, and did not, but merely suspended operations till he could get means, then all the other inventions would apply only to two years before 1836. But if he did not then reasonably persevere, nor then mean to, they would apply to two years before 1839, when he had his specification corrected, and persisted in, till he obtained the patent.

I now proceed to the next branch of the defense; it is one admissible by law, and often a very important one to the community; and that is, that Fitzgerald—although his invention was original, and important, and valuable, and applied for in 1836, and persisted in till 1843, and not meant to be abandoned during that time—yet allowed it to be in public use without taking a patent, or without applying for one, for two years before 1836. Now, gentlemen, you will perceive that the law, as to this, depends upon two questions: What is a public use? and, What is two years before the application? If you consider the application of 1836 as never having been abandoned, except for a few months, not renewed from want of means to assist in prosecuting his claim, then the public use must be for two years before 1836. But if you suppose that application was abandoned, then the public use must be two years before it was renewed, so as to avail under the principles already laid down. A "public use" is this: Public use is opposed to private use. If a man has an invention, and uses it privately, and nobody knows of it, then the use of it can not debar another person from inventing or patenting it. What is the evidence of a public use, as opposed to a private use? It need not be a general use by the community; but it must be an open use, however, so that the structure and modus operandi are apparent. But, gentlemen, one evidence of a public use is the manufacture of an article, publicly and openly, for sale; not universally, but still.

publicly—not by one person alone, and for his own private use, but the manufacture of it publicly—the offering of it for sale publicly. If a machine had been offered for sale, or had been manufactured, or had been used by various persons publicly, two years before Fitzgerald applied, his patent would fail. You can easily see the reason for it. A man is not to lie by, and let the public—several persons—use his invention without objection. He is not to lie by, and let persons manufacture the article for sale as if not to be patented; because he thus misleads them. He is not to lie by, and let them be sold in public stores. But, gentlemen, there must be a public use for two years, and a use, too, of the same machine in all essential particulars. Now, was there any use of such a machine before 1836, similar in substance, as to the material parts and arrangements? Or, if you will fix upon some later period than 1836, for the commencement of his valid application, was any other machine in use two years before that later period? The law of 1839, in respect to two years, was passed after the first application. But I instruct you that the law of 1839 applies, on all trials since, to previous cases as well as to subsequent cases. The law has come in, and given two years' use and sale to the inventor, without being barred so as to prevent experiments and trials of machines, to improve them. What next are the previous public uses relied on? The only ones which have any bearing upon this question are the Conner and French safes, which have been already considered partially. Was the use public in these cases, is one chief ingredient under this head. Was such a safe as Conner's used by the community? Was it actually sold in the stores? If there is evidence of it, you will refer to it. But if one man, alone, kept it—made it for himself, kept it in his counting-room, or in his cellar, it would be a private use. And the French safes—as to the use of them, you will judge whether there was any evidence that they were used in this country, or made in this country, or sold in this country—if they were like this in all essentials—which is another question for you to decide.

The defense to which I shall next advert is, that if Fitzgerald allowed these safes to be on sale for two years before his first application, the patent is invalid. There is justice in that. He thus would virtually extend the term for the patent. But, did Fitzgerald give permission to any others than himself or his agents, to use them; or were they on sale in the market before he made his first application? What is the evidence on that subject? If there be none, or none satisfactory, it can not operate against this patent.

There is one other defense, and that is, that this invention was described in books before the discovery of Fitzgerald. I think this must, by the act of congress, be before

the "discovery," and not before the application. One of the acts of 1836 speaks of the description in books as being necessarily before the discovery, and the use or sale before the application. As to the description in books, it says, in express terms, that it must be before the "discovery." If I am not wrong, there are books referring to Marr's patents, though that is clearly after this invention or discovery, and referring to the use of plaster as a non-conductor. But do they describe this invention of Fitzgerald's in all its material combinations? If they do not, they are no bar to the validity of this invention. Not to delay any further upon these things, I would say, finally, that if Fitzgerald succeeds in overcoming all this, yet if he, or the plaintiffs under him, abandon this invention to the public, from patriotism, generosity, or any other cause, then they should not trip up any person for using it afterward; for a parent does not often abandon his own child. An inventor does not abandon the fruits of his genius, except from some great cause. Was there any great cause which induced Fitzgerald or Wilder to abandon this invention? Have they acted as though they intended to hold on to it; or, have they, in fact, held on, to get the benefits of it; or have they utterly given it up and abandoned it?

Something has been said as to the opinions of the plaintiffs concerning the validity of their patent. I would state to you, as a question of law, that the plaintiffs are barred by any admissions of facts made by them, unless they were made under a mistake—unless they show that they were entrapped into a confession, or labored under some gross error concerning the facts. But opinions given with regard to the law by parties do not hold them in this way. Suppose a person thinks he is not entitled to a legacy; it makes no difference with the law. Many persons come here with great confidence about the legality or illegality of certain questions; it often turns out that they were very much mistaken. But when a party states a fact, and he does not show that he is under a mistake, we hold him to it; otherwise, the opposite party is deceived, or misled.

The final question upon which I wish to say a few words, is the question of damages. On the one side is the demand that you shall give nominal damages, and on the other that you shall give full damages. And it is perfectly competent for you to give nominal damages only, if you think that the plaintiffs have not been injured, or if you think that the plaintiffs have acted in such a manner that the defendants have been misled. On the other hand, gentlemen, if the defendants have not been misled, but meant to get the use of this safe without paying any thing for it, it would be a circumstance to induce the jury to give full damages, but not vindictive damages. And I sometimes in-

struct a jury to give damages, not only to pay for the injury, but, besides the taxable cost of the suit, to remunerate the plaintiff for the extra counsel fees, and necessary incidental expenses in undertaking it. If the defendants are not inventors, and have not bought of inventors, it is one of those cases where larger damages ought to be given. But if they have been misled by the plaintiffs, it is a case for smaller damages.

In relation to the additional points which have been submitted for instruction, by the defendants, it has been said that the claim in 1839 and 1843 does not extend to the degree of thickness which was laid down by me, as embraced in the patent of 1843. On that point I would instruct you that he says, at the close, in these words: "I claim the application of plaster of Paris in the construction of all iron safes, in the manner above described, or in any other manner substantially the same." What he says, "above described," as to thickness, is this. He describes a "space between the inner and outer safe of about three inches, which space may be varied a little, but should be the same all around and in every direction." I would instruct you, in point of law, that the reference is to that—to three inches. I had supposed it was only two or two and a half inches; but it is still thicker. He describes it as liquid, too, and then says it may be in that or some other way. The words are these: "I then take plaster of Paris, or gypsum, and having boiled it, or baked it in an oven, and calcined it, and reduced it to a powder, I mix it with water till it is about the consistency of cream, or thin paste, so fluid that it may readily be poured into the space left as above to receive it." He does not say that he wishes to use it in this way, merely. He describes the process which he actually performs as the liquid one. As to the doors, he says: "The inner and outer doors are prepared in the same way." And, "where one door is used, it should be made in the same manner, leaving a like space between the inner and outer crust, or face of the door; and, for a like purpose, should be fitted to the chest, or safe, with great accuracy." Also, "the sides and openings of the doors are to be neatly finished, as in other chests." The question of law is, that when he refers to the "manner above described, he refers to the thickness; to the liquid paste, especially; and to the filling of the doors, as well as the rest of the chest." As to the application of 1836, the request says that this claim was not there in substance. We must compare this application, and see. In 1836, he used water, but it was with a plaster, rather than a paste; and he says: "Within this, is a coat of a peculiar plaster (to be hereinafter described), one inch and a half in thickness; next within this, is a lining, of any kind of wood, about three-fourths of an inch thick; next another coat-

ing of the plaster, two inches thick; the whole is then lined with wood, covered with sheet-iron, upon which the shelves and apartments are fixed. These various proportions may be varied, to suit the size of the chest, and other circumstances; more or less of the plaster being used, according to the liability of the chest to be subjected to a very great heat, in case of fire." He says that the thickness is a very important ingredient, and that it is important, when the situation is such that the fire is likely to be a large one. Here is gypsum—and water with it, so as to form a plaster—two inches thick in one place, and one and a half inches in another.

It is also said, that if the specification of Marr describes this material, it is sufficient, even if he had made, as he swears, no practical machine with plaster. In his testimony, he says, twice, that he never did make one with plaster. If he describes gypsum, he must describe its use in this way. But he says nothing of its being used as a plaster, or of its being poured in as a paste, and nothing of the thickness.

It is also said that, if Fitzgerald was inactive for three years before 1836, it would imply that he had given up the invention. But you will judge, from the evidence, whether in 1835, 1834, and 1833, he did not make direct experiments, and apply to persons for aid.

Another word as to Matthews. He did not use the word "plaster" at all, and says nothing of thickness. He speaks of "soap-stone, Roman cement, alum or glue." I should hold them to be different from plaster, though they might be non-conductors; and that a patent for them did not cover one for plaster of Paris, to be used in the peculiar form and extent described by Fitzgerald.

You will retire, gentlemen, and settle the facts in dispute, and then apply them to the points in controversy, under the principles of law, as explained by the court.

The jury found a verdict for the plaintiffs.

[NOTE. For other cases involving this patent, see Gayler v. Wilder, 10 How. (51 U. S.) 477; Rich v. Lippincott, Case No. 11,758; Wilder v. McCormick, Id. 17,650; Same v. Gayler, Id. 17,643, 17,649; Same v. Adams, Id. 17,647; Gayler v. Wilder, 10 How. (51 U. S.) 509.]

ADAMS, (FALLS BRIDGE TURNPIKE CO.)

[See Falls Bridge Turnpike Co. v. Adams, Case No. 4,630.]

ADAMS, (GELSTON v.)

[See Gelston v. Adams, Case No. 5,302.]

ADAMS, (HERBERT v.)

[See Herbert v. Adams, Case No. 6,394.]

ADAMS, (HOLLINGSWORTH v.)
[See Hollingsworth v. Adams, Case No. 6,611.]

ADAMS, (HUDSON v.)
[See Hudson v. Adams, Case No. 6,832.]

Case No. 54.

ADAMS v. ILLINOIS MANUF'G CO.
[4 Ban. & A. 543;¹ 18 O. G. 412.]

Circuit Court, N. D. Illinois. Oct., 1879.

PATENTS FOR INVENTIONS—PATENTABILITY—NOVELTY.

Letters patent, No. 50,591, granted to John H. Irwin, October 24th, 1865, for a lantern, the top or dome of which is hinged to the guard on one side, in such manner that it can be closed firmly to the guard, by the operation of a hinge, and a catch on the side opposite the hinge, so that, when the top or dome is lifted or thrown back on the hinge, the globe can be removed from the guard, *held valid*.

[See note at end of case.]

In equity. [Bill by J. McGregor Adams against the Illinois Manufacturing Company for an accounting, and an injunction restraining the further infringement of patent No. 50,591. Decree for complainant.]

Coburn & Thacher, for complainant.
West & Bond, for defendant.

BLODGETT, District Judge. This is a bill for injunction and account. Complainant is admitted to be the owner of two letters patent issued by the United States to J. H. Irwin, the first, No. 47,551, dated May 2d, 1865, and the other, No. 50,591, dated October 24th, 1865, for improvements in lanterns. The defense is want of novelty in the complainant's patents. It is admitted that defendant has made, and is making, lanterns in all respects like those described in the specifications and drawings of Irwin's patent, No. 50,591. If that patent is valid, complainant must have a decree in this suit. The leading feature of this patent is the construction of a loose-globe lantern, so arranged that the globe can be readily removed and replaced, and, at the same time, have the metallic parts of the frame permanently attached together so as to make a basket in which the globe will be held or retained, even if the catch holding the top or dome to the frame of the lantern is unfastened. This is obtained by hinging the top or dome to the guard, on one side, so that it can be closed firmly to the guard by the operation of a hinge and a catch on the side opposite the hinge, so that, when the top or dome is lifted or thrown back on the hinge, the globe can be removed from the guard. The conveniences of this arrangement are obvious. It makes a lantern

¹[Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

simple in construction, with few complications, easily cleaned, and, perhaps, less liable to accidents than any other form of lantern which has been devised.

It is admitted that loose-globe lanterns had been made, long prior to that made by Irwin, in the form described in his patent. The idea of so constructing the lantern that the globe was simply held in place by the guard, and could be readily removed, was not new when Irwin entered the field; but I am satisfied that the Irwin patent can be sustained so far as its particular device is concerned. It is evidently useful, and by its application a very useful lantern is obtained. The loose-globe lanterns which had been made prior to that of Irwin's, as shown in the proof, are: First, Westlake, where the arrangement was such that you are obliged to remove the oil-pot, then the top, and then remove the guard from the globe. Second, Max Miller. By this the parts of the lantern can be separated by means of springs and catches, so that finally the globe can be taken out through the top of the guard. Third, Waters's lantern. This is separated. Fourth, Evans, English lantern. Fifth, Chappell, English patent. Sixth, Butterfield. Guard-clasps around lantern should be called a removable guard. Seventh, Morley. Eighth, Colburn. All these devices have some provision by which the parts of the lantern can be, to a greater or less extent, separated, but they can, none of them, I think, be said to suggest the specific mode by which Irwin made his globe removable, and preserved the connection of the parts of his frame. The patent may be sustained as a special device, and, as defendant infringes that device, the complainant must have a decree.

[NOTE. Patent No. 50,591 was granted to J. H. Irwin, October 24, 1865, and was the subject of litigation in Adams v. Howard, 19 Fed. Rep. 317, 22 Fed. Rep. 656.]

Case No. 55.

ADAMS v. The ISLAND CITY.

[1 Cliff. 210.]¹

Circuit Court, D. Massachusetts. May Term, 1859.

SALVAGE—CONTRACT—COMPENSATION—PLEADING.

1. In order to bar a claim for salvage there must be a distinct agreement proved between the parties for a given sum, to be paid whether the property be lost or not. It is quite immaterial whether the salvors accidentally fall in with the wreck and volunteer their services, or are called upon by the owners or persons interested to aid in saving it.

[Cited in The Louisa Jane. Case No. 8,532; Baker v. Hemenway, Id. 770; and in Chapman v. The Greenpoint, 38 Fed. Rep. 671.]

2. The mere fact that a libellant alleges his claim to be "in a cause of contract civil and

¹[Reported by William Henry Clifford, Esq., and here reprinted by permission.]

maritime, and for extra services rendered" to the vessel libelled and her crew, will not prevent such claim from being regarded as one for salvage, if it appears, from the general scope of the several allegations of which the libel is composed, that such is in reality the character of the claim.

3. Where three sets of salvors at different times rendered services to a vessel during a continuous peril, each was held entitled to compensation, although the separate service of either would not alone have saved the vessel in distress.

[Cited in *The Mayflower v. The Sabine*, 101 U. S. 387.]

4. Where three sets of salvors contributed in rescuing a vessel from peril, which vessel with her cargo was valued at \$70,000, the joint value of the several vessels engaged being \$131,000, and the whole time employed some fifteen days, the amount of salvage decreed to all the salvors was \$13,000, of which sum \$5,200 was decreed to the libellants in this case, it appearing that their vessel was worth \$85,000, and that she was employed some thirteen days in the service.

[See note at end of case.]

[In admiralty. Libel for salvage. Decree for libellants.]

This was a suit in admiralty, in a cause of contract civil and maritime, and of extra services rendered by the steamer R. B. Forbes to the bark *Island City* and her crew; and was removed into this court pursuant to the act of the 3d of March, 1821, on the certificate of the district judge that he was so concerned in interest as to render it improper for him, in his opinion, to hear the cause. The bark *Island City* left Galveston on the 10th of December, 1856, laden with cotton and hides, and bound on a voyage to Boston. She made Cape Cod on the 18th of January, 1857, in a snow-storm, when the master, finding that he could not get by the cape, kept off, and ran into the Vineyard sound, and, at four o'clock in the afternoon, anchored within six miles of Bass river. At ten o'clock in the evening, finding that his ground-tackle would not hold, he cut away the masts, and at daylight next morning found himself near the Horse Shoe. One anchor was gone; but the master supposed the other was still attached to its cable. On the morning of the 19th the gale began to diminish, and the bark remained without material change till the evening of the 21st, when she was hailed by the schooner *Kensington*. The *Kensington* was requested to tow the bark into Hyannis, when it was discovered that the bark's other anchor was gone. The bark was taken in tow by the schooner, and they proceeded about three miles toward the harbor of Hyannis; then, at eleven o'clock, bent another anchor to the chain, and came to anchor, on account of there being no wind. At one o'clock, on the morning of the 22d, finding it was commencing to snow, and the wind increasing, they got up the anchor, and proceeded about eight miles toward the harbor; but at four o'clock were obliged to anchor again, on account of the ice and the severity of the

weather. At seven o'clock they again got up the anchor, when the bark drifted astern and the hawser parted, and efforts to again make fast proved fruitless. At eight o'clock the bark came to anchor in four and a half fathoms of water, with a hundred fathoms of chain out; and the schooner left her, with an agreement to telegraph to her owners in Boston, and to return. The despatch was sent; but the schooner was unable to return, on account of the ice and severe weather. Upon receipt of the intelligence contained in the despatch the owners of the bark sent the steamer R. B. Forbes to her relief; and on the 23d of January she was found where she had been left by the schooner. The steamer took the bark in tow, and proceeded toward Hyannis till about dark, when both vessels came to anchor about a mile outside of the harbor. At daylight the next day, finding it impracticable to get into Hyannis, on account of the ice, it was decided to go to Provincetown to procure a supply of provisions and coal. After having towed the bark about nine miles toward Provincetown it was found the steamer could make no headway against the tide and ice, and both vessels came to anchor. Six hours later the anchors were got up, and the steamer, with the bark in tow, started to make the east channel, and towed all night. Monday morning, the 26th of January, at six o'clock, both vessels grounded on Great Point, in the northerly part of Nantucket, and there remained about two hours, till the tide rose, when they floated off, and the steamer again commenced towing the bark. In consequence of the quantity of ice, but little progress was made; and it was finally concluded that there was not sufficient coal on board the steamer to enable her to get the bark to Provincetown. The bark was anchored, and the crew went on board the steamer, which proceeded to Provincetown to procure a supply of provisions and coal, intending to return the following morning. On reaching Provincetown it was found that no supply of suitable coal could be obtained until the following Friday, when a quantity arrived from Boston. As soon as the coal was placed on board, the steamer started for the bark, and reached the place where she had been anchored about eight o'clock on Saturday, but found that she was gone. Saturday was spent in search of the bark, and on Sunday she was found at Hyannis, in possession of the officers and crew of the steamer *Westernport*, who claimed salvage compensation for bringing her into Hyannis; and who alleged that the *Westernport*, on the 30th of January, while on a voyage from New York to Boston, discovered the bark, dismasted and apparently deserted, whereupon she changed her course and bore down for the bark, which was, after great difficulty, boarded and found abandoned,—having out an anchor weighing only eight hundred pounds, the

chain not fastened on board, nearly all paid out and constantly rendering around the windlass; that, after twenty-four hours' labor and exposure, the bark was brought safely into the harbor of Hyannis; they also alleged that the steamer was in peril by coming in contact with the bark. On Tuesday, the 3d of February, the master of the Forbes, having received intelligence that the owners of the bark had given bond to pay such legal claim, if any, as the Westernport might justly have demanded, took possession of the bark, and arrived with her in Boston harbor, February 6th. Libels were filed by the owners of the R. B. Forbes, by those who were on board the schooner Kensington, and the owners of the steamer Westernport.

[The owners of the Westernport appealed to the supreme court from a decree forfeiting their interest in the salvage for misconduct, and that decree was affirmed.]

J. D. Bryant, proctor for libellants.

The assistance rendered to the bark is to be regarded as an entire one, and as such constitutes a salvage service. The assistance rendered by the Kensington, taken by itself alone, did not constitute a salvage service. It must be successful, and by it the vessel assisted must be taken from danger to safety. *The India*, 1 W. Rob. 408; *The Dodge Healy*, [Case No. 2,849;] *Hand v. The Elvira*, [Id. 6,015;] *The Emulous*, [Id. 4,480;] *The Henry Ewbank*, [Id. 6,376;] *The Independence*, [Id. 7,014.] *The Westernport* could only come in as a salvor, if at all, by engrafting her service on that previously rendered by the Kensington and the R. B. Forbes.

1. What shall the compensation be for this service? 2. How shall the compensation be divided among the different libellants?

1. As to the elements to be considered in fixing compensation. *The Wm. Beckford*, 3 C. Rob. [Adm.] 355; *The Clifton*, 3 Hagg. [Adm.] 121; *The Industry*, Id. 204; *The Traveller*, Id. 370; *The Boston*, [Case No. 1,673;] *The Versailles*, [Id. 16,924;] *The Sarah*, 1 C. Rob. [Adm.] 312, note; *The Hector*, 3 Hagg. [Adm.] 95.

2. The fact that the Forbes went to the assistance of the bark, at the request of her owners, introduces no different rule as to her compensation. *The Wm. Lushington*, 7 Notes of Cas. 361; *The Centurion*, [Case No. 2,554;] *The H. B. Foster*, [Id. 6,290;] *Bearse v. Three Hundred and Forty Pigs Copper*, [Id. 1,193.]

The Forbes took the bark from a place of danger. As to higher rate of compensation for salvage service rendered by steamers than by sailing vessels. *The Raikes*, 1 Hagg. [Adm.] 246; *The Adventure*, 3 Hagg. [Adm.] 153; *The London Merchant*, Id. 395; *The Perth*, Id. 415. When steamers go out of port for the express purpose of rendering aid. *The Graces*, 2 W. Rob. [Adm.] 294; *The Pickwick*, 20 Eng. Law & Eq. 630. *The*

Island City was not derelict when found by the Westernport. *Tyson v. Prior*, [Case No. 14,319;] *The Aquila*, 1 C. Rob. [Adm.] 41; *The Beaver*, 3 C. Rob. [Adm.] 293; *The Barefoot*, 1 Eng. Law & Eq. 661; *The Bee*, [Case No. 1,219;] *Rowe v. Brig —*, [Id. 12,093;] *The Boston*, [Id. 1,673.] The services of the Westernport were not needed and were not rightly undertaken. The law is jealous in maintaining the rights of original salvors. *The Charlotta*, 2 Hagg. [Adm.] 364. The right of possession once obtained was not lost by temporarily leaving the wreck. *The Amethyst*, [Case No. 330.] See *The India*, 1 W. Rob. [Adm.] 408. In order to justify the interference, the Westernport must show an absolute necessity therefor. *Hand v. Elvira*, [Case No. 6,015;] *The Maria*, Edw. [Adm.] 177; *The Blenden Hall*, 1 Dod. 418.

B. R. Curtis and William Dehon, for claimants.

CLIFFORD, Circuit Justice. All the evidence tends to show that the peril was continuous from the first moment, when the schooner went to the relief of the bark, down to the time when the steamer Westernport anchored her in the port of Hyannis, in a condition so crippled and disabled by the disaster she had encountered that the service of the other steamer was indispensable to get her into Boston, where she was bound. She was in very great peril when relieved by the schooner, and was by her placed in a position of far less exposure. Those on board the schooner were prevented from doing more by the violence of the storm, and from returning to complete the service, by causes beyond their control. They rendered important service in changing her position, and in transmitting intelligence to her owners, and in giving them the opportunity of sending forward more efficient aid. Valuable services were also rendered to the bark by the steamer R. B. Forbes, in placing her in a position of still greater safety, where, if her only remaining anchor had been of sufficient weight, there is much probability she might have ridden out the storm, till the steamer with her own crew had returned. Her exposure, however, was still very considerable, considering the state of the weather, on account of the well-established fact that the anchor was not of sufficient weight. Two of her anchors had previously been lost, and the one remaining was the stream anchor, weighing but eight hundred pounds, which, in view of the size of the vessel and her lading, was clearly insufficient to justify the conclusion that the bark was out of danger in the rough weather which followed. Floating ice still remained in the Sound, and for a considerable portion of time there was a heavy sea. Under those circumstances she was certainly liable to have drifted away, during the gale of the succeeding night. While these considerations lead necessarily

to the conclusion that the Westernport rendered valuable service to the bark, it by no means follows that the bark was derelict, as is contended by the counsel for that steamer. On the contrary, it appears that the steamer R. B. Forbes left the bark where the steamer found her, with the intention of returning, and the same remark applies to the crew of the bark, and it is not perceived, from the evidence, that the officers and crew of the steamer omitted any precaution in their power to take to leave the vessel in a safe position, or that they were guilty of any negligence in their efforts to return. Their right to salvage compensation is resisted by the counsel of the Westernport upon two grounds, which may as well be considered at the present time as in any other stage of the controversy.

It is said, in the first place, that the service was rendered under contract with the owners of the bark, and therefore was not a salvage service. Intelligence was communicated to the owners of the bark, by the master of the schooner on his return to Hyannis, that the bark was still in peril, and needed assistance. He performed that service at the request of the master of the bark, and the result was that her owners immediately telegraphed to Provincetown, where the steamer was then lying, requesting her master to go to the relief of the bark, and in pursuance of that request he went, and found her where she had been left by the schooner. No contract of any kind was made between the parties, except what may be implied from that request, which created no more obligation upon those on board the steamer to undertake the service than a signal of distress from the bark would have created, if it had been seen from the shore. They were at perfect liberty to go or to decline to go, as they saw fit, and if they had refused, either from interest or choice, the owners of the bark would have no right of action on account of the refusal. Such a service is entitled to be rewarded under the conditions and according to the measure of the maritime law; as the claim stands upon the request of the master of the steamer to go to the assistance of the bark, a compliance with that request, and the performance of a service which is salvage in its incidents and nature. All the cases show that the relief of property from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligations to render assistance, and the consequent ultimate safety of the property from such peril, constitutes a case of salvage; and where the compensation is not fixed by such a contract as a court of admiralty will enforce, it is to be adjusted according to those liberal rules which form a part of the maritime law. In order to bar a claim for salvage, there must be a distinct agreement proved between the parties for a given sum. It is quite immaterial

whether the salvors accidentally fall in with the wreck and volunteer their services, or are called upon by the owners or persons interested to aid in saving it. It is the place where the property is situated, and the circumstances of exposure and peril, which determine the question whether or not the case is one of salvage; and it has been determined that, to bar a claim of this description, it is necessary to allege and prove that a binding contract was made to pay for the service at all events, whether the property be lost or not. *The Versailles*, [Case No. 16,924;] *The William Lushington*, 7 Notes of Cas. 361; *The Centurion*, [Case No. 2,554;] *The H. B. Foster*, [Id. 6,290;] *The Independence*, [Id. 7,014.]

Another objection to the right of the steamer R. B. Forbes to recover salvage compensation arises from the pleadings. It is insisted that the libellant does not make any such claim in the libel. That view of the libel is derived chiefly from the fact that it is alleged to be in a cause of contract civil and maritime, and of extra services rendered to the bark and her crew. Standing alone, that clause would furnish some support to this argument. Such, however, is not the fact, and the character of the claim set forth in the libel must be determined by the general scope of the several allegations of which it is composed. What is meant by contract and extra service is clearly and fully explained by the libellant, in the first and second articles of the libel, and also in the last. He alleges, in the first article, that the steamer was at Provincetown on the 23d of January, 1857, and that her master on that day received a letter from the owners of the bark, stating that she was adrift near the light-boat, off Hyannis, and requesting him to go with the steamer to her aid. In the second and succeeding articles, to the fourteenth inclusive, he states the nature and character of the service rendered, and it will be sufficient to say that the statements of the pleadings conform substantially to the proofs of the case, as they are exhibited in the record. After describing the service, the libellant alleges that, by reason of the perils incurred, and the great importance, nature, and value of the service, the owners of the steamer are entitled to, and reasonably ought to have, and do claim, an extra liberal compensation by way of reward therefor, commensurate with the service, its duration and risk. These allegations are sufficient in point of law, and constitute a proper legal foundation for the claim set up by the libellant at the hearing. That claim is warranted by the pleadings, and is fully sustained by the testimony. Every suggestion that the suit is collusive is sufficiently answered by the fact that the proposition does not find any support in the evidence. It was based chiefly upon the assumption, that some one or more of the underwriters upon the bark

owned some interest in the stock of the company to which the steamer belonged. Suppose it were so, it could not avail as a defence in this suit, as it would only show a partial and contingent interest in the property saved, which could not have the effect to disqualify the owners of the steamer, as a corporation, from performing a salvage service, and claiming therefor a salvage compensation. Whether it would or would not be otherwise in a case where the owners of the stock in the steamer and the insurers were the same, or substantially the same in interest, it is not necessary to decide, as there is no satisfactory proof to sustain that view of the present case. *The Pickwick*, 20 Eng. Law & Eq. 636. All the evidence shows that the bark was dismasted on the 18th of January, 1857, and that she remained in peril more or less imminent, until she was finally carried into the port of Hyannis by the steamer *Westernport*, and anchored near the wharf. It was a continuous peril; and as each of these vessels rendered valuable service to the bark, and contributed to her relief and safety, each is entitled to salvage compensation. According to the testimony, the *Kensington* was a schooner of one hundred and eighty-one tons' burden. She was worth about six thousand dollars, and her cargo on board, together with freight and outfits, were worth about twenty-five hundred dollars; making in all some eight thousand five hundred dollars. Her exposure was very considerable, and the service was entirely voluntary. She had nine men on board, and was employed in the service some twenty-four hours. Thirteen days were spent by the steamer *R. B. Forbes*, from the time she started on the enterprise up to the time she arrived with the bark at her place of destination. Some portion, however, of the time was virtually lost, while she was lying in the respective harbors of Provincetown and Hyannis, waiting for coal, or for the completion of the arrangements by which she gained possession of the bark. She is valued at eighty-five thousand dollars, and is usually employed in towing vessels on the coast, and it appears that the demand for towing at that time was very great. All the facts necessary to be considered in this connection, in the case of the *Westernport*, have already been stated, and need not be repeated. Considering the nature and duration of the service by the several parties, and the value of the property saved, together with the value of the property employed in the several undertakings, and the danger to which the whole was exposed, and the energy and perseverance displayed in saving the bark, her cargo and crew, it is believed that the property saved ought justly to pay a salvage compensation of thirteen thousand dollars, as the entire amount to all concerned. Of that sum five thousand two hundred dollars are decreed to the libellants in this case. Should any

question arise as to its apportionment among the owners, officers, and crew, the parties will be heard when the case comes up for a final decree.

[NOTE. Originally there were three libels filed against the bark *Island City* and her cargo.—one by the owners, officers, and crew of the steamer *R. B. Forbes*; the second by the owners, officers, and crew of the schooner *Kensington*; and the third by the owners, officers, and crew of the steamer *Westernport*. Of the \$13,000 allowed by the circuit court for all the services of the salvors, \$5,200 was allotted to the *R. B. Forbes*, \$3,300 to the *Kensington*, and \$4,500 to the *Westernport*; but the court held that all that part of the compensation which would otherwise have belonged to the officers and crew of the *Westernport* was forfeited by their misconduct, and from that decree they appealed to the supreme court. In considering that appeal, Mr. Justice Grier remarked that, although no appeals had been taken in the other cases, the decisions might be collaterally challenged in the appeal of the *Westernport*, "in so far as they affect the rights of the libellant, if his vessel was entitled to the whole, and has received but one third," of the salvage. After reviewing the testimony, the supreme court concurred in the opinion of the circuit judge "that the bark was not abandoned after the salvage service commenced; that it was one continuous peril from which the bark was rescued, and that each of the several salvors contributed to the final result. The amount allowed for the salvage service was liberal, and the apportionment of it among the several salvors just and proper." The decree appealed from was affirmed. *Cromwell v. The Island City*, 1 Black, (66 U. S.) 121.]

Case No. 56.

ADAMS v. JOLIET MANUF'G CO.

[3 Ban. & A. 1; 12 O. G. 93; Merw. Pat. Inv. 252.]¹

Circuit Court, N. D. Illinois. June, 1877.

PATENTS FOR INVENTIONS—REVERSING MOTION TO PRODUCE DIFFERENT RESULT—SLIGHT CHANGE IN COMBINATION TO PRODUCE SAME RESULT—TECHNICAL DEFECT IN DESCRIPTION.

1. The complainant's invention consisted in reversing the motion of the beater-bars for regulating the feed in a corn-sheller, and by this change produced a result which had not before been attained: *Held*, that the invention was patentable.

2. The courts should not defeat a patent for a mere technical defect in description, if it clearly appears what the inventor has described and claimed as his invention.

3. A change of location of a part, in combination, where there is no new function performed by the changed member in its new location, will not evade a patent. Nor will the fact that the part changed works better in the location where the defendant puts it, than where complainant put it, if it does the same work, but only in degree better, make any difference. The result is the same.

[Cited in *Knox v. Great Western Q. M. Co.*, Case No. 7,907; *Consolidated Roller-Mill Co. v. Coombs*, 39 Fed. Rep. 34; *Schlicht & Field Co. v. Chicago Sewing-Mach. Co.*, 36 Fed. Rep. 587.]

¹[Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Also partially reported in Merw. Pat. Inv. 252.]

4. Letters patent No. 132,128, granted to Henry A. Adams, October 15th, 1872, for improvement in corn-shellers, held valid.

[In equity. Bill by Henry A. Adams against the Joliet Manufacturing Company for infringement of patent No. 132,128. Heard on bill and answer. Decree for complainant.]

Coburn & Thacher, for complainant.
Mundy & Ivarts, for defendant.

BLODGETT, District Judge. This is a bill in equity for an alleged infringement of letters patent of the United States issued to Henry A. Adams, dated October 15th, 1872, for an "improvement in corn-shellers," and prays an account of damages, and injunction.

The complainant's improvement consists in the arrangement of a winged shaft, or "beater-shaft," so geared as to revolve rapidly in the throat of the corn-sheller, for the purpose of driving the ears of corn into the machine. In his specifications his device is described as follows: "This invention relates to an improvement in a corn-sheller patented by Augustus Adams, as described in his letters patent No. 54,659, dated May 15th, 1866. In said patented corn-sheller a winged shaft is placed above the opening in the sheller, and is worked oppositely to the direction of the entering corn in such manner that the said wings strike the upper ear if two ears attempt to enter the throat at once, and throw said upper ear back into position to descend properly, but I have discovered that the ear so thrown back retards the feed, inasmuch as the following ears are likely to override the ears so thrown back, and the difficulty is thus continued. In the present invention, I propose to overcome this objection by forcing all the ears, as they approach the throat, to pass rapidly out of the way into the sheller, by means presently specified. And to this end I arrange a shaft above the throat with a series of wings, wheels or projections, to revolve in the same direction as the entering corn, so as to force the corn rapidly forward into the sheller, which is capable of shelling all the corn that can be forced through the throat. By this means I avoid any chance of clogging the feed under ordinary circumstances." His detailed description of his device is as follows: "H is a shaft, which may be surrounded by the hood R. This shaft carries the beaters or wings P, arranged to revolve in the direction of the arrows (that is, the direction of the feed) shown at Fig. 1 of the drawing. Space enough is left between the revolving wings and the bottom of the throats B to allow of a single ear, as at n, to pass freely beneath without contact, but sufficiently near to strike an overriding ear, as at m, and force it, and other ears in contact therewith, or in the road thereof, ahead rapidly into the sheller, clearing the passage for the corn following." His first claim is as follows: "The combination, with a corn-sheller, of a

series of wings, wheels, or projections, so arranged on a shaft as to revolve in the same direction the corn is running, and so placed relative to the throats as to force into the machine all misplaced or hesitating ears, substantially as specified."

It may be premised that the device in question is applicable to a power-sheller only, and is intended to operate in connection with the endless apron or other feeding device, whereby the ears of corn are brought to the throat of the sheller, and the object was to keep the throat of the machine from clogging by forcing the ears into the throat of the machine, instead of allowing them to pile up or override each other at that point. The object was to secure an operative automatic feed, which, without the care of an attendant, would keep the stream of ears of corn steadily and uniformly running into the sheller, instead of permitting it to pile up or choke in the throat.

Augustus Adams had two devices in his machine prior to complainant's invention, intended to accomplish the same purpose. The first were the small picker-wheels, running in the same plane with the shelling-disks, and intended to catch and carry forward the ears as they fell into the throat. The second was a winged shaft, or beater-bar, over the throat of the sheller, so arranged as to revolve in a direction contrary to the direction of the stream of ears of corn, and drive back the overriding ears as they approached the throat. This device was found to do but little toward securing the desired result, as the ears thrust or knocked back only got in the way of others, and the machine was, therefore, still liable to clog, so as to make the feed irregular, and require frequent attention from an attendant. At this stage of the art the complainant entered the field, and although he only reversed the motion of the Augustus Adams beater-bars, yet the evidence shows he produced, by this comparatively trifling change, a result, so far as the automatic feed of a corn-sheller was concerned, which had not been attained before.

The defence, first, denies the novelty of the invention; second, denies the infringement. Upon the question of novelty, evidence has been put into the record of a large number of devices for feeding or regulating the feed of corn-shellers, threshing-machines, straw-cutters, planing-machines, carding-machines, etc. But I do not find in any of them anything which seems to anticipate the complainant's machine. The device of Augustus Adams in form of construction is almost precisely like that of complainant's, except that it revolves in a contrary direction. But when at rest, and without the gearing by which the motion is secured, the two devices would strike the eye as substantially alike. Defendant also insists that the first claim of complainant's patent is anticipated by the picker-wheels, as they

are called, in Augustus Adams' patent; because complainant's claim is for "a series of wings, wheels, or projections, so arranged on a shaft as to revolve in the same direction the corn is running." * * * And it is argued that the claim to use "wheels" on the shaft, necessarily involves the use of wheels revolving over the throat of the sheller, as the picker-wheels revolve in the throat. It may be admitted that the terms used are somewhat unfortunate, and may tend to confuse, but the court should never defeat a patent for a mere technical defect, if it clearly appears what the inventor has described, and claimed as his invention. It seems to me the word wheels is used in this claim as a synonym for disks. The idea of the person who drew the claim, it appears to me, was that the wings or beaters might have disks on each side to help in thrusting the corn forward when they were used. I think, also, the court might, if necessary to save the patent, reject this word as surplusage, although I do not think it necessary to do so in this case, as the patentee in his specification evidently intends to suggest that some kind of wheels or disks may be fixed upon the shaft to act with the beaters; but this is more in the nature of a suggestion than a specific device by which he is bound to construct his machine.

The principle that it is the duty of the court to uphold and sustain the patent, instead of seeking for reasons to overthrow it, is fully sustained. *Turrill v. Michigan Southern R. Co.*, 1 Wall. [68 U. S.] 491; *Rubber Co. v. Goodyear*, 9 Wall. [76 U. S.] 788; *Klein v. Russell*, 19 Wall. [86 U. S.] 433; *Burden v. Corning*, [Case No. 2,143.] I do not, therefore, find the complainant's invention anticipated by the picker-wheels of Augustus Adams, nor does it seem to me the first claim of the patent should be held void for the use of the word "wheels."

As to the infringement: The proof shows that defendant makes and sells a machine—complainant's Exhibit C—with a beater-bar revolving at the entrance to the throat of the machine, so as to strike the ears of corn on the under side instead of the top, and so force them into the sheller. And it is claimed by defendant that the function performed by its beater-bar is different from that performed by complainant's. Defendant calls its beater-bar a device for forcing the feed, while complainant's is only a regulator or device for disposing of the misplaced or overriding ears. The models of both complainant's and defendant's shellers show that the ears of corn are brought forward nearly above the throat of the sheller upon an endless apron, and from that dropped or slid down a sharp, almost perpendicular incline, into the throat of the shelling apparatus. It may, I think, be therefore said, that no device for forcing the feed is required in either machine, but what both need is a regulator to prevent

the ears from overriding each other and choking up the throat; and it is very plain to me that the defendant's beaters, under the stream of ears of corn, perform the same office, and no other that is performed by complainant's. A change of location of a part, in a combination where there is no new function performed by the changed member in its new location, will not evade a patent. In the case of *Potter v. Schenck*, before his honor, Judge Drummond, [Case No. 11,337,] an infringement was alleged of the Wilson patent for a sewing-machine feed. By the defendant's device in that case the feed was secured by the pressure of teeth operating upon the top instead of the under side of the cloth, and in reference to this change of mode in effecting the result, the learned judge said: "The question is, whether this is a substantial variation in all or any of its particulars, from the invention of Wilson as described in his specifications of 1856. I have already stated that it is not, and, as it seems to me, on this ground, viz.: that when a mechanic has the leading idea which is developed in Wilson's patent, once thoroughly understood and fixed in his mind, he can carry out that idea in a variety of forms, simply by the exercise of mechanical ingenuity. Here was a great leading principle in the feed of the machine, devised and invented by Wilson. He, to be sure, describes the particular manner in which he carries out that idea; but once get that in the mind and it is clear that you can carry it out in a variety of forms. This is, it may be said, an ingenious variation or difference by which the idea of Wilson is carried out." "The shoe or main part of the feeding apparatus, is not placed beneath the plate upon which the cloth rests, but is on the top of the plate, or, as was contended and I think with a good deal of force, by the counsel for complainants, instead of being placed as Wilson describes it, it was merely reversed. It is clear that that does not change the principle of the invention, and it is clear, too, as already stated, that a mechanic once having the idea in his mind could apply it by adopting a great variety of forms and devices, and this among others."

Nor will the fact that the beater does its work even better in the location where defendant puts it than where complainant puts it, if it does the same work, but only in degree better, make any difference. The result is still the same. The ears are urged into this sheller by the blows they get from these revolving wings, whether they receive them on the top or bottom. And it can make no difference, it seems to me, that defendant's beaters may strike every ear, while complainant's strike only the overriding ones, because, when the stream is running evenly, no blows are needed on either side, and when one ear comes along with another on top of it, it makes no difference

whether the under one or upper one is first driven forward into the sheller, so long as that is the function of the beater; whether it strikes the top or bottom, the result is the same, and secured by substantially the same mechanism. Both these machines force the feed by driving the corn into the sheller and preventing clogging, and both of them regulate it. It, therefore, seems to me that neither of the points made in the answer is sufficient to defeat the patent; that, as the proof in this case stands, the patent is for a novel and useful invention, and that the defendant by its machine infringes the patent.

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Case No. 57.
ADAMS v. JONES.

[1 Fish. Pat. Cas. 527;¹ 2 Pittsb. R. 73; 7 Pittsb. Leg. J. 170; Merv. Pat. Inv. 660.]
 Circuit Court, W. D. Pennsylvania. Nov. 17, 1859.

PATENTS FOR INVENTIONS—APPLICATION—ABANDONMENT—NOVELTY.

1. By the application filed in the patent office, the inventor makes a full disclosure of his invention, and gives public notice of his claim for a patent. It is conclusive evidence that he does not intend to abandon his invention to the public.

[Cited in *Blandy v. Griffith*, Case No. 1,529; *McMillin v. Barclay*, Id. 8,902; *Bevin v. East Hampton Bell Co.*, Id. 1,379; *Johnsen v. Fassmen*, Id. 7,365; *Goodyear Dental Vulcanite Co. v. Willis*, Id. 5,603; *Colgate v. W. U. Tel. Co.*, Id. 2,995.]

2. A man might justly be treated as having abandoned his application if it be not prosecuted with reasonable diligence. But involuntary delays—the mistakes of public officers, or the delays of courts—not caused by the laches of the applicant, should not work a forfeiture of his rights.

[Cited in *Blandy v. Griffith*, Case No. 1,529; *McMillin v. Barclay*, Id. 8,902; *Bevin v. East Hampton Bell Co.*, Id. 1,379; *Johnsen v. Fassmen*, Id. 7,365; *Consolidated Fruit-Jar Co. v. Wright*, Id. 3,135; *Weston v. White*, Id. 17,459; *Woodbury Planing-Mach. Co. v. Keith*, 101 U. S. 485, 17 O. G. 1033; *Butler v. Shaw*, 21 Fed. Rep. 327.]

3. If an inventor claims two distinct improvements in one machine, he may apply for them jointly, and have a single patent for both. If he has made a mistake as to one of the improvements claimed, but is clearly entitled to a patent as to the other, he cannot be justly said to have abandoned either during a litigation as to his right to both.

4. It is only when some person, by labor and perseverance, has been successful in perfecting some valuable manufacture, by ingenious improvements, or labor-saving devices, that his patent is sought to be annulled, by digging up some useless, rusty, forgotten contrivances of unsuccessful experiments.

[Cited in *Electrical Accumulator Co. v. Julien Co.*, 38 Fed. Rep. 128.]

5. Patterson's patent for a concave, beveled keeper, is an immaterial variation of Adams' patent, worthless as an improvement, and palpably got up as a cover, and to give color to an invasion of the rights of the latter.

6. The novelty of Adams' patent for "improved keeper for right and left-hand door-locks" examined and affirmed.

[7. Cited in *Goodyear Vulcanite Co. v. Willis*, Case No. 5,603, to the point that if a party choose to withdraw his application for a patent, and pay the forfeit, intending at the time of such withdrawal to file a new petition, and he accordingly does so, the two petitions are to be considered as parts of the same transaction, and both as constituting one continuous application, within the meaning of the law.]

In equity. This was a bill in equity [by Calvin Adams against J. Hervey Jones, Alexander M. Wallingford, and another] for an injunction and account, founded upon the alleged violation and infringement of letters patent [No. 16,676,] for an "improved keeper for right and left-hand door-lock," granted to complainant February 24, 1857.

The claim of the patent was as follows:

"The use of a beveled keeper such as described, when employed in connection with a double-faced lock, having a blunt bolt, so that the lock may be used on a right or left-hand door, without changing any of its parts, as set forth."

Shaler & Co., Bakewell & Cushing, and E. M. Stanton, for complainant.

Stowe & Hampton, Geo. P. Hamilton, and George Gifford, for defendants.

Before GRIER, Circuit Justice, and McCANDLESS, District Judge.

GRIER, Circuit Justice. The complainant has a patent dated February 24, 1857, for an "improved keeper for right and left-hand door-locks." It purports to be an improvement in the manufacture of an article now known under the appellation of "Janus-faced door-locks." That species of lock was invented and patented by Sherwood. But in order to accommodate it to either a right or left-hand door, it was necessary to open it, so as to change the beveled side of the bolt. When this was done by a careless or inexperienced workman, the internal works of the lock were liable to become displaced. The object of complainant's invention is to obviate this difficulty. It is accomplished by making the bolt blunt, with rounded edges, and making a keeper, whose lip is an inclined plane the whole length of the keeper, so that the lock is available for either a right or left-hand door, without opening it to change the bolt, as the keeper may be turned with either side up, and catch the bolt. This is, undoubtedly, a valuable improvement in the manufacture of "Janus-faced door-locks," as it simplifies and cheapens the article. Drop-catch keepers had before used a slightly inclined plane on the lip of the keeper, but it could be used only for such a door as they were especially made for.

The original application for a patent for this invention was made by Adams, in 1850. In that application the invention (now pat-

¹[Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

ented) is clearly and distinctly set forth and claimed. But the applicant claimed also to be the inventor of other improvements. The commissioner of patents refused to grant him a patent for anything. An appeal was taken to the circuit court, and not decided by that court until 1856, when the decision of the commissioner was affirmed. Notwithstanding this, the original application was not withdrawn, and the applicant continued to insist upon his right to a patent for so much of the improvements claimed as was clearly his invention. A new commissioner of patents having the sagacity to see that the applicant had made a valuable invention, which had been overlooked by his predecessor, and rejected because the application had included other improvements of which the applicant was not the original inventor, very properly granted the patent now before us, as a valuable improvement in the manufacture of that species of locks called "Janus-faced."

The respondents, in their answer, allege three several grounds of defense.

1. They contend that the patent is void because the improvement therein claimed had been put in public use more than two years prior to the date of the patent.

2. That respondents do not infringe, but act under a patent granted to one Patterson in 1857.

3. That the improvement claimed is not new.

1st. As to the first point of defense. The testimony shows that the complainant made and sold locks with this improvement, more than two years before his patent, but after his original application filed in 1850. By this application, Adams fully disclosed to the public his invention, and gave notice of his intention to demand a patent. He ought not to lose his rights because of the want of perspicacity of the first commissioner. The delay in the decision of the appeal was not in consequence of any laches of complainants, but of the inability of the aged chief justice to attend to the business of his office. The reasons why courts have declared patents to be void, because the inventor had suffered his invention to be used by the public, before his application for a patent, are well stated in the case of *Pennock v. Dialogue*, 2 Pet. [27 U. S.] 1: "If an inventor should be permitted to hold back, from the knowledge of the public, the secrets of his invention; if he should for a long period of years retain the monopoly, and make and sell his invention publicly, and thus gather the whole profits of it, relying upon his superior skill and knowledge of the structure; and then, and then only, when the danger of competition should force him to procure the exclusive right, he should be allowed to take out a patent, and thus exclude the public from any further use than what should be derived under it during his fourteen years; it would materi-

ally retard the progress of science and the useful arts, and give a premium to those who should be least prompt to communicate their discoveries."

By the act of March 3, 1839, this abandonment to the public must have existed more than two years prior to the "application" for a patent. By the application filed in the patent office, the inventor makes a full disclosure of his invention, and gives public notice of his claim for a patent. It is conclusive evidence that the inventor does not intend to abandon it to the public. The delay afterward interposed, either by the mistakes of the public officers, or the delays of courts, where gross laches can not be imputed to the applicant, can not affect his right. The statute forfeits the right of an inventor to a patent only where the invention has been in public use more than two years before the application. A man might justly be treated as having abandoned his application if it be not prosecuted with reasonable diligence. But involuntary delays, not caused by the laches of the applicant, should not work a forfeiture of his rights. In this case, the complainant did not commence the manufacture of his improved lock till some time after his application was on file. The delay was not in consequence of his laches; and, within a reasonable time after the decision of the court as to the extent of his invention, a patent was granted for that portion of it to which he was clearly entitled. Here is no abandonment, either by the letter, or spirit of the statute, but a continual claim amid difficulties arising either from the obtuseness of officers, or accidental but unavoidable delays of public tribunals. If an inventor claims two distinct improvements in one machine, he may apply for them jointly, and have a single patent for both. If he has made a mistake as to one of the improvements claimed, but is clearly entitled to a patent as to the other, he can not be justly said to have abandoned either during a litigation as to his right to both.

2d. As to the question of infringement.

We have had ocular demonstration, by an examination of the defendant's admitted manufactures, that they palpably infringe the invention patented to complainant. When we have the things before our eyes (*oculis subjecta fidelibus*) we want no opinions of mechanics or experts, and give no further reason for our opinion than that "we've seen and surely ought to know." If the patent to Patterson be good for anything (being only a change of the device invented by complainant, for the worse,) it is only for an improvement on his invention. It must have been granted on that supposition. The locks exhibited show a substantial identity with Adams' invention, with a palpable attempt to make a colorable variation. It is plain also that this patent or Patterson, for an immaterial variation, is

worthless as an improvement, and palpably got up as a cover, and to give color to this invasion of complainant's rights. To clearly vindicate this conclusion of the court, it would be necessary to have the things before us, and to give a viva voce explanation. For the present we can only say such is our undoubted conviction from careful personal examination of the things themselves.

3d. The defense of want of novelty is wholly unsuccessful. The spring bolt brought from Birmingham, clearly shows that the device invented by Adams to improve Janus-faced locks, had never entered into the conception of the maker of it. As the bolt was only partially beveled, he had somewhat inclined the lip of the catch to make it slide with more ease. Everything which we have said with regard to the New York gate-locks, got up to defeat the Sherwood patent, applies with double force to the rusty sample brought to our notice from Birmingham. In both cases, the defense amounts to no more than this—that the persons who made these supposed originals came so near the patented device or machine that they might have discovered it if they had only thought of it, or could have anticipated that, at some future day, it could be converted to some useful, practical purpose, for simplifying, cheapening and improving an important article of our manufacture. It is only when some person, by labor and perseverance, has been successful in perfecting some valuable manufacture, by ingenious improvements, and labor-saving devices, that their patents are sought to be annulled by digging up some useless, rusty, forgotten contrivances of unsuccessful experimenters. Let a decree be entered for complainant according to the prayer of the bill.

[NOTE. No other cases involving this patent appear to have been reported prior to 1880.]

ADAMS, (KARRAHOO v.)

[See *Karrahoo v. Adams*, Case No. 7,614.]

ADAMS, (KEMPER v.)

[See *Kemper v. Adams*, Case No. 7,688.]

Case No. 58.

ADAMS v. KINCAID.

[2 Cranch, C. C. 422.]

Circuit Court, District of Columbia. Oct. Term, 1823.

JUSTICE OF THE PEACE—JURISDICTION IN DISTRICT OF COLUMBIA—ACT OF MARCH 1, 1823.

A justice of the peace, under the act of congress for extending the jurisdiction of justices of the peace, has not jurisdiction of suits against administrators.

[Reported by Hon. William Cranch, Chief Judge.]

At law. Adams brought suit, by a warrant of arrest, against Kincaid, administrator of McPhail, for services rendered by the plaintiff to McPhail in his lifetime. The account was proved and passed by the orphans' court. The warrant was returnable on the 13th of August, 1823, before Mr. Moulder, a justice of the peace, who adjourned the cause for consideration to the 18th, and again to the 20th, when "after a full hearing," he rendered judgment for the defendant, for costs, \$1.16.

Upon the appeal Mr. Dunlop, for appellee, contended that a justice of the peace has no jurisdiction in suits against administrators.

Mr. Wallach, for appellant, referred to the new act of congress of the 1st March, 1823, (3 Stat. 743,) extending the jurisdiction of justices of the peace in the recovery of debts in the District of Columbia, by which it is enacted, "that from and after the 1st day of June next," (1823,) "in all cases where the real debt and damages do not exceed the sum of \$50, exclusive of costs, it shall and may be lawful for any one justice of the peace of each respective county in the District of Columbia, wherein the debtor doth reside, to try, hear, and determine the matter in controversy, between the creditor and debtor, their executors and administrators, and upon full hearing of the allegations and evidences of both parties, to give judgment according to the laws existing in the said District of Columbia, and the equity and right of the matter, in the same manner, and under the same rules and regulations, to all intents and purposes, as such justices of the peace are now authorized and empowered to do when the debt and damages do not exceed the sum of \$20, exclusive of costs."

THE COURT, (THRUSTON, Judge, absent,) was at first inclined to the opinion, that the justice of the peace had jurisdiction under the new act; but, after further consideration, affirmed the judgment, with costs.

ADAMS, (LARNED v.)

[See *Larned v. Adams*, Case No. 8,092.]

Case No. 59.

ADAMS v. LAWRENCE CO.

WOODS v. SAME.

[7 Pittsb. Leg. J. 145; 2 Pittsb. R. 60.]

Circuit Court, W. D. Pennsylvania. Nov. 17, 1859.

RAILROAD COMPANIES—MUNICIPAL AID—COUNTY BONDS—BONA FIDE HOLDERS—CONSTRUCTION OF STATUTE.

1. The act of assembly of 9th July, 1853, section 7, authorizing certain counties to subscribe

to the capital stock of the North-Western Railway Company, which provides that the counties may "make payments on such terms and in such manner as may be agreed upon by said company and the proper county," confers, by such provision, full authority upon the county to issue coupon bonds in payment of such subscription.

2. All doubts as to this being the proper construction of the said section dispelled by the following considerations: 1st, Because the legislature themselves have so construed it, the proviso to the said section being "that whenever bonds of the respective counties are given in payment of subscriptions, the same shall not be sold by said railroad company at less than par value," &c., which shows that the legislature took it for granted that the issue of bonds was intended to be included in the brief but comprehensive expression of the "manner in which payment may be made." 2d, All parties concerned have treated this as the true construction, and have acted under it accordingly. 3d, The matter has been before the supreme court of the state, (S Casey, [32 Pa. St.] 144,) and it does not there appear that the county ought to have the bonds enjoined as made without authority. The decree there is based on the doctrine that these bonds are binding on the county in the hands of bona fide holders.

3. The said bonds, so issued, in the hands of bona fide holders, who have obtained them at their market value, are not affected by the proviso of the act, "that whenever bonds of the respective counties are given in payment of subscriptions, the same shall not be sold by said railroad company at less than par value."

At law.

Geo. P. Hamilton and W. O. Leslie, for plaintiffs.

R. B. McCombs and Lewis Taylor, for defendant.

GRIER, Circuit Justice. These cases were tried together at the last term of this court in May. The plaintiffs sued as holders of coupons of interest due on certain bonds issued by Lawrence county, the defendant. There was not much dispute as to the facts on the trial. The two great questions involved were: First, Had the commissioners of Lawrence county legal authority to issue the bonds given in evidence; and, Second, If they had, how far the fact that the bonds were disposed of for less than their par value should affect the plaintiffs' right to recover. In order that the court might have time for a more careful consideration of the questions, the jury were requested to bring in a special verdict, subject to the opinion of the court on these questions.

The execution of the bonds and coupons not being disputed, the jury returned a verdict finding the disputed facts, and assessing damages under three conditions, subject to the opinion of the court.

First. They find that the bonds were disposed of by the railroad company, at twenty-five per cent. less than their par value, and if the court shall be of opinion that the commissioners of Lawrence county had authority, under the act of 9th July, 1853, and the recommendation of the grand jury, as given in evidence, to issue the bonds, and that the

plaintiff has a right to recover the whole amount of the coupons declared on, notwithstanding the fact, as above stated, then they find a verdict of \$1,958 60.

Second. But if the court should be of opinion that plaintiff can recover only in the same ratio that the bonds were sold—for less than their par value—then the court to enter a verdict and judgment for \$1,468 95.

Third. But if the court shall be of opinion that by reason of the sale of said bonds for less than their par value, the plaintiff is not entitled to recover anything, they will enter a verdict for defendant.

First. The question as to authority is one of great importance, as it affects not only a large number of bonds, issued by the county defendant, but the counties of Beaver and Butler, which are in the same category. The act of assembly, referred to in the verdict, of 9th July, 1853, is that which provides for "incorporating the Northwestern Railroad Company." The third section enacts that the company shall have a right to construct a railroad from some point on the Pennsylvania or Allegheny Portage Railroad, west of Johnstown, by way of Butler, to the Pennsylvania and Ohio state line, to some point on the western boundary of Lawrence county, &c. The seventh section, which alone confers any power on counties to subscribe for stock in this railroad, is as follows:

"Section 7.—That the counties, through parts of which said railroad may pass, shall be, and they are hereby severally authorized to subscribe to the capital stock of said railroad company, and to make payments on such terms and in such manner as may be agreed upon by said company and the proper county. Provided, that the amount of subscription by any county shall not exceed ten per cent. of the assessed valuation thereof; and that before any such subscription is made, the amount thereof shall be fixed and determined by one grand jury of the proper county, and approved by the same; upon the report of such grand jury being filed, the county commissioners may carry the same into effect by making, in the name of the county, the subscription so directed by the said grand jury: Provided, that whenever bonds of the respective counties are given in payment of subscriptions, the same shall not be sold by said railroad company at less than par value, and no bonds shall be in less amount than one hundred dollars, and such bonds shall not be subject to taxation until the clear profits of said railroad shall amount to six per cent. upon the cost thereof, and that all subscriptions made or to be made in the name of any county, shall be held and deemed valid, if made by a majority of the commissioners of the respective counties."

The presentment of the grand jury is as follows: "The grand inquest of Lawrence county, Pennsylvania, did, on the 21st of May, 1853, make the following resolution: "Resolved, That the commissioners of the coun-

ty of Lawrence, state of Pennsylvania, be and are hereby recommended to subscribe stock to the North Western Railroad to the amount of two hundred thousand dollars, agreeably to the act of assembly incorporating said North Western Railroad Company, and to issue bonds for the payment of said stock, making the conditions such as will best promote the interest of said railroad company and the county of Lawrence."

1. As to the authority to the officers of the county to make subscription to the stock of the railroad and issue the bonds now in question. The constitutional authority of the legislature of Pennsylvania, at the time this act was passed, to delegate to the county, or its officers, the powers necessary to legal execution and binding force of such securities, is no longer an open question. Does this act of assembly, on a fair construction of its terms, confer such an authority on the commissioners of Lawrence county?

First. It is not disputed that Lawrence county comes within the description of the act. It is one "of the counties through parts of which the said railroad may pass."

Second. This county, represented by its officers, "the commissioners or a majority of them," is authorized "to subscribe to the capital stock and make payment on such terms and in such manner as may be agreed upon by said company and the proper county."

That this very general, indefinite, but comprehensive language of the act will include the power as exercised by the commissioners in this case, and that it is intended to do so, I have no doubt. No man ever expected or supposed that any county would become a stockholder in any other way than by borrowing money; their credit was all they could contribute. This would be done only by the issue of some sort of securities, well known in the money market. It was in this "manner" alone that any person supposed that these county corporations could "make payment." The form of coupon bonds was undoubtedly the best for all concerned, as this would give the bonds a higher value in the money market than any other.

It has been contended with much force, that in a legislative body, whose statutes are more usually obscured by a multiplication of words than by indefinite brevity, it cannot be presumed that so great and dangerous and corrupting a power was intended to be delegated in such vague language. It was easy to say, that the commissioners should have authority to pledge the credit of the county by the issue of bonds with coupons for the payment of interest half yearly, if the legislature so intended. That the power "to make payment on such terms and in such manner" may be satisfied, in many ways, without such an expansive construction as has been given to it. Besides it cannot be presumed that the extent of authority granted to the county commissioners, or the mode of its execution,

would, by any prudent legislature be conferred on them at the discretion of a private corporation. That here was an attempt to delegate legislative power to them, if they may dictate the "manner" in which such a vague and dangerous power may be exercised. I must confess that when this question was first ventilated these and other arguments of defendant's counsel had caused much doubt in my mind, inasmuch that the court offered to certify a division of opinion in order to have the matter fully settled at Washington. And, perhaps, if the case before me were a bill to enjoin the commissioners from issuing these bonds, I might have come to a different conclusion, but after consultation with my colleague, and more mature consideration, the doubts at first entertained have been dispelled.

First. Because a legislative construction has been given of this same section showing that they did intend to authorize the issue of bonds in the name of the county. Modern legislation can seldom be understood without carefully noting the provisos. Instead of exceptions the provisos often contain the very pith and marrow of the statute, which without it would be unintelligible or absurd. Here the proviso clearly shows that the legislature took it for granted that the issue of bonds was intended to be included in the comprehensive, but brief and costive expression of the "manner" in which payment may be made.

Second. All parties concerned have treated this as the true construction, and have acted under it accordingly. The bonds have been issued, without a whisper of dissent as to the power of the commissioners to make them, and this sharp construction is not demanded till the convenience of total repudiation has been discovered. But the court will not now repudiate their own practical construction of the law, to enable them to repudiate the obligations made under it.

Third. This matter has been before the supreme court of the state. (See [County of Lawrence v. North-Western R. Co.] 8 Casey, [32 Pa. St.] 144.) In that case it does not appear that the county ought to have these bonds enjoined, because made without legal authority. The ground alleged in the bill, and proven to the satisfaction of the court, was the gross fraud practiced by the officers and first subscribers of stock to that company. The decree in that case is based upon the doctrine that these bonds are binding on the county in the hands of bona fide holders. That point seems to have been conceded both by court and counsel. Else why decree that the company should pay to the county the par value of the bonds and interest due, if they do not surrender them?

The objection that the grand jury have not "fixed and determined" the amount to be subscribed, but only "recommended," is a verbal criticism, which might well have been

urged on a bill to restrain the action of the commissioners. If acts of assembly are drawn in such a careless slip shod style, how can we expect accuracy of expression in the report of a grand jury. They no doubt intended it as a literal compliance with the statute—it was accepted and acted upon as such. In such a case a court ought not to be astute in verbal criticism to release parties from their contracts, after their faith has been pledged for the redemption of these securities and value received for them.

II. The bonds having been executed by the commissioners according to the powers conferred on them, and delivered to the railroad company in payment of stock, who have paid them to contractors, who have again passed them to laborers and other bona fide holders, for their market value, how are they affected by the last proviso, of the act, "that whenever bonds of the respective counties are given in payment of subscriptions, the same shall not be sold by said railroad company, at less than par value." On the trial, the fact that the plaintiff was a bona fide holder of these bonds, was not put in issue, and is assumed in the special verdict, which "finds the bonds that were disposed of by the railroad company, at twenty-five per cent. less than the par value." This is a duty imposed on the railroad company, the original payer of the bonds. The company receives them at their par value for stock in the road, which is presumed to be a complete equivalent. But if the bonds, which are received as cash, are not of that value, it would be a fraud on the other stockholders, who paid in money or its equivalent, if the county could pay for a hundred dollars of stock in a depreciated currency worth only seventy-five dollars. Besides, the bonds being made negotiable security, payable to bearer, the county would have to pay their bond and interest, whether that bond purchased a hundred dollars worth of work or materials, or only fifty. This is no condition precedent, which affects the covenants on the bonds. It assumes that the bonds have been issued and given in payment of stock, and imposes this prohibition as a restraint upon both the county and the railroad. The county should not subscribe unless they are sure that the state of the money market is such that their securities will be worth par—nor should the railroad accept subscriptions to be paid in such securities, unless they were equivalent to the cash paid by other stockholders. Now, if these bonds were expected to be mere common bonds, not negotiable, but passing only as an equitable interest to the assignee, this proviso of the act would have been unnecessary, as the county might have set up this as a defense against the company and their assignees. It would not effect a forfeiture of the bond, but the county might well plead that it would pay no more to the company than it had contributed to the stock by its bond. It is apparent, also, that the imposition of this duty

upon the railroad is founded on the fact that the bonds given to them would be negotiable securities, to be put into the market as a sort of currency, and binding the obligor to pay the bearer according to the exigency of the bond. The proviso evidently assumes that fact, and is founded on that hypothesis. The recitals of the bonds are to show the power of the commissioners or agents of the county to bind it by subscriptions for stock, and pledging the faith of the county by such public securities. If the power has been legally executed, the bearer to whom the county has contracted to pay has no concern with intermediate holders. Whether the commissioners and the company may (one or both) have been guilty of fraud in issuing these securities, the bearer or bona fide holder need not inquire. If the corporation has wronged the county in this transaction, it does not concern the holder of the bond. He has a right to presume that both parties have acted honestly, and according to duties prescribed to them by the act. The bearer of the bond who has purchased it in market for its market value, has a right to say to the county: You have put forth your bonds in the shape of a negotiable security payable to bearer; you have covenanted to pay me certain sums at certain times; you have delivered these securities or sold them for certain stock; you have your consideration; I have your bond. If the railroad has cheated you, see you to it. It is no concern of mine. "It is not so written in the bond." It appears by the report of the case above cited, that these bonds were fraudulently obtained by the officers of the railroad company, and that the company was ordered to deliver up all the bonds in their possession, and to pay the par value of all the bonds put in circulation by them. Why has the county asked for such a decree, and why should the court have made such a decree, unless upon the admitted principle that the county were bound to pay such of these securities as were put in circulation according to the exigency of their contract? That, though technically bonds, yet by the custom of the country they were negotiable securities, and the county, by the letter and spirit of their contract, were bound to pay the bearer the whole amount. The face of the bond gave notice to every one who received it, on what legal authority it purported to be executed. A purchaser was bound to inquire whether the bonds were executed by persons having authority to pledge the faith of the county. Their delivery may be presumed from the fact that they are found in the market; whether the agents of the county or the railroad had been guilty of fraud or folly in the course of their transaction, were facts of which the face of his bond did not put the holder on the inquiry, and the knowledge of which would not affect his legal right to recover. The county cannot make a speculation out of the folly or fraud of their agents, as they certainly

would if they recover the amount of their bonds from the company, and themselves refuse to pay them to the legal holder. They cannot allege in one court, as foundation for a decree, that they are bound to pay the bonds, and deny it, when sued on the bonds in another. The court are of opinion, therefore, that, according to the conditions of the special verdict, the plaintiff has a right to judgment for the sum of \$1,958 60, and so order.

Case No. 60.

ADAMS v. LEWIS.

[5 Sawy. 229;¹ 10 Chi. Leg. News, 403.]

Circuit Court, D. Oregon. Aug. 28, 1878.

COURTS—PROBATE JURISDICTION.

1. In ascertaining the jurisdiction "pertaining to probate courts," under section 12, art. 7, of the constitution of Oregon, it is proper and necessary to consider what matters pertained to such jurisdiction under the laws of the territory at and before the adoption of the constitution, and it appearing that by such laws the probate courts of the territory had power to authorize and require an administrator to specifically perform a contract of his intestate for the sale and conveyance of real estate, such a matter is presumed to be within the jurisdiction of the county court sitting as a court of probate under the constitution.

2. The power of the legislature over the succession and conveyance of lands being unlimited, it may provide that a court of probate shall have jurisdiction to require an administrator to convey land in pursuance of the contract of his intestate.

[At law. Motion for new trial. Denied.]

This was a motion for a new trial in an action to recover the possession of the south half of lot 1, in block 16, in the city of Portland. The trial was had before the district judge and a jury, and resulted in a verdict for the defendant. The defendant claimed under a deed made by the administrator of D. H. Lowndale, the donee of the United States, and the immediate ancestor of the plaintiff's grantors, executed in pursuance of an order of the county court of Multnomah county, sitting as a court of probate, in February, 1863. Upon the trial, the record of the county court and the administrator's deed, being offered in evidence by the defendant, [it] was objected to by plaintiff on the ground that the court had no jurisdiction of the subject-matter, because chapter 7 of the act of December 14, 1853, respecting executors, etc., under which the order and deed purport to have been made, was invalid from the beginning as being unauthorized by section 9 of the organic act of August 14, 1848, (9 Stat. 326,) or had become inoperative by the adoption of the constitution. The district judge overruled the objection, and admitted the evidence, saying: "The determination of this question hinges, I suppose, upon the construction to

be given to section 12, of article 7, of the constitution of the state of Oregon, which reads as follows: 'The county court shall have the jurisdiction pertaining to probate courts and boards of county commissioners, and such other powers and duties, and such civil jurisdiction, not exceeding the amount of value of five hundred dollars, and such criminal jurisdiction, not extending to death or imprisonment in the penitentiary, as may be prescribed by law.' In my judgment, the construction of this section, suggested by counsel for plaintiff, is correct; that is to say, the words, 'as may be provided by law,' do not relate to the grant of jurisdiction pertaining to probate courts and boards of county commissioners; that these are granted absolutely, and that in addition thereto, 'such other powers and duties,' such civil jurisdiction not being defined, except that the value shall not be over five hundred dollars, and such criminal jurisdiction not being defined, except that it shall not extend to death or imprisonment in the penitentiary, as may be prescribed by law; but the two subjects, jurisdiction pertaining to probate courts and boards of county commissioners, are granted absolutely. Of course, that does not take away the power of the legislature over the subject of probate proceedings, and proceedings before boards of county commissioners, but it does not limit its power probably in this respect, so that it cannot transfer this jurisdiction or diminish it, cannot take it away, but it certainly has power to regulate the exercise of it. The legislative power extends to all rightful subjects of legislation. The legislature, then, may regulate the exercise of this jurisdiction pertaining to probate courts and boards of county commissioners, in county courts, and it may be that in the regulation of it, may suppress, so to speak, or leave in abeyance, for the time being, the exercise of some power which probate courts may have exercised heretofore.

Then the question returns, what is "the jurisdiction pertaining to probate courts?" By section 7 of article 18 of the constitution it is provided that all laws in force in the territory of Oregon when this constitution takes effect, and consistent therewith, shall continue in force until altered or repealed. So that the statute of December 14, 1853, as it was passed before this constitution was adopted, was one of the laws of the territory of Oregon, continued in force by it, if not inconsistent therewith. If it is inconsistent with this constitution, why of course the constitution displaces it, and it is no longer a law, whatever it may have been before. It may be admitted, then, that the question of what is the jurisdiction pertaining to probate courts includes this question as well as the other, because if the jurisdiction provided for in chapter 7 of the act of December 14, 1853, is part of the jurisdiction pertaining to probate courts, then the

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constitution is not inconsistent with that law, but consistent with it.

As counsel for plaintiff has well said, it is a pretty difficult question definitely to decide, what is a matter properly pertaining to probate jurisdiction in the United States. It must be answered, I think, in each state separately and somewhat historically. There is a kind of tradition that runs along with the various changes of government by means of which the phrases and terms of the constitutions and laws of one era are interpreted and explained according to the sense in which they have been used in another, or prior one. The rule is that unless the contrary appears, such phrases and terms are supposed to be used in the latter time in that sense in which they were used aforetime. That is what I understand to be the historical mode of determining what the phrase "probate jurisdiction," as used in the constitution, includes. We must ascertain the sense in which it was used in this state at the time of the formation and adoption of the constitution, and to do this it is only necessary to inquire what jurisdiction did probate courts have, at that time, in this state, as a matter of fact?

At common law, of course, there was no such probate jurisdiction. The power to grant letters testamentary where the deceased left a will, and to grant letters of administration where he died intestate, was vested in the ordinary, the bishop of the diocese. If the bishop did not exercise it in person it was done by the surrogate, a substitute, who stood in his place. But this jurisdiction only pertained to the granting of letters of administration, or testamentary. Originally, I believe, the personalty was given by the king as *parens patriae* to the ordinary, in trust, and was applied in saying masses for the benefit of the soul of the deceased, or to some other pious or charitable use. At common law the real estate was not affected in any way by the proceedings in the ecclesiastical courts. The proof of wills and granting of letters testamentary, or of administration, did not affect the land in any way, and taking that standard of what may be called probate jurisdiction, of course this is not a probate matter or anything like it. But the law has changed a great deal since that time, in regard to this matter, particularly in the United States.

I think this word "probate," "judge of probates" and "probate matters," comes to us from Massachusetts—comes from New England—that is my impression about it. And I think, there, from the beginning, very much larger power was given to the persons exercising that jurisdiction, than belonged to the ordinary, and particularly in the matter of dealing with the land of the deceased. It is very evident, according to the case read from [*Luchterhand v. Sears*,] 108 Mass. 552, that there was a statute there providing for specific performance of contracts for the con-

veyance of land, by order of the judge of probate. I cannot say what the form or manner of proceeding was, but that was the end to be attained.

Chapter 7 of the act of December 14, 1853, (Code [Statutes] 1855, p. 338,) is taken from the act upon the same subject, passed September 29, 1853, [1849,] (Code [Gen. Laws] 1851, p. 133,) with the omission of some very wholesome provisions concerning notice to the administrator, and the rights of infants, absentees, etc. [The court then read the provisions of the act of 1849, relating to the authority of the probate court to order a specific performance by the administrator of a written contract by the deceased to convey land, and compared them with those of 1853.]

Section 6 of the act of September 3, 1849, "An act to establish a probate court, and define its powers and duties," (Code 1851, p. 211,) is the prototype of section 6 of the same title, passed December 15, 1853, (Code 1855, p. 312, [339,]) relating to the jurisdiction of the probate judge. The statutes of 1849 are the earliest legislation upon the subject of judges or courts of probate, and their jurisdiction and powers in this state. The origin of the probate jurisdiction, so far as Oregon is concerned, is found in these statutes of 1849 and 1853, the latter of which are substantial copies of the former.

At the formation and adoption of the constitution, what then was understood from the prior and existing legislation of the country to be the "jurisdiction pertaining to probate courts?" Did it include the power to order specific performance of a contract relating to land by the administrator? Certainly it did. There does not seem to have been any doubt or dispute about it. This power was always included in the powers of the judges of probate.

But it is said by counsel for plaintiff that this power could not have been conferred upon the probate court by the territorial legislature, because it was not a power pertaining to probate courts, and that therefore the statute never was valid.

Section 9 of the organic act of August 14, 1878, [1848,] (9 Stat. 326,) vested the judicial power of the territory in supreme, district, and "probate courts," with jurisdiction as limited by law. Now, if the power to order an administrator to convey land in pursuance of the contract of his intestate, could not be conferred upon the probate court of the territory, because a matter not pertaining to a probate court, then the suggestion has force. But that only brings the inquiry around to where it was before, what are probate powers or matters?

Originally a debt due from the deceased could not be paid out of his land, because the administrator or executor had no power over the realty. If it was a simple contract debt, and the personal property was not sufficient to pay it, it was lost; but if it was

evidenced by a writing obligatory, an instrument under seal, then the doctrine came to be that it followed the land so far that you could sue the heir or devisee, and enforce payment to the value of the land received from the devisor or ancestor. Afterwards, in this country, the matter of making such payments, and subjecting the land to the debts of the deceased, came to be a recognized head of probate jurisdiction. That fact seems to be admitted by the plaintiff's counsel, that the probate court has authority to order the sale of lands to pay the debts of the deceased. But at one time that was not so. Now, is there any real distinction in principle between that and ordering the administrator to specifically perform any contract in relation to land?

A man dies under obligation to pay a debt to A. B., and has no personal property out of which the debt may be satisfied, and the law provides that the probate court may order the administrator to sell the lands of the deceased, and pay the debt with the proceeds, and thus take away the title of the heir. But suppose the deceased was under a valid contract to convey the same land to A. B. If the contract is not performed, the estate is liable for the loss which A. B. may sustain by reason of the non-performance. To prevent circuity of action, and settle the matter directly and simply, the court is authorized to direct a specific performance of the contract by the administrator. The deed made by the administrator conveys the title, which would otherwise have been conveyed by him to satisfy the debt, in damages for non-performance.

It seems to me there is no difference in principle between these two proceedings. It may be said that vesting jurisdiction of this kind in unlearned county courts, to be exercised without process or notice to the parties interested except the publication of a notice in a newspaper, may prove a convenient method of robbing infant heirs of their lands. So I am inclined to think, and for that reason, in preparing the Code of 1862, I intentionally omitted to provide for the specific performance of contracts relating to land in the county courts, but left the power to be exercised by the circuit court, where it properly belongs, as a recognized head of equity jurisdiction. But it is difficult to see on what ground you can limit the power of the legislature in this respect. Its power over the succession and conveyance of land is unlimited. Suppose it should provide that the administrator should perform the contracts of the intestate, in relation to lands, without the interference of any court, would not a conveyance in such a case, by the administrator, at least in pursuance of a valid contract, pass the title as against the heir? I can conceive of no reason why it would not. Then, if the law should provide that the administrator should

only act upon the order of the county or any other court, it is difficult to see how the conveyance would be impaired by this additional precaution in favor of the heir. It is only by virtue of the law that the real property of a deceased person descends to certain persons called his heirs. I suppose the legislature might provide that the property should vest in an administrator absolutely; that it should belong to him with the same power of use and alienation as the deceased had until the liabilities and obligations of the deceased were satisfied and complied with.

In my judgment, then, the making of the order at the term of the county court of March, 1863, in pursuance of which the deed from Lownsdale, administrator, to Simon, was executed, was made by the county court of Multnomah county in the exercise of "the jurisdiction pertaining to probate courts" as that phrase was used and understood in this state when the constitution was framed and adopted. This being so, the provisions of the act of 1853, under which these proceedings took place in 1863, were then in force, because being consistent with the constitution they were adopted and continued in force by it until repealed by the Code of 1862, which did not go into operation until June 1, 1863. Even if the territorial legislature had not the power, strictly speaking, to confer this authority on the probate court under the organic act, still, the act having been passed by the territorial legislature and treated and considered as a valid law until the formation of the constitution, I am of the opinion that it was adopted by that instrument and became a law of the state from the time the constitution went into operation.

The fact that the grantors of the plaintiff, the then infant heirs of D. H. Lownsdale, had only constructive notice of the proceeding under which Simon, the grantor of the defendant, obtained his deed, may be a good reason why the order should be open to attack, collaterally, for fraud or mistake. But at all events the order and deed are, prima facie, valid, and further than that it is not necessary to decide.

There was evidence given by the defendant to show that she, and those under whom she claimed, had been in the open and adverse possession of the premises since 1848.

The court instructed the jury that the defendant was the owner of the premises by virtue of the conveyance from Lownsdale's administrator and the subsequent mesne conveyances, but that the possession of D. Simon, under whom the defendant claimed, was not adverse to the title of Lownsdale, as was shown by his application under oath for a conveyance of that title at the February term, 1863, of the county court, citing *Adams v. Burke*, [Case No. 49;] and that therefore their general verdict must be for the defendant, with a special finding

that the defendant had not by herself nor those under whom she claims been in the continuous possession of the premises adversely to the plaintiff and those under whom he claims for more than twenty years before the commencement of this action. Verdict accordingly.

Benton Killin and H. Y. Thompson, for plaintiff.

William H. Effinger and W. F. Trimble, for defendant.

Before FIELD, Circuit Justice, and DEADY, District Judge.

FIELD, Circuit Justice. The ruling of the district judge, both upon the admission of the evidence and in the instruction given to the jury, was correct, and for the reasons given by him. The motion for a new trial is denied.

Case No. 61.

ADAMS v. LOFT.

[4 Ban. & A. 495; 8 Reporter, 612; 25 Int. Rev. Rec. 377; 36 Leg. Int. 405.]

Circuit Court, D. New Jersey. Sept. 24, 1879.

PATENTS FOR INVENTIONS—NOVELTY—OLD CONTRIVANCES—NEW OBJECTS.

1. Letters patent No. 111,798, granted to Thomas Adams, February 14th, 1871, for an improvement in chewing gum, held void for want of novelty.

2. The question of what constitutes sufficient novelty, discussed.

In equity.

Francis Forbes, for complainant.

M. T. Newbold, for defendant.

NIXON, District Judge. The bill was filed, in this case, by the complainant, for an injunction and an account, against the defendant, for the alleged infringement of letters patent No. 111,798, dated February 14th, 1871, for "improvement in chewing gum." The inventor, in his specifications, says that his invention consists in a method of preparing the natural product, known as chicky, to produce a chewing gum. This chicky is a vegetable gum, imported into this country from Mexico, the color of which varies from a dark cream to a brownish or earthy color. His method of preparation consists in taking the crude chicky of commerce and subjecting it to the action of hot water. In other words, he washes the gum, taken in its natural state, in hot water, in order to remove from it all coloring matter and impurities, and the product, to wit, the washed gum, is the new article of manufacture. His claim is, "the chewing gum prepared from the material and in the manner specified, as a new article of manufacture." Even if it

should be conceded that the phraseology of the claim includes the process as well as the product, it remains a serious question whether the invention has, in itself, any patentable quality. The patent act (Rev. St. § 4886,) authorizes a patent to be issued to any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof. The alleged invention must be both useful and new. How will the present stand this test?

1. In regard to its usefulness. The law charges the court with the duty of determining whether inventions are frivolous or insignificant, and I was strongly inclined, at the hearing, to apply to the case the maxim, *De minimis non curatur*, and dismiss it without further consideration. But that, perhaps, would have been going too far, especially as want of utility was set up as a defence in the answer, and no evidence was afterward offered tending to impeach the patent on that ground. *Prima facie* every patent is good, and I cannot say that it appears upon the face of the letters patent and specifications in this case, that the invention is frivolous or useless, or hurtful to the morals or health of society. Chewing gum may have its use, in the social economy, as a substitute for a greater evil or folly. The degree of utility is not a question. The law only requires that it shall be capable of some use, and that the use is not prohibited by sound morals or public policy. Curt. Pat. § 106.

2. In regard to the other requisite quality of patentable inventions, to wit, their novelty, that also is denied in the answer, and testimony has been taken tending to exhibit its lack of it. It is shown that the gum chicky is obtained from the juice of a tree, belonging, in botany, to the genus *Achras sapata*, which grows in the West Indies, Mexico, and South America. The product is a gum resin, and has the general properties of and belongs to the same class of resins as caoutchouc and gutta percha. It may be remarked, in passing, that the consul-general of Mexico was produced as a witness for the defendant, and he states, that in Mexico, the vulgar name of the tree from which it is taken is *Chico Zapote*; whence, doubtless, the name chicky is derived. He further testifies that the product is known to everybody there, and is commonly used as a chewing gum, being sold in the country stores in shape of grotesque figures. As some importance seems to have been attached to this fact, upon the argument, it may be said that such foreign prior public use was not brought home to the knowledge of the patentee before the date of the patent, and hence cannot be used in this case against its validity. The prior use which invalidates a patent, under our law, is a use within the United States, which, as yet, does not embrace Mexico. The subjection of india rubber and gutta percha to the action of hot water, for the

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purpose of cleansing, is an old and well-known process. Mr. Joslin, a superintendent of rubber works in Jersey City, fully describes the method of washing the crude articles, as pursued by him since he commenced business in 1844, and says that the same process has been used by all the rubber establishments that have come under his observation. It is the same method substantially as that described by the patentee in the specifications of his patent. To take a process so generally known as this in its application to india rubber and gutta percha, and apply it to the gum chicky, is not invention; and the result obtained, to wit, a gum more free from soluble matter and impurities than the chicky, in its crude state, is nothing new; it comes within the forbidden application of old contrivances to new objects. The case is not distinguishable from *Howe v. Abbott*, [Case No. 6,766,] in which the attempt was made to sustain the novelty of a patent for the process of curling palm leaf for mattresses, it appearing at the same time that hair had long been prepared by the same means for the same purpose. Mr. Justice Story, in holding it to be a double use of an old process, said: "It is precisely the same, as if a coffee-mill were now, for the first time, used to grind corn. The application of an old process to manufacture an article, to which it had never before been applied, is not a patentable invention. There must be some new process, or some new machinery used, to produce the result. If the old spinning machine to spin flax were now first applied to spin cotton, no man could hold a new patent to spin cotton in that mode; much less the right to spin cotton in all modes, although he had invented none. As, therefore, Smith" (the patentee) "has invented no new process or machinery, but has only applied to palm leaf the old process, and the old machinery used to curl hair, it does not strike me that the patent is maintainable. He, who produces an old result by a new mode or process, is entitled to a patent for that mode or process. But he cannot have a patent for a result merely, without using some new mode or process to produce it."

It is not claimed that chewing gum in itself is new. Every one familiar with the habits of school children knows to the contrary. It is conceded that long before the patentee attempted to convert the crude gum chicky into an article cleanly enough for the mouth of man, by washing out some of its impurities, chewing gum made from the spruce gum, paraffine, and other natural productions, was for sale upon the market. It is shown that the product of the same class or family of the vegetable kingdom had been washed and cleansed in the same manner, years before. Under these circumstances, it is difficult to find any novelty in the invention as set forth and described in the patent. If the letters patent could be sustained, there

would be no doubt about the infringement. The defendant, instead of using hot water for moistening and washing the crude article, has applied steam, with the subsequent application of cold water. Such a palpable attempt at evasion, not having even the merit of originality, would not for a moment be tolerated by the court, if we could see the way clear to uphold the patent; but not being able to do so, the complainant's bill must be dismissed, with costs.

Case No. 62.

ADAMS v. MEYERS.

[1 Sawy. 306; 8 N. B. R. 214.]

District Court, D. Oregon. Sept. 5, 1870.

BANKRUPTCY—TORTIOUS ACTS OF ASSIGNEE—CONFUSION OF GOODS.

1. The estate of a bankrupt is not answerable for the tortious acts of the assignee.

2. When the wheat of two parties is intermixed and confused, by mutual consent, they become owners in common of the grain so mixed in proportion to their respective shares of the bulk or quantity.

[Cited in *Rahilly v. Wilson*, Case No. 11,532; *The Pietro G.*, 38 Fed. Rep. 150.]

3. When the goods of two parties are mixed by one without the consent of the other, if they be grain or other articles, of equal value, the other party is only entitled to his proportionate share of the common quantity.

[Cited in *The Pietro G.*, 38 Fed. Rep. 150.]

[See *Rahilly v. Wilson*, Case No. 11,531; *Norris v. U. S.*, 44 Fed. Rep. 735; *Harrington v. U. S.*, 11 Wall. (78 U. S.) 356.]

[See note at end of case.]

[In bankruptcy. Action by E. M. Adams against George T. Meyers, as assignee of E. T. Warren. Judgment for defendant.]

John Catlin, for defendant.

DEADY, District Judge. This is a controversy submitted to the court upon an agreed case pursuant to chapter 2, tit. 14, of the Code. Code Or. 202. From the case stated it appears:

I. That on March 10, 1870, said Warren filed his petition in bankruptcy in this court, and that on March 14 he was duly adjudged a bankrupt, and that afterwards the defendant was appointed assignee of said bankrupt. That in September, 1869, the plaintiff delivered to said Warren 221 bushels of merchantable wheat, for which the latter gave his receipt as follows: "McMinnville, Or., Sept. 22, 1869. Commercial Mills. Received of E. M. Adams 13,260 lbs. wheat, equal to 221 bushels. (Signed) E. T. Warren, Frank." That said Warren received said wheat as a warehouseman and put it in a granery then owned by him and situate near his grist mill aforesaid, and with the knowledge and consent of the plaintiff intermixed and confused

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the same with a large quantity of other wheat, not the property of the plaintiff, and that prior to said March 10, said Warren allowed all the wheat to be removed from said granary, but that none of said wheat was ever returned to plaintiff, nor did he ever receive any satisfaction therefor, except for 11,⁰⁰ bushels.

II. That the defendant, as assignee aforesaid, became possessed of several hundred bushels of wheat stored in bulk in another granary near the mill aforesaid, which, on May 3, he sold at public auction, the plaintiff then and there protesting against the sale of so much of said wheat as would be equal in quantity to the number of bushels stored by him with Warren as aforesaid, and that at the time of said sale said wheat was worth sixty cents per bushel in coin. Upon this statement of facts, which is to be deemed a special verdict, (Code Or. 203) the plaintiff claims that the defendant is liable to him in the sum of \$126.12 damages for the conversion of the wheat delivered as aforesaid, and not returned or accounted for. On the other hand the defendant denies that he is liable to the plaintiff in any sum. The case was submitted without argument, and I am not therefore specially advised as to the particular questions of law which the parties to the controversy deem involved in it and necessary to its determination. It is also understood from a remark of counsel for the defendant, that there are other controversies existing between the defendant and other persons growing out of the deposit of wheat with Warren under similar circumstances, and that this is intended or expected to be a test case. For these reasons I will consider whatever questions of law that appear to arise upon the facts. And first, as to the character in which the defendant is liable, if at all. In the title of the case stated, he is described as assignee of Warren, from which it may be implied that the plaintiff seeks to charge him in his character or relation of assignee, and not personally or absolutely. But the defendant is not liable to be sued as assignee until the supposed creditor has proved his debt, and that proof has been rejected by the district judge. Bankrupt Act, § 24. In the latter case the creditor may bring an action against the assignee as such in the circuit court to establish his claim, but in either event the creditor only receives his pro rata of the bankrupt's estate. Besides, the facts stated show that the defendant, if liable to the plaintiff at all, is liable personally, and not as assignee. The gravamen of the complaint is, that the defendant sold and disposed of wheat in the north granary which the plaintiff claimed to be in some sort his property, and thereby wrongfully converted the same to his own use, to the damage of the plaintiff the sum claimed. The estate of the bankrupt is not answerable for the tortious acts of the defendant because he is the assignee thereof,

or professed to be acting as assignee in the matter complained of.

The law arising upon the facts stated concerning the deposit of wheat is well settled. The plaintiff's wheat having been mixed and confused with that in Warren's possession, with the mutual consent of the parties, the plaintiff became tenant in common with Warren of the bulk of grain produced by the mixture, and his interest therein was in proportion to the number of bushels deposited by him. Practically the result would be the same in this case if the wheat had been mixed without the plaintiff's consent, because, being presumed to be of equal value, the plaintiff would not be injured if he received the number of bushels of wheat deposited by him, although not the specific grains so deposited. *Willard v. Rice*, 11 Metc. [Mass.] 495; 2 Bl. Comm. 405; 2 Kent, Comm. 364; *Hart v. Ten Eyck*, 2 Johns. Ch. 108; *Story*, Bailm. § 40. But it appears that Warren removed, or allowed to be removed, all the grain in this granary before the filing of the petition in bankruptcy. Particularly what became of it does not appear. Probably it was manufactured into flour and disposed of by Warren long before the filing of the petition. But the inquiry is not material, so long as there is no evidence to show that it is the identical grain sold by the defendant contrary to the protest of the plaintiff. Upon this point the case stated is silent and no inference in favor of the plaintiff can be made from the facts set forth. This being so, the plaintiff, so far as appears, had no interest in the specific grain disposed of by the defendant. His only interest was that of a general creditor of the estate. It must be presumed from the facts stated that the plaintiff's grain was converted by Warren to his own use. If so he thereby became liable to the plaintiff for its value. This liability is a claim against the estate and provable as a debt in bankruptcy.

In conclusion, it is sufficient to say, that the defendant did not personally incur any liability to the plaintiff by the sale of the wheat in question, because the plaintiff does not appear to have had any specific interest or property in it. The claim of the plaintiff is for damages in money for the value of wheat deposited with the bankrupt, and by him converted to his own use and not accounted for. Such a claim is a debt or demand provable against the bankrupt's estate, and for which the assignee, as such, cannot be sued, except the same be rejected by the district judge, on objections by the assignee, as prescribed in section 23 of the Bankrupt Act. Let judgment be entered, that the plaintiff take nothing upon the case stated and that the defendant recover his costs, and expenses to be taxed.

[NOTE. Should the warehouseman sell a portion of the wheat, each original owner is entitled to claim his pro rata share; and should he buy other wheat, and mix it with the re-

maining portion, the title to such additional wheat would pass to the original owners. *Rahilly v. Wilson*, Case No. 11,531.]

Case No. 63.

ADAMS v. MILLER.

[1 Cranch, C. C. 5.]¹

Circuit Court, District of Columbia. April, 1801.

APPRENTICE—ASSUMPSIT.

Assumpsit lies by the apprentice against his master who takes the apprentice under an order of the court to bind him out, [and fails to comply with the terms of such order,] although no indentures are executed.

At law. Assumpsit for not teaching the plaintiff the trade of a silversmith, and to read and write, according to promise.

The corporation court of Alexandria had ordered the overseers of the poor to bind out the plaintiff to defendant.

THE COURT instructed the jury, that the defendant having taken the boy under the order of the court, although there was no indenture, the law raises an implied promise on the part of the defendant to comply with the terms of that order.

ADAMS, (MINI v.)

[See *Mini v. Adams*, Case No. 9,632.]

ADAMS, (MONCE v.)

[See *Monce v. Adams*, Case No. 9,705.]

ADAMS, (NEW ORLEANS NAT. BANKING ASS'N v.)

[See *New Orleans Nat. Banking Ass'n v. Adams*, Case No. 10,184.]

ADAMS, (NORTHRUP v.)

[See *Northrup v. Adams*, Case No. 10,328.]

Case No. 64.

ADAMS v. The OCEAN QUEEN.

[The case cited under this title in *The Mary J. Vaughan*, Case No. 9,217, and in *The Aleppo*, Id. 158, is the same as *The Ocean Queen*, Case No. 10,409.]

ADAMS, (OWENS v.)

[See *Owens v. Adams*, Case No. 10,633.]

¹[Reported by Hon. William Cranch, Chief Judge.]

Case No. 65.

ADAMS v. The SOPHIA.

[Gilp. 77.]¹

District Court, E. D. Pennsylvania. April 25, 1829.

SEAMEN—WAGES—LOSS OF VESSEL.

1. When the cargo and freight of a vessel are lost, before the termination of a voyage, the wages of the seamen are also lost, and the original contract therefor is annulled.

[Cited in *Davis v. Leslie*, Case No. 3,639; *The Dawn*, Id. 3,666. Questioned in *The Massasoit*, Id. 9,260.]

[See, also, *Giles v. The Cynthia*, Case No. 5,424; *McQuirk v. The Penelope*, Id. 8,925; *The Saratoga*, Id. 12,355; *Henop v. Tucker*, Id. 6,368.]

[See note at end of case.]

2. When a portion of a vessel or her cargo is saved by the meritorious and extraordinary exertions of the seamen, a new lien arises thereon for their wages, although the freight is lost, and the original contract annulled.

[Cited in *The Dawn*, Case No. 3,666, and in *The Nippon's Crew*, Id. 10,277.]

[In admiralty. Libel by Samuel Adams, Asa Combs, Kennedy Andrews, James Howard, Edward Gillespier, John Antonio, and William Martin against the brig *Sophia*, Charles A. Kalberg, master, for wages. Decree for Samuel Adams, but dismissing the libel of the other libellants.]

J. R. Ingersoll, for libellants.

D. P. Brown, for respondent.

HOPKINSON, District Judge. Two libels are filed in this case; one on behalf of Samuel Adams, the mate of the brig; and the other on behalf of Asa Combs and others, seamen; both claiming wages for the libellants as mariners on board of the brig, on her late voyage from St. Thomas to Rum Key, and from thence to Philadelphia. This vessel sailed from St. Thomas on the 19th November last, arrived safely at Rum Key, and, after some detention there, proceeded on her voyage to Philadelphia; but on the 4th of February was wrecked near the capes of Delaware. The vessel and cargo were lost; but some of the rigging and spars were saved, and brought within this district, and have been libelled and attached to answer the claims of the libellants. The seamen have set forth their claims in their libel; and the mate has preferred his separately. They present different questions for the consideration and decision of the court, and will be separately examined. I shall first take up that of the seamen. It is objected to these libellants, in limine, that their libel presents no case for them; that, taking the facts, they state to be true, they do not show a right of recovery; or rather that it is apparent, on their own statement, that they are not entitled to the prayer of their petition; that is, to their wages on the voyage described.

The proceedings of a court of admiralty are

¹[Reported by Henry D. Gilpin, Esq.]

not rigidly bound in the trammels of form; but, in every court, there must be some rules adhered to in the administration of the law, without which it would be a chaos of uncertainty and confusion. One of the most obvious and indispensable of these is, that the plaintiff shall exhibit such a case to the court, as entitles him, if true, to the judgment of the court. This can hardly be called matter of form; it is rather the substance on which the subsequent proceedings are to rest. How can a defendant answer a plaintiff who alleges nothing which charges him with any liability? Why shall he admit, or deny, or disprove a narration of facts, which when admitted or proved gives no cause of action against him; and which therefore need not be denied? Whatever case a libellant may have on his evidence, or in the truth of the transaction, he must also present a good one in his libel of complaint, and in his petition for redress, otherwise, should the relief asked be granted, the record of the court will not justify its decree; a plaintiff will obtain a judgment showing no right to it; and a defendant fall under the condemnation of the law, who has done no wrong. If such proceedings are taken, for revision, to a higher tribunal, which would have only the record for its guide and knowledge of the case, and could know nothing of the evidence, what could be done, but to reverse a decree to which the party shows he has no title?

These principles cannot be questioned; they are supported by common sense, as well as by the authority of legal adjudications. We must test by them the libel of Asa Combs and others, with a disposition to support it, if it can be done without injury to more important matters.

The libel sets forth, that the libellants, on the 20th November, 1828, at the port of St. Thomas, shipped on board the brig *Sophia*, as mariners, to perform a voyage from the said port of St. Thomas to Rum Key, and thence to Philadelphia; and thence back to St. Thomas, for certain wages. They further state, that they proceeded on said voyage, and continued doing their duty faithfully on board of said brig, until she was lost, without any fault of the petitioners, near cape Henlopen in the state of Delaware. They then state the amount of wages claimed, and pray that they may obtain relief in the premises, and such decree against the proceeds of the tackle, apparel and furniture, and other avails of the said brig within the jurisdiction of this court, as the court shall deem requisite.

In this libel we have an averment that the voyage, for which the wages are claimed, began at St. Thomas; that it was thence to proceed to Rum Key; thence to Philadelphia, and back to St. Thomas; and that before the arrival of the brig at Philadelphia, she, together with her cargo and freight, was lost. On such a case, what is the sentence of the law? Clearly and undeniably that the wages

of the seamen are lost with the freight, which is said to be the mother of those wages. This is the general, undisputed rule of the law. There is, however, an exception to this rule, founded on an obvious and just commercial policy. It is this; that when any part of the vessel or cargo is saved by the meritorious exertions of the crew, in the hour of distress and peril, they shall receive their wages out of the property thus preserved. On this principle a new claim for wages is given by the law, although that which was founded on the original contract between the ship owners and the mariners, is annulled and lost by the loss of the freight. The claim therefore presented to the court, in such a case, must lay its foundation on the facts which give it birth and existence, and by which only it can be sustained; and not on a contract which is utterly defunct and extinguished. The mariner cannot come here and say; I demand the payment of my wages by virtue of my shipping contract, and, at the same time, set forth a fact or state of things, which has destroyed and avoided that contract and every right and claim under it. He should raise and assert his new claim on the allegation of the facts, by which it is created and supported; to wit, that notwithstanding the freight of the vessel has been lost, yet that, by his exertions and services a part of the property has been saved, for which and from which he asks his reward. It should be observed, that to entitle the seaman to a resuscitation of his lost wages, two circumstances must concur, to wit, the saving of the property, which is the fund to which he is to look for payment; and that its preservation was owing to his services and exertions. The libel before us makes no allegation of either of these circumstances, but places the claim of the libellants on their original shipping contract, and their having faithfully performed their duty "until the brig was lost." But the duty and service, for which only they can maintain their claim, should have been performed after that unfortunate event, in rescuing the rigging and spars from the wreck. So as to the saving of this property; it is not directly alleged that any thing was saved, but it is merely incidentally alluded to in the prayer of the petition, by which the payment of wages is asked for, from the proceeds of the tackle, apparel and furniture of the brig. This is not such an averment or allegation as the defendant could have denied or taken issue upon. If, however, this were to be taken as a sufficient allegation of the preservation of a part of the property, where is it said or intimated that it was preserved by the meritorious exertions and services of the libellants? To say that they faithfully performed their duty until the vessel was lost, is far from presenting the ground, either directly or by necessary inference, on which alone this claim can be supported.

I wish to have it understood, that, in this

case, the libel expressly states the loss of the vessel on her voyage; and then does not go on to aver or set out the facts, by virtue of which wages become due, and may be recovered notwithstanding such loss. The case would have had a different shape, if the libel had preferred a general demand of wages, earned on that voyage, in the usual form, omitting every thing of the accident to the brig. In such a case the defendant would have opposed the demand, by answering that the vessel, cargo, and freight were lost before the termination of the voyage by shipwreck. This course of pleading would have brought the whole matter into the view of the court on the allegations and testimony of the parties. I mention this because I do not deem it to be indispensable, that in case of wreck, the libellants should set out the salvage and their services; although it is the usual and certainly the best manner of bringing up the case; but that where a seaman does state the wreck of the vessel in his libel, he must go on to set out such circumstances, as will, notwithstanding this loss, entitle him to his wages. In other words he must not show a case, on which he is not entitled to the relief he prays for; he must not demand his wages on his original contract while he shows that such contract is destroyed, and can give him no right of recovery.

It is my opinion that these libellants cannot have the judgment of this court on the case they have presented; and this libel must be dismissed. I regret to send a party out of court on anything but the clear merits of the case; and I have not been wanting in my endeavors to avoid it here. Whether, on the settlement of the accounts of these men, anything would be due to them, it is unnecessary now to inquire; so also as to the charges made against them for neglect and misconduct.

I proceed to the case of Samuel Adams, the mate of the brig *Sophia*, in this disastrous voyage. His libel sets out the contract for wages, for the voyage; and alleges, generally, the faithful performance of his duty. He proceeds: "And your libellant further showeth that the said brig, on her passage to the said port of Philadelphia, was cast away in the night time near cape Henlopen, in the state of Delaware, and that without any fault or negligence whatsoever of your libellant; and your libellant further showeth, that nearly every thing belonging to the vessel was saved and preserved, and her tackle, apparel and furniture brought within the jurisdiction of this honourable court through the exertions of your libellant." Here then is exhibited to the court a full and complete legal right to wages, if the allegations of the libellant are supported by the testimony. How has it happened that,

in these libels, filed by the same counsel, on the same facts, there has occurred the difference, that exists between this for the mate, and that presented for the crew of the brig? It is the more unaccountable, too, as the libel for the mate was amended by some suggestions from the court, to prevent difficulties and exceptions to its form; and was filed with the clerk, two or three weeks before that of the men. Why the same form was not pursued; why so essential a departure from it was made, it is impossible for me to say.

To defeat the claim of the mate, some attempts have been made to show great negligence of duty in the course of the voyage; and, what is more important, that the very disaster by which all was lost, was owing to his culpable inattention in not casting the lead, when it was his watch on deck, and they were known to be on the coast. The mate assuredly does not stand before the court as a very vigilant or meritorious officer. He has no strong claims to consideration and reward out of the savings of this wreck. He has exhibited no extraordinary exertions or skill in the work of preservation, to reward which the law revokes its doom upon his contract for wages. But, on the other hand, the situation of the property did not call for extraordinary skill and daring; and he does not seem to have been wanting in any thing that was required of him by the captain, or by the emergency. The charges against him of gross neglect, antecedent to the loss of the brig, are not sufficiently sustained by the proof. I shall therefore decree that Samuel Adams be paid, out of the property attached by the process of this court, or its proceeds, the wages due to him at the time of the wreck.

Decree. That Samuel Adams, mate, recover his wages out of the property saved, or its proceeds from the 19th November, 1828, to the 4th February, 1829, the time of the loss of the vessel, deducting sixteen dollars and seventy-five cents paid to him; and that the libel of Asa Combs and the other libellants be dismissed.

[NOTE. Act June 7, 1872, (now Rev. St. § 4525,) provides that a seaman's right to wages shall not be dependent upon the earning of freight by the vessel, except that, in case of wreck or loss, proof that the seaman has not exerted himself to the utmost to save the vessel, cargo, or stores shall bar his claim.

[In *The Massasoit*, Case No. 9,260, Sprague, J., held that, in case of shipwreck, the seamen are entitled to wages if by their exertions remnants of the vessel to the amount of such wages are saved, although no freight is earned; also where the owner appears with another force for the salvage of the vessel, and does not desire the assistance of the seamen, although they are willing to render it. They may in such a case recover their wages in a suit in rem against the vessel.]

Case No. 66.

ADAMS v. STOREY.

[1 Paine, 79; 6 Hall, Law J. 474.]

Circuit Court, D. New York. April Term, 1817.

BANKRUPTCY—STATE AND NATIONAL LAWS—CONSTITUTIONALITY—CONSTRUCTION—LEX LOCI CONTRACTUS.

1. The act of the state of New-York of the 3d of April, 1811, is an insolvent and not a bankrupt law.

2. Distinction between insolvent and bankrupt laws.—Derived from England, where it has been long established. Those laws defined.

3. If the act in question, however, had been a bankrupt law, it would not have been void as repugnant to the constitution of the United States.

4. Presumption in favor of the constitutionality of state laws.

5. The existence of a power in the states to pass bankrupt laws, not incompatible with the powers delegated to congress for that purpose. The exercise of the powers of the latter would, however, suspend the powers of the former.

6. Importance of bankrupt laws to the larger commercial states, and probability that they intended to retain the right of making their own until congress could adopt an uniform system. Difficulties attending the adoption of such system.

7. Whether a general bankrupt law, including any classes besides traders, would be within the powers granted by the constitution to congress? *Quere.*

8. The constitutional provision that "no state shall pass any law impairing the obligation of contracts," does not apply to insolvent laws.

9. Difficulty attending the application of this provision.

10. Rules of constitutional construction.

11. History of the evils which led to the adoption of this and the like restraining provisions. Insolvent laws were not among those evils; on the contrary, they were esteemed beneficial.

12. Inference from the uninterrupted practice of some of the states in favor of the constitutionality of such laws.

13. Presumption that contracting parties, being aware of this practice, make their contracts with reference to it.

14. The retrospective operation of insolvent laws does not bring them within the constitutional provision.

15. Chronological account of the insolvent laws of New-York. No distinction in any of them between existing and future contracts.

16. The rule *lex loci contractus* does not apply to cases of discharge under insolvent laws.

[Cited in *Cook v. Moffat*, 46 U. S. (5 How.) 316.]

17. Meaning of this rule. Mischievous tendency of some dicta and decisions arising out of it, proceeding on a mistake in applying it as well to the remedy as to the construction and validity of the contract. Remarks on *Smith v. Buchanan*, [1 East, 11,] and other cases

18. Expediency and justice of insolvent laws.

19. The defendant made to the plaintiffs at Boston, Massachusetts, while they all resided there, several promissory notes, and afterwards

removed to New-York, where he was discharged under the insolvent law of that state, of the 3d of April, 1811, which was passed after the making of the notes. Held that his discharge was a good bar to the action.

[20. Cited in *Cooper Manuf'g Co. v. Ferguson*, 5 Sup. Ct. Rep. 741, 113 U. S. 727, to the point that contemporary interpretation of a constitutional provision by a legislative enactment is entitled to great weight.]

At law.

J. D. Sedgwick and R. Sedgwick, for plaintiffs.

T. A. Emmet and J. D. Fay, for defendant.

Before LIVINGSTON, Circuit Justice, and VAN NESS, District Judge.

LIVINGSTON, Circuit Justice. This is an action brought on several promissory notes, made or endorsed by the defendant, then residing in Boston, to the plaintiffs, who were then and are yet residents of the same place. The notes are also made payable in Boston, and were dated prior to the passing of the insolvent law hereinafter mentioned. The defendant pleaded the general issue, and on the trial offered in evidence, pursuant to a notice given for that purpose, a discharge by the recorder of the city of New-York, dated the 13th of November, 1811, which was granted in virtue of an act of the legislature of the state of New-York, entitled "An act for the benefit of insolvent debtors and their creditors," passed the 3d of April of the same year. To the reading of this discharge the plaintiffs objected—but it was admitted. A verdict, however, was taken by consent, for the plaintiffs, subject to the opinion of the court on a case to be made by the parties. If the discharge was improperly admitted, judgment is to be entered on the verdict as it now stands; but if the discharge shall be thought a good bar to the action, the present verdict is to be set aside, and a verdict and judgment thereon entered for the defendant. The defendant, at the time of obtaining his discharge, resided and yet resides in the city of New-York. Few questions have ever been agitated in any court of the United States, since the formation of the federal government, of more extensive consequence, or of more delicacy than those which are now to be decided. When the binding force of an act of the legislature of any state is drawn into question for its supposed repugnancy to the federal constitution, although no court can entertain any doubt of its right to pronounce it invalid, yet it is no more than becoming to proceed with caution, and with more than ordinary deliberation. Presumptions will ever exist in favour of the law, for it will not readily be supposed that any state legislature, who are as much bound by the constitution, and are under the same solemn sanctions as the judges of those courts, to regard it, have

¹[Reported by Elijah Paine, Jr., Esq.]

either mistaken its meaning, or knowingly transcended their own powers. If, then, by any fair and reasonable interpretation, where the case is at all doubtful, the law can be reconciled with the constitution, it ought to be done, and a contrary course pursued only, where the incompatibility is so great as to render it extremely difficult to give the latter effect, without violating some provision of the former.

The plaintiff's counsel, in support of the verdict, say, that the discharge which was given in evidence can be no bar to the action. They contend that the statute of New-York, under which it was obtained, is a bankrupt law, and as such, is void for its repugnancy to the constitution of the United States; and this position is supported by the broad assertion that every law which discharges the person and property, as well future as in possession of the debtor, is a bankrupt law. But to this definition the court does not assent; for this would be to confound at once almost all the distinctions between these laws, which have been known and recognized in England, from which country we borrow the term, from the first introduction of the system there, in the reign of Henry the Eighth, down to the present time; distinctions which must have been familiar to many of the members of the convention that made the constitution. It is not because these laws may, in some respects, produce the same effects, that they are not to be distinguished from each other. In England the bankrupt system has been confined exclusively to traders, and the creditors of traders; whereas the insolvent laws of this country embrace every class of debtors. It is of no importance whether the debt has been contracted in the way of trade or not, for a person to come within the purview of an insolvent law. So exclusively have bankrupt laws operated on traders, that it may well be doubted, whether an act of congress subjecting to such a law every description of persons within the United States, would comport with the spirit of the powers vested in them in relation to this subject.

But it is not only in the persons, who are the objects of these laws, that a difference exists, but their general and most important provisions are essentially dissimilar. Under a bankrupt law, the debtor is at once, by operation of law, as soon as he has committed an act of bankruptcy, divested of all his property, which is transferred to assignees in trust for his creditors. All dispositions by the bankrupt himself after this are void; an insolvent, on the contrary, retains the management of his own estate, however he may misbehave towards his creditors at large, and it is rarely, unless on his own application, vested in others. It is of no importance how many acts he may commit, which, under a bankrupt system, would enable his creditors to take from him the con-

trol of his property; they can seldom act upon him compulsively under the provisions of an insolvent law, if he be obstinate or dishonest, until he has given what preferences he thinks proper, and is become so poor as to be scarcely worth pursuing. Under the one system the creditors are actors, and under the other the debtor himself originates the proceedings; and if, as is sometimes the case, his creditors may do it, even then his consent is generally indispensable under the provisions of an insolvent system. Other differences, in almost every stage of proceeding, might easily be pointed out, but they are so familiar to the profession, that a bare inspection of the act under which this discharge was obtained, will leave no doubt on the mind of any one to which class it belongs. "The title proclaims it to be an act for the benefit of insolvent debtors and their creditors." The first section gives power to the insolvent himself, who is imprisoned on any civil process issuing under the authority of this state, to present his petition to a proper officer, praying that his estate may be assigned and he discharged from his debts. The residue of the act is principally made up of directions as to the proceedings which are to be observed after the presenting of such petition, until the final discharge of the debtor, all of which differ greatly from the proceedings which take place on the issuing of a commission of bankruptcy. The fourth section declares, that such "discharge shall extend to all debts due from him at the time of the assignment, or contracted for before that time, though payable afterwards." If this be not an insolvent law, the court is at a loss to say to what act this appellation can apply. The opinion which has been expressed on this point would seem to preclude the necessity of inquiring how far this law interferes with the authority given to congress to "establish uniform laws on the subject of bankruptcies;" but as the view which has been taken of the act of this state may be thought incorrect, the court has no objection to consider it, as though it were a bankrupt law. The power to pass laws of this character, it is said, is exclusively vested in congress, and whether they exercise it or not, no state can have a bankrupt law of its own. As a consolidation of the different states into one national sovereignty was neither erected nor intended to be effected by the constitution, it has always been conceded that the state governments retained so much of the power, which they before had, as was not by that instrument exclusively delegated to the United States. It is now indeed one of the amendments to the constitution, that the powers not granted to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people. It is agreed that such exclusive alienation of state sovereignty can only exist in three cases; where, by its terms,

it is so, or where a power is conferred on the federal government, and the states are prohibited from exercising a similar authority, or where an authority is granted to the former, to which the exercise of a like power on the part of the different states would be absolutely and totally contradictory and repugnant. It is not pretended that the grant of the power under consideration is exclusive in its terms, or that there is an express prohibition on the states from exercising a like authority; but it is supposed that such exercise would be so totally inconsistent with the one granted to the government of the Union as to be necessarily comprehended in the third class of exclusive delegation. If it be really so, that the passing of a bankrupt law by a state, to operate, as it necessarily must, within its own limits, be absolutely incompatible with the power vested in congress, it would be conceded at once, that such an act would amount to a violation of the constitution of the United States and be void. Let us see whether the counsel have succeeded in establishing this position.

It must be allowed by all, that at the time of making the constitution, each state had a right to pass insolvent and bankrupt laws. As it was desirable, in a country so extensive as the United States, and every part of which was more or less commercial, that the laws relating to bankrupts should be uniform, so also it was an object of great importance that none of the larger commercial states should at any time be without some code on this subject. A system of the first kind, that is, one which should be uniform throughout the Union, could not well be brought about but by delegating the power of rendering it so to congress. Great difficulties however would lay in the way of a statute, whose provisions should pervade the United States; and as these must have been foreseen, the states might be willing and desirous of retaining the right of passing laws of this nature, until congress could agree on a general plan. Nor can the court perceive any contradiction, absurdity, or repugnancy in these several powers existing at the same time in the general and in the state governments; in such subordination, however, that the exercise of the authority vested in the former should, for the time, suspend all exercise of the power which resided in the latter, and operate as a repeal of any laws which might have been previously passed by the several states. It is an uniform rule which congress are to prescribe. But if they furnish none, how is it an interference for each state to legislate for itself? Neither the terms nor spirit of the instrument are thus disturbed. It seems designedly to have been left optional with the general government to exercise this power, that if the embarrassments which lay in their way were insurmountable or very great, they might omit to do it, and

thus leave the states to take care of themselves. If it had been intended immediately to divest the states of all power on this subject, and to compel congress to act, the terms the terms of the article would have been much more imperative than we find them, and probably it would have been accompanied with a prohibition on the states. No writer on this part of the constitution has gone further than to say that the power of naturalization is exclusive; because, if congress have a right to ordain a general rule, the states can have no right to prescribe a distinct rule. This construction is supposed to follow, not from any inconsistency there would be in each state passing a naturalization act for itself, if congress did not bring into action the power delegated to them, but from the inconvenience to which it might subject some of the states, by imposing upon them as citizens, obnoxious foreigners, who might become naturalized in another state, without any previous residence, or without any regard to character, by the mere formality of taking an oath of allegiance.

If the argument *ab inconvenienti* applies to the case of naturalization, it has no bearing on that of bankruptcy; for, in this case, each state would be legislating principally for its own citizens, and other states could not be injured by any system it might adopt. But this construction, even in the case of naturalization, where the argument in favor of an exclusive power is much stronger than in that of bankruptcy, has not only been strongly controverted, but is opposed by a judicial decision entitled to no little respect. It is the case of *Collet v. Collet*. [Case No. 3,001,] in the circuit court of Pennsylvania, in which the three judges, one of whom had been a member of the federal convention, decided, after solemn argument, that the several states still enjoy a concurrent right with congress on this subject, "which, however, cannot, they say, be so exercised as to contravene any rule which congress in their wisdom may establish." The most strenuous advocates for the exclusive exercise of every unqualified power granted to the general government, seem not unwilling to admit the several states to a participation of such power, if it can be exerted consistently with, or without derogating from the express grant to congress. It has not been shown how a bankrupt act, passed by a particular state, can interfere with the exercise of a power residing elsewhere, to promulgate a uniform law for all the states. If similar powers had been granted to the government of the Union, respecting the descent of real estates, the recording of deeds, or the celebration of marriages, will it be said that the several states must have remained without any laws to govern the transmission of landed property, or that no deed could be acknowledged or recorded, nor a valid marriage solemnized, although congress might

for years omit to prescribe rules on these subjects? The object of this grant could have been no other than to place somewhere a power to correct the mischiefs which might arise from the different states passing on the same subject, not only dissimilar laws, but such as might be unequal in their operation on the citizens of other states. This end of the grant will be sufficiently and effectually attained, if, when the evil arises, congress bring into action the authority vested in them. From them only can a uniform system emanate; but systems, greatly varying, it is true, all of which, however, may be salutary, may be established without any derogation from or interference with a right residing elsewhere, to introduce uniformity on the same subject. Nay, from these very provisions, however discordant, might be selected materials for the one which it was committed to the general government to form. Neither can the passing of such laws by the states be regarded as a resumption of power by them, in which case, it is said, they should produce an express grant of it. This argument proceeds on the presumption of a previous relinquishment on the part of the states of all right to interfere in this matter, and is thus taking for granted what is the whole question in controversy; for, unless such transfer has been made, which is not admitted, no reassignment of it by the general government can be necessary.

No court of the United States will be suspected of feeling any disposition to countenance encroachments by the state legislature on the legitimate authority of the government of the Union; but in cases of doubt, and where the limits of separation are not very distinctly marked, and especially where the powers exercised leave in full force and unimpaired those given to the general government, the tranquillity and harmony of the Union will be better preserved by allowing to the states a reasonable share of legislation on the subject in dispute, than by strenuously insisting on a total exclusion. Congress themselves must have entertained an opinion, that the different states have this right in the present case; for on no other principle can we account for their leaving the United States so long without a uniform system of bankruptcy. Great and pressing as the call for such a system has been, the obstacles in the way of one that shall be uniform, and in that shape agreeable to all the states, continue to be so numerous, that but little hope is now indulged that any will be soon adopted; but great and serious as these difficulties may be, it would almost be the duty of congress to disregard them, if there existed no where else a power to correct the mischiefs which must necessarily be felt in many of the states from the non-user of this authority. The inference which has been drawn at the bar from this silence or inaction of con-

gress, does not appear correct. It is considered as equivalent to an expression on their part of their sense against the wisdom and policy of all bankrupt laws, and that none ought to exist any where. Keeping in view the power which congress have, on this subject, it is more natural to interpret such silence into a declaration of their opinion of the inexpediency at present of any uniform system, and that the several states still retain the power which has been contended for, and can therefore take care of themselves. This would not be so great an imputation on their wisdom, as to suppose they can entertain an opinion in opposition to the sense of the whole world, that in a commercial state, such laws are mischievous or unnecessary. The opinion of the court, therefore, is, that this law, if a bankrupt law, would not on that account be void.

Another constitutional objection is made to the defense which is set up in this cause. The law under which this discharge was obtained, having passed subsequent to the date of the notes on which the action is brought, is supposed to "impair the obligation of contracts," and therefore to be void, either in the whole, or so far as it may extend to debts incurred previous to the passage of it.

There is not, perhaps, in the constitution any article of more ambiguous import, or which has occasioned, and will continue to occasion, more discussion and disagreement, than the one under which the present difficulty arises, or the application of which to the cases which occur, will be attended with more perplexity and embarrassment. Laws may be passed which so palpably trespass on this article as to leave no doubt on the mind of any man; others again will be of so questionable a character as to render it not very easy to form a satisfactory opinion concerning them. All the other restraints on the separate members of the confederacy, contained in this section of the constitution are conceived in terms so clear and intelligible, that rarely will any hesitation exist as to what will amount to violations of them; but to decide whether a law impairs the obligation of a contract, will generally be a task of some intricacy, and it will not be surprising if, in the discharge of it, great diversity of opinion should arise. This has been treated as a very plain case by both parties. By the plaintiffs we are told that it is the clearest case of a law impairing the obligation of contracts that can well be imagined; while the defendant contends that it is quite as certain that insolvent laws were never intended to be embraced by this provision of the constitution. The latter is the opinion of the court; but instead of regarding it, with the defendant's counsel, as a question of little or no difficulty, the court has not come to this conclusion, but after much hesitation, owing not only to its intrinsic difficulty, but be-

cause it is well known that the most respectable opinions to the contrary have been expressed elsewhere. The court will proceed to assign its reasons for the judgment which it has formed.

To arrive at the true meaning of any article of doubtful import in the constitution, a better mode cannot be adopted than the course which is generally pursued for the interpretation and understanding of ordinary remedial statutes: that is, to recur to the situation and history of the country at the time; to its contemporaneous exposition, if it has received any; and to the general understanding of the community, especially if such understanding shall have been long acquiesced in by all the states and all the courts of the Union. Keeping in view these rules, let us inquire what were the kind of laws to which this prohibition was principally designed to extend. There can be no doubt that by it was intended to be corrected some, if not all, of the evils which had crept into the system of legislation of many of the states, and had excited a considerable alarm for the security of private rights. In many parts of the Union all confidence in public faith was extinguished. This had been occasioned by frequent interferences on the part of some of the legislatures in matters which were not believed to fall within their ordinary and legitimate sphere of action. By recurring to the history of the times, and the reasons assigned by the friends of the constitution for the insertion of this article, much useful information will be obtained, and we shall be at no loss to discover to what species of laws it was then thought that the interdiction was principally supposed to extend.

During a long and arduous struggle for independence, much individual misery and distress were unavoidably produced. Driven from their homes, and cut off in many cases, from their ordinary pursuits, the resources of many were either exhausted, or so much impaired, as to induce the legislature, on various occasions, to listen to the pressing calls which were made upon them to devise some mode for their relief. Various expedients were accordingly resorted to, and the practice of interfering between creditor and debtor became so very extensive and so inconsiderate, as in many instances to place the former entirely at the mercy of the latter, and that too under laws which were apparently introduced with no other view than that of affording to the debtor a temporary relief from the pressure occasioned by the then situation of the country. Bills of credit, and paper money were issued, and by legislative sanction were substituted for gold and silver in the discharge of debts. Creditors in some places, were liable, without any adverse proceeding on their part, to be cited by their debtors, and to have the sums due to them tendered in a currency whose depreciation at the time pro-

duced the most glaring injustice. On their refusal to submit to this mockery of justice, the public securities, which had been thus offered, might be deposited with some public officer, and the creditor was for ever barred from any recovery. In other cases payments were authorized to be made by instalments. In some states the interest which had accrued during the war, or a part of it, was remitted, while elsewhere not only a paper currency of no value, but almost every species of property, was made a legal tender, and no stipulation however solemn, to pay in the precious metals, afforded any security to the creditor. The courts of justice in many of the states had been closed altogether, and the creditor thus withheld, at least for a time, from every appeal to the laws of his country, while his debtor might be squandering the property out of which his demand ought to have been satisfied. Geographical limits had also been resorted to, for the purpose of introducing the most odious discriminations between creditors themselves. For those who resided within the British lines, and those who were without those precincts, distinct remedies were prescribed, and the scales of justice so unequally graduated, that while the latter might recover the whole of their demands, the former, if they sued, were compelled to receive public certificates of one description or other, of so little value, as scarcely to indemnify them for the costs of suit which they were obliged to pay. Very great liberties had also been taken with British creditors, many of whom complained, and too justly, of the impediments which continued to be thrown in their way, even after the return of peace. These frequent interpositions in private concerns, during a period of great public and private suffering, and for many of which the condition of the country and the great object at stake, might seem to offer some apology, became so common, so intolerable, and so inveterate, in many places, that it became no easy matter, even after the restoration of peace, and the acquisition of our independence, to lay them aside. There will, therefore, be found in the statute books of several of the states, after the termination of the war, many provisions of the same meddling and obnoxious character, which either changed the nature of contracts, or suspended the payment of them, or authorized it in a way contrary to the plain engagement and meaning of the parties.

By laws of this description, which had become too dangerous and oppressive to be any longer borne, very extensive and great uneasiness was produced, and against them was raised a corresponding and almost universal expression of indignation and regret. Accordingly, to all the objections made against the prohibition, on the part of the states, to pass laws impairing the obligation of contracts, we find the friends of the

constitution every where, and again and again, urging the necessity of it, in order to put an end to the evils which had flown from acts of the kind which have been mentioned, and which had, after the Revolution, been extended by designing and influential men, to many other cases, so as to increase, instead of diminishing, the alarm which had been excited. To such acts we find them constantly ascribing the decay of commerce, the ruin of public credit, and the almost entire extinction of confidence between individuals, and pressing with vehemence the adoption of this article as one of vital importance, and as the only guard and preventive against the promulgation by future legislatures of similar acts in derogation of private rights, however great the emergency might be deemed. But on no one occasion do we hear of any complaints against the power of passing insolvent laws. This practice had not arisen out of the calamities of war; it was brought with the first American colonists from the mother country; it was adopted, in one form or other, by all the British colonies in North America, without an exception that has been discovered as to any one which now composes a part of the United States. It must have originated, wherever we find the practice of it, and perhaps it is not hazarding too much to say, that it is universal, not only from a conviction that the encouragement of trade required it, and so are the recitals to many of the acts; but from those indelible principles which are implanted in the breast of every man, and which proclaim, in a language not to be misunderstood, that in every country where imprisonment for debt is allowed, there must and ought to reside a power somewhere of compelling creditors to abandon their hold of the body of a debtor, who shall fairly, and under such restrictions as the law may provide, make a complete surrender of his property, to be divided amongst those whose debts some unexpected turn of fortune has rendered him unable to pay. In such cases, his future acquisitions, although here there may exist some diversity of opinion, should also be his own, or he will be restored to his freedom and family, not only without property, but without credit, and in many cases with such a heavy load of unextinguished debt, and so many liens on his future acquisitions as must stifle every exertion to make any. His freedom, in such cases, will be a mockery, nor will such a state of servitude to his creditors often prove of any service to them; for, sinking under a burden from which he sees no prospect of relieving himself, his ambition and efforts will be limited to the gaining of a bare maintenance for himself and family, knowing that neither he nor they can ever be benefitted by any surplus.

But whatever considerations may have first called into practice a power of this

kind, it is sufficient for our present purpose, that we find it in use in perhaps every state of the Union, under some modification or other at the time of the adoption of the constitution, and that the laws passed on this subject very generally, if not universally, provided not only for future cases of insolvency, but for those which existed at the time. If this be so, and that it was so to a very great extent is not denied, it must have been known to the friends of the constitution, who exerted themselves in favour of its adoption; and yet no arguments drawn from that source are to be found in the debates of any of the conventions, in favour of the prohibition. Nor is it recollected, that those who were hostile to its adoption, ever objected to this feature of it, because of its liability to such construction; and yet such objections would have been heard from more quarters than one. If it had then been thought susceptible of the interpretation which the court is now expected to apply to it. It may also be observed, that if it had been thought necessary at that time of day to tie up the hands of future legislators in relation to this matter, it would have been more natural to have committed to congress a power of establishing a uniform system of insolvency as well as of bankruptcy, or to have transferred to the general government an unqualified and express power in the premises; for it cannot be credited that a people who had been so long accustomed to laws of this kind, would have consented to deprive the state legislatures of the power of passing them, without at the same time delegating to that of the Union some control over the same subject. Dissatisfaction may have existed and been expressed at the abuses which were committed under the sanction of such laws, for not more effectually protecting creditors against the frauds of their debtors, and such dissatisfaction is often heard at the present day; but never was the right or propriety of an interference in this way called in question.

To the practice of the states antecedent to and at the epoch of the adoption of the constitution, and to the silence on this head of those whose attention was directly called to this article, may be added the uninterrupted and undisputed usage of all or most of the states from that day down to the present time. Yet after the lapse of near thirty years, during which time scarcely a chasm or intermission is to be discovered in the usage of the state where the court is now holding, it is called upon to pronounce all its insolvent laws, so far at least as they operate on past debts, and all discharges under them of such debts, as repugnant to the constitution, and therefore void. Without adverting to the serious consequences of such a decision, with which the court has nothing to do, how, it may be asked, is the uniform practice which has been mentioned to be accounted for, but

from a general and universal understanding that such practice was no departure from any of the obligations which one state had contracted with the others? Can we believe, that before time was allowed to organize the general government, and while the instrument of its formation was undergoing the examination and criticism of able and industrious adversaries, any state could have passed laws of this character, not only without animadversion, but execute them without any objection from a numerous class of citizens who are in general not the most inattentive to, or ignorant of, their rights? Would not a clamour on the part of creditors have been heard from one extremity of the Union to the other, against such an usurpation of power, if it had been viewed in that light? And if the legislatures of the several states could not have been brought back to a sense of duty by remonstrances against the exercise of such a right, would not applications have been made to the courts of justice, to arrest by their decisions the progress of such gross and frequent violations of the constitution?

But not only have these laws been passed without a constitutional difficulty being ever suggested by any member of the legislature, at the time, but frequently as they must have been, brought to the notice of the courts of the different states, and sometimes of the federal judiciary. It is not until very recently that the present objection has been heard of. Congress too, in the only bankrupt law which they ever passed, introduced a provision, that it should not "repeal or annul the laws of any state, then in force, or which might thereafter be enacted for the relief of insolvent debtors;" many, if not all of which then in force, will, on examination, be found to be retrospective. Either then, these laws are not within the prohibition, or if they are, and the terms of it are so obscure as to have hitherto eluded the research of so many who must have had an interest in its discovery, it is the very case in which a court ought to rely for its true sense on a general practice which has been so long submitted to.

It has been said that a practical construction is of no importance when a question arises on public acts of so important and solemn a nature as a written compact between several independent states. The instrument, it is said, should speak for itself. But if there be anything in this remark, a decision of the supreme court of the United States, on the effect of a practice in fixing the meaning of the constitution, would not permit the court to listen to it. In the case referred to, a usage of only ten or twelve years, and which had once been interrupted by an act of congress, was deemed to settle a question, in which was involved the very independence of an important and co-ordinate member of the federal government, and that too in opposition to what, many will think, as probably did the judges themselves who decided it, the plain and obvious letter and spirit of the

constitution. But, aside from this contemporaneous and universal expression of public and private sentiment on this subject, the court is not very certain that it would have regarded a law of this nature, if the question were of earlier date, as "impairing the obligation of contracts." This objection goes only to such of these laws as affect antecedent contracts. It may very safely be assumed, that most, if not all of the insolvent laws of this country, fall within this description, and an interposition by the legislature in this way seems absolutely necessary, if not inevitable, wherever imprisonment for debt is allowed. Such laws cannot therefore be regarded as contrary to the first principles of the social compact, or opposed to those sound and wholesome rules of legislation which were intended to be preserved pure and inviolate by those who made the constitution. A power to pass such laws necessarily results from the antecedent state of things, and from the existence of a system, which, if left to itself, without occasional controls on the part of the legislature, would produce permanent individual distress and ruin, and to an extent, highly injurious, not only to the state itself, but to the very parties, who might, in the moment of passion or disappointment, resort to it as a means of coercion. This attribute of sovereignty, for as such it is regarded by the court, it was better that the states should retain, than to have relinquished it to the federal government. By the former it would be exercised within a less extended sphere, and of course with not so much danger of injury to the parties concerned, as if the same duty had been performed by the congress of the United States. If then the passing of laws affecting in this way, past as well as future debts, has been in use within this state ever since its independence, and for many years while a colony, and if such practice has not only been acquiesced in, but was absolutely necessary, may it not be fairly presumed that every contract within this state, or to be enforced here, is made under a full knowledge of such practice, which must now be deemed a perfect right; and that this being known and understood by both parties at the time, the creditor has no right to complain if his debtor shall one day be liberated by virtue of an insolvent law which may be in force at the time of the contract, or which may be afterwards passed; not from the obligation or payment of the debt; but from personal confinement, on condition of making payment as far as he is able?

The court has proceeded on a belief, that most, if not all, of the states had been in the habit of extending their insolvent laws to all debts without any regard to the time of contracting them. Time has not been afforded during a very busy term to examine the statutes of the different states, even if they had been within reach of the court, to see if there were any exceptions. There may be

some difference in these laws, as to the mode of proceeding, and in the effect of a discharge obtained under them. In some cases, the debtor is alone the actor in obtaining it; in others, a part of his creditors unite with him; by some again the person only is exonerated, either from all his creditors, or from those who have sued him. By others, all future acquisitions as well as the body are placed out of the reach of the creditors; but the principle on which they proceed is the same in all, that is, a right in the legislature to relieve insolvent debtors from imprisonment by some general law. The degree of interference is of no importance as it affects this question. Every kind of interference, however limited in degree, must, on the principle on which the plaintiffs rely, be a violation of the constitution. If these laws had been of the odious character which is now attached to them, is it not probable that at least some one state would have checked the further enacting of them by an article in the bill of rights prefixed to its constitution? No such limitation however is to be found, nor any expression bearing on the subject.

Referring those who may wish to pursue the inquiry for the laws of the other states on this subject to their several statute books, the court will only notice some of those which have been passed by the colony and by the state of New-York. In 1755 a general act for the relief of insolvent debtors was passed. In May, 1761, another passed requiring the assent of three-fourths of the creditors in value, which expired in 1770. From that time until 1784 no general system was in force, but many acts were occasionally passed for the relief of individuals. In 1784 a general system was again adopted similar to the one which had expired in 1770. In 1788, another general insolvent law passed. This was revived in 1801. In April, 1811, the law passed, under which the present discharge alone to petition, without the concurrence of any creditor. In 1812, the last law was repealed, and the consent of three-fourths of the creditors again required. In 1813, the system now in force was adopted which requires the co-operation of two-thirds, instead of three-fourths, of the creditors. By not one of these laws are debts previously contracted, excepted from its operation. Let it also be remembered, that frequently as the attention of the council of revision of this state, composed of the governor, chancellor, and judges of the supreme court, has been called to this subject, this objection has never occurred to them, watchful and able as they ever have been to discover and check every aberration in the legislature from a correct and constitutional course of duty.

But if it be on account of their relation back, that insolvent laws are regarded as impairing the obligation of contracts, bankrupt laws are liable to the same objection;

and such was the character of the only one which congress ever passed. Now, although there be no constitutional restraint in terms, on that body, from passing laws interfering with private contracts, it is not to be presumed they would, knowingly, give their sanction to any act of this kind. Nor, even in passing a bankrupt law, would they have done it in a form liable to so serious an imputation, if they had believed they were impairing the obligation of contracts, especially as that power might have been exercised free from every objection of this nature. This is some proof that laws of this description are not regarded by congress as any violation of contracts, merely on account of their retrospective influence.—The contract in truth remains in full force, while payment thereof by the policy and humanity of most civilized nations must, in case of misfortune, be sought for out of the estate of the debtor, who, as well as his future property, is, in general, released.

After all that has been said, the court considers this question as one of considerable difficulty, and regrets that it has not yet received a decision at Washington, which would produce uniformity of judgment; at least in the courts of the United States.

But if these constitutional objections are removed, it is alleged, that the contract being made and being payable in Boston, cannot be affected by any discharge obtained under the laws of the state of New-York. Under this head of argument the court has been reminded of a rule, which, it is presumed, when properly understood, will be acknowledged by every one; that is, that the *lex loci contractus* must be resorted to, in order to ascertain the meaning of every agreement made abroad. This does not proceed from mere comity or courtesy towards other nations, but from the immutable principles of justice, which would be violated by applying to a foreign contract, when deciding on its obligation and effect, any other law than that of the place where it was made—for how palpably unjust would it be for this court to pronounce void, a bond executed at Canton and payable there, because by it should be reserved a greater interest, which might be lawful there, than seven per cent. per annum, which would render it usurious in this state? This is the meaning of the rule, and it is a salutary and just one. But out of it have arisen some dicta, which are ripening very fast into decisions of the most mischievous tendency, and between which and the rule itself it is difficult to perceive any connection. It has been said that, as the nature and validity of a contract must be settled by the law of the place where it was made, so, also, it cannot be affected by any discharge of the debtor under the bankrupt or insolvent laws of the place where he resides, or of the country to which he belongs; or in other words, that a contract, made in a foreign state,

and with a view to its code, can only be discharged pursuant to, that is, as the rule is now applied, under the bankrupt laws of such state.—Accordingly, suits have recently been maintained against bankrupts and insolvents, whenever they have been arrested by process out of the court of any other state than the one in which they became so. Thus a citizen of Pennsylvania has not been permitted to sue in New-York a debtor who may reside, and have been liberated under a law of the latter state; but if he can be found in Massachusetts, or elsewhere, his certificate, it is said, will be of no avail, provided the contract were made in Philadelphia, or elsewhere in the commonwealth of Pennsylvania. This is not exactly the case here, but as these decisions are supposed to have a considerable bearing on it, the court will be expected to express an opinion on them. It has no hesitation in saying, that it considers them as forming part of a class of cases, which, it will one day be lamented should ever have found their way into the commercial code of this country. They appear to proceed on a misapprehension of the rights of independent nations; but principally on a mistake in applying the *lex loci contractus*, as well to the remedy, as to the construction and validity of the agreement, contrary to all the adjudged cases on this head. They maintain that a debtor can never, under any circumstances, be discharged against the will of his foreign creditors, if his contracts with them be made where they reside, and with a view to the laws of their country, by any proceedings under the insolvent laws of the state of which the debtor is a member, but only by a certificate obtained pursuant to the bankrupt system, if any such there be, of the several countries in which his creditors may happen to reside. If the rule be not laid down precisely in these terms, such are its import and effect, and such, or something like it, is the practice which is very fast introducing itself, under the sanction of it. If this be so, how is an American merchant, who may be indebted in several countries abroad, in case of misfortune, ever to get disentangled from his debts? No proceedings under the bankrupt laws of the United States, if there be any, nor in conformity with the insolvent provisions of his own state, can do him any good. If he remains in his own country, trusting to the validity of such proceedings, perpetual imprisonment must be his doom, if his foreign creditors shall be as unrelenting as this rule is well calculated to render them; for no power there, it is said, can relieve him against this class of demands, but upon full payment of them, without a violation of the contract made abroad, or a disregard of the comity, due from one nation to another. According to this doctrine, he has no alternative left, but that of going to the different countries where he may be indebted,

and there submitting to the proceedings established for the relief of unfortunate traders. And yet it is not perceived how his foreign creditors will be gainers by exposing him to, so great a hardship; for if he shall commence his career of insolvency, as he naturally will do, in his own state, the assignment of his estate made there, will leave nothing for the creditors abroad, it being admitted, that by it the whole of his property, wherever it may be, will pass. In like manner, a debtor who shall fail, and have creditors of this description in different parts of the Union, will have to make a tour of the United States before he can commence business again, in order to seek relief under the insolvent system of each state. It is not more reasonable to suppose, as the case most undoubtedly is, that every contract, wherever made, must proceed on an expectation, that the parties shall perform it according to the terms, if they are able, but if there shall be an inability in either to fulfil his part of the agreement, that then the other party shall be placed on as good, but not on a better footing, as to any remedy which he may seek for its breach or non-performance, as those who may reside in the country of the debtor? This, in case of insolvency, I should regard as a performance of the contract, *secundum legem loci contractus*, unless it were shown, that some different stipulation in the event of insolvency had been entered into, which is not pretended, and probably never did form a part of any contract, where no specific security was taken; and if it did, would hardly be enforced to the prejudice of other creditors.

If a remedy against the person of an insolvent debtor be allowed to his creditors abroad, which is denied to a domestic creditor, what is it but to give the former a preference over the latter, which neither justice will sanction, nor the *lex loci* in any case expect? On this subject I had an opportunity of expressing an opinion many years ago, in one of the cases which has now been cited. To that opinion I adhere, and shall adhere until a different rule shall be presented by a tribunal which has a right to control and direct the judgment of this court. I then stated, that a surrender of all the bankrupt's effects, under the laws of the state in which he permanently resided, ought to operate as a discharge from his creditors in every part of the world; and will now add, without any regard to the court or country in which the action against him may be prosecuting. Whatever fault may be found with this opinion, I am mistaken if it will not be found to conform with the sentiments and practice of commercial men, and to be for the benefit of trade, that it should be so. Merchants generally believe, that if their debtors abroad, no matter how the debt was contracted, or when payable, be regularly discharged by the

bankrupt, or any other law of the state in which they reside, and his estate be divided among all his creditors, they are exonerated every where. The rule so often cited from Huberus and Casaregis, has no application to such a case. When the latter speaks of contracts territorial and extraterritorial, it is most manifest that he means nothing more, than that a contract made in one country is not to be construed by the laws of another. Now the difficulty is, to find out what the *lex loci contractus* has to do with the case of a future insolvency, or how the law of one country can differ from that of another in this respect. It is presumed to be law every where, that a man is to pay according to his contract; but if he be unable to pay any where, what then has the *lex loci* to do with the case? Is it part of that law, or is it any part of the contract, express or implied, that no government upon earth shall be allowed to interfere for his protection in case of misfortune and insolvency; or if it does, that such protection shall not extend beyond the limits of the state in which he lives, and not even there, as is contended in this case? Is it not for the advantage of foreign creditors, and will it not comport better with the interest of all parties, that when an insolvency occurs, they shall be placed on an equal footing with domestic creditors? It may be ruinous to the debtor, but of what advantage will it be to his absent creditor, to have him consigned to a prison during life, without any right to a participation on his part, in the property in the hand of assignees; for it has not yet been pretended, although this might as well be proved by the *lex loci*, that the creditor abroad has a right to a dividend of his estate, and to the body of the debtor in the bargain. If care be not taken, the great solicitude which has recently been discovered for creditors in other countries, will produce decisions, if such have not already been made, which, in case of bankruptcy, will do them more harm than good. The truth is, all that amity, good faith, the contract of the parties, and the *lex loci*, if it has anything to do with the question can require, is, that their interests and rights shall not be postponed, or in other words, that they shall be as well taken care of as those of other creditors. Yet the court of king's bench, in *Smith v. Buchanan*, [1 East, 11,] went on the sole ground of the *lex loci*, when it decreed on the inefficacy of a discharge in Maryland against the claim of a British creditor. "It is impossible," says Lord Kenyon, "that a contract made in one country is to be governed by the laws of another." It is also remarked in this case, that it might as well be contended, that if the state of Maryland had enacted that no debts due from its own subjects, to the subjects of England, should be paid, the English creditor would be bound by it. A law of this kind would not have been enforced

by any court of this country; but between the iniquity and injustice of such a statute, and one which placed the British on a level with the American creditor, this court perceives no resemblance; while the one is calculated to excite the just indignation of any man, the other is well entitled to universal approbation. If, in all its provisions, it did not resemble the bankrupt laws of England, its effect in producing an equal division of the insolvent's estate was the same. It ought not to pass unnoticed that at the very moment of rendering this judgment, the court admits that an assignment under the act of Maryland, would vest the property of the bankrupt, wherever it might be, in his assignees. If so, it would seem to follow, that the debtor himself ought to be discharged; for, if the law takes from him, and against his consent, his property every where, and secures it even from the pursuit of a foreign creditor, why should it not be allowed to offer a protection equally extensive to his person? Or, why should he be placed in the very awkward situation of being liable to imprisonment abroad, when, in that very country, he may have more than property enough to satisfy the demands of his foreign creditor, but which has been placed out of his reach by an assignment previously made under the laws of his own state? And it may here be remarked, that the universal effect which is given to such assignments is not among the least of the advantages which foreign creditors derive from the bankrupt or insolvent laws of the country where their debtors reside. It prevents the creditors near him, and who will be first apprized of his misfortunes, and of the nature and situation of his property, from laying attachments on many parts of it, to the prejudice of those at a distance. This case will be dismissed with only one other observation. The merchants of the United States have never supposed that they can proceed in their own courts against British bankrupts, if found here, merely because the debt may have been contracted and payable on this side of the Atlantic; they receive and are satisfied with the dividend made in England; but if they shall hereafter make the attempt and succeed, it is to be hoped that the court which shall sustain so novel a pretension, will have more courtesy than to compare the bankrupt laws of England, which are perhaps as perfect as such a system can well be, with an act of parliament, which should prohibit to American citizens the recovery of their just demands against British subjects. In the case of *Van Raugh v. Van Arsdain*, [3 Caines, 154,] in the supreme court of this state, we are only told that the question had been decided ten years before, but what the case referred to was, or on what ground the decision was placed, does not appear. In *Smith v. Smith*, [2 Johns. 235,] however, the court refers to the decision in 1 East, and

assigns the same reason that is there given, and which has already been remarked on.

But this court is desired and expected to advance one step beyond all the decisions which have yet been made on this subject. Hitherto, an unfortunate debtor, even if he had heard of the few cases which have been mentioned, might think himself safe if he would confine himself within the limits of his own state. He might confidently expect protection against the pursuit of every creditor without regard to his place of residence, or to the spot where the contract was to be performed. But even this security from imprisonment is now desired to be withdrawn from him, and this course of conduct is pressed on the court, not on the footing of a series of adjudged cases from which there might be no escape; for none such are produced; not because it will accord with the general sense of the commercial world; for that, it is believed is directly opposed to it. Not because of any odious discriminations which are found in the insolvent laws of this state, between territorial, or extra-territorial creditors; for they are placed on a perfect equality. Not because the interests of commerce will be advanced by it; for in such a state of things, none but men of the most enterprising character will dare to engage in it. Nor yet because other countries practise on this rule; for nothing resembling it is pretended to be in use in any other part of the globe. Nor is it to be believed that the court of King's bench itself, notwithstanding the solitary case which has been produced as to a discharge abroad, would disregard a plea of bankruptcy by a British debtor, against the claim of any foreign creditor, whatever might be the place of contract or of payment.

The court having already expressed its opinion on the inapplicability of the *lex loci contractus* to all cases of this kind, will only add, that this rule has performed its office, when a construction is given to the contract according to such law; but in case of inability to pay, a new state of things occurs, the only proper rule to govern which is, that care be taken to enforce an equal and fair distribution of an estate, under the laws of the country in which the debtor has his residence.

Insolvent laws have been harshly and not very correctly compared by the plaintiff's counsel, to laws authorizing the payment of a debt with one cent in the dollar, and in a way and at a time different from the agreement of the parties. They do no such thing; they afford a sanction to no injustice; they violate no law human or divine; they leave the obligation of parties in full force; they create no inability, nor interfere between one who is able to pay, and his creditors; but when such inability intervenes, they step in and take care, or at least such is their object, that a complete

surrender of the debtor's estate shall be made for the benefit of all his creditors; and when this is done, they compel the latter to observe towards him that mercy and forbearance which, in similar circumstances, they would wish and expect to have extended to themselves.

It seemed to be admitted on the argument, that if foreign creditors had been named in this act, they would have been barred. The court thinks them as much bound by the general and comprehensive terms of this act, as if they had been specially designated. Enough has already been done in their favor, without clothing them with a prerogative not yet heard of; that of being exempt from every law, unless particularly named. Nor is this the ground on which these decisions go. It is, that a state has no right to pass laws to discharge its insolvent subjects from debts due abroad. But if the court has erred in the principles which it has adopted, or in the application of them to foreign creditors in general, the plaintiffs have no right to complain; for when a citizen of Massachusetts, where they reside, is imprisoned, at the suit of a citizen of this or any other state, he can, under the laws of that commonwealth, obtain his discharge, as to his person at least, without the creditor's consent; and such discharge is regarded, as it ought to be, as binding on all the courts of that state.

Sitting, therefore, in the state which passed the insolvent act in question, and to which no constitutional objection appears, this court is not sensible that it departs from a single adjudged case in England, or in this state, when it decides on the universal validity of a discharge obtained under it.

Upon the whole, this court is of opinion, that the act of the 3d of April, 1811, is an insolvent, and not a bankrupt law—that, if it be of the latter description, the several states have a right to pass bankrupt laws for themselves, until congress shall establish a uniform system on the subject—that an insolvent act extending to past, as well as future debts, is not a law "impairing the obligation of contracts," within the meaning of the constitution—and that a federal court, sitting within this state, is bound to support a discharge under such law, against the claim of a foreign creditor, although the debt due to him may have been contracted (and made payable at the place of residence.)

The present verdict must, therefore, be set aside, and a verdict and judgment entered for the defendant.

NOTE, [from original report.] Since the question of the constitutionality of the state insolvent laws has been raised, the supreme court of the U. S. has settled the following principles, which are, of course, the law of the land. In *Sturges v. Crowninshield*, which was decided at the February term, 1819, 4 Wheat. [17 U. S.] 122, the court held, that until the power to pass uniform laws on the subject of bank-

ruptcies be exercised by congress, the states are not forbidden to pass a bankrupt law, provided it contains no principle which violates the 10th section of the first article of the constitution of the United States—That insolvent laws which discharge the person of the debtor, but leave his obligation to pay in full force, are not repugnant to the 10th section—And that a discharge of a debtor under the act of the state of New-York, of the 3d of April, 1811, from a contract made in New-York before the passage of the law, the creditor then residing in Massachusetts, and not having proceeded to execution against the body of his debtor in New-York, was void by the 10th section. In *M'Millan v. M'Neill*, Id. 209, the debt was contracted in 1813, in South Carolina, the debtor and creditor both residing there, and the discharge was obtained in Louisiana, whither the debtor had removed, in 1815, under a law of the state, passed in 1808. The court held, that "this case was not distinguishable from that of *Sturges v. Crowninshield*; and that the circumstance of the state law, under which the debt was attempted to be discharged, having been passed before the debt was contracted, made no difference in the application of the principle." It will be observed, that the court do not notice the circumstance that the contract was made in South Carolina, where the parties then resided. In *Farmers' & Mechanics' Bank of Pennsylvania v. Smith*, 6 Wheat. [19 U. S.] 131, the court held, that a discharge obtained in Pennsylvania in September, 1812, under an act of that state, passed the 13th of March of the same year, from a contract made in Pennsylvania in 1811, the contracting parties at all those times being residents of that state, was void. The case of a discharge under the law of a state, where the contract was made within the state, between residents of the state, and after the passage of the law, has not yet been decided. Such a case is, however, pending, and has been argued, and is held under advisement and for a further argument at the next term.

ADAMS, (UNITED STATES v.)

[See United States v. Adams, Case No. 14,421.]

ADAMS, (UNITED STATES LIFE INS. CO. v.)

[See United States Life Ins. Co. v. Adams, Case No. 16,792.]

ADAMS, (WALLER v.)

[See Waller v. Adams, Case No. 17,107.]

Case No. 67.

ADAMS v. WEST ROXBURY.

[1 Hask. 576.]¹

Circuit Court, D. Massachusetts. Sept., 1875.

MASTER AND SERVANT—NEGLIGENCE OF MASTER—DEFECTIVE APPLIANCES.

1. A master failing to use due care and prudence, either in furnishing his servant a suitable kind or quality of explosive for blasting, is guilty of negligence.

2. In determining such care and prudence, it may be considered how far such kind of explosives was in general use and ordinarily con-

sidered safe and proper for the purpose, and how far the particular brand or manufacture of the explosives furnished was generally considered a safe article by those using it.

3. It would be want of care and prudence for the master to furnish an explosive of inferior quality on account of its cheapness, if such article from its inferior quality is more dangerous to use than an explosive of good quality. The more dangerous the instrument, the more care is required in providing it.

4. A master, by furnishing an explosive known to him to be dangerous and unsafe for the use to which it is to be put, is guilty of negligence.

5. A superintendent of the streets of a city or town, having authority to employ servants for the municipality to work upon the roads under his direction, bears the relation of vice principal to such servants, and negligence upon his part becomes the negligence of his principal.

6. A servant cannot recover for injuries sustained in the employment of his master, unless they were occasioned by the negligence or want of due and proper care and prudence of the latter.

At law. Action of tort, to recover damages for personal injuries sustained in the service of the defendant town, from the unaccountable discharge of an explosive furnished for use in blasting. The case was tried upon the general issue and the defendant had a verdict in its favor, whereupon the plaintiff moved for a new trial for misdirection of the court. [Motion overruled.]

Benj. F. Butler, for plaintiff.

R. M. Morse, Jr., for defendant.

FOX, District Judge. The plaintiff claims to recover damages in this action for personal injuries of a very serious nature, sustained by him from an explosion of certain electrical exploders which had been obtained by the defendant's agents, to be used in blasting with dualin. There is but little controversy as to the material facts. Clement Herschell was one of the superintendents of streets in West Roxbury, in the year 1873, and had the charge of the work of preparing stone to be used in repairing roads. In behalf of the town, he employed in this business various persons, and among others the plaintiff, an engineer, to run the engine to drive the machinery for crushing the stone, which was first blasted from the ledge. On the afternoon of February 3, Herschell directed the foreman to procure at Neponset some dualin, together with fifty exploders to be used in the blasting. They were obtained by him and brought to the place in a paper box that evening, and put in a chest with the dualin; there being some powder in the chest, the plaintiff put the box which contained the exploders on a shelf in the engine room. They remained there until the next morning, when they were examined by the foreman, and finding that the wires were shorter than he wanted, he, concluding to return them, put them back into the paper box, and while tying the string around it, holding the box between his knees, an explosion occurred, and thereby the plaintiff, who was standing

¹[Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

in front of the foreman, was injured. The sight of one of his eyes is nearly destroyed, and he also sustained other damages, and for these injuries, this action was brought, and was tried before me at the last fall term; a verdict was rendered for the defendant, which the plaintiff now moves may be set aside, for alleged erroneous rulings and instructions to the jury.

The principal question in the cause is, what obligations and liabilities did the defendants assume towards the plaintiff in providing materials for the business, he being in their employment at the time as an engineer in charge of the engine, which drove the machinery for crushing the stone after it was blasted from the ledge? The instructions given to the jury declared that it was a matter of care and prudence in providing safe and proper materials, and whether there was any negligence in that behalf, and that the defendants were not to be held responsible for absolute certainty as to their safety. The language of the instructions is as follows: "The defendants were bound to use reasonable care and precaution to procure safe and proper material for the use of their servants, and if from want of such care and precaution, the plaintiff has sustained injury, the defendants are accountable; but if they exercised such care in the selection and procurement of material, they do not become insurers of the safety of their servants from injury in using such material. In determining the question of due care, the jury will first determine, whether, under the circumstances, it was proper care and precaution to use electrical exploders in blasting at the time and place contemplated. This involves the propriety of the use of the article for blasting. In deciding upon this point the jury will determine to what extent these exploders had come into general use at that time, and how far by the persons engaged in the business of blasting they were ordinarily considered a safe and proper article to be used for this purpose. Was it negligence and want of due care to use electrical exploders in blasting, or were they proper, fit articles to be so employed? If the jury find that they were generally and ordinarily considered a safe and proper article to be used in blasting, and that there was no negligence or want of due care on the part of the city in their use, then the city was bound to take due care to obtain that kind of exploders which were safe and properly made, and they would have no right to purchase those which were more dangerous and liable to explode, because they could obtain them somewhat cheaper. The more dangerous the instrument employed, the more care should be taken to obtain as safe an article as possible properly manufactured. The jury therefore will determine whether these exploders, Brown's, were, by the persons accustomed to use exploders and by those engaged in blasting, generally deemed to be a good, safe

article of the kind used and manufactured, and as safe as any which could with care be obtained in the market. The jury will also determine what Herschell's opinion and knowledge was of the nature and character of these exploders, because if they should find that he deemed them unsafe and improper to be used, then it would be negligence and want of due care on his part to provide such material for their use. The negligence of Herschell in this respect, would be the negligence of the town, for which it would be chargeable." "If the jury find that the defendants were justified in obtaining for the use of their workmen Brown's exploders, and that those procured were in all respects apparently safe and properly manufactured, but that by reason of some secret unknown defect in one or more of them, which was not discoverable by the most careful examination, they exploded without any known cause, the defendant would not be accountable for the damage occasioned by said explosion. It would be as between these parties a simple accident, for the consequences of which the defendant would not be accountable to the plaintiff. If the jury find it was negligence and want of care on the part of the defendant, either to use electrical exploders at all, or to have procured in the manner they did this particular kind of exploder, the manufacture of Brown, then the defendants are accountable to the plaintiff for the damage occasioned by such negligence. But if on the contrary the jury think there was no want of ordinary care and prudence in procuring in the manner they did, for the use of their workmen, this particular manufacture of exploder, then the plaintiff would fail to establish negligence on the part of the defendants, and he cannot sustain his action."

These instructions held the defendants chargeable with the knowledge of Herschell as to the safety of these exploders, and that if he was guilty of any negligence in relation to them, the defendants would be accountable therefor; that their liability depended entirely on whether due care and precaution had been used in the selection and use of the exploders; that the plaintiff could only sustain his action by establishing more or less negligence on the part of the defendant. These instructions are found, on an examination of the authorities, to have their entire support; not one has been met with, in any way in conflict with them.

It is hardly necessary to refer to any of them, and a few only will be presented. *Priestley v. Fowler*, 3 Mees. & W. 5; *Wright v. New York Cent. R. Co.*, 25 N. Y. 566; *Patterson v. Wallace*, 1 Macq. H. L. Cas. 748; *Tarrant v. Webb*, 18 C. B. 801; *Gilman v. Eastern R. Corp.*, 10 Allen, 238. In which last case it is held that a master is bound to use ordinary care in providing structures and engines, and is liable to any of his servants for his negligence in this regard.

In *Ford v. Fitchburg R. Co.*, 110 Mass. 255, the instruction was: "A corporation is required to use due care in supplying and maintaining suitable instrumentalities, for the performance of the work or duty which it requires of its servants, and is liable for damages occasioned by neglect or omission to fulfill this obligation, whether it arises from its own want of care, or that of its agents intrusted with that duty. * * * The obligation of a corporation, so far as respects those in its employment, does not extend beyond the use of ordinary care and diligence. By ordinary care and diligence is meant, such as men of ordinary sense, prudence and capacity, under like circumstances take, in the conduct and management of their own affairs. This varies according to circumstances as the risk is greater or less, and must be measured by the character and risks and exposures of the business." These instructions were sustained by the full court.

In *Wonder v. Baltimore & O. R. Co.*, 32 Md. 417, it is decided that "all that can be required of the master and for the neglect of which he is responsible to the servant is, that he shall use due and reasonable diligence in providing safe and sound machinery. * * * The master is not liable to his servant for any injury occasioned by a defect of machinery furnished to the latter to operate, unless he was negligent in providing such machinery, or if he knew of the defect, in omitting to warn the servant of its existence."

The same rule is applicable to the selection of servants as to providing of proper materials and instruments, and in *Baulec v. New York & H. R. Co.*, [59 N. Y. 359, December, 1874.] it was held, "that when reasonable precautions and efforts are used to procure safe and skillful servants, and without fault one is employed through whose incompetency damage occurs to a fellow servant, the master is not liable."

The following instruction was requested by plaintiff, but was refused by the court, viz.: "That if the agent of the town in the course of blasting stone for the use of the town, for which he was employed, procured electric exploders, which were in fact dangerous to be used, but the safety or propriety of using the particular kind of which could not be determined by any inspection whatever, so as to be known whether they were dangerous or proper to be used or not, and the plaintiff whilst in the proper discharge of his duty using due care was injured by said exploders, the town was liable to him for the damage caused thereby." In the view of the court, this instruction would impose on the master the responsibility of absolute safety, and render him the guarantor in that respect of the dangerous implements furnished by him to his servants to be used in their employment, in the labor for which they were engaged, and wholly ignores all questions of negligence and due care in the

selection of such implement. It would hold the master accountable if the exploders were in fact imperfect and dangerous, although by the greatest care, it would have been impossible to discover that they were defective and dangerous; and this is but another form in fact of stating the proposition, that if by the most careful scrutiny, the defective exploders could not have been detected, if the defendant saw fit to obtain exploders, and one proves dangerous and injures one of the servants, the master is to be held accountable for the consequences.

In this proposition is entirely wanting the great elements which the jury were by the instructions called upon to find established before they could exonerate the defendants, viz. that it was not negligence and want of care to use electrical exploders in blasting, and that there was not any want of care in obtaining for this purpose the Brown exploders. If these elements should be incorporated into the instructions, it would then substantially affirm as the rule of law in such a case, that although the master was entirely justified in procuring and using Brown's exploders, still if a single one should prove defective and cause an injury to one of the servants, although by the extremest care and diligence the defect could not be discovered, the master would be accountable for injuries occasioned by such defects.

Negligence or want of care is not affirmed by this rule as a necessary element to create the master's liability; and when these are wanting, it is clear, from all the authorities, a liability to indemnify the servant does not exist, if he sustains an injury.

The argument of the learned counsel for the plaintiff is, that because the exploders proved unsafe, although this could not be determined by the most careful scrutiny, the risk in such case should be borne by the master; but a master's accountability in such a case is not changed by the increase of risk, or the dangerous character of the instruments employed. The degree of care demanded in one case, may be very much greater than in the other, and the more dangerous the article in question, the greater should be the care and precaution; or as the jury were instructed, the more dangerous the instrument employed, the more care should be taken to obtain as safe an article as practicable, properly manufactured.

The use of exploders in blasting, not being as the jury have found, negligence per se, and the town having procured exploders, which at that time, by persons accustomed to their use, and by those who were engaged in blasting, were generally deemed to be a good safe article of the kind used and manufactured, and as safe as any, which with care could be procured in the market, and there being no defect discoverable by the greatest scrutiny, what higher degree of care could be required of the master? What test should be applied to discover this secret

defect? It would seem that none could be suggested, which would not involve the discharge of the exploder, and thereby cause its entire destruction. These exploders were a part of a box taken from the depository at Neponset, and there is no evidence to show that any of those left in the box at Neponset ever proved defective, and the probability is, that in the present case, a single bad one caused the explosion of all the others, so that nearly the entire quantity might have been destroyed in testing them, without discovering the one which caused the mischief. No reasonable test could therefore have been applied, which with any certainty could have discovered that any of them were defective.

If a master should procure a box of percussion caps from a well known respectable manufacturer, which were by the community at large, generally considered safe and free from danger, would it be expected of him that he should use up a large portion of the contents of the box in testing them before he put them in the hands of his servants for use? Could he not well rely on the standing and reputation of the maker of the article for his putting on the market a safe and proper cap, and if on careful inspection they were apparently all right, and no defect could be discoverable, should he be deemed guilty of negligence, if under such circumstances he procured and used them in his business?

It is difficult to discover any distinction between that and the present case, excepting, perhaps, it may be said that exploders were not so well known, and were of a more dangerous nature; but this as before stated only requires of the master greater care, and does not render him a guarantor of perfect safety in its use by his servants.

It is claimed that Herschell, the agent of the town, was well aware of the danger attending these exploders, and should therefore have advised the plaintiff of their being liable to explode without any apparent cause; but the plaintiff substantially admitted that he was aware of their character, as he testified that he had seen them used in blasting, and that the night before he was injured, he removed the box of exploders from the powder chest to a shelf in the engine room. The jury were instructed, "that the negligence of Herschell in not procuring a suitable article would be negligence on the part of the town, for which it would be chargeable; that they should determine Herschell's means of knowledge as to their safety, because if he deemed them unsafe, it would be negligence and want of due care to provide such material for the use of the workmen. It is a matter for you to determine, taking all of Herschell's statements, and what you find to have been his previous knowledge on this point, whether you can fairly charge him with negligence in having procured this kind of exploder." No

other instruction was requested on this branch of the case, and if counsel had desired any more specific, it should have been prayed for at the close of the charge. Whatever knowledge Herschell had as to their being dangerous was distinctly declared to be the knowledge of the town for the purposes of this trial, and if Herschell was not justified in their use, then the town was accountable and must answer for his negligence. In none of the authorities cited by the learned counsel is anything to be found in conflict with the rulings at the trial.

In *Cayzer v. Taylor*, 10 Gray, 274, the instruction given to the jury was that the implied contract between a master and servant is, that the master will use such care as a prudent and careful man in the same business would use in the selection and use of engines and appurtenances belonging thereto. If the defendant used an unfit engine and apparatus, and such use arose from want of ordinary care in the employer, and by reason of this want of care the injury was incurred, then the defendant would be responsible. This ruling was in strict conformity with that made in the present case and was sustained by the supreme court of Massachusetts.

In *Spelman v. Fisher Iron Co.*, 56 Barb. 155, the court says: "Personal negligence is the gist of the action, and the master is liable where he knew or ought to have known of the defect which occasioned the injury."

In *Ford v. Fitchburg R. Co.*, 110 Mass. 259, the language is: "The jury must have found that the defendant corporation did not exercise ordinary care and diligence in supplying and maintaining an engine safe to be used."

In *Noyes v. Smith*, 28 Vt. 64, it is said "that it is the duty of the master to exercise care and prudence, that those in his employment be not exposed to unreasonable risks and dangers;" and this principle is sustained by the court in *Connolly v. Poillon*, 41 Barb. 367.

In *McGatrick v. Wason*, 4 Ohio St. 566, it is said "that if the defect in the machinery could have been cured by the use of ordinary care then the master is liable." It is very clear that in all these cases the various courts recognize the same principles of law as were here given to the jury, viz., that the defendants were bound to use reasonable care and precaution to procure safe and proper materials for the use of their servants, and if from want of such care the servant was injured the master would be liable.

The requested instruction derives no support from either of those decisions, but the rather declares the law to be entirely different, and would hold that if the absolute safety of the articles furnished cannot be determined by the most careful inspection, and in their use they should prove dangerous and injure the servant, the master would

be accountable therefor; that by their use he becomes an insurer of the servant's safety against the danger, although it is impossible to discover the defect in the article which is of the same character and description, and from the same manufacturer as those commonly made use of in the employment for which the servant is engaged. Such a liability is far in excess of that, which only requires due care and diligence to be shown to exonerate the master if injury ensues to the servant, and although in the present case a very serious injury has been sustained by the plaintiff, the court is not satisfied that any error occurred at the trial which entitles him to have his cause again presented to a jury. Motion overruled. Judgment on the verdict.

Case No. 68.

ADAMS v. WHITE.

[2 Pittsb. R. 21; 7 Pittsb. Leg. J. 41; 16 Leg. Int. 293.]

Circuit Court, D. Pennsylvania. Aug. 20, 1859.

NEGOTIABLE INSTRUMENTS — ACTION ON NOTE — DEFENSES—PLEADING—DILATORY PLEAS—JURISDICTION OF CIRCUIT COURT.

1. Matters which appertain solely to the jurisdiction of a court, or to the disabilities of a suitor, should never be blended with questions, which enter essentially into the subject matter of the controversy.

2. In dilatory pleas the greatest precision is required.

3. A plea to the jurisdiction concludes to the cognizance of the court, by praying judgment if the court will take cognizance of the suit, or of the plea (declaration) aforesaid.

4. Plea to the jurisdiction must be signed by the defendant in person, and not by attorney.

5. The affidavit accompanying the plea must be positive, and not "as he believes."

6. The plea must be put in within four days of the term, to which the declaration is filed, counting both days inclusive.

7. Filing plea in bar is a waiver of the plea in abatement.

8. A literal copy of the note, omitting the endorsement, which is averred in the declaration, is a compliance with the 71st rule of the United States district court.

9. In his affidavit of defense, the defendant must state "fully and particularly," the nature and amount of his set off.

10. To put plaintiff on proof of consideration of negotiable paper, it must be shown that it was obtained, or put in circulation, by fraud or undue means.

11. When the citizenship of the parties gives jurisdiction, and the legal right to sue is in the plaintiff, the court will not inquire into the residence of those who have an equitable interest in the claim.

12. He who has the legal right may sue at law in the federal courts, without reference to the citizenship of those who may have the equitable interest.

[At law. Action by Samuel Adams against A. M. White on a promissory note.]

The facts of this case sufficiently appear in the opinion of the court. It came up on a

plea to the jurisdiction of the circuit court of the United States, and on a rule to show cause why judgment should not be entered for want of a sufficient affidavit of defense. As the case involved important questions relating to the jurisdiction and practice of the courts of the United States, the court directed a re-argument, and it was re-argued on the 13th inst. [Plea overruled. Rule absolute. Judgment for plaintiff.]

C. B. Smith, for plaintiff.

John M. Kirkpatrick, for defendant.

MCANDLESS, District Judge. Plaintiff sues upon a note dated 26th October, 1858, at four months, for \$2,055 97-100 drawn by defendant, payable "to the order of myself," and endorsed by him. An affidavit of claim and copy of note omitting the endorsement, were filed with the precipe; and before the return day of the writ a narr. was filed, reciting the note, and averring the endorsement to plaintiff. Defendant's counsel interposes a plea to the jurisdiction, and an affidavit of defence. We must dispose of this plea before considering the argument upon the affidavit. Before the court can proceed to entertain any question on the merits, it must know that it possesses proper jurisdiction over the parties. It is plain that the question as to the citizenship of the parties must be preliminary in its nature, and the exception must be taken by way of a plea. *Dodge v. Perkins*, [Case No. 3,954;] [Smith v. Kernochen,] 7 How. [48 U. S.] 198.

1. Then as to the point of jurisdiction. The plea filed in this case is bad both in substance and form. It does not deny plaintiff is a citizen of the state of Virginia, but alleges that the note on which this suit is brought, is the property of John M'Vay, a citizen of Pennsylvania, who is not entitled to sue in the courts of the United States. That is a question of title, and is matter in bar, and not in abatement. It has been received as a canon of pleading, that matters which appertain solely to the jurisdiction of a court, or to the disabilities of a suitor should never be blended with questions which enter essentially into the subject matter of the controversy; and that all defences involving inquiries into that subject matter imply, nay admit, the competency of the parties to institute such inquiries, and the authority of the court to adjudicate upon them. Hence it is, that pleas to the jurisdiction, or in abatement are deemed inconsistent with those which appertain to the merits of a cause: they are tried upon different views, as to the relations of the parties, and result in different conclusions. [*Sheppard v. Graves*,] 14 How. [55 U. S.] 505; Gould, [Pl.] 221.

As to the form of the plea. In dilatory pleas the greatest precision is required. [*Evans v. Prosser*,] 3 Term R. 186. This plea has no conclusion—it prays no judgment. The language of the pleader's last sentence is "therefore he pleads that this

suit may abate, at the proper costs and charges of Samuel Adams, plaintiff above named," a person by the way, the defendant alleges is a myth, and has no substantive existence. A plea to the jurisdiction concludes to the cognizance of the court by praying judgment, if the court will take cognizance of the suit, or in more technical language of the plea (declaration) aforesaid. Gould, [Pl.] 238. The present plea is by attorney. A plea to the jurisdiction must be signed by the defendant in person. For, if signed by an attorney who is an officer of the court, he is supposed to have signed it by leave of the court, and the asking of leave is a tacit admission of the jurisdiction. Bac. Abr. "Abatement," A; "Pleas," E. 2. Again, the affidavit, which is a necessary adjunct to all pleas in abatement, must, in a plea to the jurisdiction, be positive, and not "as he believes." This is fatal to this plea.

The rules of courts of law with regard to dilatory pleas are very stringent, and require them to be put in within four days after the term to which the declaration is filed, counting both days inclusive. They require also, that the affidavit of the truth of the plea be positive and not according to the belief of the defendant. In the practice of these courts also, a dilatory plea, not filed in time, or subsequently authenticated, may be treated as a nullity, and the party making it defaulted for want of a plea. Grier, J. [Ewing v. Blight,] 1 Phila. 576.

Aside from all this, the defendant has filed a plea in bar. This is a waiver of his plea in abatement. [Potter v. McCoy,] 2 Casey, [26 Pa. St.] 462. It is a rule of pleading without an exception, that objections to the jurisdiction of the court, or the incompetency of the parties, are matters pleadable in abatement only; and that if, after such matters relied on, a defence be interposed in bar, and going to the merits of the controversy, the grounds alleged in abatement become thereby immaterial, and are waived. [Sheppard v. Graves,] 14 How. [55 U. S.] 510.

2. As to the affidavit of defence. It is alleged in the affidavit, and was contended with ability on the argument, that the copy of the note filed was not a literal transcript, required by the rules of court. But the defendant has not informed us in what the difference consists. If it be the omission of the endorsement, that is supplied by the averment in the declaration.

The defendant claims that he has a set off, but it is not against the demand of the plaintiff, but John M'Vay, and we are not advised of its nature or amount. In the affidavit he states that the amount of set off "he does not exactly know," and hence is unable exactly to designate the same. If John M'Vay were the plaintiff here, this

would be insufficient, and is less sufficient when suit is brought by an innocent holder. Under the rule he must state his defence "fully and particularly." The burden of the affidavit is that John M'Vay is the real plaintiff, and that the name of Adams is used to sue in this court. The plaintiff is the holder of a note which is negotiable; and to put him on proof of consideration, it must be shown that it was obtained or put into circulation by fraud, or undue means. Some fact must be alleged from which we can reasonably infer that the note came into the hands of the holder by fraud, or without consideration. [Brown v. Street,] 6 Watts & S. 222. There is nothing here but a vague allegation. When defendant drew this note payable to the order of himself, and endorsed it, he converted it into negotiable paper, payable to bearer, untrammelled in its circulation, subject at maturity to suit in the hands of any holder, and exempt from impertinent inquiry, from any quarter, as to the consideration. After he endorsed it, it passed by delivery; and the plaintiff had the same right to sue upon it in his own name, as if it had been made payable to bearer. He alleges that he is a citizen of Virginia, and consequently the circuit court of the United States has jurisdiction. [Bonnafée v. Williams,] 3 How. [44 U. S.] 574.

When the citizenship of the parties gives jurisdiction, and the legal right to sue is in the plaintiff, the court will not inquire into the residence of those who may have an equitable interest in the claim. They are not necessary parties on the record. A person having the legal right may sue at law in the federal courts, without reference to the citizenship of those who may have the equitable interest. [Irvine v. Lowry,] 14 Pet. [39 U. S.] 298. The opinion of the court is with the plaintiff on both points submitted. The plea to the jurisdiction is overruled. The rule to show cause is made absolute, and judgment for the plaintiff; sum to be ascertained by the clerk.

NOTE, [from original report in 2 Pittsb. R. 21.] As to the pleadings, see cases cited in note to Yeatman v. Henderson, [Case No. 18,132.] Upon the other branch of the case, see Snyder v. Rilev, 6 Barr. [6 Pa. St.] 164; Gray's Adm'r v. Bank of Kentucky, 5 Casey, [29 Pa. St.] 365; Jarden v. Davis, 5 Whart. 338; Phelan v. Moss, 17 P. F. Smith, [67 Pa. St.] 59.

ADAMS, (WHITE v.)

[See White v. Adams, Case No. 17,534.]

ADAMS, (WILDER v.)

[See Wilder v. Adams, Case No. 17,647.]

Case No. 69.

ADAMS v. WHITING.

[2 Cranch, C. C. 132.]¹

Circuit Court, District of Columbia. April Term, 1817.

ADMINISTRATORS—ACTIONS—PERSONAL LIABILITY ON PROMISE—DECLARATION.

A declaration upon a promise made by the defendant as administrator must aver assets, in order to charge him personally *de bonis propriis*.

At law. The declaration charged that the defendant, administrator of Charles Little, made his promissory note to Thomas Peake, and thereby as administrator of the said Charles Little, promised to settle with him for sundry taxes and clerk's notes due from the late Charles Little for himself individually, and as executor and administrator of others, to the amount of \$47.74; which note the said Thomas Peake assigned to the plaintiff, of which the defendant had notice; by means whereof, and by force of the statute, the defendant became liable to pay to the plaintiff the said sum of money in the said note specified, according to the tenor and effect thereof and of the said assignment, and being so liable, the defendant, in consideration thereof, promised the plaintiff to pay him the said sum of money. Nevertheless, the defendant, although often requested, has not paid, &c. To this declaration there was a general demurrer and joinder.

Mr. Taylor, for defendant, cited *Hawkes v. Saunders*, Cowp. 289, and *Atkins v. Hill*, Id. 284.

Mr. Fitzhugh, contra, cited *Morris v. Lee*, 2 Ld. Raym. 1396, and *Grant v. Vaughan*, 3 Burrows, 1516.

THE COURT (THRUSTON, Circuit Judge, absent) decided that the declaration was bad for the want of an averment of assets; inasmuch as the promise was made by the defendant as administrator, and the declaration sought to charge him personally *de bonis propriis*.

Case No. 70.

ADAMS v. WILBUR.

[2 Sum. 266.]²

Circuit Court, Rhode Island. Nov. 1835.

WILLS—OMISSION TO PROVIDE FOR CHILD—REPEAL OF STATUTE.

The statute of wills of Rhode Island of 1798, § 6, provided, "that any child, &c. not having a legacy given him in the will of his father or mother, shall have a proportion of the estate of his parents assigned unto him, as though such parent had died intestate." This section was repealed in 1803. *Held*, that a will, made in 1801, while the foregoing provision was in force, where the testator died in 1804, after it

had been repealed, was not affected by it, but was fully operative to pass a good title to the devisee.

At law. Ejectment for lands in Newport, Rhode Island. [Judgment for plaintiffs.]

The parties agreed to a special statement of facts, as follows: Silas G. Huddy being seized of the demanded premises in fee by his last will and testament, dated, made and duly executed on the seventh day of December, A. D. 1801, and after his decease duly proved, and approved by the court of probate, devised the same premises in fee to his wife, Elizabeth Huddy, he, the said testator, then having no issue. That the said Silas and Elizabeth had a child born on the 31st day of July, A. D. 1802, which child died in infancy, before the said testator. On the 22d day of April, A. D. 1804, said Silas G. and his said wife Elizabeth, had another child born, named Silas G. Huddy, Jun., who survived both the testator and his said wife, and died July 8, A. D. 1818, in the fifteenth year of his age, intestate, and without issue. That Silas G. Huddy, senior, the testator, died at sea in the month of August, A. D. 1804. That said Elizabeth Huddy, widow and devisee of said Silas G. Huddy, senior, by her last will and testament, dated, made and duly executed on the 20th day of August, A. D. 1809, and after her decease duly proved and approved, devised the use and improvement of the premises to her mother, Ann Bently, until her (the testatrix's) son, the said Silas G., should be twenty-one years old, and then to her said son in fee; and if her said mother should die before her son arrived at that age, then to the said son in fee, and if said son should die without issue of his body, then to her said mother in fee. And afterwards, in the year 1809, said Elizabeth died, her said mother and son both surviving. The said Ann Bently, the mother, died in the year 1812, and the said Silas G. Huddy, the son, died July 8th, A. D. 1818, as before stated. That said Elizabeth Huddy had two sisters, one of whom, named Abigail Adams, now deceased, was the mother of the plaintiffs, who are the only surviving children of said Abigail, and are next of kin to the said Silas J. Huddy, Jr., of the blood of his mother, the said Elizabeth. If, upon this statement of facts, it shall be the opinion of the court that the plaintiffs are entitled to recover, then it is agreed that judgment shall be entered for them, the plaintiffs; otherwise, for the defendant.

The cause was argued by Hazard for plaintiffs, and by Turner and Pearce for the tenant.

Hazard. By the agreed statement of facts, upon which the parties have put this case, it appears that the defendant does not set up any adverse title, but leaves the plaintiffs to make out their title, to the demanded premises. And as to this, it is agreed, that the premises were vested in fee in Silas G. Hud-

¹[Reported by Hon. William Cranch, Chief Judge.]

²[Reported by Hon. Charles Sumner.]

dy, Jr., and came to him by devise from his mother, Elizabeth Huddy, and that said Silas died seized of the premises, July 8th, 1818, intestate, under age, and without issue, leaving the same to his heirs at law. It is also agreed, that the plaintiffs are next of kin to the said Silas G. Huddy, Jr., of the blood of said Elizabeth Huddy, his mother, and devisor.

The title of the plaintiffs depends upon the Rhode Island statute of 1798, (Dig. 1798, p. 237,) "directing the descent of intestate estates," &c.; by the 1st section of which statute, it is provided, that if such right, title and interest to such real estate, came by descent, gift, or devise from the parent or other kindred of the intestate, and such intestate die without issue, the same shall vest in and be divided equally amongst the next of kin to the intestate, and those who legally represent them, if any of them be dead, of the blood of the person from whom such right, title, or interest came or descended. This is the title under which the plaintiffs claim. This title is good, unless defeated by the provision contained in the 6th section of the Rhode Island statute of wills of 1798. It is unnecessary to consider what application that provision might have (if still in force) to the present case, since all that part of the said 6th section was repealed by an act of the legislature, passed expressly and solely for that purpose, June 4, 1803, (more than a year before the death of S. G. Huddy, senior, and fourteen months before the birth of his son), entitled, "An act to repeal part of the 6th section of the act, entitled, 'An act prescribing the manner of devising lands, tenements and hereditaments, and of disposing of personal estate by will.'" This repealing act is contained in the "Supplement to the Digest of the Laws in 1798," and remained in full force until the last revision of the laws in 1822, when the general acts relating to devises and wills were revised, and the act now and ever since in force was passed.

Turner & Pearce for the tenant.

The question now presented to the court we conceive to be this, did the statute of 1803, repealing in part the statute of 1798, under which the will was made in 1801, while the statute of 1798 was in full force, and unrepealed, so far act retrospectively as to change the legal destination of real estate under that will? In order to entitle the plaintiffs to recover in this action, it is incumbent on them successfully to maintain the affirmative of this question; their case depends entirely on their so doing. Yet the argument is rather implied than expressed, and as it is supported and enforced by no authorities introduced, if available it must be considered as depending upon the application of general principles of law, independent of authorities. Every will, in a certain sense, is inchoate and imperfect, un-

til the death of the testator; but it is so considered only in reference to the estate that will or will not pass by it; and not at all in reference to the law by which it shall be construed, controlled and governed. The preparation and the legal execution of a will, are the acts of the party—the testator himself. When every ceremony and requisite on his part has been performed, the instrument is perfect and complete, so far as human agency and human law are concerned; and the only remaining act necessary to its full and complete consummation, is the act of God alone, the death of the testator. This is the only sense, and utmost extent, in which a will, duly executed according to the requirements of law, as the law stands at the time of its execution, ever has been, or can be considered as inchoate. We are not aware of any legal principle, under which a different rule has been applied, in this respect, to wills, than is applied to deeds, bonds, mortgages, or any other contracts or writings, whether under seal or not; in relation to all which we deem the rule to be, that effect shall be given to them, according to the law, as it stood at the time of their execution. Upon the ground taken by the plaintiffs, the act of June 4, 1803, would, in this case be entirely retrospective; and although we shall not contend, that the legislature may not pass, and have not passed retrospective laws, in contradistinction to ex post facto laws, yet we feel warranted by authorities in saying, that if such was the intention of the legislature, at the time the act was passed, it must have been clearly expressed in the act itself; and cannot be legally presumed. Now does the act of June 4, 1803, contain any expression giving it a retroactive operation on wills, that had been then already made? The language and the intention are evidently prospective, and can be considered as applicable to such wills only as should thereafter be made; and not to those that had been already executed. In *Gillmore v. Shooter*, 2 Mod. 310, the court said, in giving judgment for the plaintiff: "It could not be presumed, that the act had a retrospect to take away an action to which the plaintiff was then entitled; for if a will had been made before the 24th of June, and the testator had died afterwards, yet the will had been good, though it had not been in pursuance of the statute." The same case is cited in *Couch v. Jeffries*, 4 Burrows, 2461, and is also reported in 2 Show. 16, 2 Lev. 227, 1 Vent. 330, and T. Jones, 108. The law had been such in Rhode Island ever since the passage of 12 Wm. III. c. 7. The legislature of Rhode Island, in the same year passed an act, on the 30th day of April, 1700, entitled "An act for putting in force the laws of England, in all cases where no particular law of this colony hath provided a remedy," providing as follows: "That in all actions, matters, causes and

things whatsoever, where no particular law of this colony is made to decide and determine the same, that then, and in all such cases the laws of England shall be put in force, to issue, determine and decide the same; any usage, custom or law to the contrary notwithstanding." Dig. R. I. Laws 1744, p. 28. The act here recited, adopted the English statute of 12 Wm. III. c. 7, as the law of Rhode Island, and it continued in force until the revision of 1798, when the statute of this state was passed, copied from that which had been passed in Massachusetts in 1784; and although both the statutes of Massachusetts and Rhode Island omit the preamble to the section in the English statute, yet it was decided, [*Terry v. Foster*,] 1 Mass. 150, that it was entitled to consideration under a new statute in pari materia. The testator then, in this case, when, on the 7th December, 1801, he made his will, may be fairly presumed to have known what the law then was, and probably acted under the advice of counsel; if so, he must have been aware, that our statute not only amply secured and provided for children subsequently born, who were, technically speaking, posthumous, but also for all such as might be born after the will was made, and before his own death. To give the will, therefore, at this time a different construction, or rather a different effect, would be to destroy the presumed intent of the testator, and would prove both inconvenient and unjust. See *Whitman v. Haggood*, 10 Mass. 437; *Inhabitants of Somerset v. Inhabitants of Dighton*, 12 Mass. 333; *Church v. Crocker*, 3 Mass. 17; *Inhabitants of Medford v. Learned*, 16 Mass. 215; *Wild v. Brewer*, 2 Mass. 570; *Bigelow*, Dig. p. 741, arts. 14, 15; *The Saunders*, [Case No. 12,372.]

The argument for the defendant might be illustrated by a great variety of examples; one or two only shall be mentioned. Suppose a will had been made before the statute was passed, requiring its execution and publication before three witnesses, and it had been witnessed by two witnesses only, and the testator had not died until after the enactment of the statute; would it be argued in such a case, that the will was void? Again, the legislature of Rhode Island have recently passed an act, requiring all bills of sale that are intended for security, and to operate as mortgages, to be recorded in the same way that deeds of real estate are; suppose such a bill of sale had been executed prior to the passing of that law, and that the term of payment did not expire by the condition of the deed, until after it became a law, it is not supposed, that if such bill of sale were not recorded, that therefore it would be void against attaching creditors, or others.

Before STORY, Circuit Justice, and PITMAN, District Judge.

STORY, Circuit Justice, delivered the opinion of the court. The testator (Silas G. Huddy) made his will in 1801, having then no issue; and thereby devised the premises in fee to his wife. He afterwards died, in August, 1804, leaving his wife, and a son, who was born in April, 1804; and who afterwards died, in July, 1818, intestate, and without issue. The wife died in 1809; and the plaintiffs claim, as heirs of the son, ex parte materna; and the defendant claims, as heir of the son, ex parte paterna.

The statute of wills of Rhode Island, of 1798, in the sixth section, provides, "That every child, or children, or their legal representatives, in the case of their death, not having a legacy given him, her, or them, in the will of their father or mother, shall have a proportion of the estate of their parents assigned unto him, her, or them, as though such parent had died intestate;" with a proviso, not important to be mentioned in the present case. This section was in force at the time, when the testator's will was made, in 1801; but, at the time of his death, in 1804, it had been repealed (act of 4th June, 1803). If it had been in force at the time of the testator's death, it is admitted, that the plaintiffs would have no title to the estate; as it would have vested in the son by descent, ex parte paterna, in virtue of the section. The real question, therefore, between the parties, is, whether in the intermediate repeal defeated the title, which the son would otherwise have taken. Our opinion is, that it did. The will was good and operative to all intents and purposes to pass the whole of the premises to the wife, subject only to be defeated by any title, which might accrue to the son under the section above quoted. The will was ambulatory during the life of the testator; and no title could accrue to the son until the death of the testator. If the son had died during the life-time of the testator, without issue, it is clear, that the will would have had precisely the same effect, as if he had never been born. To give the son then any title in the estate, two things must have concurred; first, that he should have survived the testator; and, secondly, that at the time of the death of the latter, there should have been some law in force, which should confer a title on him. He is to take, not by the bounty of the testator, but by the operation of law. Now, at the time when, if ever, this title was to accrue, there was no act in force, which conferred any such title upon him. It had been repealed; and the repeal put an end to the possibility of his acquiring any title under it. The argument of the defendant's counsel seems to rest mainly on the foundation, that an inchoate title was created in the son by the execution of the will, which ought not to be defeated by relation by the subsequent repeal. But we take the law to be, that no inchoate title vested at all by the execution

of the will; and that the son's title, if any, must first accrue on the death of the testator. Having said thus much upon the point, it appears to me, that there is no farther room for argument upon it.

Our judgment is, that the defendant is [plaintiffs are] entitled to recover the premises sued for.

ADAMS, (WILLIAMS v.)

[See Williams v. Adams, Case No. 17,711.]

Case No. 71.

ADAMS v. The WYOMING.

[2 N. J. Law J. (1879,) 275.]

District Court, D. New Jersey.

SEAMEN—MASTER'S WAGES—MORTGAGE ON VESSEL—PRIORITIES.

[1. The registry and license of a steamer, and the bond required by law describing a certain person as the master, being sworn to by such person and the owner, estop both to deny the truth of the description. The registry determines who is master in the eye of the law.]

[2. The owner of a steamer entered into an agreement with a certain man, whereby the second party was to command and run the vessel between New Brunswick and New York as captain, for the salary of \$100 per month, and three per cent. of the gross earnings. The clerk of the boat generally received money for passengers and freight, and paid over the receipts to the owner, but this arrangement was not set forth in the agreement, and it did not appear that the captain might not, if he chose, have had the receipts under his control. *Held*, that the captain was the master, and had no lien upon the boat or the proceeds of sale in the registry for payment of his wages.]

[3. A master knew of a pre-existing duly recorded mortgage on the vessel, and let his wages, payable monthly, accumulate, when he had means of securing payment. *Held*, that he was not entitled to the proceeds as against the mortgagee.]

[In admiralty. Libel in rem for wages by Adams against the steamer Wyoming, (H. B. Crosset, claimant.) Counter petition by mortgagee. Libel dismissed. Decree for mortgagee.]

Flavel McGee, for libellant.

A. V. Schenck, for claimant.

NIXON, District Judge. This is a libel in rem for wages. On the 27th of February, 1878, H. B. Crosset, being the owner of the steamship Wyoming, entered into a written agreement with the libellant whereby the latter, for the period of three years and upwards, to wit, from 1st of March, 1878, to the 16th of June, 1881, was to command and run the said steamboat on a route between New Brunswick and New York, as captain, for the salary of one hundred dollars per month and three per cent. of her gross earnings represented by the monthly collection for passengers and freights. The owner reserved to himself the privilege of terminating the engagement whenever the libellant failed

to perform his duties as captain to his satisfaction upon paying to him such apportionate sum as may have accrued up to the date of notice. The libellant claims in the libel that he was not the master of the boat. He styles himself "late seaman," and says that he had no control over the moneys received for freight or passengers, but that the same was solely in the charge of the boat's clerk; that his duties were only those of commander of the vessel, except when occasion required that he should temporarily perform the duties of pilot.

The question as to who is the master of the vessel is ordinarily determined by the registry or enrollment and license. The laws of the United States require that the owner shall make oath who is master and that he is a citizen of the United States, or where the latter is in the district he shall make such oath himself. They also require that the master shall join with the owner in the execution of a bond for various purposes enumerated in the act, before a registry or enrollment of the vessel shall take place. The proof in the case is that the libellant in all these necessary papers, appears as the master of the boat. He, as well as the owner, swears to the fact, and hence they are estopped from coming into court to deny that he sustained any such relation to the vessel. The matter was fully discussed in *The Dubuque*, [Case No. 4,110,] and the court there held "that so long as the person in whose name as master the vessel is recorded, continues to be master by the registry he is such to all intents and purposes in the eye of the law." But independent of the registry, which concludes the parties, the master is the one to whom the owner entrusts the navigation and discipline of the vessel, and the evidence shows that the libellant occupied this position. It is true that the clerks of the boat generally received the fares for passengers, and collected the freights for merchandise, and paid over the daily receipts to the owner. No such arrangement was set forth in the agreement in which the captain was engaged, and it was doubtless made to divide labor and responsibility. It does not appear but that the libellant might not, if he had desired, have had the receipts under his control. The clerk, Sheppard, expressly testifies that he would have paid any bill or handed over any amount of money that the captain ordered him to pay or hand over. I must, therefore, conclude that the libellant was the master, and the law determines that as such he has no lien upon the boat or the proceeds of sale in the registry for the payment of his wages. The libel must be dismissed. But it does not thence follow that he is not entitled to be paid his claim, or petition, from the surplus and remnants. The admiralty court, although not technically a court of law or of equity, is a court of justice, and distributes surplus amongst claimants ac-

ording to the rules which govern all these courts when their aid is invoked in the distribution of funds under their control. The master, although having no lien, but having a maritime claim, which he can enforce in the admiralty, in a suit in personam, may be paid from the surplus as against the owner of the vessel. The *Stephen Allen*, [Case No. 13,361.] In the present case, however, the money is claimed by the mortgagee. Sarah S. Crosset, the wife of the owner, has filed her petition claiming the balance of the proceeds of sale as due to her upon a mortgage assigned to and held by her against the said boat and upon which there is yet due upwards of two thousand dollars. This raises a different question, to wit, whether in the distribution of surplus and remnants the master is entitled to be paid his wages against the claims of a bona fide mortgagee. It was alluded to and waived as not involved in the case by Judge Betts in *The Stephen Allen*, supra, and so far as I know has never received distinct adjudication.

It is well settled in the admiralty that the mortgage of a vessel is not a maritime transaction, and hence the admiralty courts have always declined to take jurisdiction to enforce the payment of a mortgage. *Bogart v. The John Jay*, 17 How. [58 U. S.] 402; *Hurry v. The John and Alice*, [Case No. 6,923.] But although this is so, a mortgagee is nevertheless allowed to file a petition in the case of remnants and surplus in the registry and to have his mortgage paid as against the owner; but in such cases the satisfaction of the mortgage is postponed to the claims of a privileged creditor having a maritime lien. *Schuchardt v. Babbidge*, 19 How. [60 U. S.] 239; *Remnants in Court*, [Case No. 11,697;] *Thomas v. The Kosciusko*, [Id. 13,901.] It is also conceded that whilst the master has a lien upon the freight for his wages, he has none upon the vessel. He is expected to look to the personal responsibility of the owner. His claim for wages, however, is one of admiralty jurisdiction and he can maintain a suit in personam for the amount due. *Willard v. Dorr*, [Case No. 17,679.] And it is for this reason that he is permitted to come in by petition and obtain payment of his wages and for advances as against the owner from the surplus moneys in court arising from the sale of the vessel. *Gardner v. The New Jersey*, [Case No. 5,233;] *Zane v. The President*, [Id. 18,201;] *The Santa Anna*, [Id. 12,325.] I say as against the owner, but not necessarily against the mortgagee. There may be cases where the master has an equity to be paid, equal if not superior to the equity of the mortgagee. But this is not one of them. The mortgage has been of long standing, was given in 1871, was duly recorded, and the master rendered the service with full [notice of the] rights of the mortgagee. The law required him to take notice of them. It does not seem equitable that he should allow his

wages, payable monthly, to accumulate when he had within his reach the means of securing payment, and then claim their payment above and against the mortgage. Besides, if it be admitted that the equities of the parties are equal, the mortgagee is older and first in time and hence stronger in right. The case falls within the principle of *The Grace Greenwood*, [Case No. 5,652,] where Judge Drummond, in the distribution of proceeds, postponed material men to mortgagees, upon the ground that the mortgages were recorded before the date of furnishing the materials and supplies. If those in interest desire to contest the truth or validity of the petitioner's mortgage, leave will be given to do so. If no steps are taken to this end, within ten days after notice to the owner and master, an order may be entered that the clerk pay the residue of the proceeds of the sale of the steamboat, to the petitioner, on account of her mortgage. No costs are allowed to the claimant Crosset against the libellant. If Mrs. Crosset had intervened and answered as mortgagee, it would have been different.

Case No. 72.

ADAMS & W. MANUF'G CO. v. ST. LOUIS WIRE-GOODS CO.

[3 Ban. & A. 77: 12 O. G. 940; Fent. Pat. 31.]

Circuit Court, E. D. Missouri. Sept., 1877.

PATENTS FOR INVENTIONS — INFRINGEMENT — KNOWN PROCESS — PRELIMINARY INJUNCTION — AFFIDAVIT.

1. The improvement in sieves for which letters patent No. 106,597 were granted to Robert J. Mann, August 23, 1870, and of which the complainant is the owner, being construed by the court to consist in a combination of the hoop and sieve cloth, when the edge of the sieve cloth is clasped in the hoop and there fastened by swaging: *Held*, that the patent is not infringed by making a wire sieve connected with the rim, which is fastened by what is known as double-seaming, inasmuch as double-seaming is a mode of fastening known long before the date of the patent.

2. On a motion for a preliminary injunction, the court may consider certain matters independent of the affidavits, such as general principles supposed to be known to every one of ordinary intelligence.

3. The design patent No. 4637, granted to Robert J. Mann, February 7th, 1871, for a flaring rim for sieves, whereby they will nest together, possesses no novelty, even if it were a design which would properly come within the patent law.

In equity. This bill was brought to restrain the alleged infringement of letters patent No. 106,597, dated August 23d, 1870, for improvement in sieves, and letters patent No. 4,637, dated February 7th, 1871, for design for sieves, both granted to Robert J. Mann.

Coburn & Thacher, for complainant.
S. S. Boyd, for defendant.

[Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

TREAT, District Judge.² I have received a note from counsel for plaintiff, in which they desire the result of the action of the court to be certified to them. I have not had time to write an opinion in this matter. But as this case has been presented in a hurried way, as the court was very much occupied at the time, and as it will come up hereafter on its merits, I will merely state the conclusions so far as this motion is concerned. The claim in the patent is for: "The combination of the hoop A and sieve-cloth C when the edge of the sieve-cloth is clasped within the hoop and thus fastened by swaging, substantially as and for the purpose specified and shown."

Without going into an elaborate disquisition with regard to these matters, it must suffice that this patent has been twice established as a valid and subsisting patent, and for the purposes of this motion must be so treated by this court. Thereupon, only one inquiry is presented: Is the sieve, as used by defendant, an infringement thereon? If we go through the mechanical combination involved in their use by the defendant, and into the mechanical combination for which the plaintiff, as assignee, has a patent, we will find, according to the claims of the patent, the essential element is, that the sieve is placed into proper position with regard to the hoops, and swaged, which results in tightening the sieve below, and produces this convenient effect in the form indicated, whereby the rim remains, so that the plaintiff's sieve, thus produced, may effect results which sieves of this character are intended to produce. Now, plaintiff does not claim, and cannot claim, that the wire sieve is, simply in connection with the rim, patentable, because both of those things existed anterior to his patent. What, then, is his patent? It is that, in connection with a metallic rim, he produces a curve by swaging, which works out the results here shown. On the other hand, defendant takes the wire sieve, which is not new at all, connected with the rim, which is fastened by what is known in the mechanical arts as "double-seaming." There is nothing new in double-seaming. It is a mode known long before this patent as one for fastening not only lid-heads of cans, etc., but for a variety of other purposes. Hence, for the purposes of the present motion, it is only necessary for this court to determine first, that the essential element in plaintiff's patent is a combination of a hoop with a sieve-cloth, whereby the edge of the sieve-cloth is clasped within the hoop, and fastened by swaging. Now, the connection of a sieve-cloth with the hoop, in itself, is not his patent, unless the swaging follows. And he had no patent except for the combination. It is a combination patent. Swaging is the important element in determining

this patent. What is swaging? It is a mechanical device whereby compression is produced in a variety of forms other than a plane surface, whether it be curved, hexagonal or otherwise. The essential element and advantage of the patent of the plaintiff is, that by swaging he fastens his sieve to the rim by a swaging process, which tightens the sieve itself, and thereby necessarily produces the rim below, so that the sieve itself does not rest on a line with that rim. Thus, if it were brought over externally with regard to it, the sieve would rest on the rim, but, by being swaged in the mode here indicated, not only produces the rim but tightens the sieve-head by but one operation, and, so far as the swaging is concerned, produces the required result.

The defendant simply resorts to an old and well-known mode of double-seaming, which is entirely distinct and different from plaintiff's mode. Double-seaming is simply double-bending a metallic material so that the wire of the sieve passes through one hoop with another over it, and thus, by fastening the sieve together, retains its position without swaging at all. There is nothing new in the double-seaming process as a mode of fastening. You may fasten a preserve or any other can by the double-seaming process, which is entirely simple in itself—old and well known to every housewife and every mechanic. But swaging is an entirely different matter. It is the producing of a given form and given result by the use of what are known as "swaging tools," which tools produce from the two parts any form that you desire produced. Thus a straight impression, parallel, as two hooks, produced by compression, is no swaging at all. By swaging you may make them take any desired form. If you wish to produce a curved form, and one tool is pressed convex against a concave surface, the material between will take the curved form. There is nothing new at all or strange in placing two things parallel with each other, and with sufficient application of force squeezing them together. There is nothing new in that. It is as old as the use of two parallel forces. But, by the use of swaging, you may give any form you desire, consequent upon the use of swaging-tools. This patent, then, is for the use of a swaging-tool, in the manner described in the claim, which accomplishes the result therein stated.

The defendant uses no swaging-tool, but resorts to the old and well-known mode of double-seaming. This is the essential element on which this bill is founded.

The second element is for a design patent. But, before passing on that, I will remark that, looking at the affidavits filed by the plaintiff and defendant with regard to the alleged infringement of the combination patent, if the matter rested solely on the affidavits, the weight of testimony would be entirely against the plaintiff. But there are

²[This opinion was stenographically reported, and afterwards revised by the judge.]

certain matters, as the supreme court of the United States has decided, consonant with right reason, which the court can always consider independent of affidavits—such general principles as are supposed to be known to every one of ordinary intelligence. Now, every one of ordinary observation and intelligence has known for a long period of time what double-seaming is, and, though he may not have known the name, he may or may not have known what swaging is. The testimony before the court shows what swaging is, and in the light of these matters the court determines that it is an essential element to plaintiff's patent, that swaging should be used in connection with his hoop and tightening process.

The second matter involved in his bill is what is called a "design patent," concerning which there are one or more affidavits presented. This is the question to be considered first. What is a design patent? Complainant insists that he is assignee of the design patent, whereby through flaring—a conical section—these sieves may be nested. Without going into the discussion whether this is, within the meaning of the patent law, a design patent, which is extremely doubtful, it must suffice to say that, in the light of the affidavits and common experience, the alleged design is nothing new. And even if it fell within the meaning of the patent law, as a patentable design, there is no novelty in it. Putting one thing in another, and making it a little flaring instead of rectangular, is an old matter.

Third. Plaintiff claims that this defendant has infringed his trade-mark. He says that his product is called a "metallic sieve," and puts it on the market as "Mann's metallic sieve." This is his trade-mark. Defendant's sieve bears the name of this corporation—"The St. Louis Wire Goods Company." Defendant sends its product on the market under its specific brand. So far as any pretence exists here that the trade-mark exists in the words "metallic sieve," disconnected from the words "Mann's metallic sieve," there can be no foundation for an injunction. The metallic sieve is nothing new. It is well-known. But if this defendant had designated his sieve "Mann's metallic sieve," he would have infringed his trade-mark. He stamps on the metallic sieve his own name, thus indicating that it is his own manufacture, and consequently he does not fall within any rule known to trade-marks. [See note to *Alleghany Fertilizer Co. v. Woodside*, Case No. 20.] This matter has been thrust upon me in the midst of other business, and I have not had time to write an opinion; but it is immaterial in this stage of the inquiry. I treat the patent as valid, and I treat as an essential element of that patent the swaging process whereby plaintiff's result is produced. As defendant's result is obtained by other than the swaging process, there is no infringement.

The defendant's product is produced by double-seaming, which is entirely distinct and separate from swaging, and known long before this patent was issued. As to the designed patent, it is doubtful whether it falls within the purview of the patent law. If it does it has no novelty. As to plaintiff's trade-mark, it is not used by defendant, and hence the motion for provisional injunction is refused.

ADAMS EXP. CO. (BANK OF KENTUCKY v.)

[See *Bank of Kentucky v. Adams Exp. Co.*, Case No. 889.]

Case No. 73.

ADAMS EXP. CO. v. DAVISON et al.

[3 Balt. Law Trans. (1870) No. 7.]

Circuit Court, D. Virginia.

EQUITY—PARTIES—PLEADING—INJUNCTION—RES JUDICATA.

[In equity. Bill by the Adams Express Company against Joseph Davison, the Washington, Alexandria & Georgetown Railroad Company, Oscar A. Stevens, and W. Jackson Phelps.]

CHASE, Circuit Justice, delivered opinion of court.

Upon a careful consideration of the pleadings, proofs and arguments in this case, we have reached the following conclusions:

(1) Adams Express Co. was not a party to the suit of Davison vs. The Washington, Alexandria & Georgetown R. R. Co. and others, in the circuit court of Alexandria Co., and, therefore, is not bound by any decree or order made in that cause.

(2) It is not necessary, in the case, to pass definitely upon the question, whether the lease made by the Washington, Alexandria and Georgetown R. R. Co. to Stevens & Phelps on the 5th day of May, 1866, was valid, or, for want of authority not valid, as a lease.

(3) The contracts of the Adams Express Co. with the Washington, Alexandria & Georgetown R. R. Co. and with Stevens & Phelps, representing that company, and in actual charge of the railroad with its consent, viz. the contracts of February 1st, 1866, and June 18th, 1866, were valid contracts, and under them the Adams Express Co. is equitably entitled to compensation for the rent or use of the rolling stock, including locomotive engines placed upon the road by it, and to the surrender of the property in good order, or to payment for its cost or present value with rent, or reasonable compensation for use, and also to reimbursement for moneys advanced for repairs made upon the engines of the railroad company used upon the road, and for repairs of the road; and, on the other hand, the

Adams Express Company is bound to pay to the city of Washington such amount as may be ascertained to be due from the railroad company, not exceeding \$60,000, and fulfill the other stipulations of the contract on its part.

(4) The contract of September 16, 1868, was between S. M. Shoemaker, on the one part, and Stevens and Phelps and Lathrop, receiver, on the other part, and there is sufficient proof that in making it Shoemaker was acting in behalf of the Adams Express Company.

(5) It is not shown by the contracts or other proof that the Washington, Alexandria & Georgetown R. R. Co. is bound to pay any expenses incurred by the Adams Express Co., or Stevens and Phelps for attorney or counsel fees in litigation, concerning the road or rolling stock or for services of Shoemaker as trustee.

(6) At the time the original injunction was allowed in this cause, Marbury was not in possession of the railroad as receiver appointed by circuit court of Alexandria county, and the Adams Express Co., not being a party to or bound by the proceeding in which Marbury was appointed, was not defeated of its right to seek relief by its suit in the court. It is therefore ordered the injunction heretofore allowed be continued, with leave to complainant to amend the bill making S. M. Shoemaker a party defendant, and that the cause be referred to Andrew Jameison, who is hereby appointed a master in chancery for this purpose, who is directed to examine the depositions and documents already taken or filed in the cause, and to take further depositions, if necessary, upon such reasonable notice to all parties to this suit as he may think necessary to give them due opportunity to attend and to report: (1) What engines or other rolling stock have been placed upon the road by the Adams Express Company at the instance of the Washington, Alexandria & Georgetown R. R. Co. or of Stevens & Phelps as its lessees or agents, the original cost, the present condition, and present value of that property, and the amount of rent accrued or of fair compensation for use. (2) The sums which have been paid and the sums which remain due to the Adams Express Company for the use or rental of engines, cars, or other rolling stock employed upon such road, and separately the sums paid or due to S. M. Shoemaker under his contract with Stevens and Phelps and Lathrop, receiver. (3) The sums paid by the Washington, Alexandria and Georgetown R. R. Co., if any, on account for purchase of such engines, cars, or other rolling stock from the express company. (4) The sums advanced by the Adams Express Company for the repair of the road or other use of the railroad company under their contracts not included under previous heads. (5) The sums paid by the Adams Express Company

in satisfaction of the claim of the city of Washington, or in payment of interest on the bonded debt of the company or for sinking fund. (6) In making the foregoing statements, the master will exclude all charges for counsel or attorneys' fees, and for services of Shoemaker as trustee, but he may, if either party desire, make a separate statement of such charges, and report such facts relating thereto as may appear to him useful to a correct understanding of the rights of the parties.

And said master is directed, further, to state a general account between the Express Co. and R. R. Co., showing at one view balances, if any, due to the former upon the several suppositions already stated, and to accompany such account with a sufficient statement of his reasons for his conclusions, and to file his report with the clerk of the court within ——— days. And for the coming in of said master's report, and for further order, this cause is continued.

ADAMS EXP. CO., (NORWALK BANK v.)
[See *Norwalk Bank v. Adams Exp. Co.*, Case No. 10,354.]

Case No. 74.

ADAMSON v. DEDRICK.

[2 O. G. 523.]

Circuit Court, E. D. Pennsylvania. Oct. 17, 1872.

PATENTS FOR INVENTIONS—VALIDITY.

Patent of Charles H. Dedrick, "Improvement in the Manufacture of Soles and Heels of Boots and Shoes from Hides," adjudged invalid.

In equity.

Before McKENNAN, Circuit Judge.

This was a suit in equity, brought by William Adamson against Charles H. Dedrick, under the provisions of section 58 of the patent act of 1870, for the purpose of setting aside certain letters patent [No. 127,964] granted to the defendant June 18, 1872, and alleged in the bill to be for the same invention as the patent granted to complainant January 31, 1865. The invention, as set forth in defendant's patent, had for its object the economizing of time, labor, and material in the manufacture of the soles and heels of boots and shoes, and it consisted in cutting from the raw hide pieces approximately of the form required and applying the tanning process to these pieces alone. There was thus saved the additional time, labor, and material that otherwise would have been required in tanning the "waste pieces;" the cuttings, being in the condition of raw-hide, and not of tanned leather, were valuable for glue and other purposes, and it was claimed that the soles and heels produced were of better quality. The complainant's patent was for precisely the same invention,

except that he did not limit himself in the application of this process to the manufacture of boots and shoes; his claim being for:

Cutting from raw or untanned hides or skins, or parts of the same, pieces of the size or about the size and form required for useful articles of tanned leather, and tanning the said pieces after they had been thus cut from the raw or untanned hides, as and for the purpose herein set forth.

The bill was filed on the 24th day of July, 1872, and the writ of subpoena issued thereupon was duly served upon the defendant; but the defendant failed to enter an appearance, and thereupon, viz., on the 17th day of October, 1872, the court, upon motion of C. Howson, Esq., counsel for complainant, granted a decree declaring said patent of De-drick wholly invalid, inoperative, and void.

ADDATTE, (UNITED STATES v.)

[See United States v. Addatte, Cases No. 14,422 and 14,423.]

Case No. 75.

ADDERLY v. AMERICAN MUT. INS. CO. OF BALTIMORE.

[Taney, 126.]¹

Circuit Court, D. Maryland. Nov., 1847.

MARINE INSURANCE—SEAWORTHINESS—NECESSITY TO REPAIR LEAK.

1. In order to entitle the plaintiff to recover for a loss on a policy of insurance on his vessel, she must, at the time the policy attached, have been seaworthy for such a voyage as she was engaged in at the time of the disaster, and have been lost by reason of one of the perils insured against in the policy.

2. She is presumed to have been seaworthy at that time, unless the contrary is proved by the testimony; and the burden of proof of unseaworthiness is on the defendant.

3. If there was a leak in the vessel, at the time of sailing on the voyage insured for, of such a nature, that a prudent and discreet master, of competent skill and judgment, would have deemed it necessary to examine and repair the leak, before proceeding on the voyage, and the disaster was occasioned by his omission to do so, and would not otherwise have happened, there can be no recovery for the loss.

[Cited in *The Titania*, 19 Fed. Rep. 106. and in *Union Ins. Co. v. Smith*, 8 Sup. Ct. Rep. 546, 124 U. S. 405.

4. But if the character of the leak were such, that a master of competent skill and judgment might reasonably have supposed that she was seaworthy for the voyage in which she was then engaged, notwithstanding the leak, and on that account, omitted to examine and repair, then such omission to examine and repair will be no bar to the recovery.

In admiralty. This action was instituted on the 31st October, 1846. The plaintiff was a British subject, residing at Nassau, the owner of the brig *Victoria*; and he brought this action against the American Mutual In-

¹[Reported by James Mason Campbell, Esq., and here reprinted by permission.]

urance Company of Baltimore, upon a policy of insurance effected on said vessel, which was lost on the voyage insured for. The defence taken was unseaworthiness at the time of the insurance; and negligence on the part of the master or owner, after the voyage had commenced. The facts of the case do not appear, except in the following prayers, on the part of the plaintiff and defendant, and the court's instructions to the jury.

Plaintiff's Prayers.

1. That the question of seaworthiness, or unseaworthiness, is a question for the jury; and that the presumption is that the brig was seaworthy, till the contrary is proved.

2. That the burden of proof of unseaworthiness is upon the defendant.

3. That in determining whether the vessel was seaworthy or not the jury are to regard the whole evidence; and that part of the evidence bearing on said question, consists of the reports made to the said defendant and other underwriters in Baltimore, by their agent, Captain Clackner, and the fact of the receipt of the premium on the policy, after the defendant had been made acquainted with the particulars of the disaster which had happened to the brig, as the same were set forth in the papers delivered to them by the plaintiff's agent.

4. That although a leak may have been sprung on the second day after leaving Long Island, and continued for the time stated in the evidence; yet, that if on the third day, being the day of the brig's touching at Nassau, and some time before reaching there, the leak stopped, and the vessel did not spring a leak for between three and four days after leaving Nassau, and the leak was then caused by stress of heavy weather and high seas, then that there was no negligence on the part of the master or owner, in not causing said vessel to be carried into Nassau for examination and repairs.

Defendant's Prayers.

1. The defendant prays the court to instruct the jury that, before the plaintiff can recover in this case for the loss of the brig mentioned in the policy sued on, the jury must find that, at the commencement of the risk, the brig was tight, staunch, strong and well found for a voyage from Long Island to New Orleans, by way of Nassau, with a cargo of salt; and that neither her construction nor the materials of which she was built, were such as to render her unfit to encounter the ordinary sea-perils of such a voyage.

2. The defendant further prays the court to instruct the jury that, if they find from the evidence, that upon the first day after leaving Long Island, with her cargo of salt, the said brig began to leak, so that it was necessary to pump her every half-hour, and that she continued to leak until her arrival

at Key West, where she was condemned as utterly unseaworthy, by the report of the surveyors, given in evidence, and that she commenced leaking in this manner in moderate weather, without any apparent cause, or extraordinary accident, to which the leaking could be ascribed, and that the leak continued for four or five days before the brig encountered any heavy weather or high seas at all, there is a strong presumption that the brig was unseaworthy when she sailed from Long Island; and in the absence of any proof, on the part of the plaintiff, of any sea-peril occurring to the brig, between the time the risk commenced and when she began to leak, sufficient to produce the leak, the plaintiff is not entitled to recover.

3. The defendant further asks the court to instruct the jury that, if they find the facts stated in the preceding prayer, and further find that the said brig, upon the second day after leaving Long Island, being in a condition to need repairs, and after she had been for a day leaking so badly that it was found necessary to pump her every half-hour, arrived off Nassau, her home port, where she could have been fully repaired, and where the master went ashore at 10 P. M. of one day, and returned at 10 A. M. on the following day, after having communicated with the owners and received his instructions to proceed upon the voyage to New Orleans—under all these circumstances there was negligence on the part of the master or owner, in not having the brig examined and repaired at Nassau, and the defendant is not liable for any subsequent loss or damages to said vessel, which was produced or increased by such negligence.

R. Johnson and J. M. Campbell, for plaintiff.

Brown & Brune, for defendant.

TANEY, Circuit Justice. 1. In order to entitle the plaintiff to recover, the vessel must have been seaworthy at the time the policy attached; that is to say, seaworthy for such a voyage as she was engaged in at the time of the disaster; and have been lost by reason of one of the perils insured against in the policy.

2. But she is presumed to have been seaworthy at that time, unless the jury find the contrary is proved by the testimony; and the burden of the proof of unseaworthiness is on the defendant.

3. If, when the vessel touched at Nassau, the leak, mentioned in the testimony, was such, that a prudent and discreet master, of competent skill and judgment, would have deemed it necessary to examine and repair the leak before proceeding on the voyage, and the jury find that the disaster was occasioned by his omission to do so, and would not otherwise have happened, then the plaintiff is not entitled to recover.

4. But if the jury find that, from the char-

acter of the leak, a master of competent skill and judgment might reasonably have supposed that she was seaworthy for the voyage in which she was then engaged, notwithstanding the leak, and on that account omitted to examine and repair, then such omission to examine or repair the vessel at Nassau, is no bar to the recovery of the plaintiff.

Verdict for the plaintiff.

Case No. 76.

In re ADDISON.

[3 Hughes, 430.]¹

District Court, E. D. Virginia. April Term, 1874.

DISTRICT COURT—JURISDICTION IN BANKRUPTCY—LIQUIDATION OF LIENS — DISCRETION OF COURT — POWER OF REGISTER.

1. The bankrupt court has exclusive jurisdiction to liquidate the liens upon a bankrupt's real estate; but whether it will exercise this jurisdiction in any case is a matter for its own discretion, and this discretion must be exercised by the court itself, and cannot be delegated to or assumed by the register.

2. It is irregular to undertake to sell real estate free from incumbrances until all liens and their priorities are fully ascertained.

In bankruptcy. The case as shown by the record is as follows: John Addison, Jr., the present bankrupt, by the partition of his father's real estate, became the owner of a tract of land situated in Northampton county, Virginia. Under the decree of partition liens were retained for owelty of partition in favor of the estate of Edward V. Addison for \$895, Bettie E. Fisher for \$198.33 $\frac{1}{2}$, and William R. Fisher for \$420, upon the tract called Grapeland, which was assigned and set apart to him. In January, 1866, the said Addison conveyed to Mrs. E. A. Turner, by mortgage deed, this tract of land, subject to the aforesaid liens for owelty of partition, to secure a loan of \$4530.86, with interest thereon at the rate of six per centum per annum. In 1872 Mrs. Turner brought her suit on the chancery side of the circuit court of Northampton county for a foreclosure of her mortgage and a sale of the mortgaged premises. In 1873, before a sale could be had under decree of the state court, Addison took the benefit of the bankrupt act, and thereupon all proceedings in the suit instituted in the state court were suspended. Edward D. Pitts, one of the petitioners, was appointed assignee of said bankrupt, and upon his petition an order of sale of the said tract of land was made by the district court of the United States at Norfolk. In August, 1873, the land was sold by the said assignee and purchased by Mrs. Turner at the price of \$5300. The sale was reported by the assignee to the register and approved by him, and he proceeded to ascertain the liens and their priorities upon the fund, in the hands of the assignee,

¹[Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

arising from the sale. Upon the coming in of the register's report, ascertaining the liens and their priorities upon the said fund, Mrs. Turner excepted to the same upon the following grounds: 1st. Because out of the fund arising from the mortgaged subject, E. P. Pitts, a creditor, was allowed the sum of \$125.90, with interest, and the said sum given priority over her debt secured by mortgage. 2d. Because John Addison, Jr., the bankrupt, was allowed \$525.39 with interest, out of the said fund, and the said sum given priority over her debt secured as aforesaid; and 3d. Because T. C. Walston, assignee in bankruptcy of John Addison, Sr., was allowed the sum of \$184.77, with interest, out of the sale of the land on which she held a mortgage. The court sustained each and all of these exceptions, and directed the assignee to pay: 1st. The liens for owelty of partition; and, 2d. The balance of the money in his hands from the sale of the said tract of land over to Mrs. E. A. Turner. E. D. Pitts, the assignee in bankruptcy, and Walston, assignee in bankruptcy of John Addison, Sr., did not ask the action of the court below to be reviewed. But E. P. Pitts, the creditor, petitioned for a review. The claim of this petitioner was a judgment obtained in the circuit court of Northampton county in November, 1872, by John Addison, Jr. (now bankrupt), against W. R. Fisher, and assigned by Addison before his bankruptcy to E. P. Pitts. At the time of the assignment of this judgment by Addison to Pitts, Addison was largely more indebted to Fisher than the amount of the judgment recovered against Fisher and assigned to Pitts. Upon this judgment thus assigned, Pitts caused an execution of fieri facias to issue against the goods and chattels of Fisher. Fisher enjoined in the state court the collection of this judgment for \$125.90, and upon a hearing of the case the injunction was perpetuated and the judgment of \$125.90 was, by the decree of the said circuit court, directed to be applied as a payment pro tanto upon the amount due Fisher by Addison, as an equitable set-off. See *Wayland v. Tucker*, 4 Grat. 267. That court held that Pitts was substituted to the rights of Addison by the assignment of the judgment, and took the judgment subject to be set off against Fisher's unsatisfied lien for owelty of partition, and to be extinguished by that lien. It was so ordered by a decree of a court of competent jurisdiction, and the subject was res adjudicata. But the register in bankruptcy overruled this adjudication of the circuit court, and allowed this judgment, which had been thus satisfied, priority over Mrs. Turner's debt, and directed the assignee to pay it a second time out of the money in the custody of the court. Upon exception, the district court reversed the register.

Upon this ruling of the district court, E. P. Pitts, the creditor, appealed to the supervisory jurisdiction of the circuit court, which affirmed the decree of the district court.

The following was the decision of the district court, rendered by HUGGLES, District Judge:

This bankrupt's farm, in Northampton county, worth some \$6000, was incumbered by undisputed owelty and mortgage liens to the amount of about \$9000. The register, B. B. Foster, ordered the land to be sold free of incumbrances, before any previous ascertainment of liens and their priorities. The sale was made by the assignee, E. D. Pitts, and duly reported. The register confirmed the sale. The register then drew up a report of the liens upon the land, and of their priorities. Exceptions were taken to this report by the mortgagee and principal lienor, Mrs. Elizabeth A. Turner. On these exceptions the case comes for the first time before this court since the order of reference. These proceedings seem to require an announcement of the principles which will govern the court in dealing with real estate incumbered by liens equal to, or exceeding its value, where the probability is small of the bankrupt's estate having any interest in a surplus, or equity of redemption.

Since Judge Story's decision in the Case of *Christy*, reported in 3 How. [44 U. S.] 292, the very language of which is embodied in the jurisdictional clauses of the general bankrupt act of 1867, no doubt has been entertained of the power of a bankruptcy court of the United States to control the entire estate of the bankrupt, both contingent and actual, whether it be not or be the subject of litigation in other courts, and in whatever stage of litigation. Whether, therefore, a bankrupt court will exercise its jurisdiction over such part of the bankrupt's estate as may be the subject of litigation in other courts, or be covered by liens equal to or exceeding its value is not a question of power and right, but only of discretion.

For obvious reasons the bankrupt court must reserve to itself, in every case, the decision of the question whether or not it will exercise this discretion. And, therefore, no assignee of a bankrupt can have power to sell real estate, which is subject to liens, free of incumbrances, without a special order of court. The register has no power to confer such authority. It can come only from the court itself. The exercise of this authority involves considerations of great delicacy, inasmuch as it often produces a conflict of jurisdiction with other courts. The idea is not to be tolerated that any but the court itself may assume to exercise a discretion so important and so responsible. This discretion, reposed by law in the bankrupt court, cannot be delegated by it, either by general rule or special order, to either the assignee or the register; much less can the discretion be assumed by either of those officers. Rule 38, of the series of rules adopted by this court on the 21st day of September, 1869, cannot logically, and must not in fact be construed to delegate such a discretion; nor does the

order (form No. 4) or reference to the register intrust to that officer the exercise of such a discretion.

In the exercise, itself, of this often delicate discretion, this court will not interfere with trustees or local courts in their proceedings to subject real estate to unquestioned liens, where there is little probability of a surplus or of an equity of redemption resulting to the bankrupt's estate; but the court will content itself with requiring the assignee to become party to suits or to trustee's sales. Where there is nothing to be sold that is likely to be available to the assignee, any action of this court for the liquidation and settlement of such liens and for the sale of property subject to them, would cause a useless expense both to the lienors and the bankrupt's estate, producing nothing. Interference of this unavailing character, besides being futile of any good to the bankrupt's estate, would unnecessarily take away from the persons really interested in the land the right of having their liens adjudicated by the courts of the counties where they reside and where the property subject to the lien lies—a right which is not lightly to be disregarded.

I am, therefore, free to say, that if this matter of the Grapeland farm, or John Addison, Jr., bankrupt, had come before me in its inception, I should not have interfered with the proceedings of the circuit court of Northampton county, looking to a foreclosure of the mortgage of Mrs. E. A. Turner, and to a settlement and discharge of the owelty and mortgage liens resting upon that farm, it being confessedly worth less than \$6000, and those liens amounting to \$9000. There was plainly no possibility of a resulting surplus or equity of redemption to the bankrupt's estate; no possibility of any tangible interest having passed, under the operation of the 14th section of the bankrupt law, to the assignee. But finding the case here, as I do, under these circumstances, and those who would have a right to complain of its having been brought here being willing now to acquiesce in the action of this court, I will give to the matters before me such adjudication as seems proper.

I am to pass upon the exceptions which have been taken by the mortgage creditor, Mrs. E. A. Turner, to the report and orders of the register of the 11th and 14th of October, 1873.

1st. Her first exception is to the register's allowance of the claim of \$125.90 to E. P. Pitts in the form of a judgment in favor of John Addison, Jr. (now bankrupt), v. W. R. Fisher, one of the owelty lienors, which was assigned to Pitts before the bankruptcy. It is conceded that as against Fisher this judgment is extinguished, it having been subject to the right of set-off which Fisher had against Addison for an owelty lien of \$420 on the Grapeland farm; a court of competent jurisdiction having decreed that it should be applied as a credit upon that owel-

ty debt due Fisher. This decree of the local court was rendered on the principle that the equity of Fisher was superior to that of Pitts. But it is claimed that Pitts was substituted somehow to the rights of Fisher, and stands in Fisher's shoes as a lienor, to the extent of his judgment, against Addison's land, which he had mortgaged to this exceptant. It is not shown how this substitution has taken place. Pitts has no other rights than Addison himself could have had if the judgment had not been assigned. By the transfer he was simply substituted to the rights of Addison. He took the judgment subject to its liability to be set off against Fisher's owelty claim, and to be annulled and extinguished as a part of that lien. It was thus annulled by decree of the local court. As a lien it is *res adjudicata*. Pitts's recourse is against Addison, or his estate, of which he is only a general creditor. His equity is for compensation out of that estate. Mrs. Turner's equity as to her debt is for payment out of the estate generally, and out of the mortgage subject especially, after the unpaid owelty liens have been paid. Pitts is only a general creditor. Mrs. Turner is a general and a lien creditor, and her equity is superior to that of Pitts. The exception to this allowance out of the mortgage fund must therefore be sustained, and the allowance disapproved.

2d. This mortgagee's second exception must be sustained upon a somewhat similar ground. The bankrupt, John Addison, Jr., was a devisee of Joseph W. Addison before the partition which gave Grapeland to John in his own right and as Joseph's devisee, subject to owelty liens, and also, as to Joseph's interest, subject to the general debts of this devisor. Shortly after the partition, and after coming into possession of Grapeland, he mortgaged the farm for a debt to Mrs. Turner, conveying all his right, title, and interest, individually and as devisee, to her with general warranty. By transactions which need not be recited, John Addison, Jr., himself, afterwards and before his bankruptcy, became the holder of a debt against Joseph's estate, for which the register now allows him \$525.39. This debt was also allowed on some undefined doctrine of substitution. By taking in this debt of Joseph Addison and becoming himself its owner, John's mortgage deed became operative against it in his own hands. Mrs. Turner's equity against it as his property, under his own mortgage deed, is certainly superior to any equity he may have against her; and the register's allowance of this \$525.39 to Addison, as an exemption, cannot be approved.

3d. The mortgagee's third exception is to the register's allowance of \$184.77 to Thomas C. Walston, assignee in bankruptcy of John Addison, Senior's, estate, as a general creditor of Joseph Addison, deceased, devisor of John Addison, Jr. As a claim in prejudice of Mrs. Turner's mortgage lien, the allow-

ance cannot stand. John Addison, Jr., took Joseph's interest in Grapeland as devisee as early as the fall of 1865; and he mortgaged his whole interest to Mrs. Turner in 1866 by recorded deed. As late as November 4th, 1873, the clerk of the county and circuit courts of Northampton county certified that there had been no qualification on the estate of Joseph Addison, deceased, and no fiduciary accounts; that no classified account of debts was ever returned to the clerk's office of either of the courts, and that no suits were brought or were pending in said courts for the settlement of the estate. The bona fides of the mortgage deed is not questioned, and section 5, c. 127, p. 934, of the Code of Virginia, provided that the bona fide conveyance by a devisee of real estate shall be good against creditors of the estate in cases where, at the time of such conveyance, no suit shall have been commenced for the administration of assets, nor any reports have been filed of the debts and demands of those entitled. The representative of Addison, Senior, therefore, claiming upon a debt of the deceased deviser, chargeable against his devisee, cannot make good his claim against the mortgagee of Grapeland, an innocent purchaser, without notice, and he ranks only as a general creditor of this bankrupt. The allowance to Walston is disapproved.

Case No. 77.

ADDISON v. DUCKETT.

[1 Cranch, C. C. 349.]¹

Circuit Court, District of Columbia. Oct., 1806.

EQUITY—PLEADING—ANSWER—VERIFICATION.

An answer in chancery is not sufficiently authenticated unless the authority of the justice of the peace, before whom it was sworn, be sufficiently shown.

[In equity.] Injunction. Motion to dissolve. It was objected that the answer does not appear to be sworn, &c., there being no certificate but that of the justice himself, that he was a justice of the peace for Prince George's county, in Maryland, at the time he administered the oath. This court has never gone so far as to admit an answer sworn and certified in this manner. In England, the answer is taken by commission.

THE COURT refused to consider the answer as sufficiently certified, and refused to dissolve the injunction. The court cited the cases of Wright v. West, [Case No. 18,102,] and Lloyd v. Lund, [Id. 8,433,] at Alexandria, March, 1806; Watson v. Tapscot, [Id. 17,290,] Alexandria, March, 1805; Potts v. Ghequere, [Id. 11,346,] Alexandria, March, 1805; Wilson v. Stewart, [Id. 17,837,] Alexandria, June, 1803; Mandeville v. Ringgold, [Id. 9,015,] Al-

¹[Reported by Hon. William Cranch, Chief Judge.]

exandria; and Tibbs v. Parrott, [Cases 14,022, 14,023,] Washington, June, 1806.

(DUCKETT, J., absent.)

ADDISON, (SMITH v.)

[See Smith v. Addison, Case No. 12,998.]

ADELAIDE, The, (CHADWICK v.)

[See Chadwick v. The Adelaide, Case No. 2,571.]

ADELAIDE, The, (GREEN v.)

[See Green v. The Adelaide, Case No. 5,752.]

Case No. 78.

The ADELE.

[1 Ben. 309.]¹

District Court, S. D. New York. Aug., 1867.

PRACTICE—PRIORITIES—STATE LIENS.

1. Where several libels were filed against a ship by material men, and the vessel was sold, and application was made to the court to decree payment out of the proceeds, the last libel filed being to enforce a lien given by the law of the state of New York: *Held*, that the court had no jurisdiction to enforce the state lien.

2. The other decrees should be paid in the order in which the libels were filed, each decree being paid with its costs until the fund was exhausted.

[Cited in *The Arcturus*, 18 Fed. Rep. 744, and in *The Lady Boone*, 21 Fed. Rep. 733.]

In admiralty. Several libels were filed by material men claiming liens against the ship *Adele*. The vessel was sold without opposition, and the proceeds paid into court, and the several libellants, having had the reports of the commissioner as to their several amounts confirmed by the court, applied to the court to decree payment out of the funds. The libel last filed was by Charles Wall and others for supplies, but they claimed a priority in payment over all the others. [Libel dismissed.]

SHIPMAN, District Judge. Decrees in favor of the material men, on their several libels, according to the amounts found due on confirmation of the commissioner's reports in the several cases, are to be entered and satisfied, out of the funds in the registry of the court arising out of the sale of the ship, in the order in which the libels were filed. The amount of each decree, together with the costs, in the above named order, is first to be paid, until the fund is exhausted. The claim of priority set up by the libellants, Charles Wall and others, is disallowed. The libel in this latter case seeks to enforce the lien given by the local

¹[Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

law of the state of New York, and not to enforce the lien given by the general maritime law. Since the alteration of the twelfth rule of the supreme court of the United States, these local liens cannot be enforced by proceedings in rem in this court, although the language of the rule, as modified, refers only to domestic ships. The object of that court in the alteration was to relieve the courts of the United States from the "necessity of examining and expounding the varying lien laws of the state, and of carrying them into execution." The *St. Lawrence*, 1 Black, [66 U. S.] 530. This libel avers no lien, except that under the state law, but expressly avers that the libellants filed specifications and items of the articles furnished in the county clerk's office in the county of New York, under the state law, and that the claim thereby became a lien. As I understand the law, the process in rem cannot be used in this court for the enforcement of such a local lien, and, therefore, this court is without jurisdiction. Let a decree be entered, dismissing this case of Charles Wall and others, without costs.

Case No. 79.

The ADELIA.

[1 Hask. 505.]¹

District Court, D. Maine. Feb., 1874.

TOWAGE—NEGLIGENCE—BURDEN OF PROOF.

1. A contract for towage requires from the tug that degree of care and skill which prudent navigators usually employ.

2. When towage is voluntarily attempted in dangerous and perilous places, the tug must exercise skill and care commensurate with the perils it assumes to encounter.

3. The burden rests upon the libellant, who seeks damages from negligent towage service, to prove that the injury resulted from the fault of the tug.

In admiralty. Libel in rem for damages sustained from negligent and improper towage service. Defense that the injury resulted from inevitable accident. The cause was heard on libel, claim, answer and proof. [Decree for libellants.]

A. A. Strout and John C. Dodge, for libellants.

Wm. L. Putnam, for claimants.

FOX, District Judge. This steam tug is proceeded against by the owners of the schooner Harry L. Whitten of Quincy, to recover the damages sustained by said schooner being forced upon the rocks on the eastern shore of the Kennebec river above Gardner, when the tug was attempting to wind her preparatory to towing her to sea. The injury took place in the forenoon of May 26, 1873. The H. L. Whitten is a new three masted vessel

of 481 tons, and had taken on board a full cargo of ice at the Knickerbocker loading pier at Farmingdale. On the morning in question, she was winded by her master and crew with warps and the force of the current while at this pier, and without the aid of a tug, and then dropped down river 400 to 500 yards and came to anchor.

The Adelia is a powerful tug of greater steam capacity than any other then employed on the river, surpassed at that time by one only on the Penobscot, all other tow boats in this state being much inferior to her; the claimants, the Knickerbocker Towage Co., control the towage business on this river, and they had at that time contracted for a more powerful tug, and it has since been completed, and is now employed in the business upon the river and at sea. The loading wharf of the ice company is on the western shore, is built upon a shoal in three blocks or piers of logs, is about 250 feet wide on the river, and extends from the bank into the river about 300 feet at the upper corner and nearly to the channel, where there was at this time about fourteen feet at low water, the freshet which had increased the depth about four feet at its height, having fallen about one half on May 26. The current of the river as it passed by the upper corner of the loading pier run at the rate of four to five knots, and set strongly towards the eastern shore, forming an eddy in front of the piers, which was of a triangular form about 100 feet in width at its base, which was a short distance below the lowest pier. From these piers there was a depth of about fourteen feet, for a width of 300 feet. On the eastern shore, 500 to 600 feet below the lower pier, a shoal extends about half way across the river with large rocks upon it. The center of the current passed near the outer point of this shoal, and then turned towards the west shore. In this condition of things the master of the Adelia, with the tide about two hours flood, made fast with the usual lines to the starboard side of the schooner, and after her anchor was free, took the entire control of both vessels, being at his wheel, with the master of the schooner at her helm. Steam was put on, the vessels were taken slowly up river, just below the pier they swung off somewhat into the eddy, the object being to place the stern of the schooner in the eddy, there to be retained by the tug, whilst the bows by the force of the current would be swung round, so that the vessel could be properly guided by the tow ahead. In the present case it unfortunately happened that the stern of the vessel was not held and retained in the eddy, but she was taken out bodily into the current, and was set by the force of the current at the same time down river, and over towards the eastern shore, forcibly striking upon the rocks on the shoal, and with such violence as to do great damage to her keel and garboard, causing her to fill with water and sink on the western

¹[Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

shore, where she was towed by the tug. She was subsequently taken into the Portland dry dock, and there repaired at considerable expense, for the recovery of which this libel is instituted.

"It must be conceded that an engagement to tow does not impose either an obligation to insure or the liability of common carriers. The burden is always upon him, who alleges the breach of such a contract, to show either that there has been no attempt at performance, or that there has been negligence or unskillfulness to his injury in the performance. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill, which prudent navigators usually employ in similar services; but there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it." *The Webb*, 14 Wall. [81 U. S.] 414.

In *The Syracuse*, 12 Wall. [79 U. S.] 171, the court says: "It (the law) does require on the part of those persons engaged in her management (a towboat,) the exercise of reasonable care, caution, and maritime skill, and if these are neglected and disaster occurs, the towing boat must be visited with the consequences."

In *Transportation Co. v. Downer*, 11 Wall. [78 U. S.] 134, the language is: "A presumption of negligence from the simple occurrence of an accident seldom arises, except when the accident proceeds from an act of such a character that when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible."

Guided by these authorities, does the evidence in the present case establish negligence or want of care on the part of the master of the tug, it being admitted that the master and those on board the schooner in no way contributed to the disaster? It is said that the place chosen for winding this vessel was dangerous and unsafe, and that it might have been safely accomplished at the anchorage. The testimony shows that on some occasions vessels had been winded near where this vessel was at anchor, but that the most usual practice had been to take them up into the eddy, and avail themselves of the two counteracting forces, that of the eddy to hold and the current to wind the vessel, and that this had in every instance been successful; but none of these vessels were so large as the *Whitten*; that the place selected was much more dangerous than that near the anchorage the court cannot doubt, as the current was much stronger, and the shoal and rocks necessarily endangered the safety of the vessel, if she became beyond the control of the tug; but

the advantages from the eddy and current combined greatly contributed to the ease and speed with which the winding could be accomplished, whilst at the other place there was no eddy to profit by, and the winding could only be done by the tug moving to and fro in a narrow space, though somewhat wider than at the piers. It is said that there would be danger from a collision with the bridge at Gardner, if for any cause the tug did not wind the schooner at the first attempt; but this objection does not appear to the court of any great weight, considering the distance more than a half mile, which the bridge was below the anchorage. The court has little doubt that the anchorage was the safest place for this object, and that the main reason why it was not there attempted was, that ordinarily the winding was much sooner accomplished in the other position, and without the trouble attending the backward and forward movements of the tug, which were requisite in still water to wind the vessel successfully.

Under the circumstances the court does not discover that want of proper care on the part of the master of the tug in attempting to wind the schooner at the place he did, which should subject the tug to liability for this disaster. The master of the tug well knew all the dangers which attended this locality, which were neither few nor small. He knew the current there was more violent than at the anchorage, that the width of river for his movements did not exceed 300 feet, with the current setting strongly to the easterly shore as well as downward, that the shoal with the rocks thereon projected nearly half the width of the river and into the current, and that if the tow should become unmanageable and escape the control of the tug, she must be taken down broadside by the current and thrown upon the shoal and rocks, inevitably subjecting her to damage; that in order to prevent this, it was absolutely requisite that the tow should be held back, and not presented broadside to the current, and to accomplish it, that the stern and larger portion of the hull of the vessel must not be allowed to pass out of the eddy, but must without fail be held therein, as when the tow was beyond the eddy the tug was powerless to govern her, either by preventing her shooting on towards the eastern shore, or swinging her bow down river so that she could pass down with the current. Knowing as the master must all these dangers, and if he did not know them then he was not qualified for his position, and having without consultation with the master of the schooner chosen to make the attempt to wind her in that locality, in the opinion of the court, a much higher degree of care, skill, and attention was demanded of him, than if he had undertaken the same movement under circumstances free from danger. If the place selected had been deep, broad, open, still wa-

ter, free from rocks and shoals, it is clear that the master would not have been expected to exercise the same carefulness and attention and good judgment as to the speed and management of his tug, and in holding the tow always under instant control, as he would when there was great and immediate danger, with strong forces to contend with, which if not properly met involved the destruction of the property under his charge. In the one case, the consequences attending his neglect would not ordinarily result in loss or damage to any great extent; the tow by reason of too great speed might run nearer the shore, or from want of proper control might run ashore upon soft bottom, but no injury would probably be sustained thereby; whilst in the other position, with rocks and shoals and rapids to encounter, if the tow was not entirely in control of the tug, by running a space of not more than fifty feet from the intended course, she might subject the tow to immediate peril and disaster.

The tug is only chargeable with reasonably proper skill and care; but in the opinion of the court, these are relative terms, and must be understood to be such as are reasonable and proper, and demanded by the peculiar circumstances and emergencies of the case. The master admits that everything depended on availing himself of the eddy; that his motive in attempting to wind the vessel at this place was wholly the combined forces resulting from the eddy by retaining the stern, whilst the current swung round the bow, and that if he lost the eddy and run out of it, his tug was powerless to save the vessel. He admits that he failed to accomplish his intended purpose; and in the opinion of the court the circumstances attending the disaster are such as to require of him a reasonable and satisfactory explanation of the cause and occasion, and why the result in the present case was so very different from what had been previously the case.

The master of the tug testifies: "After they started ahead I gave the speed bell as was my practice; I steamed ahead for the Knickerbocker wharf, and when within 300 feet of the lower pier slowed down and let her range up toward the pier; the vessels' headway nearly stopped, and finding I was not going to reach out just as I wanted, I touched her up with the slow bell that she might range further up; ranged out by the lower pier and everything looked well in my judgment for a good swing; could not ask for anything better than it looked at that time. The tide took the vessel, and as soon as her bow ranged into the main current, gave the engineer the bell to back her and back her strong. The tide took her and we ranged off from that pier sidewise to the current until we went down onto the shoal and rocks, when she swung round and I shoved her onto the other shore.

I went up as high as I did because I wanted the stern of the schooner to come right up to the lower pier, with her quarter just as near as I could have it, in order to get the advantage of the eddy. I wanted the eddy to take the stern while the current took the bow, which enables her to turn on her keel." He states: "When within 300 feet of the pier the engine was stopped entirely; when I touched her up she was about up to the pier; I think it was between her bow and fore-rigging. She was not going fast enough to suit me, gave her only eight to twelve revolutions and then stopped her." To the inquiry, what in your opinion occasioned the accident? the master answers: "The current was very strong, the vessel large, and I got deceived; we fell off and I lost my eddy." The master further states: "After I brought the vessel nearly to a standstill, I gave her a few turns ahead, and when I stopped the engine I waited for her to reach the main tide; her bow then was not within fifty or seventy-five feet of it; she was working up and out; in my opinion two more backward revolutions of the propeller would have saved her going onto the rock. Just as soon as I saw her bow strike the main tide I went back strong; when I first apprehended trouble she was in the current; the schooner did not stop dead at any time, she was ranging ahead a very little, not over a quarter of a knot; they had some little steerage way on the tow."

The account given by the engineer of the orders received by him from the master, respecting the handling of his engine, substantially agree with the master's statements, and they are in most respects corroborated by the testimony of Cox, who was a passenger on the tug. He states: "The schooner's bow swung out by the pier and commenced swinging into the river all the time. She went ahead very slowly, not running one half a knot per hour, went 5,070 feet from the lower corner of the pier, was perhaps two-thirds her length from the pier when she began to feel the current sensibly. When she struck the current, she was almost at a standstill, as far as moving ahead was concerned, but she moved down river quite rapidly at the time she struck the main current; heard bell to stop engine before we got up to pier, and she slackened her speed; next signal was one bell to go ahead. This was before her bow struck the current; next signal was three or four seconds after, to back and commenced backing violently." Cox further states: "The captain of the tug remarked, as the bow shot out past the pier 'it won't do to back her here, I shall have her stern in onto the rocks,' and then he immediately rung his bell to go ahead and she started ahead under the impulse of the movement. When he made this remark he was in the eddy, not entirely out by the pier. When he started her ahead, she went from two to three knots, about

two. She seemed to accelerate her speed a little when she struck the current."

The testimony in behalf of the libellants represents the movements of the tug as essentially different in many respects. The master of the schooner says: "They shoved her off at an angle with the stream; they stopped steam on the boat until about seventy-five feet from the lower pier, the schooner then going ahead about two knots, forcing her ahead angling with the river; as she struck the current that set down, her bow took that and swung her off, and as she struck the tide, she started ahead faster than she was going, and gained speed; as she struck the current she fell off, directly across the river, drifted down with it abreast to the current, and when she got over on the other side of the channel, the captain rung for the boat to go astern. We were then fifty to seventy-five feet from the rocks; after she got down further, he rung for more speed to back her stronger, but she drifted down and in a very few seconds touched the rocks; did not go within seventy-five feet of lower pier; after she got square across the river, she did not turn any at all, but drifted bodily with the current; should judge she was within seventy-five feet of the rocks before any signal to back was given. If they had stopped the vessel still before she struck the current, they would have had a better command of her. When she struck the current she was going about two knots per hour, but as soon as she struck it, she gained headway; when her bow struck the current, her stern was in the tide current and all clear of the eddy." This latter statement he reiterates in cross-examination, saying: "I speak of what I saw; I think the first order of bell to stop was given near the pier, just before we struck the current; as near as I recollect, the next order was to back her, only about a minute after; heard no order to go ahead."

The mate says he should think they were about 100 feet from the place where they struck when they commenced to back.

Mr. Marshall who was on the shore near the place where the schooner anchored, and who was looking at the vessel says: "The schooner passed into the current, and when the tide struck her, she went right across the river, did not seem to turn any, went down river and struck on the rocks. Previous to this season don't remember of seeing a vessel taken up there and shot out the way this one was; they always winded them at the wharf, or between the pier and the anchorage in the eddy. In attempting to wind the schooner they went up past the eddy."

The libellants have also produced three witnesses who had for many years been well acquainted with the river at this locality, and with the usual course of handling vessels in the current and eddy. These men were all on the deck of the Stine, a schooner then loading at the wharf, and their attention was

called by her movements to the course taken by the tug in the present instance. One of them, Millbridge, says: "The schooner's jibboom came up to the end of the Stine, and when it was lapping over our stern, she was about seventy-five feet outside the Stine; she struck the current and appeared to be sagging fast towards the eastern shore, this attracted my attention through fear of trouble. When they struck the current the stern of the tug could be seen by me and there was no ripple to show that she was backing or turning. When she struck out into the current the motion was very rapid, quickened very much."

Derry says: "I could see the stern of the tug when she was half the distance across, and did not see the propeller working or any ripple in the water; the schooner came up rapidly and shot out into the current. The jibboom came up by the quarter of the Stine and her bow was then touching the eddy; when she was at the highest point, should judge half her length was in the current or nearly so, and her flying jibboom might have been up as high as the Stine's main rigging."

Peacock says: "I could see no indications that the tug was backing; she was about two eighths across the river."

The court has more than once read over all the evidence for the purpose of satisfying itself as to the cause of the disaster, and without referring in detail to the evidence of the various witnesses, the conclusion at which it has arrived is, that the master of the tug when he began to move forward with the schooner in tow did not intend to go above the lower pier to accomplish the winding of her. It is shown by Marshall's testimony, that it had been the practice previously to make the attempt below this pier, the eddy being there of the greatest width, and the current not being as strong as it was toward the upper end of the pier. When the tug had reached the place where the master originally intended to wind her, he found he would fail to accomplish his purpose, as is quite evident from Cox's statement that the master said "it won't do to back here, I shall have her stern in on to the rocks." and he immediately rung to go ahead. The tow then was under way, and without doubt would have reached the current, if the master had not put on more steam; he did however, for a longer or shorter time, run with greater speed, and instead of striking the current squarely, he ranged up altogether beyond what had been customary, as is manifest from the testimony of the three men from the Stine, whose attention was attracted to the course of these vessels from apprehension of peril. The bow of the schooner was not placed in the current until she had run up so far that the eddy had become very narrow, probably not one half of its greatest width at its base, and as the master of the schooner says, her stern was in the current at the same time

with her bow, by which the court understands that she went up near the eastern edge of the eddy, so that the greater portion of the hull would be, by the contraction of the eddy, exposed almost at the same instant to the force of the current, as the vessel ranged ahead. There is considerable discrepancy in the testimony as to the precise time when the tug began to back; those on the tug asserted that it was when she struck the eddy, whilst the master of the schooner and others on that side say it was not till within about seventy-five feet of the rocks; be this as it may, the result shows that the attempt was not made until it was futile, without effect, and should have been made sooner to have been successful.

In the opinion of the court, when the master of the tug found he could not safely wind the schooner below the pier, and that he must go further up, instead of putting on steam and running with more speed across and up the eddy, he should have remembered that by so doing, he was losing a large portion of the advantages from the eddy which were so necessary to accomplish his purpose, and he should, without fail, have retained the larger portion of the schooner's hull wholly within the eddy to aid him, instead of allowing her to pass without it and become exposed broadside to the current, in which position the master knew he could not control her movements, and that she would be subjected to imminent peril and disaster. In these respects the court finds there was a want of care and caution on the part of the tug, proportionate to the dangers to which the master by his conduct was subjecting the *Whitten*, and that for these reasons, the libellants are entitled to hold the tug accountable for damages sustained. Decree for libellants.

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Case No. 80.
The ADELPHI.
 1862.

MARITIME LIENS—SERVICE—SEAMEN—AGENCY.

[Cited in *Flaherty v. Doane*, Case No. 4,849, and *The L. L. Lamb*, 31 Fed. Rep. 34, to the point that seamen do not lose their lien on the vessel although hired by a charterer, since admiralty liens depend more on services rendered the ship than on any question of agency.]

[Note. Nowhere reported; opinion not now accessible.]

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 A. DENIKE, The. (LANE v.)
 [See *Lane v. The A. Denike*, Case No. 8,045.]

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 ADGER, (The JAMES.)
 [See *James Adger, The*, Case No. 7,183.]

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 ADIE, (LILLIBRIDGE v.)
 [See *Lillibridge v. Adie*, Case No. 8,350.]

Case No. 81.

ADJUSTABLE WINDOW-SCREEN CO. v.
 BOUGHTON.

[1 Ban. & A. 327; 10 Phila. 251; 31 Leg.
 Int. 254.]

Circuit Court, E. D. Pennsylvania. June 12,
 1874.

PATENTS FOR INVENTIONS—REISSUE—CLAIM.

The reissued patent, granted to complainant, as assignee of Abner B. Magown, for an adjustable window-screen, held to be invalid, by reason of the claim being too broad, and comprehending the invention patented to Lewis S. Thompson, February 24, 1863, [No. 52,726.]

In equity.

[Bill by the Adjustable Window-Screen Company against John W. Boughton for the infringement of the reissue of patent No. 52,726. Bill dismissed.]

George E. Buckley, for complainant.
 Leonard Myers, for defendant.

McKENNAN, Circuit Judge. The complainant's bill is founded upon letters patent, reissued to it, as assignee of Abner B. Magown, for an adjustable window screen. "The nature of the said invention consists of an adjustable window screen, composed of two or more frames, each frame being covered with wire or other gauze, and sliding within guides, attached to either or both of the frames, being so constructed that each screen, when completed, can be immediately adjusted to windows of various widths, without altering the screen, viz., without adding to, or deducting anything from, it." The novel merit of this screen consists in its adjustability to windows of various widths, after the gauze is attached to it. This is the only essential difference between it and the mosquito frame, patented by Lewis S. Thompson, on the 24th February, 1863, three years before the date of Magown's patent. Thompson's frame must first be fitted to the opening intended to be covered, and a netting, of suitable width, then attached to it. In Magown's, however, this separate adjustment of the frame and the netting is avoided, by its being composed of two frames covered with gauze, held together by a metallic guide, and, by sliding them in or out laterally, it may be fitted to the width of any opening. But the adaptability of both screens, to the purpose for which they are to be used, is due to the adjustability of thin frames. The frames must be, and are, capable of extension and contraction to fit them to openings of varying widths. This capability, therefore, is a fundamental condition of both inventions.

Now, Thompson was the first inventor of an adjustable frame for a window screen, and, I think, the frame forming the basis

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of Magown's invention, cannot be distinguished from it, in the principle of its construction, or the modes of its operation. Obviously, similar mechanical appliances—metallic clips or guides—are used, in both, to secure the same results, and they are alike adapted to the openings to which they are to be applied, by extending or contracting them in the guides. It is true, that Magown's screen is composed of two separate frames, but this is only a formal difference. Their conjunction is indispensable to the completeness of the screen, and, when united in the guides, they are adjusted in the same mode in which Thompson's frame is. Nor does this form of construction, secure a different, or more effective mode of adjustment of the frame. Its evident and only object, is, to effect the adjustability of the netting, so that, by its attachment to separate frames, sliding past each other, in the same guide, it is adaptable to any opening to which the combined frame is fitted. In this respect, it is an improvement upon Thompson's invention; but the use of the latter, is indispensable to its efficiency, and is the essential basis of it. By properly limiting his application, Magown might have been entitled to a patent for this improvement, but he could not appropriate what he did not invent. Under cover of securing his own invention, he cannot expand his claim to embrace the invention of another. The consequence of such an attempt, is to imperil his title to the product of his own mechanical skill. The reissued patent claims a window screen, the only apparent difference between which, and Thompson's, aside from the improvement referred to, is in its being composed of two separate frames. This, as before stated, is a formal and not a substantial difference. It is broad enough to comprehend Thompson's prior invention, and, upon such a footing, it cannot be sustained. The bill must, therefore, be dismissed with costs.

Case No. 82.

In re ADLER.

[2 Woods, 571.]¹

Circuit Court, M. D. Alabama. Nov. Term, 1874.

BANKRUPTCY—REMOVAL OF ASSIGNEE—JURISDICTION OF CIRCUIT COURT.

The removal of an assignee in bankruptcy by the district court, for a "cause which in its judgment renders such removal necessary or expedient," is not such a case or question as can be reviewed by the circuit court.

[Cited in *Re Beck*, 31 Fed. Rep. 555.]

In bankruptcy. Petition of review under sec. 2, bankrupt act.² [Dismissed.]

¹Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

²[Section 2 (14 Stat. 518) provides that the circuit courts "shall have a general superintend-

ence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case in a court of equity."] *Lehman Durr & Co.* and other creditors of the bankrupt estate of *Isaac Adler & Brothers*, on the 17th of August, 1874, filed their petition in the district court, praying for the removal of *P. H. Pitts* and *C. C. Carr*, assignees of the bankrupt estate. The grounds upon which the removal was asked were that the assignees were squandering, mismanaging and illegally disposing of the assets of the bankrupts. The assignees answered, denying generally and specifically the averments of the petition, and the matter was referred to *Joseph W. Burke, Esq.*, register, to take testimony and report his opinion upon the law and facts. On the 2d of September, 1874, *Mr. Burke* made his report, in which he found that the specific charges alleging particular acts of maladministration, collusion and fraud, were not sustained by the weight of evidence. He reported, however, that the assignees had disposed of and sold at private sale for \$10,850, a large stock of goods valued at \$22,000, without an order of court, and that no account was kept of the articles sold, the purchasers of the same, or of the amount for which such articles were sold. He also reported that the real property belonging to the bankrupt estate was subject to two mortgages, the amount due on which was about equal to the value of the property, and that the assignees, without any authority from the court, surrendered this real estate to the junior mortgagee, on condition that she would pay off the senior mortgage, and release all claim to the remainder that might be due on her mortgage after exhausting the security. These findings of the register seemed to be abundantly supported by the evidence. In fact, they were not disputed. It appeared from the evidence, very clearly, that in selling the stock of goods at private sale without an order of court, the assignees acted under the advice of their counsel; but the evidence does not clearly show that they were advised by their counsel not to keep an account of the articles sold, the persons to whom they were sold, and the amount received for each article. Nor did it appear that the transfer of the real estate to the second mortgagee was made by advice of counsel. Upon the coming in of the report of *Mr. Burke*, the court, upon consideration of the evidence, the report of the register and arguments of counsel, ordered that the assignees be removed. To review and reverse this action of the district court was the purpose of the petition of review.

H. A. Herbert, for petitioners.

S. F. Rice and *J. Q. Smith*, for defendants.

WOODS, Circuit Judge. It is insisted by counsel for defendants that this court has no jurisdiction of the question presented, and this point necessarily first demands attention. Section 14 of the bankrupt act (Rev. St. § 5039) provides "that the court, after due notice and hearing, may remove an assignee for any cause which, in the judgment of the court, renders such removal necessary or expedient." It further provides that "at a meeting called by order of the court in its discretion for the purpose, or which shall be called upon the application of a majority of the creditors in number and value, the creditors may, with the consent of the court, remove any assignee by such a vote as is herein provided for the choice of assignees."

This section places the removal of an assignee entirely within the discretion of the district court, either acting alone or in connection with a meeting of the creditors. Can it be reasonably claimed that the action of the court in removing an assignee, or in consenting to a removal by a vote of the creditors is such a case or question as may be reviewed by virtue of the provisions of the second section of the act?

The court may remove "for any cause which, in its judgment, renders such removal necessary or expedient." It is the judgment of the district court touching the necessity or expediency of the removal that decides the question of removal, not the judgment of the circuit court. The only question is this: Was the removal necessary or expedient in the judgment of the district court? This is settled conclusively by the record and is not open to dispute or review. If this court could review the decision of the district court removing an assignee, it could also review the discretion of the district court in calling a meeting of creditors to pass upon the question of removal, and could review the consent of the district court to a removal made by a meeting of the creditors. The discretion lodged with the district court to remove an assignee is just as broad as the discretion to appoint an assignee under certain circumstances.

The 13th section of the bankrupt act (Rev. St. § 5034) declares: "If no choice is made by the creditors at said meeting, the judge, or if there be no opposing interest, the register, shall appoint one or more assignees." So that if the creditors fail to elect, and there is an opposing interest, the judge is authorized to appoint assignees. This power to appoint under the 13th section is no more clearly confided to the discretion of the judge than the power to remove under the 18th section. Can it be claimed for a moment that the appointment of assignees by the judge, made by virtue of the 13th section, could be reviewed by the circuit court. Suppose a creditor, or all the creditors, should think that the assignee

appointed by the judge was an improper one, would the circuit court review the appointment? Clearly not, because the power and responsibility of the appointment is lodged under the circumstances where the district court has power to appoint at all, with the district court and not with the circuit court or with the creditors. If the circuit court cannot review an appointment of an assignee made by the district court, neither can it review the removal of an assignee made by the same court. For both the power of appointment in the contingency mentioned and the power of removal is lodged in the discretion of that court.

These views are sustained by the decision of Mr. Justice Miller in the case of Woods v. Buckewell, [Case No. 17,991.]

I am of opinion, therefore, that the question presented by the petition of review is not a question which this court has the power to review; that in the appointment and removal of assignees, the discretion is lodged with the district court, and that discretion cannot be questioned by the circuit court or the judges thereof. It follows that the petition of review must be dismissed.

ADLER, Ex parte.

[See In re Irons, Case No. 7,066.]

Case No. 83.

ADLER v. NEWCOMB.

[16 Int. Rev. Rec. 142, 174; 2 Dill. 45.]¹

Circuit Court, E. D. Missouri. Sept. Term, 1872.

FEDERAL COURTS—JURISDICTION—SUIT ON MARSHAL'S BOND—PLEADING.

1. The federal courts have jurisdiction in suits by individuals upon a marshal's bond, even where all the parties to the suit are citizens of the same state,—the reason being that the act of congress of April 10, 1806, which gives the right to a party injured by breach of the bond to sue thereon in his own name, puts such party in the place of the United States, and does not take from the federal courts the jurisdiction they had before the act was passed, when suit had to be brought in the name of the United States.

[Cited in Pierson v. Philips, 36 Fed. Rep. 837.]

2. In suits upon a marshal's bond, the petition should ask for judgment for the damages sustained, and not for the whole penalty of the bond.

[Cited in Hagood v. Blythe, 37 Fed. Rep. 251.]

[See U. S. v. Davidson, Case No. 14,921.]

At law. Plaintiff sued Carman A. Newcomb, United States marshal for the eastern district of Missouri, and the sureties upon his official bond. The alleged breach of the bond was, that plaintiff being the

¹The syllabus of this case is reprinted from 2 Dill. 45, by permission, and is also reported in 16 Int. Rev. Rec. 174. The statement and opinion are reprinted from 16 Int. Rev. Rec. 142.]

legal owner and possessor of two cases of merchandise of the value of \$1,000, the defendant Newcomb, acting as United States marshal, and under color of that office, seized and took possession of said cases wrongfully and without leave. Plaintiff prayed judgment for the amount of the bond (\$20,000,) and also prayed the court to assess the damages by him sustained.

Defendant demurred to the petition, upon the ground chiefly that the court had no jurisdiction, the plaintiff and the defendants being all citizens and residents of Missouri, and the controversy being thus between citizens of the same state, a federal court could have no jurisdiction. The act of congress of April 10th, 1806, (2 Stat. 372,) gives the right to any person injured by the breach of the condition of a marshal's bond, to institute a suit thereon, in the name and for the sole use of such person; but gives no direction as to the forum in which such suit shall be brought. Defendants therefore contended that there being no express jurisdiction conferred by that act on federal courts, neither was there any implied jurisdiction thereby conferred on them; that the plain design of the act was to remedy the difficulty that had previously been experienced by the parties in having to bring suit in the name of the United States; and that in no act of congress was any jurisdiction conferred on the federal courts such as would cover a case like the present where the suit was between citizens of the same state.

Plaintiff contended that as the law stood before the act of 1806, suits brought on marshal's bonds could only be brought by the United States or in the name of the United States to the use of the party injured, and such suits were then properly brought in the federal courts, and that the act of 1806 simply conferred on the party injured a right to sue in his own name, but did not take away the jurisdiction vested in the federal courts before the act was passed. Plaintiff further contended that the case was one arising under the laws of the United States, and therefore within the scope of section 2 of article 3 of the constitution of the United States, which provides that the judicial power of the United States shall extend to all cases in law and equity arising under the laws of the United States, and cited the decision of Judge Drummond in *United States v. Davidson*, [Case No. 14,921,] in which it is laid down that the United States courts have jurisdiction in all cases of marshal's bonds, irrespective of the citizenship of the parties.

Nathan Frank, for plaintiff.
Dryden & Dryden, for defendant.

TREAT, District Judge, held that, while the act of 1806 allowed a party injured by breach of the condition of marshal's bond to be substituted in the place of the United States and to bring suit in his own name,

it was not intended thereby to take from the federal courts the jurisdiction they previously had over such cases. The act did not change the jurisdiction, but simply conferred upon an injured party the right to sue in his own name instead of in the name of the United States to his use, and in legal intendment the federal courts had now the same jurisdiction over such cases as they had before the act was passed; and therefore in the present case the court had jurisdiction, notwithstanding the fact that the suit was between citizens of the same state.

On the argument upon the demurrers a point was raised as to the mode of pleading, and on this point the court held that the position [petition] was defective, in this: that it asked judgment for the whole penalty of the bond instead of asking only for the damages sustained, since by section 3 of the act of 1806 (2 Stat. 372) it is provided that after any judgment rendered on the bond of a marshal, such bond shall remain as a security for future breaches until the whole of the penalty shall have been recovered. Upon this ground the demurrer was sustained, and leave given to plaintiff to amend.

ADLER, (UNITED STATES v.)

[See *United States v. Adler*, Case No. 14,424.]

Case No. 84.

The ADMIRAL.

[18 Law Rep. (1856,) 91.]

District Court, D. Massachusetts.

COLLISION — ENFORCEMENT OF LIEN — LACHES — CHANGE OF OWNERSHIP — NOTICE TO CORPORATION.

1. A lien in admiralty continues until a reasonable opportunity is given to enforce it.

2. What is a reasonable time depends on the circumstances of each case.

3. When a collision occurred October 7th, 1852, and a libel in rem was filed after more than twenty months, during which time the libelants might have enforced their lien, if any, and after a change of ownership, the court refused to enforce the lien. Quere, whether it should be enforced if the res had not changed owners: and if the delay had operated to the prejudice of the owners.

[Cited in *The D. M. French*, Case No. 3,938; *The Artisan*, Id. 567; *The Bristol*, 11 Fed. Rep. 163.]

4. The knowledge of stockholders in a corporation, the former owners of the corporate property, will not affect the corporation with notice of a lien when there are other stockholders who took stock in ignorance of the claim.

[Cited in *Davis Improved Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co.*, 20 Fed. Rep. 700.]

5. A notice to a stockholder or to a party who afterwards becomes an officer of the corporation is not notice to the corporation.

6. The fact that a party receiving the notice afterwards becomes an officer in the company will not make it obligatory on him to give that notice, before received, to the company.

[In admiralty. Libel in rem by the Merchants' Steam Navigation Company against the Admiral (the Eastern Steamboat Company, claimants) for damages sustained in a collision. Libel dismissed, with costs.]

C. P. Curtis, Jr., for libelants.
Henry C. Hutchins, for respondent.

SPRAGUE, District Judge, gave his opinion in this case, from which the facts sufficiently appear, in substance as follows:—

This is a libel filed by the Merchants' Steam Navigation Company—owners of the Steamer Eastern State—for damages sustained by that vessel, in a collision with the steamer Admiral. The collision occurred October 7th, 1852, and this libel was filed July 1st, 1854, a period of more than twenty months, during all of which time the Admiral was plying twice a week between this port and St. John, and there were agents of the Eastern State here. The libelants, therefore, have had a period of twenty months to assert their lien and have not done so. It may be that if third persons had not become interested in the Admiral this libel might be maintained, although I am not prepared to say that I should hold that the lien still remained upon the vessel if there had been no change of ownership. If the boat still remained the property of her former owners it would perhaps be a matter of no concern to them whether they were sued in personam or whether the boat was seized. If the delay operated to prejudice them in any way, I am not certain that the lien ought not to be held to have been lost. This case differs from the ordinary cases of liens. This is a lien for a tort. Generally liens are sought to be enforced for debts.

At common law liens are lost with the possession of the property. This is not so in admiralty. From the necessities of commerce these liens are upheld without reference to the possession—vessels are frequently away from their owners, and their masters without credit, and unless this extraordinary security was given great loss and inconvenience would often be sustained. These liens are secret. There is no place where inquiry may be made and their existence and extent be ascertained. The whole tendency of legislation has been that the world should know the incumbrances on property. Such was the object of the act of congress passed in 1850, requiring the registration of bills of sale and mortgages of vessels. Such is the policy of the law in reference to the title to real estate. The rule adopted in courts of admiralty, is to allow the continuance of the lien until a reasonable opportunity is given to enforce it. If a party neglects to avail himself of it, third persons are not to be prejudiced by his delay. What is a reasonable time is left by the law to be determined by the circumstances of each case. In case of a lien for repairs or materials furnished,

a proposed purchaser may, perhaps, by inquiry, ascertain the extent of the lien, but in case of a lien for collision, this is impossible. It may be doubtful whether there is any claim, and if there be any, the amount cannot be ascertained. If a party were allowed to lie by, for such a length of time, and afterwards assert his lien, it would deprive the owner of the opportunity of selling his vessel, or at least cast a shade upon the title, and thus injure the value. Another difficulty growing out of this delay, is the loss of evidence. It is well known that in cases of collision, there is a great deal of contradictory testimony, that of sailors and others, who are often difficult to be found at the end of so long a period. One party might secure this testimony, and the other could not. One might wait till the witnesses of the other were dispersed, and then file his libel. It is said that the transfer in this case is colorable. There is no evidence of it. The case must be decided upon the testimony before me. There is a bill of sale—an acknowledgment of the receipt of the consideration, and a delivery of the vessel, and the bill of sale was duly recorded. This makes a good title to the claimants. It is said all the former owners of the Admiral were stockholders in the claimants' company, and thus the corporation is affected with knowledge of this lien. It does not appear that they owned in the company in the same proportion as before, and if it did it would make no difference, because there were other stockholders in the company who took stock in ignorance of the claim, and they ought to be protected. The former owners became merely stockholders in the new company, and their knowledge does not affect the corporation with knowledge. The difficulty is, that as this is a process in rem, and the boat the property of the corporation, there is no process to reach the interests of the former owners without affecting the interests of others who purchased innocently.

The boat is now owned by a corporation and not by individuals. The persons owning do not own as before any part or right in the boat, but they own stock in the company. It is said by the libelants that they gave notice of the claim to the agent of the Admiral here. This notice, (though denied) if given, was given within three days after the collision. But the notice was only of a claim, and not whether the claim would be made in personam or in rem. But what is of more importance, it was given to the agent of the former owners, and not to the agent of the claimants. And the notice which is stated by a Mr. —, of Bangor, is not satisfactory. How does he know the notice was given? He does not say he gave it, but that Mr. Clark, the attorney, gave it. He does not say how he knew this notice was given, and I do not consider this proper proof of notice. But if it were given, it was after the purchase of the boat, and then what

could the claimants do? They did all they could in sending the vessel within the jurisdiction, and thus gave the libelants an opportunity to assert their lien, and the libelants have not proceeded to assert their claim for all this time. I doubt if Nichols was the proper party to be notified. He was not the general agent of the corporation. If any notice could avail, it, at least, should have been given to some person who was authorized to receive and act upon it, or whose duty it was to communicate it to the corporation. A notice to a stockholder or to a party who afterwards becomes an officer of the corporation is not notice to the corporation, because the notice was not given to a party whose duty it was to notify the corporation. The fact, that a party receiving the notice afterwards becomes an officer in the company, will not make it obligatory upon him to give that notice before received to the company. It is said that another suit was pending between the former owners of the Admiral and the libelants, and that this was notice of the claim, but that libel and suit was between other parties. It is farther said that it was proper for the libelants to await the issue of that suit before filing this libel, and so avoid litigation. There was a matter of personal convenience to the libelants and for their own protection, and to save themselves expense, but a delay for such purpose must not be allowed to work an injury to others. For these reasons this libel must be dismissed with costs.

Case No. 85.

The ADMIRAL.

[3 Wall. Jr. 361;¹ 5 Phila. 116; 19 Leg. Int. 300.]

Circuit Court, E. D. Pennsylvania. April Sess., 1862.

PRIZE—BLOCKADE—FALSE CLEARANCE.

1. Where a vessel sailed from Liverpool, England, for the port of Savannah, then blockaded by the United States, as a rebel port, with orders to seek the blockading squadron (if the blockade was found to exist), and procure an indorsement on her register that she had been warned off, and then to proceed to St. John's, New Brunswick, but with a clearance on board expressing St. John's as the sole port of destination, it was held (the vessel having been captured off Savannah,) that she was confiscable for a violation of the blockade of that port.

[See note at end of case.]

2. Semble, that the president's proclamation of the 19th of April, 1861, announcing that he had set on foot a blockade of the ports within the state of Georgia and other states, does not entitle a vessel, which has full knowledge of the establishment of the blockade before she enters upon her voyage, to a warning by one of the blockading vessels, or an endorsement of a warning upon her register, when taken in the act of entering one of the blockading ports.

In admiralty. This was a libel in prize, filed by the United States against the ship "Admiral," her tackle, apparel and furniture, and the goods, wares and merchandise laden thereon; and came here on appeal of her claimants, British subjects, from the district court condemning her.

The facts appearing from the evidence in preparatorio, and the ship's papers, were as follows: 1. That the said vessel was of English ownership, and the property of the claimants. 2. That she cleared from Liverpool in September, 1861, with a cargo of salt and coal; the whole being of British growth, and loaded and owned by British subjects. 3. That the clearance at Liverpool expresses St. John's, New Brunswick, as the sole destination of the vessel. 4. That the real destination of the vessel at the time of her clearance, was to Savannah, Georgia. This fact appeared from a letter of instructions from the owners of the ship to the master, dated Liverpool, 12th September, 1861, in which they say as follows: "We hope you will have good start of channel, and thus make a good passage out. The enclosed charter with Messrs. W. & R. Wright, will show you the nature of the voyage. These gentlemen, like many others, hold the opinion that this unfortunate contest cannot last long, it being so obviously the interest of both parties to bring it to a close. 'Tis being so, and they being very wishful to have cargo of pitch pine from Savannah to St. John's, so soon as the port is opened again, for their new ship, 'St. John's River,' is our great reason for their making it a condition in taking the ship, that she should go off Savannah, so that if possible they might have the very first shipment of timber. Of course, in calling off, you will endeavor to meet the blockading ship (if the blockade is found to exist still,) and then get the officer in command to endorse on your register that the ship has been warned off. This will be all that is necessary for us as owners of the ship, to justify your departure for St. John's, and there consigning the ship to Messrs. W. & R. Wright, to whom, in the meantime, we will write respecting you. You will distinctly understand, therefore, that you run no risk whatever with the ship, but rather endeavor to satisfy yourself as to blockade, and then find out the man-of-war, report yourself and get the register endorsed. You will no doubt speak some vessels when approaching the American coast, so as to ascertain exactly the state of matters, and be guided thereby in such way as not to infringe the blockade regulation. Hoping in good time to hear from you."

It also appeared from the answer of the master to one of the interrogatories in preparatorio. He says: "The captured vessel sailed on her present voyage from Liverpool, England. She cleared for St. John's, with orders to go to Savannah, seek the blockad-

¹[Reported by John William Wallace, Esq., and here reprinted by permission.]

ing squadron, if any there was, uncertain whether the blockade still existed, and if so, then proceed to St. John's."

7. The following is an extract from the claim filed by the master: "When I was about thirty miles off Tybee Island, under the British flag, and standing towards the land off the port of Savannah, and without any knowledge whether a blockade existed, or whether it had been raised, and while I was looking for a blockading vessel, or some other vessel, of which I might inquire whether a blockade existed, I was hailed and boarded by an officer from the United States Steamer 'Alabama.'"

8. The log showed that at the time of the capture the vessel was preparing to enter the port of Savannah.

Ashton, for the United States.

GRIER, Circuit Justice. I agree with Chief Justice Tindal, in *Medeiros v. Hill*, 5 Bing. 231, "that the mere act of sailing to a port which is blockaded at the time the voyage is commenced, is not an offence against the law of nations, where there is no premeditated intention of breaking the blockade." Consequently, if, in the present case, the Admiral had taken out a clearance for Savannah, with the expectation that the blockade might be removed before her arrival, with instructions to make inquiry as to its continuance, at New York or Halifax, or other neutral port; and after having made such inquiry, had made no further endeavor to approach or enter the blockaded port, her seizure and condemnation as prize, could not have been justified. But she presents a very different case. She was off Tybee Island, sailing for the blockaded port. She had made no inquiry on the way; had no reason to believe the blockade to be raised; and when arrested in her attempt to enter, she exhibits a clearance for St. John's, New Brunswick, a port she may be said to have passed, and a letter of instructions from the owners, to call off the harbor of Savannah, to "endeavor to meet the blockading ship, and get the officer in command to endorse the register," etc., but to make no attempt to run the blockade. The clearance is the proper document to exhibit and disclose the intention of a ship. The clearance in this case may not properly come within the category of "simulated papers." But it does not disclose the whole truth. The suppression of a most important part, makes the whole false. It may be true, that in times of general peace, a clearance exhibiting the ultimate destination of a vessel, without disclosing an alternative one, may have sometimes been used by merchants to subserve some private purpose. But in times of war, when such omissions may be used to blindfold belligerents, as to the true nature of a ship's intended voyage, and to elude a blockade, the concealment of the truth must be

considered as prima facie evidence of a fraudulent intention.

The Admiral, with a full knowledge that her destined port is blockaded, takes a clearance for St. John's, and is found a thousand miles from the proper course to such port, and in the act of entering the blockaded port. And when thus arrested, for the first time inquires whether the blockade has been raised. A vessel which has full knowledge of the existence of a blockade, before she enters on her voyage, has no right to claim a warning or endorsement, when taken in the act of attempting to enter. It would be an absurd construction of the president's proclamation, to require a notice to be given to those who already had knowledge. A notification is for those only who have sailed without a knowledge of the blockade, and get their first information of it, from the blockading vessels. Now the primary destination of this vessel is to a blockading port. If the owners had reason to expect that possibly the blockade might be raised before the arrival of their vessel, and thus a profit be made, by their ability to take the first advantage of it, their clearance, in the exercise of good faith, should have made admission of the true primary destination of the vessel. If the truth had appeared on the face of this document, and if the master had been instructed to inquire at some intermediate port, and to proceed no farther, in case he found the blockade still to exist, the owners might justly claim, that their conduct showed "no premeditated intention of breaking the blockade." But when arrested in the attempt to enter a port known to be blockaded, with a false clearance, it is too late to produce the bill of lading or letter of instructions to prove innocency of intention. In such cases intentions can be judged only by acts. The true construction of this proceeding may be thus translated: "Enter the blockaded port if you can, without danger; if you are arrested by a blockading vessel, inform the captor that you were not instructed to run the blockade, but had merely called for information, and would be pleased to have your register endorsed, with leave to proceed elsewhere." If so transparent a contrivance could be received as evidence of a want of any "premeditated intention to break the blockade," the important right of blockade would be but a brutum fulmen, in the hands of a belligerent. "It would" (says Lord Stowell), "amount in practice to a universal license to attempt to enter, and being prevented, to claim the liberty of going elsewhere." In the cases where the stringency of the general rule established by this judge (but overruled in *Medeiros v. Hill*) had been by him relaxed as to American vessels in certain circumstances, the clearances were taken contingently, but directly for the blockaded port, in the expectation of a relaxation of the blockade,

with instruction to inquire as to the fact at a British or neutral port. The clearance exhibits the whole truth, and the place of inquiry their good faith. In these most material facts this case differs from them. Decree affirmed.

[NOTE. On appeal to the supreme court, this decree was affirmed. It there appeared that, if the blockade be not raised, the vessel was to proceed to St. Johns, N. B., and deliver her cargo. The stipulated freight was 30 shillings per ton if the cargo should be landed at Savannah, and 15 shillings per ton if landed at St. Johns. The court, by Mr. Justice Clifford, held that the proofs warranted the conclusion that the vessel sailed for a blockaded port with the intention of violating the blockade regulations, and that previous warning is not necessary in such a case, nor is it necessary that any warning should have been previously indorsed on her register. Mere sailing for a blockaded port is not an offense; but where the vessel has a knowledge of the blockade, and sails for the blockaded port with the intention of violating the regulations, she is clearly liable to capture. *The Admiral*, 3 Wall. (70 U. S.) 603.]

Case No. 86.

The ADOLPH.

[1 Curt. 87.]¹

Circuit Court, D. Rhode Island. Nov. Term, 1851.

SALVAGE—PAYMENT OF PROCEEDS INTO REGISTRY
—AUTHORITY OF FOREIGN CONSUL.

A foreign consul has authority to petition the court to order the marshal to pay into the registry proceeds of a sale of property libelled for salvage, in which the citizens or subjects of his country are interested, they being absent, and having no other legal representative in the United States.

[Cited in *The Conserva*, 38 Fed. Rep. 434.]

In admiralty. A suit for the salvage of the said vessel and cargo having come into this court by appeal, salvage was decreed to the libellants, at the November term, 1839, and the residue of the proceeds of the saved property, after payment of the salvage, was, by the decree, directed to be retained in the registry of the court, to be paid to the owners of the property saved, or their lawful representatives. When the proceeds of the sale were brought into court by the then marshal, who is no longer in office, one promissory note, given by a purchaser, remained unpaid. The marshal caused a suit to be brought thereon, and collected the contents upon an execution; but, instead of bringing the money into the registry of the court, accounted, as he alleges, with the salvors out of court, and retained the balance to reimburse himself for sundry payments, and for his own services. In July last, F. Gouraud, representing himself to be vice-consul of France for this district, and also attorney in fact of the representative of the owners of the said vessel, filed a petition in this court, praying that the late

¹[Reported by Hon. B. R. Curtis, Presiding Judge.]

marshal might be ordered to bring the amount so collected by him into the registry of the court. The authority of M. Gouraud to prefer this petition was denied. He produced his exequatur, which bears date on the 29th day of October, 1851. He also exhibited a power of attorney, executed before two notaries at Nantz, by a person who states, in the power, that he was appointed by the tribunal of commerce of the city of Nantz, settling agent of the old commercial house formerly established at Nantz, under the style of James Francis's Brothers, who were the owners of the Adolph; this power purports to authorize M. Gouraud to collect any money arising from the sale of the said vessel.

J. S. Pitman, for petitioner.

Mr. Jenckes, for respondent.

Before CURTIS, Circuit Justice, and PITMAN, District Judge.

CURTIS, Circuit Justice. The duty of the marshal to pay this money into the registry of the court, as soon as he had received it, is clear. He had no power to adjust the account with the salvors, or pay them, or retain anything for his own services; these are all matters to be passed on by the court; and under its direction, and only by its authority, can any payments be made or allowances had. It may be added, that it is the duty of the court to see that its officer does pay into the registry money which he has collected for that purpose; and although the court cannot have the necessary information to act upon its own motion, it certainly ought not to be very rigid in its requisitions of authority, when a suggestion that its officer is in fault in this respect is made. We deem it sufficient for this particular purpose, that M. Gouraud is the vice consul of France; and that French citizens are interested in these proceeds.² It is true, he had not received his exequatur when he filed this petition; and if this were a suit instituted by him, and depending on his official character when brought, it must fail. But we do not consider the proceeding at all analogous to a suit, or even to a petition for the execution of a decree. It is rather in the nature of a suggestion, made in writing to the court, that one of its officers has not discharged his official duty; and, although the person making such suggestion may not have had any official or personal connection with the subject when first made, if he has now, when the matter is actually presented to the court, sufficient authority to make it, the court feel bound to listen, and allow it to have effect. Upon this suggestion and representation, we find, by the answer of

²The *Invincible*, 1 Wheat. [14 U. S.] 239; *The Anne*, 3 Wheat. [16 U. S.] 439; *The Divina Pastora*, 4 Wheat. [17 U. S.] 52; *The Bello Corrunes*, 6 Wheat. [19 U. S.] 156; *Bank of Washington v. Peltz*, [Case No. 952;] *Rowe v. The Brig*, [Id. 12,093.]

the late marshal, that he did receive this money on account of the proceeds of the sale of a part of the salvage property; and, although we have no doubt he thought himself justified in retaining it, and did not intend to depart from his duty, he must be now required to pay it into the registry of the court.

Order.

That Burrington Anthony, lately marshal of the United States for the district of Rhode Island, forthwith pay into the registry of this court, in the cause wherein Caleb Williams and others were libellants against the ship Adolph and cargo, the moneys received by him on account of two certain promissory notes, given by one Edward Dexter, the purchaser of part of the property libelled in the said cause; and all claims of the said Anthony, for any just allowances on account of the said moneys, or otherwise in the said cause, be referred to Francis E. Hoppin, Esq., to report thereon to the court. And all parties in interest, or their legal representatives, may appear before the said assessor, and be heard in the premises. And all further questions are reserved until the coming in of the said report.

Entered by order of the court.

ADOLPHE, The, (WILLIAMS v.)

[See Williams v. The Adolphe, Case No. 17,712.]

Case No. 87.

The A. D. PATCHIN.

[1 Blatchf. 414.]¹

Circuit Court, N. D. New York. Oct., 1849.

SALVAGE—UNDER CONTRACT—NONJOINER OF ALL OF THE SALVORS.

1. Where a vessel was stranded, and salvage services were rendered by another vessel in relieving her, in pursuance of a written contract between the owner of the latter and the agent of the master of the former, which stipulated the per diem compensation for the services: *Held*, that the district court had jurisdiction of a libel in rem for the salvage services, notwithstanding the written agreement.

[Cited in *The Circassian*, Case No. 2,723; *The Silver Spray's Boilers*, Id. 12,857; *The Williams*, Id. 17,710; *Pope v. The Sapphire*, Id. 11,276. Followed in *The Louisa Jane*, Id. 8,532.]

[See note at end of case.]

2. The contract was not necessarily binding upon the vessel in peril, or upon her owner, and it would be the duty of the court to disregard it, and to award compensation according to the principles of admiralty in salvage cases, if any advantage was taken by the libellant in the agreement.

[Cited in *The Independence*, Case No. 7,014; *Bowley v. Goddard*, Id. 1,736; *The J. G. Paint*, Id. 7,318; *Harley v. Railroad Iron*, Id. 6,068; *The Williams*, Id. 17,710; *Chap-*

man v. The Greenpoint, 38 Fed. Rep. 672; *The G. W. Jones*, 48 Fed. Rep. 926.]

[See note at end of case.]

3. The rate fixed by the contract is looked at in determining the amount proper to be awarded for the salvage services, and would be disregarded if disproportionate or unreasonable, or if extorted through the pressure of impending calamity.

[Cited in *Bowley v. Goddard*, Case No. 1,736; *The J. G. Paint*, Id. 7,318; *Chapman v. The Greenpoint*, 38 Fed Rep. 672; *The G. W. Jones*, 48 Fed. Rep. 926; *Brooks v. The Adirondack*, 2 Fed. Rep. 393.]

[See note at end of case.]

4. The admiralty jurisdiction, in salvage cases, is as essential to the protection of the vessel subject to salvage, as it is to the indemnity of the salvor, and can scarcely be ousted by any agreement for rendering the services.

[See *Williams v. The Jenny Lind*, Case No. 17,723.]

5. Although all the suitors for salvage ought to join in the suit against the property saved, yet the non-joinder of the crew of the salvor vessel, in a suit by the master and owner, is no objection to the maintenance of the suit, in a case where the crew were exposed to no extraordinary hardships or personal danger.

In admiralty. A libel in rem was filed, in the district court, by Charles L. Gager, owner and master of the steamboat Albany, against the steamboat A. D. Patchin, to recover for salvage services rendered to that vessel by the Albany, under the following circumstances. The Patchin was aground upon a ledge of rocks at Racine Point, Wisconsin, and a contract in writing was entered into between the libellant in person and one Higby, who professed to act as agent for one Harry Whittaker, the master and sole owner of the Patchin. The contract was as follows: "This article of agreement made this 13th day of June, 1848, between the steamer Albany, and the steamer Patchin, Capt. H. Whittaker, in which Capt. Gager of the steamer Albany agrees to do all he can do to assist said Patchin, now on the rocks at Racine Point, Wisconsin, and to stay with her until discharged by said Capt. Whittaker, and said Albany is to be paid four hundred and fifty dollars per day, and time to commence four o'clock to-day. Said Albany to have the privilege to make harbor in case of storm. Milwaukee, June 13, 1848. H. Whittaker, per L. J. Higby, Agent." The agreement was made at Milwaukee, a few miles from where the Patchin lay, and was assented to by the claimant, on its being soon afterwards made known to him. He resided in Buffalo, N. Y. It did not appear that the libellant had any knowledge, at the time the contract was made, that Whittaker had any interest in the Patchin as owner. The Patchin was in no danger of immediate destruction when the contract was made; the weather was fair and calm; a large number of persons were already engaged in endeavoring to get her off the rocks; steamers were frequently passing near to the spot where she lay; the terms of the agreement were deliberately

¹[Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

settled; and, in order to determine the just measure of compensation, the books of the Albany were resorted to for the purpose of ascertaining her ordinary earnings, and the amount to be paid was fixed accordingly. The vessels were both of them of large value. The Albany transferred her passengers, of which she had a large number on board when the contract was made, to another steamer, and refunded to them their passage money. She was then constantly employed during four successive days and nights in rendering assistance to the Patchin, not altogether without danger to herself from hidden rocks, and, during a portion of the time, in strenuous efforts, subjecting her to heavy strains, to jerk or drag the Patchin from the rocks. The crew of the Albany were engaged in assisting the Patchin, but did not join as libellants in the suit. The decree of the district court was in favor of the libellants.

The opinion of CONKLING, District Judge, was as follows:

"One of the objections urged against the libellant's right to maintain this action is, that the services for which he claims compensation, having been performed in pursuance of an express agreement between the parties, and for a stipulated compensation, this is not a case of salvage, but a case of contract of which the court has no jurisdiction. In support of this objection, the counsel for the claimant relies upon a similar case of *The Mulgrave*, 2 Hagg. [Adm.] 77, in which Lord Stowell pronounced against the action on this ground, observing that it was not a case of salvage but one of contract, and that he could not entertain the question. Lord Stowell did not, of course, intend to say that he could entertain no action arising *ex contractu*, but only, that the case before him' not being a case of salvage, he could not entertain it as a case of that character, and not being a case falling within either of the descriptions of contracts embraced within the jurisdiction of the court, he could not entertain it as such. It is well known that the only contracts upon which, at the date of this decision, original suits were in fact entertained in the English high court of admiralty were those for seamen's wages and bottomry bonds, although it has always been conceded that the jurisdiction of the court extended to all such contracts as were made on the high seas and were to be there executed. But, by a long series of American decisions, terminating with that of *New-Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. [47 U. S.] 344, the principle is now firmly established, that the jurisdiction of the American courts of admiralty does not depend on the decisions of the English common law courts relative to the jurisdiction of the high court of admiralty in England, but that all contracts in their nature strictly maritime, are cognizable in the admiralty. Such, certainly, is the character of this con-

tract; and if the suit had been in personam, the jurisdiction of the court would have been unquestionable.

"But, whether the contract created a lien on the Patchin, and may, therefore, also be enforced in a suit in rem, is another question not devoid of difficulty. That a suit in the admiralty for salvage may be maintained in either form, has never been doubted, and this right is, moreover, expressly recognized and declared by one of the late rules prescribed by the supreme court. Rule 19, Conk. Adm. 790. If, therefore, the salvor's title to remuneration in ordinary cases may be considered as founded in implied contract, it might with great apparent force and propriety be insisted, that the remedial right of the salvor could not in any degree be impaired by an express contract entered into beforehand for the mere purpose of fixing the amount of compensation, without any express or clearly implied intention of waiving the right to prosecute in either of the accustomed forms. But, suits for salvage have generally been considered—though I confess it has always appeared to me with somewhat questionable propriety—as cases rather of tort than of contract. It would not necessarily follow, therefore, because the maritime law gives a lien in favor of the salvor in a case strictly of salvage, that it also confers one for services of the like nature rendered in pursuance of a contract. But it is a general principle of the maritime law, that from contracts made by the master which bind the owner, as all authorized contracts entered into by him on account of his ship do, unless otherwise expressly provided, there results an implied hypothecation of the ship. The master, undoubtedly, has authority to hire the services of others, when necessary for the preservation of his vessel, and I imagine that such a contract, subject to the revisory power of the court, would constitute a lien on the vessel.

"It happens, however, in the present instance, that the master was also the sole owner of the vessel to which assistance was rendered; and it is insisted that on this account he incurred no other than a personal responsibility. Admitting the general principle thus asserted it becomes necessary, nevertheless, to inquire whether the present is a case to which it is properly applicable. The contract was originally entered into between the libellant in person and Lewis J. Higby, professing to act as agent for the claimant. It was made at the place where it bears date, a few miles from the place where the Patchin lay, and, on being soon afterwards made known to the claimant, was assented to by him. His residence was in Buffalo, in the state of New-York. The claimant, it will be observed, is described simply as the captain of the Patchin, and there is no allegation in the pleadings, nor any evidence, that the libellant had any knowledge of his proprietary interest in the

vessel. In the case of *The St. Jago de Cuba*, 9 Wheat. [22 U. S.] 409, it was held that although, for materials or supplies furnished in a home port, no implied lien in general attaches to the ship, the reasonable presumption being that they were furnished on the credit of the owner, yet if a vessel comes into her home port in a foreign guise, and obtains supplies, this principle is applicable to the case, and a lien in favor of material men arises. "The question," says the court, "then arises, on what does the privilege of material men depend? On the state of facts, or on their belief of facts?" The answer given by the court is, that it depends on the latter. *De non apparentibus et non existentibus eadem est ratio*. Applying the principle decided in the *St. Jago de Cuba* to the present case, it would follow that the contract ought to be treated as having been made with the master as such, unless the libellant was bound to show affirmatively his ignorance of the fact that the claimant was also the owner of the *Patchin*. But, considering that the contract was made at a place remote from the owner's residence, and that the claimant is described in it only as master, and considering also that his ownership is now set up by him for the purpose of exempting his vessel by way of exception from the general rule, I am of opinion that the onus probandi lies upon him to show the libellant's knowledge of such ownership.

"In discussing this point, I have thus far conceded that if the libellant had known that the claimant was the owner, and had contracted with him as such, no lien would have resulted from the contract. But, I infer that the late Mr. Justice Story entertained a different view of the law, and that he supposed it to be in this respect immaterial whether the contract was made with the master or owner. In *The Emulous*, [Case No. 4,480,] which was a suit in rem, the vessel was owned in Boston, and, having struck on a rock within the waters of that state, one of the sets of salvors contracted to tow her into port for a specific sum agreed upon. The contract, it is true, was made with the master of the schooner, though, as already observed, in the state to which she belonged. But the learned judge, in a formal exposition of what he understood to be the law applicable to cases of that nature, seems not to have recognized any distinction between contracts of this description entered into by the master, and those made by the owner in person. His language is as follows: "The court has been asked, upon this occasion, to lay down some clear and definite rule, as to what shall be deemed salvage service, and what shall be deemed a mere common contract for labor and services. I take it to be very clear, that wherever the service has been rendered in saving property on the sea, or wrecked on the coast of the sea, the service

is, in the sense of the maritime law, a salvage service. If it has been rendered under circumstances which establish that the parties have voluntarily, and without any controlling necessity on the side of the proprietors of the property saved, or their agents, entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation for labor and services quantum meruerunt; in either case, it does not alter the nature of the service, as a salvage service, but only fixes the rule by which the court is to be governed in awarding the compensation. It is still a salvage contract, and a salvage compensation. It is true, that contracts made for salvage services are not ordinarily held obligatory by the court of admiralty upon the persons whose property is saved, unless the court can clearly see that no advantage is taken of the parties' situation, and that the rate of compensation is just and reasonable. The doctrine is founded upon principles of public policy, as well as upon just views of moral obligation. No system of jurisprudence, purporting to be founded upon moral or religious, or even rational principles, could tolerate for a moment the doctrine, that a salvor might avail himself of the calamities of others to force upon them a contract, unjust, oppressive, and exorbitant; that he might turn the price of safety into the price of ruin; that he might turn an act, demanded by Christian and public duty, into a traffic of profit, which would outrage human feelings, and disgrace human justice.' In *The Centurion*, [Case No. 2,554,] the learned judge of the district of Maine cites the case of *The Emulous*, as in his judgment containing a just exposition of the law of salvage. It is quite 'immaterial,' he observes, 'whether the salvors accidentally fall in with the wreck and volunteer their services, or are called upon by the owners or persons interested in the wreck to aid in saving it. It is the place where the property is situated, and the circumstances of exposure and peril in which it is found, that determine the question whether it is a case of salvage or not.' But in a later case, that of *Bearse v. 340 Pigs of Copper*, [Case No. 1,193,] which arose in the district of Massachusetts, and was finally decided on appeal in the circuit court, the objection was distinctly taken, that the services having been performed in pursuance of an express contract, no action in rem could be maintained therefor. The contract was made in that case not by the master, but by the proprietors in person of the property saved; but this circumstance does not seem to have been considered of any importance even by the counsel for the claimants. The objection was that the service, though of a nature which would otherwise have been a salvage service, having been performed by contract, no right accrued from it to the libellants to proceed against the property.

The district judge held, that as the respondents had denied in their answer, that any contract subsisted between them and the libellants, at the time the property was recovered, which also appeared upon the evidence, the libel was rightly brought against the property, whether the principle contended for by the respondents was correct or not.' The conclusion of Mr. Justice Story on the appeal also was, that the particular services in question were not embraced within the contract set up by the claimants, under which other salvage services had been previously performed by the libellants. But, he adverts to the question only as one bearing upon the amount of remuneration to be awarded, and seems not to have considered it as at all affecting the right of the libellant to maintain his action in rem. He refers also, with apparent approbation, to his observations above cited in the case of *The Emulous*. The just inference, therefore, appears to be that he considered all services, which, if rendered voluntarily would be salvage services, as not the less so because rendered in pursuance of an agreement for that purpose; and as entitling the salvor to the like remedies, whether rendered in the one form or the other. If the salvor, especially after the performance of the service, should take a bond or receive a bill of exchange or a negotiable promissory note in payment, it may be conceded that his remedy would be limited to a personal action on the security so taken. But there does not appear to be any solid reason for denying to the salvor a lien on the property saved, merely because the salvage service was performed at the request either of the master or the owner, and under a promise of remuneration, especially as a court of admiralty possesses an unquestionable power to shield the owners of property saved, against extortionate exactions, by reducing an exorbitant reward promised under the pressure of alarm or distress. My opinion, therefore, is that this objection is invalid.

"It was insisted, also, by the counsel for the claimant, that the persons composing the crew of the *Albany* ought to have been parties to the suit. When, as is commonly the case, salvage is claimed by the crew, as well as by the master and owners of the salvor vessel, and a suit is to be instituted in the admiralty therefor, it is certainly proper that all should join in such suit; and in a case where the salvage service was highly meritorious, as where it required exhausting labor, or was attended by great danger, if the master should designedly institute a suit in behalf of himself, or of himself and his owner alone, in the hope that, through the ignorance of the crew, he might secure a large reward to himself at their expense, he would expose himself to just censure; and there may be cases in which it would be the duty of the court to enquire into the

reason of the non-joinder of the seamen, and to see that their rights were maintained, unless they chose voluntarily to relinquish them. But, in the present case, the crew of the salvor vessel were exposed to no extraordinary hardships or personal danger. Their services were rendered chiefly on board of their own steamer, and were substantially such as they had contracted to perform; and they probably, and perhaps very properly, deemed their stipulated wages a sufficient compensation therefor. If they had thought otherwise, it may be supposed that they would have applied to the court for redress, and it is a mistake to suppose that the right of the libellant as owner and master of the *Albany*, to prosecute his suit, is prejudiced by their non-joinder in the action.

"With respect to the amount of remuneration to be awarded, there are no circumstances attending the case, which demand the jealous scrutiny of the court into the reasonableness of the stipulated reward. There was scarcely room for the indulgence of a spirit of rapacity by the libellant, and there is no evidence to show that he was actuated by any such spirit. I cannot say that the stipulated sum of \$450 a day is an exorbitant or even an unreasonable compensation for the sacrifices and services of the *Albany*, and I am satisfied that the duty of the court will be best performed by simply enforcing the voluntary agreement of the parties. I accordingly award to the libellant the sum of \$1,800."

The claimant appealed to this court.

Eli Cook, for the libellant.

I. The *Patchin* was stranded on the rocks, and was in real and imminent danger, and the libellant's service was a salvage service. *Talbot v. Seeman*, 1 Cranch, [5 U. S.] 1; *Conk. Adm.* 279, 281. II. Salvage is allowed to the owner of a salvor vessel, though the owner of the vessel saved be not present and in command of her. The allowance is made for the risk of property, &c. *The Henry Ewbank*, [Case No. 6,376;] *Mason v. The Blaireau*, 2 Cranch, [6 U. S.] 240. III. It is equally a salvage service, whether performed in pursuance of an express contract, or not. *The Emulous*, [Case No. 4,480;] *The Centurion*, [Id. 2,554;] *Bearse v. 340 Figs of Copper*, [Id. 1,193.] IV. The contract was a fair one; no advantage was taken of the necessities of the *Patchin*; and the amount of compensation agreed upon was not unreasonable. V. The libellant performed the services required by his contract. VI. The salvor has his election to proceed against the property in rem, or against the owner or contractor in personam. Rule 19 of United States Courts in Admiralty; *Conk. Adm.* 790. VII. The amount is not unreasonable, and this court will not encourage appeals by a reduction of the amount allowed by the district court. *The Emulous*, [Case No. 4,480.]

William H. Seward, for the claimant.

The service was not a salvage service. 1. It was not voluntary, but was rendered in pursuance of a pre-existing contract for a fixed rate of compensation. *The Neptune*, 1 Hagg. [Adm.] 236, 237; *Hobart v. Drogan*, 10 Pet. [35 U. S.] 108, 121; 3 Kent, Comm. (4th Ed.) 245; *Conk. Adm.* 274. 2. It was not efficient, nor was the Patchin in impending danger of shipwreck. 3 Kent, Comm. (4th Ed.) 245; *Marsh, Ins.* 488; *Emerigon, Traite des Ass.* p. 400. 3. The libellant could have recovered against Whittaker personally on the contract, even if the Patchin had been totally lost. 4. The provision in the contract, that the Albany might make harbor in case of storm, is inconsistent with the idea of a salvage service.

NELSON, Circuit Justice. I am of opinion, according to the authorities referred to by the counsel for the libellant, and by the court below, that the district court had jurisdiction of the case, notwithstanding the special agreement in respect to the compensation to be received for the service. That contract was not necessarily binding upon the vessel in peril, or upon her owner, and it would have been the duty of the court to have disregarded it altogether, and to have awarded a rate of compensation according to the principles of admiralty in salvage cases, if any advantage had been taken by the libellant in fixing the rate in the agreement. The rate thus fixed is looked at in determining the amount proper to be awarded for the salvage service; but would be disregarded, if disproportionate and unreasonable, or if extorted through the pressure of impending calamity. Under these circumstances, any agreement that might be entered into could hardly be regarded as ousting the admiralty jurisdiction. That jurisdiction is as essential to the proper protection and security of the vessel subject to salvage, as it is to the indemnity of the salvor.

I concur with the court below, that the amount agreed upon affords but a reasonable compensation for the assistance rendered by the vessel and crew of the libellant, and that the service was essentially and strictly a salvage service.

Decree affirmed.

[NOTE. A contract, written or otherwise, for salvage service, will not be enforced unless the rate of compensation is just and reasonable, and it appears that no advantage has been taken of the party in distress. *Williams v. The Jenny Lind*, Case No. 17,723; *The J. G. Paint*, Id. 7,318. For cases in which the compensation named in the contract has been reduced by the court, see *The Nancy*, Case No. 12,493; *The Brothers*, Id. 3,294; 202 Tons of Coal, Id. 14,299; *The Homely*, Id. 6,661; *The C. & C. Brooks*, 17 Fed. Rep. 548.]

A. D. PATCHIN, The, (GAGER v.)
[See *Gager v. The A. D. Patchin*, Case No. 5,170.]

A. D. PATCHIN, The (PATCHIN v.)
[See *Patchin v. The A. D. Patchin*, Case No. 10,794.]

Case No. 88.

ADRIAN et al. v. The LIVE YANKEE.

[33 Hunt, Mer. Mag. (1855) 703.]

District Court, D. California.

SHIPPING—INJURIES TO GOODS—SWEAT—NEGLIGENCE.

[In an action against a vessel for damages to the cargo caused by moisture in the hold of the vessel, usually called "sweat," where it appears that the goods were stowed in the usual and proper manner, it will not be held negligence in the carrier to have failed to adopt a certain system of ventilation, the utility and efficacy of which as a preventive of a "sweat" is a matter of doubt and dispute.]

[In admiralty. Libel by Adrian and Story against the vessel *Live Yankee* on a contract of affreightment. Libel dismissed.]

HOFFMAN, District Judge. This was a libel on a contract of affreightment. The goods were shipped under the usual bill of lading, but on delivery were found to be saturated with moisture, and much damaged. It was proved that the goods were stowed in the usual and proper manner, but on the top of the between-decks cargo, and immediately under the upper deck, and that the damage was caused by moisture in the hold of the vessel, or what is usually called "sweat." On the general principle by which this cause must be determined this court has already expressed its opinion. In the case of *Levy v. The Caroline*, [Case No. 8,301.] it was considered that the carrier is not liable for damage arising from sweat, unless he is proved to have been guilty of negligence. That so far as relates to damage from this cause, all goods transported on voyages like that from the eastern states to this port must be considered perishable, or liable to injury, and the general rules with regard to perishable goods must be applied to them. That where damage is attributable to the intrinsic perishability of goods, the carrier is not liable, unless it appear that he has neglected to take proper care of them. These principles must, I think, govern this case. In the case of *Camoys v. Scurr*, 19 Car. & P. 383, which was an action against a carrier for damage to goods arising from their bad stowage, it was held that, if on the whole it be left in doubt what the cause of the injury was, or if it may as well be attributable to "perils of the sea" as to negligence, the plaintiff cannot recover. Lord Denman said, in summing up, that "the jury were to see clearly that the defendants were guilty of negligence, before they could find a verdict against them." Ang. Carr. § 212. In *Cariss v. Johnson*, in the New York superior court, 1848, Judge Oakley said: "I do not consider that common carriers are in all cases responsible for not delivering

property in a sound state. They are not warrantors that the property shall remain safe and sound. They are only warrantors for its safe delivery, and their further responsibility depends upon whether they use due care and diligence in carrying the property, or negligence can be proved against them by any omission to do what prudent men should do under such circumstances." Undoubtedly, when goods are given to a carrier in a sound state, and are damaged when delivered, the presumption of law is that it was by his negligence. But if he can show a peril of the sea sufficient to account for the injury, or a natural cause, such as the leakage, evaporation, or fermentation of liquids, or the rotting or decay of fruits, &c., the burden of proof will then be on the plaintiff to show actual negligence or defective means. If, in such a case, the proof leaves it doubtful what the cause of the injury was, or "unless the jury," in the words of Lord Denman, "see clearly that the defendants have been guilty of negligence," the plaintiff cannot recover. The degree of diligence to which, in respect of perishable goods, carriers are bound, is stated by Judge Oakley in the case already cited. Their responsibility depends upon whether they use due care and diligence in carrying the property; or negligence can be proved against them by any omission to do what prudent men should do under such circumstances.

In the case at bar, the injury is shown to have arisen from sweat or moisture collected in the hold during the voyage. It appears that sweat is incidental to all voyages around the Horn; that, in a greater or less degree, it almost invariably occurs; that it is a cause of damage well known to both shippers and ship owners, and that as yet no certain means have been devised to prevent it; that it is caused by the great variations in temperature necessarily occurring on such voyages; that it depends, in a great degree, upon the nature of the cargo, and is affected by other circumstances, the nature and operation of which are not clearly explained. It appears, therefore, that damage by sweat arises from natural causes independent of the agency of man, and that it is to be likened to the damage by fermentation, evaporation, spontaneous combustion, &c., which are all more or less owing to the heat or other conditions under which cargo is carried in ships, but for losses by which the carrier is not liable, unless negligence can be proved. The negligence attributable to the carrier in this case is alleged to consist in his not having provided sufficient ventilation for his ship. So far as his means extended, the master is shown to have used all diligence in ventilating the cargo. The hatches were frequently taken off, and everything was done which during a voyage could be done to preserve it. The ship was provided with one large ventilator, going down to the hold, and communicating with the between-decks by air-

holes. She seems, in the opinion of some of the witnesses at least, to have been as well ventilated as ships ordinarily are; but her means of ventilation were inferior to those usually provided in clipper ships—the latter being generally furnished with one or two pairs of ventilators of Emerson's construction.

It is contended that the carrier was negligent in not having had more ventilators, or a system of ventilation such as that recently adopted in most clipper ships. The carrier in this case undoubtedly supposed that the ventilation provided by him was sufficient to secure all the good effects which may attend ventilation. The question is, has he been guilty of negligence in not having adopted a more thorough system? On the part of the claimants it is contended that the only preventive of sweat which has been suggested, is of extremely uncertain efficacy; that sweat frequently occurs in well ventilated ships, and that sometimes no traces of it are observed in the least ventilated vessels; that it depends more upon the nature of the cargo than upon any other circumstance; but that it is affected by causes the nature and mode of preventing the operation of which are not ascertained. In support of these allegations they have called many witnesses of the highest respectability, and possessed of the largest opportunities for observation. Some of them have not hesitated to declare that they considered the ventilation of ships, as commonly practiced, of no use whatever, or positively injurious.

On the other hand, the libelants have attempted to show by the testimony of an equal number of witnesses, that the sweating of ships can be, and is, prevented by the use of a thorough system of ventilation; that such a system has been generally adopted in the clipper ships of recent construction, and that its efficacy has been proved by the condition of the cargoes of several ships now or recently in port. They further showed that ventilation is required by Lloyd's agents in China, in ships taking cargoes of tea and silks, to prevent the effects of steam. It was suggested, however, that the steam thus intended to be prevented was a dry and noxious exhalation, impairing the flavor of teas and injuring the fabrics of silks, but was wholly distinct from sweat, which is condensed moisture collected on the lower side of the deck. This point, however, was not clearly established. Had the libelant in this case clearly established the general recognition of the fact that a particular system of ventilation will prevent damage by sweat, that that system is universally adopted and is usually effectual, he might claim that the master in omitting to adopt it had shown a want of ordinary diligence and care. But although he has shown that the clipper ships which frequent this port are usually ventilated in some way more or less thorough, he is met by the fact that cargoes are fre-

quently damaged in the best ventilated ships, and by the testimony of numerous witnesses, who express their disbelief in the efficacy of any system of ventilation whatever. Before the court can say that the omission of any particular means of preventing this damage is negligence in the master, it must be satisfied that those means are generally recognized as effectual. Does, then, the testimony establish this fact?

Whether or not ventilation is of any service, seems to be a mere matter of opinion, nor is it possible for the court, on the evidence, to come to any certain conclusion, whether the advocates or opponents of ventilation are in the right. The whole subject seems involved in doubt and obscurity, and the systems of ventilation that have been resorted to appear to have been adopted as experiments or attempts to remove the evil, rather than as a certain and ascertained means of preventing it.

It has been urged with great force by the advocate of the libelants that it is the duty of the court to exact from the carrier the employment of the latest inventions, and to demand that he keep pace with the last improvements in mechanical art; that by so doing the court will cherish, promote, and stimulate the application of science to the useful arts, and contribute to their growth and improvement. But the difficulty in this case is that it does not clearly appear that ventilation is an improvement. On the contrary, several witnesses, whose great experience entitles their opinions to much credit, affirm that in their own ships, and for their own cargoes, they would not adopt any system of ventilation whatever. Emerson's ventilators, the employment of which was most strongly insisted on by the advocate of the libelants, have been in use for the last five or six years. If they had been found so effectual a remedy as to justify the court in pronouncing the carrier who fails to adopt them guilty of negligence, is it credible that so many and so respectable persons connected with shipping would be found to disbelieve in that and all other systems of ventilation? The testimony brought to show a prevailing usage in this port, that the shipper bears a loss by sweat, though it failed to establish a usage in the legal sense of the term, proved this at least: that the general opinion of persons connected with commerce, shippers and ship owners, is that the ship is not liable. Surely such an opinion would not prevail if there were any well-known, usually-adopted, and generally-recognized means of preventing sweat. And yet the court must find such to be the fact before it can declare this vessel to be liable. If it should be determined in this case that every vessel which is not provided with a ventilating apparatus is liable, the principle would include many ships which have avoided injuring their cargoes, though wholly unprovided with ventilation. In the case of The

Thomas Watson, [Case No. 13,933.] for example, the rule would operate with peculiar hardship. That vessel, it appears, has made five voyages to this port, and has never damaged a single package, and yet she is not ventilated at all. Surely her owners are justified in assuming that ventilation in her case would be no improvement. If then, on her next voyage, some of her cargo is injured by sweat, her master would be held liable for negligence, under the principle the court is asked to adopt. With what propriety can the court call upon her owners to adopt a system which experience of their own ship has proved to be unnecessary, if not injurious; and how can it make a similar exaction of any of the numerous witnesses of intelligence and experience who profess their disbelief in the efficacy of all systems of ventilation? It may be said that ventilation may not be requisite in vessels of the size of the Thomas Watson, while in clipper ships to omit it would be improper. But this, after all, is but an opinion opposed by many of the most experienced witnesses, and affording no solid basis for the judgment of a court. Besides, in the uncertainty and obscurity in which this subject is involved, how can the court discriminate between vessels of various sizes? When is a vessel large enough to require ventilation? When is she small enough to dispense with it? Even the witnesses for the libelants, who are the strongest advocates for ventilation, confess that damage by sweat is of constant and daily occurrence; that few ships arrive whose cargoes are not more or less injured by it, and that a still more thorough system of ventilation is required. Could this be so if there did exist, as claimed by the libelants, any generally known and usually adopted remedy? If the ship owner is guilty of negligence in this case, for having failed to adopt a generally-recognized remedy for sweat, it should appear that cargoes can be, and usually are, protected by it—and yet the reverse is the fact. How can this remedy be said to be generally recognized as such when it fails so often as to leave the question as yet undetermined whether it is of any use whatever?

It is urged that the ship owners in this case have themselves recognized the expediency of ventilation by introducing it into their own ships, but that the means adopted by them were incomplete and insufficient. But the fact that they have tried what they no doubt considered a sufficient system of ventilation, at least shows that they were not reckless or indifferent on the subject, and the question still recurs—Are there any well-known and generally-recognized means of preventing this kind of damage which they have been guilty of negligence in omitting to use? If there had been any such, it is but fair to suppose they would have been adopted in the ship which the libelants in their letter to the master pronounce "a noble specimen of the merchant marine." It is to be observed that in the

very letter in which the libelants announce their intention to test the question of the ship's liability for damage by sweat, they make no complaint of insufficient ventilation, or suggest the use of more efficient means to that end. But they propose "the idea of experimenting upon the prevention of sweat by ceiling the between-decks overhead." They thus seem themselves to admit that no certain or established means of preventing this damage exist, and the remedy is suggested merely as an experiment.

On the whole, I consider that under the evidence in this case it does not appear that the damage has occurred from causes originating in the agency of man; nor that it could, like damage by rats, injuries by worms, etc., have been prevented by proper care; that the injury has arisen from natural causes, the effect of which the court cannot affirm the carrier could or ought to have guarded against; that it is not to be likened to the case of some unknown and internal defect in the particular vehicle of conveyance, for which the carrier is liable, but it is a risk to which every shipper knows his goods are liable, and which he also knows there are no ascertained and established means of preventing; that he is as competent as the carrier to determine which of the various modes of preventing it are most likely to insure the desired result; and that in shipping in this vessel he assumed the risk of her system of ventilation, as he would have assumed the risk of damage without any ventilation whatever had he shipped his goods in the *Thomas Watson*—and that, inasmuch as he knew the dangers to which his goods would be exposed, he might, had he chosen, have protected them by packing them in a different manner. But while I feel called upon so to determine in this case and with the present imperfect knowledge of this subject, it is not to be inferred that the same decision will always hereafter be made. On the contrary, if it should hereafter appear that science has suggested, or experience has shown, a remedy or preventive of damage from this source, which shall be generally recognized and adopted, it will be negligence in the carrier to omit its use. But as at present it cannot be said with any certainty that such a remedy has been discovered, I cannot find the carrier guilty of negligence in having failed to resort to one that has been suggested and used to some extent, but the utility or efficacy of which is still a matter of discussion and dispute.

ADRIANCE, (HOTCHKISS v.)

{See *Hotchkiss v. Adriance*, Case No. 6,715a.}

ADRIANCE, (SPRAGUE v.)

{See *Sprague v. Adriance*, Case No. 13,248.}

Case No. 89.

The ADRIATIC.

[9 Ben. 98; 16 Amer. Law Reg. (N. S.) 491; 4 Amer. Law T. Rep. (N. S.) 353; 24 Pittsb. Leg. J. 208.]

District Court, S. D. New York. April, 1877.²

COLLISION IN THE IRISH CHANNEL.—STEAMER AND SAILING VESSEL.—IDENTITY OF STEAMER—OPPOSITE COURSES.—CONFUSION OF PURPOSE.—LIGHTS.—STEAMER'S DUTY.

1. The American ship *H. Q.*, with all hands, was sunk at night in the Irish channel, by a collision, as alleged, with the British steamer *A.* The steamer averred that the ship was either sunk by a collision with some other vessel than the steamer, or was wrecked, and that her loss was not caused by any collision with the steamer. The evidence seemed to be, that the steamer was proceeding down the channel, heading from W. $\frac{1}{4}$ N. to W. $\frac{1}{2}$ N., and going about 12 knots an hour, and the ship was heading about E. by S. $\frac{1}{2}$ S., with the wind from about S. W., and sailing from 8 to 9 knots an hour. The steamer made the ship's green light about 2 points on the starboard bow. The steamer kept her course for some 4 minutes, until the ship's green light was some $3\frac{1}{2}$ points on the starboard bow, when the ship shut in her green light and showed her red light; whereupon the steamer ported and slowed. The ship then showed her green light again; whereupon the steamer stopped and backed and had got sternway at the time of the collision. Before the collision, the ship made another change, and showed her red light; and the steamer struck the port bow of the ship: *Held*, that the loss of the ship was caused by a collision with this steamer.

2. That, under the circumstances, it was the duty of the steamer to keep out of the way of the ship, and it was the correlative duty of the ship to allow the steamer to keep out of her way, and not to embarrass the steamer in performing such duty.

3. That it was proper for the steamer to keep on her course as long as the ship's green light was visible, and that, when the ship showed her red light, the steamer's duty of avoiding the ship did not cease, and she discharged that duty a second time by porting and slowing.

4. That it was reasonable and proper, under the circumstances, for the officer in charge of the steamer, when he saw a movement in the approaching vessel, indicated by the shutting in of the green and the showing of the red light, to take this as evidence of her intention to throw herself across his onward path.

5. That, it appearing that the officer in charge of the steamer was a good seaman, of capacity, watchful, thoughtful, and deliberate, much must be left to the judgment of such a man, charged with the safety of a large steamer, and of the lives of those on board, as to which one of two or more methods he will adopt in a given exigency, if it is not shown that the one he adopted was such as to indicate that there was no fair exercise of reasonable judgment in concluding to adopt it.

6. That, when the ship again showed her green light, and the danger of collision was apparent and imminent, it was the highest duty of the steamer to stop and back, rather than go ahead and starboard; that, if it be conceded

¹[Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

²[Affirmed by circuit court in *The Adriatic*, Case No. 91; and by supreme court in *Marshall v. The Adriatic*, 2 Sup. Ct. Rep. 355, 107 U. S. 512.]

that the stopping and backing was an error of judgment, it was not a fault.

7. That it was impossible that the changes by the ship from green to red and from red to green could have been caused by the yawing of the ship.

8. That the ship was in fault in her movements in presence of what she could and should have seen was a steamer; that, for what ensued after the ship exhibited her green light a second time, the steamer was not responsible; and that the libel must be dismissed.

[In admiralty. Libel in rem by the owners of the Harvest Queen against the Adriatic. Libel dismissed; also dismissed upon appeal to the circuit court. The Adriatic, Case No. 91. Decree of circuit court affirmed, upon appeal to the supreme court in *Marshall v. The Adriatic*, 2 Sup. Ct. Rep. 355, 107 U. S. 512.]

Thomas B. Stillman and Henry J. Scudder, for libellants.

Everett P. Wheeler and Joseph H. Choate, for claimants.

BLATCHFORD, District Judge. On the 30th of December, 1875, the ship Harvest Queen, an American vessel, belonging to the libellants, with a cargo on board, also belonging to them, set sail from the harbor of Queenstown, in Ireland, for Liverpool, in England. The steamer Adriatic, a British vessel, sailed from Liverpool to New York, on the same day, and proceeded down the Irish channel. The libel alleges, that, when the ship was distant about fifty miles from her place of departure, and was proceeding up the Irish channel, the wind blowing a stiff breeze from about southwest, and the weather being clear starlight, she was run into by the steamer, at about 3 o'clock A. M., on the 31st of December, the steamer striking the ship on her port bow, with such violence as to cause her, with her cargo, to sink in a very short time after the collision; that by said collision the ship was totally lost, and her master and officers and all hands on board of her were lost; that prior to and at the time of the collision the general course of the ship was up, and the general course of the steamer was down, the Irish channel, and their courses crossed but slightly, if at all; and that the collision was caused by the negligence and improper conduct of those on board of the steamer, in not having a good and sufficient lookout, in running at too great a rate of speed, in not keeping out of the way of the ship, and in not stopping and backing in time to avoid the collision. The libellants claim to recover against the steamer, as damages sustained by the collision, the sum of \$225,000.

The answer of the steamer avers that the ship was either sunk by a collision with some other vessel than the steamer, in the Irish channel, on or about the 31st of December, or was wrecked on or about that day in said channel, and that her loss was caused there-

by and not by any collision with the steamer. Without discussing in detail the evidence on the subject, it is sufficient to say, that it leaves no doubt in the mind that the steamer, at or about the time and place charged, came into collision with the ship Harvest Queen, belonging to the libellants, in such manner and with such results as to cause the sinking and loss of the ship and of her cargo and of every person on board of her.

The material question in the case, to be determined on the evidence, is as to whether the steamer was in fault. The vessels were sailing on nearly opposite courses. The steamer was heading from west one-quarter north to west one-half north. The ship was heading about east by south half south. They were thus drawing on to the courses of each other from one point to one point and a quarter. The ship was sailing at the rate of from 8 to 9 knots an hour and the steamer at the rate of about 12 knots. The steamer made the green light of the ship at about 2 points on the starboard bow of the steamer. The red light of the ship was not then visible to the steamer. The white and green lights of the steamer, and not her red light, ought then to have been visible to the ship, and undoubtedly were, and it was her duty to heed them. Under the circumstances thus existing, it was the duty of the steamer to keep out of the way of the ship, and it was the correlative duty of the ship to allow the steamer to keep out of her way, and not to embarrass or hamper the steamer in performing such duty. The position was one of safety. The green lights of the two vessels, and only those, were exposed to each other. There was no exposing of green to red. Under this condition of things, the steamer kept on her course, neither porting nor starboarding, nor slowing, nor stopping, nor reversing. It was proper for her to so keep on her course. She had a right to presume that, in the presence of her exposed green light, the ship would continue to expose her green light and that only. There was no obligation on the steamer then to starboard, because the vessels were at such a distance apart, probably 2 miles, that, if both kept their courses, the ship was certain to pass clear, on the starboard hand of the steamer. She would draw more and more on the starboard bow of the steamer. And such was the fact. The ship's green light opened more to the starboard of the steamer until it got to be some 3½ points on the starboard bow of the steamer. This was a position of safety. The ship would not reach the path of the steamer until she was astern of the steamer. At this juncture, and some four minutes after the ship's green light had first been seen by the steamer, the ship shut in her green light and exposed her red light. All the time before that she had exposed her green light, and that alone, steadily, with no glimpse of her red light. Here, then, arose an exigency. Here was danger. The first officer of the

steamer, Mr. Bence, was on her bridge, watching the green light off his starboard bow. He had charge of the steamer at the time and was responsible for her navigation. He had seen the green light for four minutes and had seen it thus open more on his starboard bow. He could not tell to what species of craft it belonged, whether to a fore and aft vessel which could sail within five points of the wind, or to a square-rigged vessel which could not sail nearer to the wind than from six to seven points. He saw a movement in the approaching vessel, indicated by the change in her lights, which it was reasonable and proper for him, under the circumstances, to take as evidence of her intention to throw herself across his onward path. He was called upon suddenly and in an exigency to determine whether he would do anything, and, if something, what. He could, as to the course of his vessel, do one of three things—either let it remain as it was, or starboard, or port. He ported. The libellants insist that he erred in porting; that, if he had not ported, there would have been no collision; that he ought to have starboarded, or, at least, have kept on the same course; that, if he had even kept his course, there would have been no collision, as the ship could not have reached his path ahead of him; and that, if he had starboarded, he would certainly have sailed away from all danger. It is easy to criticize and to be wise after the event. Mr. Bence seems to have been a good seaman, of experience and capacity, watchful, thoughtful and deliberate. Much must be left to the judgment of such a man, charged with the safety of a large steamer and of the lives of those on board, as to which one of two or more methods he will adopt in a given exigency, if it is not shown that the one he adopted was such as to indicate that there was no fair exercise of reasonable judgment in concluding to adopt it. By determining to port and throw the head of the steamer to starboard, Mr. Bence took a course which would certainly, if the approaching vessel continued to display only her red light, very soon bring the vessels on parallel courses, with their red lights exposed to each other. That was safety. To take that course was prudent, and, at the distance apart the two vessels were, it would have been successful, if the ship had continued to expose only her red light. The steamer's duty of avoiding the ship did not cease because the ship shut in her green light and exposed her red light. It continued in the altered circumstances. As the exigency was sudden and unforeseen, and as the vessels were nearing each other rapidly, promptness of decision and action on the part of the steamer was necessary. Even if the ship had continued to expose only her red light, the steamer might, it may be conceded, have passed her in safety by going on at the same speed as before, without starboarding or with starboarding. But I think

it quite clear, that, if the ship had continued to expose only her red light, the steamer would, having ported, have equally avoided a collision with the ship, especially as, on the weight of the evidence, the steamer's engines were slowed at the time her helm was ported. The steamer adopted this manoeuvre of porting and slowing deliberately and wisely. There was no apparent necessity, at that time, that she should stop and reverse her engines. She discharged her duty of avoiding the ship, by proper movements, for the second time. She did this, although the ship was in fault in her movements in the presence of what she could and should have seen was a steamer. These movements of the steamer had been made, and she was swinging to starboard under her port helm, when the ship shut in her red light and exposed only her green light. Seeing this confusion of purpose in the ship, the engines of the steamer were stopped and reversed at full speed. This was proper. There was nothing else for the steamer to do. The ship had twice turned from a course and position in reference to which the steamer had acted, and acted in a way which would have given safety to the ship. Whatever followed the ship had brought upon herself. For what ensued after the ship exhibited her green light the second time, the steamer was not responsible. Before the collision, the ship made another change, and shut in her green light, and showed only her red light.

A strenuous effort was made on the part of the libellants to induce the belief that the changes by the ship from green to red and from red back to green were produced by the yawing of the ship in the following sea and with the free wind. But it is impossible to believe this, for, the green light was visible at first, alone, for four minutes continuously, with no glimpse of the red light, and the green light opened from two points on the starboard bow of the steamer to three and a half points on the same bow, before the red light appeared. The effects of yawing would have been sooner observed.

It is earnestly contended, for the libellants, that the red light of the ship, because of which the steamer ported, was in sight for only one minute, and that, when the green light of the ship again appeared, the steamer should have kept going ahead and should have starboarded. The ship was a third time, and in a third position, imposing on the steamer the duty of avoiding her, after the steamer had twice assumed and discharged that duty. The distance between the vessels was diminishing fast, and with this erratic vessel nearly ahead, and the danger of collision apparent and imminent, it was the highest duty of the steamer to stop and reverse her engines. She did so, and her engines were reversed at full speed, and, on the evidence, she had got sternway on at the time of the collision. If it were to be conceded that the stopping and reversing was an error

of judgment, it could not be held to have been a fault, occurring as it did after what had previously happened, but would be regarded as an error which the libellants could not make a ground of complaint. But it is not to be admitted that it was an error of judgment.

Although the court is asked to condemn the movements of the steamer, no testimony of any expert in seamanship or in navigation is advanced to show that such movements were faulty or unwise or imprudent or unintelligent. The case of the libellants seems to rest on the proposition, that it was the duty of the steamer to keep out of the way of the ship, and that it is not established that the ship changed her course. But the steamer could act only in view of what she saw, and what she had a right reasonably to infer from what she saw. Her movements were taken with a reasonable certainty that they would give safety to both vessels. She exercised the highest degree of diligence imposed by the law, in her efforts to avoid the ship. She exercised that diligence discreetly throughout to the end, in all the emergencies which the vacillating movements of the ship threw upon her.

The libel is dismissed, with costs.

Case No. 90.

The ADRIATIC.

[16 Blatchf. 424; 8 Reporter, 231.]

Circuit Court, S. D. New York. June 23, 1879.

CARRIERS—LIABILITY FOR LOSS AND INJURY—
EVIDENCE.

A bill of lading for coir yarn in bales, shipped by a steamer from Liverpool to New York, receipted for the bales as "in good order and well conditioned," and described them as "in transit" from another steamer. They were, apparently, in good external order. The voyage was ten days. The bales, when discharged, appeared to have been, at some time, wet with sea water. The yarn inside was damp to the touch, discolored, and unfit for use to make fine goods. The bales were properly stowed, and nothing appeared as to how they could have been damaged on the steamer. There was no evidence as to the condition of the bales when shipped. On a libel, in admiralty, against the steamer, to recover for the damage: *Held*, that the libellant could not recover, because he had not shown that the goods were damaged while on board of the steamer.

[See note at end of case.]

In admiralty. This was an appeal by the libellants from a decree of the district court, in a suit in rem, in admiralty, dismissing the libel. The following facts were found by this court: "On the 20th of October, 1875, two hundred and fifty bales of coir yarn

were shipped on the steamship Adriatic, consigned to the libellants, in New York. Coir yarn is the fibre of the cocoanut husk, made into strands of yarn, and put up in hanks. The hanks are put in bales, compressed, covered with burlap wrappers, and wound around with iron hoops from end to end. Coir yarn is used for making mats. The bill of lading signed by the agent of the ship at Liverpool, receipted for the bales, in the usual form, as 'shipped in good order and well conditioned.' The goods were described as 'two hundred and fifty bales coir yarn, in transit from steamer Macedonia,' and were to be delivered 'in like good order and well conditioned.' The bill of lading also contained this clause: 'Weight, contents, quality, condition, quantity and value unknown, and ship owner not accountable for the same.' At the time of the shipment, the bales were, apparently, in good external order and condition. The ship sailed from Liverpool October 20th, and arrived in New York October 30th, making her voyage in about ten days. When the bales were landed in New York, one hundred were found to have been wet at some time with sea water. The wrappers were somewhat stained and discolored, and the hoops rusty. On cutting the wrappers and examining the yarn, it was found to be damp. It was not wet enough to drip, but the dampness was perceptible to the touch. It was, to some extent, discolored and unfit for the manufacture of fine goods, to which it was, on account of its quality, originally adapted. The bales were landed upon a dry and covered dock. The bales were all well and properly stowed in the lower hold of the ship. No other goods came out of the vessel wet. There was no appearance of a leak, and the hatches were all in good order and well secured, so as to be impervious to sea water, when the ship arrived. There was no evidence as to the condition of the bales when shipped, other than that which was contained in the bill of lading. It was not shown how long they had been 'in transit' when the shipment was made. Neither was it shown from what place the original consignment was made, nor whether the bales had been specially exposed to sea water, either while on the voyage from Liverpool to New York, or before. There was nothing in the appearance of the yarn to indicate that the wetting might not have occurred before the delivery to the Adriatic."

Francis Howland, for libellants.
C. E. Souther, for claimant.

WAITE, Circuit Justice. The receipt in the bill of lading is an admission that the goods were, when received, in apparent good order, but it is not conclusive as to their actual condition. It makes a prima facie case against the ship, and gives the libellants

¹[Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

a right to recover, unless this case is overcome by the evidence. The burden of the admission rests upon the ship, until it is shown that the condition and appearance of the goods at the time of their discharge are consistent with the actual existence, in the packages, of the cause of the damage when the shipment was made, without discovery by the ship's agents, acting in good faith, and with ordinary care, while taking the cargo on board. There is, here, no question of estoppel. The bill of lading has not been assigned, and it does not appear that any advances have been made on the faith of it. The parties and their rights are precisely the same as they were when the receipt was signed. The evidence is, as I think, sufficient to shift the burden of proof from the ship to the libellants. The goods were received while "in transit," and from another ship. They might have been exposed to sea water while on their way to Liverpool, and still the damage such as not necessarily to attract attention as the transfer was made from ship to ship. It was only about ten days from the time of the shipment in Liverpool to the discharge in New York. When the bales were discharged, there was no appearance of recent exposure. The wrappers were discolored and the yarn was damp. No water dripped from any of the packages, and no attempt seems to have been made to ascertain whether any could be brought out by pressure. Certainly, it is to be presumed that such an attempt would have been made, if the indications were such as to make it reasonable. No other goods were wet, and there was no appearance of any leak in the ship. There was no water to be seen in the hold where the goods were stowed, and none of the other cargo appears to have been damp, even. Under these circumstances, it seems to me clear, that the libellants, before they can recover, must prove that their yarn was actually free from wet or dampness when it went on board. The damaged appearance of the yarn when it came out, is a circumstance to be taken into consideration in their favor, but it is not, of itself, sufficient, in my opinion, to overcome the effect of the other facts, which are clearly established by the evidence. The judgment of the district court was right, and a decree may be prepared, dismissing the libel.

[NOTE. In a suit against a common carrier, the libellant makes a prima facie case by producing the receipt of the carrier: "Received in good order." But these words do not constitute an agreement; they are a mere admission, and may be explained or contradicted by the carrier. *The Pacific*, Case No. 12,644: *The Howard*, 59 U. S. (18 How.) 231. In case of loss, the presumption of law is that it was occasioned by the act or default of the carrier; and the burden of proof is upon him to show that it arose from a cause existing before his receipt of the goods, and for which he is not responsible. *Nelson v. Woodruff*, 1 Black, (66 U. S.) 156.]

Case No. 91.

The ADRIATIC.

[17 Blatchf. 176; 3 Reporter, 615.]

Circuit Court, S. D. New York. Oct. 1879.¹

COLLISION — BETWEEN STEAM AND SAILING VESSELS—CHANGE OF COURSE.

1. A steamer collided with a sailing ship in the night, having changed her course and stopped and backed her engine, in an endeavor to avoid the collision. It appeared that, if the steamer had kept her course and speed, and the ship had done what she in fact did do, there would have been no collision. But, as the steamer had skilful officers, who exercised good judgment, in view of the appearances of, and changes in, the ship's lights, it was held that the steamer was not in fault.

[Cited in *Hoben v. The Westover*, 2 Fed. Rep. 93.]

[See note at end of case.]

2. The ship sank with all on board, and the steamer was held not to have been in fault for her conduct after the collision, in respect to getting out her boats and proceeding on her voyage.

[3. Cited in *The Westover*, 2 Fed. Rep. 93, to the proposition that if there is any uncertainty as to the lights or course of a sailing vessel, an approaching steamer must, if necessary, slacken her speed, stop or back and neither proceed nor change her course till the course of the sailing vessel is ascertained.]

[See note at end of case.]

This was a libel in rem, in admiralty, filed in the district court, to recover damages for a collision. That court dismissed the libel, [*The Adriatic*, Case No. 89] and the claimant appealed to this court. [Libel dismissed. Decree of circuit court subsequently affirmed by supreme court in *Marshall v. The Adriatic*, 2 Sup. Ct. Rep. 355, 107 U. S. 512.]

This court found the following facts: "During the forenoon of December 30th, 1875, the ship *Harvest Queen*, on a voyage from San Francisco, touched at Queenstown, Ireland, for orders. She was 187 feet long, 42.6 broad, 28.6 deep, and of 1,626 tons burthen, American measurement. She had on board 1,750 tons of grain, in bulk. Both vessel and cargo were owned by the libellants. Her jib-boom was 31.6 feet long and 16.5 inches in diameter. The bowsprit extended from the stem forward 33.6 feet, and from its heel to the stem was 12 feet. The size of the stem was 32x33½ inches. On top of the bow and over the bowsprit was a breasthook of oak, about twenty feet long and sixteen inches thick, extending each way from the stem about ten feet. A stick of timber from 28 to 32 inches square was required to make it. It was firmly bolted to the knightheads. Above this was the forecastle rail. Having received orders to go to Liverpool, the ship was towed

¹[Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

²[Affirming decree of district court, in *The Adriatic*, Case No. 89. Decree of circuit court affirmed by supreme court in *Marshall v. The Adriatic*, 2 Sup. Ct. Rep. 355, 107 U. S. 512.]

out of the harbor by a tug, and left, about half-past eight in the evening, four or five miles southeast of Roche's Point, headed on her voyage. The wind at the time was blowing a fresh breeze from the southwest. The tide was ebb and running to the westward. The usual route for vessels bound from Queenstown to Liverpool was past Tuskar Light, off the southeastern extremity of Ireland. The proper course for a sailing vessel, from the point where the Harvest Queen was left, would be east by south, but, to make that course, under the circumstances of wind and sea which prevailed that night, it would be necessary to steer somewhat more to the southward. The Harvest Queen could not sail closer to the wind than seven points, and, with the wind as it then was, she was capable of making eight or nine knots an hour. The Adriatic was an iron steamer, running regularly between Liverpool and New York, in the White Star line. She was 450 feet long, 42 broad and 30 or 32 deep, with no bowsprit and a very sharp bow. She left Liverpool, on one of her regular voyages, at noon of December 30th, 1875, and was in all respects tight, staunch and strong, and properly officered, manned and equipped. She passed Tuskar Light a quarter of an hour after midnight, and the Saltees or Coningbeg Lightship, four or five miles away, at 1.55 A. M. of the 31st. The captain, after passing the Lightship, put her upon a course west $\frac{1}{4}$ north, which was somewhat further away from the Irish coast than usual, as he was not to stop at Queenstown. At 2.15 A. M. he went into the chart room and lay down on a sofa, without taking off his clothes. He had been on duty all the time after leaving Liverpool, and, when he went away, gave orders to be called at four o'clock, or sooner, if any vessels were seen. The chart room adjoins and opens out of the wheel house. The first officer was then on watch. He stood on the bridge, and most of the time on the starboard side. Three seamen were on the lookout, two stationed one on each side of the No. 3 house, and the other on the port side of the bridge. The third officer was on the saloon deck, where he could pass orders from the bridge to the wheel. One of the quartermasters was at the wheel, and another in the wheel house with him. The forward deck was roofed, and, from its shape was called the turtle back, or whale back. No. 3 house was just abaft this turtle back. It was 130 feet from the stem, and both the turtle back and the saloon deck were reached from it by bridges. The spray dashed over the turtle back, so that the lookouts could not have seen ahead at all times, if they had been stationed there. For this reason they were put on the house. The bridge was one hundred and seventy-five feet from the stem. At 2.35 A. M., the first officer, from his place on the bridge, and looking through a

night glass, saw a green light about two points on his starboard bow. It was so far away that it could not be seen with the naked eye. The steamer was then about fifty-two miles to the eastward of Roche's Point, and fifteen miles south-southeast of the Hook Tower Light. Both Coningbeg and the Hook Tower Lights could be seen from where she was. The wind was from southwest to south-southwest, blowing a fresh gale, and with a force indicated by the figures 7 or 8 on the Beaufort scale. The night was dark on the water, but the sky was clear, with detached clouds. The sea was high and running strong from the southward. The steamer was going about twelve knots an hour, which was as fast as she could be driven under the existing conditions of wind and sea. She had all her regulation lights in their proper places and brightly burning. None of her sails were set, and she was propelled exclusively by steam. When the first officer discovered the green light, he had no means of telling what kind of a sailing vessel it was on, or what her exact course was. He did not change his course, but called the third officer to the bridge, who also looked at the light through the glass. Not long afterwards a light, bearing in about the same direction, was seen by the starboard lookout on the No. 3 house. He sent the other lookout stationed with him on the house, to give two strokes of the bell placed on the turtle back for signal purposes. This was promptly done, and signified that there was a light ahead off the starboard bow. It gave no indication of the color of the light. At 2.39 A. M. the green light, which had broadened to three and a half points on the starboard bow, or, possibly, something less, changed to red. The first officer thereupon ordered the wheel to port, and telegraphed the engineer to 'stand by,' following this, at once, with a further order, to 'slow.' All these orders were promptly obeyed, and, under the influence of her port helm, the steamer swung slowly to starboard. About a minute afterwards, the red light changed to green. By this time the bow of the steamer had gone off about a point to starboard, and was swinging more and more in that direction, under the continued port helm. As soon as the green light reappeared the first officer gave an order to stop the engine, and then, as soon as it could be done, to back at full speed. These orders were all obeyed, and the engine got under reverse motion at or about 2.41. No change of the wheel was then made, but the first officer directed that the captain be called, and this was done. The captain, when he was called, came out of the chart room into the wheel house, and, as he passed to the deck on the starboard side, noticed, by the indicator, that the wheel was to port. When he got on deck, the engine was under reverse motion, and this he detected. Looking ahead, he

saw a green light not very far away, about two points off the starboard bow. Then green and red lights appeared together, and then the red alone. Without any consultation with the first officer, he gave the order from the deck 'hard a-starboard,' and went on the bridge. This order was obeyed. In going astern the effect of a starboard helm is the same as that of a port helm when going ahead; it swings the bow to starboard. Very soon after the captain got on the bridge the Harvest Queen appeared through the darkness. She was apparently under as much sail as she could carry and headed for the Adriatic. Before anything further could be done on the steamer to avoid a collision, the jib-boom of the Harvest Queen ran over the turtle back and was in some way broken so that it fell down over the side of the steamer. The Adriatic's engines were at the time backing at full speed, and, if the vessel herself was not actually under sternway, she was not going ahead much, if any. She kept on backing, and, when the vessels got separated, as they soon did, a part of the ship's outer jib and its blocks and rigging were found on the turtle back and hanging over the port rail. The fish davits were made of round iron six and a quarter inches through where they leave the turtle back, and bent upwards like a bow. At the time of the collision, they were ranged forward along the side of the vessel. The anchor stocks were of iron — inches through. There were light iron guard rails around the turtle back. After the collision the port fish davit was found bent downwards towards the deck seventeen inches, or thereabouts, the port anchor stock broken and hanging by the lashings, and the guard rails on both sides bent, and some of the stanchions broken. The paint on the bow was somewhat chafed and scratched, but not very much. The first fish davit was thirty-seven feet from the stem, and the bent and broken rails about twenty-eight feet. The broken anchor stock was a short distance forward of the fish davit. No other injury was done to the Adriatic. The shock of the collision was scarcely perceptible abaft the foremast. There was no hail from the Harvest Queen, but, just after the collision, the first officer of the Adriatic hailed her once from the turtle back. No answer was heard. The Adriatic continued backing until 2.53 A. M., when her engines were stopped. After the vessels separated, the Harvest Queen passed across the bow of the steamer from port to starboard. Her masts appeared to be all standing and the sails upon them set, but, in some way, she was injured by the collision, so that she sank not long afterwards, with all on board, and became a total loss. Nothing has since been heard of her or

any of her crew. When last seen she was apparently half a mile away from the steamer, and showing her green light four or five points off the starboard bow. Immediately after the vessels got separated, orders were given on the Adriatic to clear away the boats, and the men at once set to work to do so, but, the Harvest Queen still keeping in sight, the order was countermanded, for the moment. The Adriatic then steamed slowly toward the Harvest Queen, until she became lost to view. About the time she disappeared cries for help were heard in the water off in the direction of where she was last seen. The orders to lower the boats were then promptly repeated, and two boats put out. Some confusion occurred in getting the boats away, as the crews had not been assigned to them, the steamer having only just left port. There was no unreasonable delay, however. The boats were put in command of the second and fourth officers, and rowed in the direction of where the voices came from, and where the ship was last seen. They remained out from half an hour to an hour, when they were recalled by a signal from the steamer. Nothing was found except a piece of timber supposed at the time to be a part of the broken jib-boom, and a piece of rope. At 4.30 A. M., the Adriatic again started on her voyage. The movements of the engine, after it was stopped at 2.53, were thus recorded in the engineer's log: '2.54 A. M., ahead slow; 3.00, stop; 3.15, astern slow; 3.16, stop; 3.23, astern slow; 3.26, stop; 3.45, ahead slow; 4.00, stop; 4.09, astern slow; 4.11, stop; 4.15, astern slow; 4.16, stop; 4.26, ahead slow; 4.30, full speed.' When the green light was first seen from the Adriatic, it is not probable that the Harvest Queen was where she could see the Coningbeg Lightship. She must have been just then coming within the range of that light, which is placed some miles outside of the land. It is at the southeastern extremity of a series of dangerous rocks extending out a considerable distance from the land, known as the Saltees Rocks. On the 12th of January, 1876, a piece of the port side of the breasthook of the Harvest Queen, seven feet and ten inches long, and a piece of the starboard forecaskle rail, extending from the cathead forward to the towing chock, were found cast ashore about a mile and a half west of Carnsore Point, which is on the coast of Ireland about midway between Tuskar and Coningbeg. Near the same place were also found a small piece of the name board of the Harvest Queen, and part of an oar, with her name on it. No other parts of the wreck have ever been found. The place at which these articles were found was where the wreckage would naturally have drifted, if the Harvest Queen went down in the neighborhood of where the collision occurred. The breasthook was broken square off, apparently about eighteen inches or two feet

*[Number of inches not given in original report.]

from the stem. The piece found was torn from the frame to which it had been bolted. In such a manner as to leave the bolts standing in the original position, only a few being bent, and none drawn out. The name board was of light pine, not more than two or three feet long, and a foot wide."

Thomas E. Stillman, for libellant.

Everett P. Wheeler and Joseph H. Choate, for claimant.

WAITE, Circuit Justice.⁴ Many of the facts disputed below have not been questioned here. The claimant does not deny that the vessels actually collided, or that the Harvest Queen sank with all on board, in consequence of injuries received in the collision. The libellants also concede, that, if the Adriatic was not in fact going astern when the collision took place, she was making little or no headway. These questions are, therefore, out of the way, and the controversy about the facts is reduced to the color of the light first seen by the Adriatic; its distance; the time it appeared; the changes in color and bearing; and the movements of the Adriatic.

It would not be easy to solve all these questions satisfactorily, if the evidence was considered only in its parts. Taking it as a whole, however, I have had no great difficulty in reaching the conclusions stated in the finding of facts. The recollection of witnesses as to time, distances and bearings, cannot be relied on, in all cases, with implicit confidence. It is, at best, but the impression of what the judgment of the witness was about a matter of which no special note was made at the time. In but few instances is it claimed that the time was actually taken from a time keeper, or the bearing by a compass. It is easy to see that such impressions would be more or less influenced by what afterwards happened.

1. As to the time. All agree that no one saw the light until after five bells, or half past two. It was seen by the first and second officers on the bridge before it was by the lookouts. The officers put the time at 2.35, so recording it in the log, and I see no reason to doubt the accuracy of their estimate or recollection. No witness directly contradicts them, and they are strongly supported by what is known to have taken place afterwards. At any rate, they cannot be far from the truth.

The engineer's log shows that the engine was first stopped, after backing, at 2.53. This was after the collision. It is the duty of the engineer, or his assistant, to make a record of every change in the movement of the engine, and the time when it occurred. En-

tries are made, at the very time the changes take place, with chalk, on a blackboard kept near at hand for that purpose, and the time is taken from a clock hung where it can conveniently be seen from the place where the engineer stands when working the engine. If the assistant attends to this duty, his place is at the blackboard immediately behind the engineer. From these entries the log is afterwards written up. Such being the duty of the engineer, it is to be presumed, until the contrary is shown, that the log contains a true statement of the time when the engine was stopped.

Upon this evidence, I have found that the light was first seen at 2.35, and that the engine was stopped after the collision, while backing, at 2.53. Consequently, eighteen minutes elapsed between the first discovery of the light and the time when it was deemed safe, after the collision, to stop backing the Adriatic, and go slowly ahead to see what was necessary to be done to save life or property.

2. As to the distance. The regulations require colored lights to be of such a character as to be visible on a dark night, in a clear atmosphere, from the deck of a ship, and with the naked eye, at least two miles. This light was first seen from the bridge of a large steamer and with a glass. The sea was high and the vessels consequently unsteady. Under such circumstances, it has seemed to me that the addition of half a mile or a mile to the regulation distance, on account of the glass and the height of the place of observation, was, probably, enough. This would make the distance of the light, when first seen, two miles and a half or three miles. The estimate of Hamilton, the lookout, that it was three or four miles off when he first saw it, must be wrong, for it can hardly be believed that he could see such a light that distance, on such a night, and keep it in view, with the naked eye, standing, as he did, on deck, some feet below the bridge. Everything goes to show that the actual distance could not have been more than three miles and that it was probably less.

3. As to the color. The first and third officers both say distinctly it was green, and the lookout on the bridge thinks that was the color. All agree it first appeared off the starboard bow. The vessels would naturally be on nearly opposite courses. The Adriatic was going from, and the Harvest Queen to, Liverpool. The Adriatic, being a steamer, undoubtedly took the shortest practical route to Coningbeg. The Harvest Queen, having the wind free and being able to go substantially where she chose, would be likely to shape her course so as to sail as near as she could conveniently over the course of the Adriatic between Coningbeg and Liverpool. At Coningbeg the Adriatic was set upon a course a little to the southward of that the Harvest Queen would take in coming up from Queenstown. This would naturally place the Harvest Queen, before

⁴[This cause was heard by Mr. Chief Justice Waite, holding the circuit court for the southern district of New York, pursuant to Rev. St. § 617, at the request of Mr. Justice Hunt, allotted to the second circuit.]

she reached Coningbeg, to the northward, which would be on the starboard of the Adriatic and expose her green light, unless she was heading outside of and across the Adriatic's course. The evidence that the red light was first seen is not of a character to inspire the fullest confidence, and falls far short of satisfying me that the first and third officers, corroborated, as they are, by other undisputed facts, are mistaken. These officers had the means of knowing, and it was their special duty to know, what the facts really were. Their conduct was consistent with what they say they saw, and the scrap log, written up by the third officer, and afterwards transferred by the first officer, with such corrections as he thought necessary, to the official log, agrees with their testimony. These logs are the official record of what they saw. The light was either green or red. Whether the one or the other could alone be determined by the eye, and the impressions made at the time would be likely to continue, no matter what happened afterwards. If the logs are not correct, it is because they were intentionally falsified, a thing certainly not to be presumed.

That a red light was seen at some time before the collision is not disputed, and I entertain no doubt that it first appeared after the green.

4. As to the bearing. The log states, that, when first seen, the light bore about two points on the starboard bow, and, when it changed from green to red, about three and a half points. This was the estimate of both the first and third officers. No memorandum was made of it until the scrap log was written up, between four and five o'clock in the morning. In the mean time the collision had occurred, and the attention of all had been directed for more than an hour and a half to a search for the other colliding vessel, and to the saving of life and property. From the other circumstances in the case, I am strongly inclined to think the officers have put the bearing further to the starboard than it really was, but still there is nothing which shows satisfactorily what, if any, change should be made in their estimates, and their record in this particular must be accepted as true.

5. As to the movements of the Adriatic, and, in this connection, as to where the collision occurred and when the changes in her movements were made. There can be no doubt that the steamer ran for some time after seeing the light without changing her course or speed. The first order was to port, and that was followed immediately by orders to "stand by" and "slow." These last were given, according to the engineer's log, at 2.39. The correctness of this entry was disputed on the argument, but I see no reason to doubt it. The chief engineer was alone at the engine when the orders came. The assistant got to his post as soon as he could after he heard the telegraph bell, and

remained until the watch was changed. In the absence of the assistant it was the duty of the engineer to make the necessary memorandum on the blackboard. The presumption is that what ought to have been done was done, and I have found nothing in the case to indicate that this officer was negligent in anything. His record should show the actual time, as given by the clock, when the change was made, and I am satisfied it does.

This being the case, it follows that the Adriatic kept her course at full speed four minutes after the light first appeared. The vessels, during that time, must have been lessening the distance between them at a combined speed of full twenty miles an hour, or about a mile and a third in the four minutes. At 2.39, therefore, they were probably not more than a mile and a half apart. The engine was then slowed, and, before the collision, the speed of the steamer ahead was run down from twelve miles an hour to nothing, if she had not actually acquired sternway. Her average speed from the time she slowed until her headway was entirely overcome was half what it was before, or say six miles an hour. During the same time the average combined speed of the two vessels was fourteen or fifteen miles an hour; and if, at 2.39, they were a mile and a half apart, it would take them six minutes, and, probably, a little more, to get together. The Adriatic stopped backing at 2.53. She was then supposed to be about half a mile from the place of collision. Her maximum speed in backing did not exceed seven miles an hour. Her average speed in getting up to this maximum, after she had stopped going ahead, would, consequently, be three miles and a half an hour, if there were no obstructions in the way. But, we know that, in addition to getting up her own sternway, she had to separate herself from the *Harvest Queen* almost entirely by the use of her own power, since the effect of the wind was to keep the two vessels together until they got free of each other. I think it fair to assume, therefore, that the steamer continued backing seven or eight minutes after the collision. In this time she would have gone about half a mile. In view of these facts I have had no difficulty in reaching the conclusion, that the wheel of the Adriatic was ported at 2.39, and that the collision occurred from 2.45 to 2.47.

The first officer says, that, when the green light appeared the second time, he telegraphed to "stop," and followed this order, as soon as possible, with another, to back at full speed. The engineer's log shows that the order to stop came at 2.40, and the one to back at 2.41. Time in seconds is not put on the log, and from entries of this kind it may fairly be inferred that one order followed close on the other.

Some discussion was had at the bar, in this connection, as to the time the captain was called, and how soon he came on deck, but

to my mind these questions are unimportant, so far as this branch of the case is concerned.

It only remains to consider, under this head, what changes were made in the course of the Adriatic. At 2.39 the wheel was ported, and at the same time the engine was slowed. At 2.40 the engine was stopped, and at 2.41 put at full speed, under the reverse motion. The steamer could not, therefore, have run more than two minutes under her port helm before her screw began to turn backwards. In two minutes, at her full speed of twelve miles an hour, she would not have gone but two-fifths of a mile, and, under the "slow," it is not probable she made much, if any, more than a quarter of a mile. The estimate of the witnesses is, that, when the orders to stop and go astern were given she had not swung more than a point or a point and a half. This being so, her departure from her original course could not then have been very great, and, when the screw was reversed, the rudder had but little effect until sternway was acquired. Under these circumstances, I cannot think, that, when the collision took place, the steamer had gone more than two or three points off her course. Very little dependence can be put on the recollection of the officers or men as to the exact heading of their vessel. They were in a position which made it more important to look at the way they were to get out of the danger that threatened them, than to the exact angle of their course.

Without more as to the particular facts, I proceed to the consideration of what seems to me to be the real controversy in the case; and that is, whether, as a matter of law, the Adriatic was in fault for porting, stopping, or backing, or for starboarding on the order of the captain, when he came on deck. There is now no doubt, that, if she kept her course and speed, and the Harvest Queen had done what she in fact did do, there would have been no collision. It was a mistake, therefore, to change, but every mistake is not necessarily a fault, in admiralty. The law requires that those in charge of the navigation of vessels like the Adriatic should possess a very high degree of nautical skill. They are charged with the important duty of directing the movements of the powerful machinery placed under their control, so as not unnecessarily to endanger life or property, either on board or not on board. For this purpose they are required to exercise good judgment. They need not be infallible. It is enough if they do what others, having the requisite skill, and placed in a like situation, would ordinarily have done.

The conduct of those on the Adriatic must be considered in connection with the facts as they successively presented themselves at the time. And, first in order was the green light, seen a point and a half or two points on the starboard bow, two miles and a half or three miles away, and to the leeward. The wind was from the southward

and westward, accompanied by a driving sea from the same direction. So long as that light alone was in view in that quarter, it was safe for the steamer to keep her course and speed, and no one could complain if she did. The highest skill would not be likely to suggest anything different. Next, the green light was changed to red, and thus the green of the steamer exposed to the red of another vessel not a very great way off. At this time nothing but a light was seen. Neither the ship nor her sails had appeared. It was only known for a certainty that a red light was on the water, well off the starboard bow of the steamer, between her and a dangerous lee shore, and that it was probably carried on some kind of a sailing vessel, as no white light accompanied the red. What course the vessel was steering could not then be told with exactness. It was under such circumstances that the first officer was called on to decide whether he would attempt to cross in front of the light at full speed without porting, or whether he would port and slow, or do either alone.

I am aware that it is not every case of meeting port to starboard that will justify a port wheel, to put port to port. The rule is for one vessel not to cross the bow of another at a dangerous proximity, and it is just as wrong to knowingly do this by porting as it is by starboarding. Here, however, there was uncertainty. A light only was seen. It might be on a vessel beating down the channel, or on one coming up. The vessel might be one that could sail close to the wind, or another that was obliged to keep more away. On a steamer going at the rate of twelve miles an hour against or across the wind, it is not always easy to tell the exact direction from which the wind is blowing. Practice will undoubtedly enable some to make estimates that will approximate the truth, but it will not always do to venture on nice calculations, without more accurate observation than can generally be made under such circumstances.

The appearance of the red light in the place of the green indicated clearly that the vessel on which it was displayed occupied a different position towards the steamer from what she did before, and that in some way the courses of the two vessels were changed, so that they crossed ahead of where the steamer then was. How far ahead was uncertain. Under these circumstances it was that the officer in command deemed it prudent to put his wheel to port, so as to bring his red light opposite the same light of the approaching vessel, and, as there was doubt, to bring his vessel under better control in case of an emergency, by reducing her speed. It is now probable, that, if the ship could have been seen, and her exact position made out, neither of these things would have been done, but the question here is not what, with the knowledge we now have, ought to have been done, but what, with the facts as

they then appeared, ordinary prudence would suggest. It needs no argument to show, that a speed of twelve miles an hour, with a vessel weighing, as the Adriatic did, 3,000 tons, would, under some circumstances, be dangerous. The natural impulse of a skilful navigator, if in doubt as to what was before him, would be to reduce this speed, so as to get his ship under better control while the uncertainty continued. So, to, a red light exposed to a green is more likely to be unsafe than red to red; and, where reasonable doubt exists as to the relative position of the two vessels, instinctively, almost, those in command endeavor to bring the two red lights together, as the appropriate way of avoiding all danger.

It has, however, been argued with much force, that, if the red light was first seen a mile and a half away, three points and a half over the starboard bow, the Adriatic ought to have known, that, with the wind as it was, she would cross the course of the approaching vessel long before there could be any danger of collision, and that to attempt to pass otherwise was a clear fault. I have very great doubt whether, when the red light appeared, it was as far over the bow as seems now to be supposed, but, be that as it may, the exact position of the ship could not be seen; and I do not think such a mistake as may have been made ought, under the circumstances, to be visited with the consequences of a legal fault. The change of the green light to red was calculated to induce the belief that the ship on which it was carried had changed her course, and I am by no means satisfied, from the evidence, that she did not do so. As the case stands, it now seems to me probable, that, if the steamer had kept her course, with that light in view, there would have been no collision. Soon, however, the red light went out and the green again appeared, still without ship or sails in sight to aid in determining what ought to be done. This added to the original uncertainty, and clearly made a case apparently for the application of the rule which requires a steamer in doubt to get away from apprehended danger. To go ahead would look like approaching the peril, while to back would seem to be withdrawing from it. A change of helm at that time was not specially important, because, before it could be made of any practical use, the screw would be under its reverse motion, and then the rudder could have but little effect until the momentum was overcome and sternway obtained. When that was done, the port wheel would have the same effect on the swing of the bow as a change to starboard would have in going ahead. If the witnesses are to be believed, the course of the ship appeared to be unsteady, and, that being so, it is hard to say that backing away from her was a fault. In the darkness which then prevailed that would seem to be the safest thing that could be done.

Complaint is made of the captain, because, after coming on deck, he ordered the wheel to starboard, without consulting the first officer. The captain says he gave the order when he saw the red light change to green, and when, as he supposed, the steamer was under sternway. I am satisfied, however, that the forward motion had not been overcome. The engine was working astern and throwing the "white water" forward, but the steamer herself was still going ahead. If she had been going astern the order would have been right, for the starboard wheel, in backing, would bring the bow to starboard, and thus assist in putting the vessels on parallel courses, with their green lights opposite each other. As long as she was going ahead slowly it made but little difference which way the rudder was, since the backward movement of the screw prevented the operation of the rudder to any considerable extent. The order, therefore, could not have contributed to the collision and did no harm.

It is again insisted, that the Adriatic was in fault for delay in getting out her boats, and for not waiting until daylight before starting on her voyage. The order to clear away the boats all agree was given with promptness, and I cannot find that there was any culpable delay in getting them out. Before they could be lowered, the steamer was half a mile away from the place of collision and from the ship. It was, certainly, good judgment to wait until the steamer could be got nearer before putting the boats in the water, and it is not seriously contended, that, when the order was given the second time, it was not obeyed with all the promptness that ought to have been expected. The engineer's log, the correctness of which I do not doubt, shows conclusively that the steamer was lying by and moving cautiously about in the vicinity of where the accident occurred for much more than an hour. The gale was all the time increasing, and the lee shore not far away was dangerous. The official report of the weather shows that the next morning at eight o'clock the wind was blowing a strong gale at Tuskar, the nearest signal station. The ship must have gone down before morning, and, probably, while the steamer was lying by. If the ship's boats had been got out, there can hardly be a doubt they would have reached the steamer, lighted as she was from the mast-head. If they were not out, it is probable there was nothing left on the surface of the water to save, after the voices which had been heard were lost; and this must have been considerably more than an hour before the steamer left. In the meantime the steamer's boats had been out for nearly an hour, and diligent in their efforts to do all that could be done. While, therefore, it would have been more satisfactory if the steamer had staid by longer, I cannot say she was in fault for not doing so. The probability is that nothing more could have been done if

she had held on, and she owed her first duty to those she had on board.

Complaint is also made of the unsatisfactory account of the collision given in the logs, of the painting over of the scratches on the bow in New York, and of the reticence of officers of the steamer on her arrival. All these furnish just cause for criticism, but I cannot say they overcome the effect of the other facts which to my mind have been satisfactorily established in spite of them.

My attention has also been called to some supposed discrepancies in the cases made by the logs, the answers, and the testimony given on the defense. I have failed to find any such substantial differences as to cast suspicion on the testimony. The difficulty with me has been not so much as to the facts, as to the duty of the Adriatic in connection with the facts I have found.

The case has been presented in the most satisfactory manner on both sides. Nothing has apparently been left undone by counsel or parties that they could do, to aid me in the determination of the facts or of the law; and, after the careful consideration which such laborious preparation deserves, I have been unable to reach any other conclusion than that the fault of the Adriatic has not been shown. A steamer is not justified in coming into collision with any other vessel, if it is possible to avoid it, that is to say, if it can be avoided by the use of such means as those having the requisite skill would ordinarily employ for that purpose under like circumstances. I cannot but think the officers of this steamer have brought their justification within the fair operation of this rule. Much of what was done at the time of this disastrous collision will never be known. It is impossible to tell with certainty how the vessels came together. The ship came and went in a comparatively short time, and necessarily in the midst of great excitement. Almost every witness has his own peculiar theory. Hardly any two of the large number of diagrams in the record, representing what the observers think they saw, agree in the material points, and it would be a useless task to attempt now to ascertain just how the damage was done. It seems almost incredible that so large, and apparently so strong, a ship could be broken into and sunk in so short a time, without inflicting serious injury on the Adriatic. As it was, the iron plating was hardly touched. Not a single indentation has been found which can fairly be attributed to an actual contact with the hull of the ship. The scratches on the paint must have been very slight, and it is by no means certain, from the testimony, that any were found on the stem or the starboard side of the bow. There is certainly no satisfactory evidence showing that the sharp bow of the Adriatic went any considerable distance inside the hull of the ship. As the Adriatic was stopped, or nearly so, it is evident that the blow which caused the loss must somehow have come from the Har-

vest Queen herself. It is a very remarkable fact, under the circumstances which are known to have existed, that no hail was heard from the deck of the ship before or after the collision. This seems entirely inconsistent with the idea that she could have had her proper complement of men standing watch and attending to their duties at the time. Confessedly, a considerable time elapsed between the collision and the final disappearance of the ship, enough, certainly, to have given an opportunity to lower away her boats, if her crew had been at their posts. But it is not my intention to look for the faults of the ship. I place the decision entirely on the ground, that, upon the case as it stands, the steamer is free from blame.

A decree may be prepared dismissing the libel, with costs in both courts.

[NOTE. This case was appealed to the supreme court, in which, after a motion to strike from the transcript certain depositions and testimony had been heard and denied,—a new rule on the subject, however, being promulgated, (103 U. S. 730.)—a hearing was had on the merits on the finding of facts above reported. In affirming the decree of the circuit court, Mr. Justice Field said: "When a steamer is approaching another vessel, and there is danger of collision from continuing the rate of speed at which she is going, it is the duty of her captain to slacken her speed, and, if necessary, to reverse her engines, and move her backwards. Such is the express language of rule 21 adopted by congress for the prevention of collisions on water, which is as follows: 'Every steam vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam vessel shall, when in a fog, go at a moderate speed.' Rev. St. § 4233. * * * The rule is for a sailing vessel meeting a steamer to keep her course while the steamer takes the necessary measures to avoid collision. * * * Though the rule should not be observed when circumstances are such that it is apparent its observance must occasion a collision, while a departure from it will prevent one, yet it must be a strong case which puts the sailing vessel in the wrong for obeying the rule." *Marshall v. The Adriatic*, 2 Sup. Ct. Rep. 355, 107 U. S. 512. See, also, *Crockett v. The Isaac Newton*, 18 How. (59 U. S.) 583; *Williamson v. Barrett*, 13 How. 101; *Bedell v. The Potomac*, 75 U. S. (8 Wall.) 590; *Baker v. The City of New York*, Case No. 765.]

Case No. 92.

The A. D. VANCE.

[Blatchf. Prize Cas. 608.]

District Court, S. D. New York. Sept. 29, 1864.

PRIZE—VIOLATION OF BLOCKADE—CONDEMNATION.

Vessel and cargo condemned for a violation of the blockade.

In admiralty.

BETTS, District Judge. The above vessel, and the cargo and lading on board of her, were captured at sea, September 10, 1864, by the United States war vessel *Santiago de*

¹[Reported by Samuel Blatchford, Esq.]

Cuba, Captain O. S. Glisson, of the navy, commanding, and were sent into this port for adjudication September 16, 1864. On the same day a libel was filed in court against the said prize by United States attorney, and process of attachment and monition, returnable on the 27th of September following, was issued from the court to the marshal, and was, by the marshal, returned in court on the aforesaid return day, duly served; whereupon public proclamation was made, in open court, of such service and return, in due form and order of law, and no appearance or claim being interposed or offered thereupon in behalf of the aforesaid prize, or any person interested therein, judgment of condemnation and forfeiture thereof to the United States was, on motion of the United States attorney, then and there made and ordered, in open court, in due course of law.

The vessel, when seized, had on board a certificate of British registry, issued at the customhouse in Dublin, September 26, 1862, to Joseph Royce and others, of the county and city of Dublin, merchants, as joint owners, under the name of the Lord Clyde, British-built, at Greenock, Renfrew county, Scotland. A certificate was indorsed on the registry by the register, at the custom-house, Greenock, May 21, 1864, that Joannes Wyllie had that day been appointed master of the ship, in place of John Stephen Byrne. No shipping papers, crew list, charter-party, manifest, log-book, instructions, or other papers relating to the course or destination of the ship, on the voyage upon which she was seized, were found on board of her when she was arrested, or were put in evidence with the proofs in preparatorio.

Joannes Wyllie, master, Thomas Carter, purser, and Charles Harris, second engineer, were examined by the prize commissioners in preparatorio, on the 17th and 19th of September, 1864.

The witnesses all concur in stating that they were present on the ship at the time of her capture at about 7 o'clock in the evening of September 10, 1864, at sea, outside of Wilmington, North Carolina, for running the blockade of that port. The witnesses were all subjects of the Queen of Great Britain. The master testifies that the vessel was owned by Pour, Low & Co. of Wilmington, North Carolina, who appointed him to the command of her and delivered her to him in Wilmington; that the vessel's name, when built, was the Lord Clyde, but was afterwards changed to the A. D. Vance; that, when arrested, she had on board a cargo of cotton and turpentine; that it was taken on board in August, 1864; that the vessel sailed last from Bermuda to Wilmington, and thence back from Wilmington, September 9, 1864, for Bermuda; that she had been running between Nassau, Bermuda, and Wilmington, ever since he had been connected with her, for fully twelve months, and had

carried the same kind of cargoes; that he believes some papers were thrown overboard from the ship while she was being chased and attempting to escape capture; that all the ship's company knew, while they were following the trade spoken of, that Wilmington was under blockade by the vessels of the United States; that the vessel had repeatedly entered and departed from Wilmington while that port was under blockade, while he was on board of her; that the cargo captured was of the growth and manufacture of the Confederate States, but he does not know that it was of North Carolina; and that, when this vessel was chased by the United States war ship she put on all the steam she could carry, and endeavored to escape capture. There is no contradiction made by the other witnesses of the material facts stated in the testimony of the master. Upon the facts proved, the evidence is clear and satisfactory that the vessel seized and the cargo laden on board of her were guilty of a wilful violation of the blockade of the port of Wilmington, North Carolina, as charged in the libel; that the condemnation and forfeiture of the vessel, tackle, and cargo is adjudged accordingly.

ADVANCE, The, (UNITED STATES v.)
[See United States v. The Advance, Case No. 14,425.]

Case No. 93.

The ADVENTURE.

[1 Brock. 235.]¹

Circuit Court, D. Virginia. Nov. Term, 1812.*
NON-INTERCOURSE ACT—PRIZE—RIGHTS OF CAPTORS—SALVAGE.

The Adventure, a British ship, with a cargo of British goods and merchandise, was captured by a French frigate on the high seas, pending a war between France and Great Britain, and was given by the commander of the French frigate, to the captain and crew of an American vessel which had been previously, on the high seas, captured, plundered, and burnt, by the same frigate, and who were detained on board of the French frigate, when the Adventure was captured. The American sailors brought the ship and her cargo into the port of Norfolk, in the state of Virginia, while the laws interdicting all commercial intercourse between Great Britain and the United States were in force, which declared it unlawful to import into the United States, goods, wares, and merchandise, of British growth and manufacture, "from any foreign port or place, whatever," and prohibited their introduction under pain of forfeiture and other severe penalties. *Held:* That this was no infraction of the non-intercourse laws, the ocean, which is the great highway of nations, not being a foreign "port or place" within the meaning of those laws. To constitute a violation of the law, the British goods, &c., must have been brought from

¹[Reported by John W. Brockenbrough, Esq.]

²[Reversed by supreme court, 12 U. S. (8 Cranch,) 221.]

some port or place within the dominions of some foreign potentate or power.

[See *The Astrea*, 1 Wheat. (14 U. S.) 125; *Rowe v. Brig and Cargo*, Case No. 12,093.]

[In admiralty. Libel for salvage. Claim of forfeiture on behalf of United States. Decree of forfeiture by district court (decree nowhere reported; opinion not now accessible) reversed, and ship and cargo adjudged to libellants. Decree of circuit court for libellants reversed, on a different ground, by supreme court in *The Adventure*, 8 Cranch, (12 U. S.) 221.]

Appeal from the district court of Norfolk. The libellants filed their libel in the district court of Norfolk, in admiralty, praying that the ship *Adventure* and her cargo should be condemned and sold for their benefit, or that if it should appear that the same, or any part thereof, ought to be restored to any person or persons, as the former owner or owners thereof, then that the same might be restored upon the payment of such salvage as by law ought to be paid for them. The attorney for the United States also filed a claim on behalf of the United States, claiming the ship and her cargo as forfeited to the United States, the *Adventure* being a ship, owned by British subjects, and having brought into the port of Norfolk a cargo composed of goods, wares, and merchandise, of the growth, produce, or manufacture of Great Britain, in contravention of the act interdicting commercial intercourse between the United States and Great Britain.

The counsel for the libellants and the United States agreed [upon] the following case as the one arising under the evidence in this cause. The libellants in this cause were the master, supercargo, mates, mariners, and cook, of and belonging to, an American brig, called the *Three Friends*, which brig, navigated by the libellants, sailed from the port of Salem, in the state of Massachusetts, on the 11th day of October, 1811, laden with a valuable cargo, and bound on a voyage from thence to the port of Pernambuco, and to any other port or ports on the coast of Brazil. The *Three Friends* and her cargo, at the time of her sailing from Salem, were the property of Pickering Dodge, a citizen of Massachusetts. The brig proceeded on her destined voyage until the 14th day of November, 1811, when, having arrived in latitude 7° 58' north, and longitude 25° west, of Greenwich, on the high seas, she was fallen in with and captured by a French frigate, called the *Medusa*, which frigate was accompanied by another French frigate called the *Nymph*. The crews of these two frigates, by command of their commodore, removed the libellants from the *Three Friends* on board of the *Medusa*, and then burnt and destroyed the brig and her cargo. After this event, the libellants were kept and detained on board of the *Medusa* until the 21st of November, 1811, when, in latitude 21° 20' north, and longitude 32° 20'

west, from Greenwich, on the high seas, the *Medusa* fell in with and captured the ship *Adventure*, which is libelled in this cause. The French captors took, and made prisoners of war, of all the crew of the *Adventure*, took away such part of her cargo as they wished, and all her papers, and on the following day the commander of the *Medusa* made an unqualified donation to the libellants, at their request, of the ship *Adventure*, with the residue of her cargo. The libellants, after receiving the ship, proceeded in her for some port of the United States, and although too few in number to be equal to the task of navigating properly so large a ship, yet, after sustaining great labor, damage, and fatigue, and after a long and tempestuous voyage of 71 days, they at length arrived in the port of Norfolk, in Virginia, on the 1st of February, 1812. The *Adventure*, at the time of her capture by the *Medusa*, was a British ship, furnished with letters of marque and reprisal, armed with twelve guns, and navigated by seventeen seamen, and, together with her cargo, belonged to some British merchants residing in Liverpool, whose names are unknown, and was then bound on a voyage from Liverpool to the British island of St. Christophers, in the West Indies. At the period of the capture, open war existed between France and Great Britain, and the cargo of the *Adventure*, which was brought into the United States, consisted entirely of articles of the growth or manufacture of Great Britain.

The district court decreed, "that the said ship, *Adventure*, her tackle, apparel, and furniture, together with the cargo, brought in the said vessel, into the port of Norfolk, within the district of Virginia, be forfeited for entering a port of the United States in violation of the act to interdict the commercial intercourse between the United States and Great Britain and France, and their dependencies, and for other purposes," and of the act supplementary thereto:" and from this decree the libellants appealed to this court. [Reversed by supreme court, 12 U. S. (8 Cranch,) 221.]

MARSHALL, Circuit Justice. The only question made at the bar in this case is:—Are the ship *Adventure* and her cargo forfeited to the United States, as having contravened the act interdicting commercial intercourse between this country and Great Britain? Act March 1, 1809; 2 Story, *Laws U. S.* 1114–1120, [2 Stat. 528.] The *Adventure* was a British ship, captured by the *Medusa*, a French frigate; and presented to the libellants, who were the master, supercargo, and mariners, of the American brig *Three Friends*, which brig, with her cargo, had been previously captured and burnt by the same frigate. The *Adventure* was navigated into the port of Norfolk, and there libelled by the sailors to whom she had been

given. The United States filed their claim to the vessel and cargo as forfeited.

The clause of the law supposed to be infringed, is in these words:—"Nor shall it be lawful to import into the United States, or the territories thereof, from any foreign port or place whatever, any goods, wares, or merchandise whatever, being of the growth or manufacture of Great Britain or Ireland," &c. Section 4. The United States contend, that the Adventure and her cargo have incurred the penalties of this act. The libellants, that the case is not within the act. In argument, the impropriety of inquiring in this place into the policy of the law, and the legal principle that penal laws should be construed strictly, have both been made the subjects of animadversion. On these observations I will only say, what has been often before said in substance from this place, that the wisdom or folly of any particular system, is for the consideration of the legislature, not of the court; and when the policy of the law is mentioned by a judge, I always understand him to use the term in reference to the object of the legislature, and to the means by which that object is to be effected, as disclosed in the words they have employed.

The maxim, that penal laws are to be construed strictly, has never been understood, by me at least, to imply, that the intention of the legislature, as manifested by their words, is to be overruled; but that in cases where the intention is not distinctly perceived, where, without violence to the words or apparent meaning of the act, it may be construed to embrace or exclude a particular case, where the mind balances and hesitates between the two constructions, the more restricted construction ought to prevail; especially in cases where the act to be punished is in itself indifferent, and is rendered culpable only by positive law. In such a case, to enlarge the meaning of words, would be to extend the law to cases to which the legislature had not extended it, and to punish, not by the authority of the legislature, but of the judge. The counsel for the United States contend, that this case is within the plain letter of the law; and, to prove their position, have gone into a critical analysis of the sentence.

Although the disquisition is a dry one, and the arguments may appear nice, perhaps trivial, such as ought not to determine a question of property, it is deemed, by the court, to be one which is required by the character of the case. This part of the inquiry seems to turn on the meaning of the words "foreign place," as they stand in the act of congress. For the goods must be imported from a "foreign port or place," to come within the description of the law. The counsel for the claimants take these words in their most enlarged sense, and suppose that any place on land or water, within or without the dominion of any foreign power,

is a "foreign port or place," within the meaning of the act. It is worthy of remark, that this broad construction refuses to the words under consideration, any operation whatever. Expunge them, and the ambiguity of the sentence is removed. It means all that is required. This will be perceived, by reading the sentence without them, "Nor shall it be lawful," &c. If the act was drawn on reflection: if the legislature weighed the words they employed, it must have been perceived, that the words "from any foreign port or place whatever," could have no other operation, than to limit the broad meaning which the sentence without them would necessarily require. They were not wanting to exclude cases of goods, brought from one American port to another, because such an importation is not an importation into the United States. The words in question, then, operate restrictively, or they operate not at all. Unquestionably, redundancy in language, especially in legislative acts, is often seen; and, therefore, it would not be admissible to overrule the intention of the legislature, rather than pronounce a member of a sentence entirely useless. But in a case, where the intention is involved in absolute uncertainty, the rule of construction which would give some effect to every part of the sentence is not to be entirely disregarded; especially, if, as in this sentence, the words appear to have had some importance attached to them by the legislature. It may also be noticed, that the same words are used frequently in the same section,—always denoting some place within the dominion of a foreign potentate. In all these cases, the word "place" is, in terms, limited to some spot within the territory of a foreign nation. This may aid in showing, that the place, in the mind of the legislature, was some place, not in air, or in water, but within the power and jurisdiction of a foreign state, which was capable of being resorted to, for the purposes of commerce. So, subsequently, in the same sentence, the words are used in the same restricted sense.

It certainly does not weigh much, yet it is something in determining the sense of an ambiguous phrase, that the word "place," throughout the law, is coupled with the word "port," or the word "country," by the disjunctive conjunction "or;" and a "port," or a "country," is necessarily within the limits of some state, or capable of being within those limits. This association would seem to indicate, that the word "place," also, is used in relation to a foreign territory; and is introduced, because, otherwise, the law might be evaded, by taking in a cargo at some place, not established as a port. But what weighs more than either or all of these arguments, is this: The broad navigable ocean, which is emphatically and truly termed the great highway of nations, cannot, in strict propriety of language, be denominated "a foreign place." The words are said to be

used to denote any place, not belonging to the United States. But the sea is the common property of all nations. It belongs equally to all. None can appropriate it exclusively to themselves; nor is it "foreign," to any.

If, then, the legislature designed to prohibit the importation of goods, acquired as was the cargo of the Adventure, they would either not have introduced the words foreign "port or place" into their law, or they would have added other words adapted to such intention. It cannot be believed, that the legislature would have designated, by the term "foreign," a place in which the United States claim equality of dominion with other sovereigns. If this case comes within the act, the American sailors who have availed themselves of this fortunate occasion, as they deemed it, to return to their country, will be liable to a penalty of treble the value of the goods on board the vessel. Section 5. Could any court, or ought any court, to strain the meaning of words, in order to give such a judgment?

It is contended that the word "import" is co-extensive with the words "bring in." I am not prepared to controvert, or absolutely to admit, this proposition. But let it for the present be conceded. It will be perceived, that the argument which has been used allows that broad meaning to the word "import," and is founded on the meaning of the words "foreign port or place." But let us see how far we are unavoidably carried by establishing this construction of the word "import." Suppose the captain of the Medusa, instead of giving the Adventure to the American sailors, had brought her, with her cargo, into an American port, as a prize. would the penalties of the law have been incurred? Are gentlemen prepared to give this construction to the act? If they are not, the exception of such a case must be supported, either by the technical meaning of the word "import," or by allowing to the words "foreign place" the meaning which the court has given to them.

I will not put the case of a prize brought in by an American cruiser, because the war, and the consequent measures of government, may be considered as so far repealing the act of congress. But it is said, that if goods may be introduced as they have been, the law would become a dead letter, and the French flag would cover a prohibited trade, under the pretext of capturing British vessels and bestowing them on American sailors. This fraud presupposes a combination between the cruiser under the French flag, the British vessels to be captured, and the owners of those American vessels and cargoes, which must be previously destroyed, in order to furnish a case for the gift of a British vessel and cargo. This machinery would be too expensive to render the fraud so profitable as to be worth pursuing. In addition to the certain loss of the American vessels and cargoes there would be danger of detection, in which case the

penalties of the law would be incurred. But if, notwithstanding these safeguards, the mischief should grow to a size worthy of attention, the legislature can at any time furnish the correction, by expressing its will on that subject.

I cannot admit, that this importation is opposed more to the spirit and intention, than it is to the letter of the law. If I look either into the act itself, or into the contemporaneous history of my country, I am informed, that the object of the legislature was, by refusing the American market to British manufactures, to affect the manufactures, and through them the government. Therefore, the importation of British manufactures, not only from Britain, but from any foreign port or place whatever, was prohibited: for such foreign port or place might be made the medium through which the trade should be carried on. But bona fide belligerent captures cannot be made the medium of such a trade. Nor would the admission of goods, so captured, into the United States, benefit or relieve the British manufacturer or nation.

I think the case not within the act, and, therefore, that the sentence ought to be reversed and the subject condemned, and adjudged to the libellants.

NOTE, [from original report.] From the decree which was pronounced by the circuit court in this case, in conformity with the above opinion, the United States appealed to the supreme court, and that court reversed the decree of the circuit court. It will be perceived from the following analysis of the opinion of the supreme court, that the opinion of the chief justice, as far as it went, is entirely supported by it: but that the decree was reversed upon a new and distinct ground which was not touched in the circuit court. The supreme court said, that the most natural mode of acquiring a definite idea of the rights of the libellants in the subject-matter, would be, to follow it through the successive changes of circumstances by which the nature and extent of the rights of the parties were affected, viz.: the capture, the donation, the arrival in the United States, and the state of war.

1st. The capture. As between the belligerents, the capture produced a complete divestiture of property. It left nothing in the original British owner, but a mere scintilla juris, the spes recuperandi.

2d. The donation. Upon the donation, however absolute the right of the captor, or unqualified the gift, the donee could acquire no more than what was consistent with his neutral character to take. He could be in no better situation than a prize master navigating the prize, in pursuance of orders from his commander.

3d. The arrival in the United States. The vessel remained liable to British capture on the whole voyage, and on her arrival in a neutral territory, the donee sunk into a mere bailee for the British claimant, with those rights over the thing in possession, which the civil law gave for care and labor bestowed upon it. By the importation of the vessel, under the peculiar circumstances of the case, no forfeiture attached under the non-intercourse laws. The ship was the plank in the shipwreck: the tabula in naufragio; and it came within the description of property cast casually on our shores. To have carried the vessel *infra prae-sidia* of the enemy, unless forced by necessity to do so, would have been an unneutral act.

But by bringing her into a neutral port, where the original right of the captured would revive, and might be asserted, the libellants did an act exclusively resulting to the benefit of the British claimant. The libellants, therefore, were entitled to salvage: and in the absence of any express rule for ascertaining the amount, and under the circumstances of this case, they should be allowed, in different proportions which were ascertained by the court, one half of the amount of sales of the cargo, viz.: \$8,000.

4th. The war. As war between the United States and Great Britain intervened, the British claimant could not interpose his claim for the residue, *flagrante bello*. But as the property was found here, at the declaration of war, it must stand on the footing of other British property similarly situated, and might be claimed, after the termination of the war, unless previously confiscated by legislative enactments.

The supreme court therefore decreed and ordered that the decree of the circuit court be reversed, that the costs and charges be paid out of the proceeds of sale; that one half of the balance be adjudged to the libellants, and that the balance be deposited in the Bank of Virginia, to remain subject to the future order of the court. After the termination of the war, the original British owners of the *Adventure* and her cargo preferred their claim, duly authenticated, in the circuit court, and the balance remaining to the credit of this cause in the Bank of Virginia was paid to them. The *Adventure*, 8 Cranch, [12 U. S.] 221.

Case No. 94.

The *ADVOCATE*.

[Blatchf. Prize Cas. 142.]¹

District Court, S. D. New York. April, 1862.

PRIZE—VIOLATION OF BLOCKADE—APPRAISEMENT BY NAVAL SURVEY—APPROPRIATION TO GOVERNMENT—PRIZE PROCEEDINGS.

1. Where a vessel captured as prize is appraised by a naval survey, and appropriated to the use of the United States, and her papers and crew are, with the appraisal, sent to this court, proceedings against her in prize are regular, although she is not brought before the court.

2. Vessel condemned as enemy property, and for a violation of the blockade.

In admiralty.

BETTS, District Judge. This vessel, with her lading, was captured December 1, 1861, in Mississippi sound, off the coast of Mississippi, by the United States ship-of-war *New London*, and taken to Ship Island, where, on appraisal by a naval survey, she was appropriated by the United States flag officer at that port to the military use of the United States, as necessary for that service. The appraisal, with the papers, the master, and part of the crew of the vessel, were sent to this port, and she was here libelled in this suit, March 3, 1862.

The vessel belonged to her master, John Fallon, an Englishman, but a citizen of Louisiana, who has resided in New Orleans since 1857, but is not a married man. He regards Long Island, New York, as his real

¹[Reported by Samuel Blatchford, Esq.]

home. The vessel sailed from New Orleans a blockaded port, under the rebel flag; and with a fishing license from the Confederate States, and was seized with these evidences upon her. She was engaged in fishing, and had no cargo on board when arrested, except the fish intended for sale on her return to New Orleans. The capture was about sixty miles east of New Orleans, and the master knew of the war, and that the Southern ports were under blockade when he went out. The vessel had, in May previously, been warned, off Pensacola, of the blockade of the southern ports, and the master knew that New Orleans was blockaded when he went out of that port. The register and license under which the vessel was sailing when captured were issued under the rebel or Confederate States' authority.

Upon these facts, the vessel and her equipments were enemy property, and had also been used to evade the blockade of the port of New Orleans, in her egress therefrom, on the adventure upon which she was seized. The proceedings against the property as prize are regular, without its being brought before the court, (Proceeds of Prizes of War, [Case No. 11,440,]) being in conformity with the mode of procedure in admiralty in seizures for forfeitures under the revenue laws. Prize Rule, No. 24; Dist. Ct. Adm. Rule, No. 184; Sup. Ct. Adm. Rule, No. 39.

Judgment of condemnation and forfeiture will be entered, accordingly, with costs; and the appraised value of the vessel be paid into court, in satisfaction thereof.

A. E. DOUGLASS, The, (SOUTHWORTH v.)

[See Southworth v. The A. E. Douglass, Case No. 13,195.]

A. E. I., The, (SLOAN v.)

[See Sloan v. The A. E. I., Case No. 12,946.]

AEOLIAN, The, (LOGAN v.)

[See Logan v. The Aeolian, Case No. 8,465.]

Case No. 95.

AERTSEN v. The *AURORA*.

[Bae, 161.]¹

District Court, D. South Carolina. Sept., 1800.

ADMIRALTY—JURISDICTION—SEAMEN—ARTICLES STIPULATING FOR REGULATION BY LAW OF HOME PORT.

Seamen may be moderately corrected by the captain. This court will not interfere where they are bound by articles to submit all disputes to a home tribunal.

[Cited in *Bucker v. Klorkgeter*, Case No. 2,083.]

¹[Reported by Hon. Thomas Bee, District Judge.]

[In admiralty. Libel for wages. Dismissed.]

BEE, District Judge. This is a suit instituted for seamen's wages, and to obtain a discharge, on account of the captain's having ill treated them. The crew consisted of eleven persons, two of whom are cabin boys. The rest are joined in this application. The question for me is whether these men have suffered such ill treatment as will justify me in ordering their discharge, and payment of their wages.

A master of a vessel is authorized by law to correct his seamen moderately. In this instance it has been proved that the captain, at different times during the voyage, struck three of the libellants with his fist; these were the boatswain, the cook, and a seaman named Hanson. It seems that after being eleven weeks at sea, they were restricted to an allowance of water of a bottle per man; and this caused discontent. The boatswain, going at the head of the crew to demand more, was ordered off the quarter deck. On his refusing to comply, a scuffle ensued, and the captain struck him once or twice with his fist. For the same cause he struck Hanson, and threatened to shoot him, if he did not go away; he ordered his pistol to be brought up, but this was not done. The cook was also struck once by the captain, with his fist, for having unnecessarily consumed the wood.

There is evidence of the captain's having a pistol on deck twice; once, when he loaded it to shoot a dog that had bit him; and at another time to intimidate the crew; but in the last instance there is no proof that it was loaded. The captain, indeed, swears expressly that it was not; and his answer must be admitted because there are not two witnesses to contradict it. From this evidence, I do not see sufficient cause to entitle these three men to their discharge: 1st, because no unlawful weapon was used; 2dly, because there was provocation enough to justify blows with the fist. The rest of the crew have shown no claim whatever to their discharge. It is true that the captain was frequently intoxicated during the voyage; but there is no proof of his having struck one of the others. It appears that their allowance of water was increased, and that they had their brandy daily.

This is the case of a neutral vessel, the crew of which are bound by their articles to return to Hamburg, before they are entitled to receive their wages; and the 12th of those articles stipulates that every thing not specified therein shall be regulated according to the marine law of Hamburg for regulating the conduct of officers and seamen aboard vessels belonging to that place.

Let the suit be dismissed with costs.

AETNA INS. CO., (ANTHONY v.)

[See Anthony v. Aetna Ins. Co., Case No. 486.]

AETNA INS. CO., (BAUBIE v.)

[See Baubie v. Aetna Ins. Co., Case No. 1,111.]

AETNA INS. CO., (BOON v.)

[See Boon v. Aetna Ins. Co., Case No. 1,639.]

AETNA INS. CO., (COLLINS v.)

[See Collins v. Aetna Ins. Co., Case No. 3,009.]

AETNA LIFE INS. CO., (FRANCE v.)

[See France v. Aetna Life Ins. Co., Case No. 5,027.]

Case No. 96.

AETNA INS. CO. v. HANNIBAL & ST. J. R. CO.

[3 Dill. 1; 1 Cent. Law J. 206.]

Circuit Court, E. D. Missouri. 1874.

INSURANCE—ASSIGNMENT—SUBROGATION—ACTION
—PARTIES.

1. Where insured property has been destroyed by a wrongdoer and the insurer has paid to the owner on the policy less than the value of his loss, and taken a partial assignment of his right, he cannot sue the wrongdoer in his own name for the injury, either as at common law or under the statute of Missouri. The action must be in the name of the owner of the property destroyed.

[Cited in First Presbyterian Soc. v. Goodrich Transp. Co., 7 Fed. Rep. 260; Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co., 41 Fed. Rep. 645.]

[2. The wrongful act, being single and indivisible, gives rise to but one liability, and only one action can be maintained therefor.]

[Cited in Springfield Fire & Marine Ins. Co. v. Richmond & D. R. Co., 48 Fed. Rep. 361.]

[At law. On demurrer to petition. Demurrer sustained.]

The plaintiff insured the personal property of one Myron H. Balcom, situate adjoining the defendant's railway, for \$1,900. Within the lifetime of the policy, property covered by it to the value of \$2,214 was destroyed by the carelessness of the defendant's servants in the use of its locomotive engine. The insurance company paid Balcom, in full satisfaction for all claim under his policy, \$1,050, and received from him a written instrument reciting the foregoing facts, and assigning to it all his right to recover on account of said loss against the railroad company, reserving all rights in excess of the \$1,050. The petition, which is in the name of the insurance company, sets forth the foregoing facts, and asks a judgment against the railroad company for the \$1,050. The defendant demurs, because the cause of action is not assignable, either by operation of law or by act of the

¹[Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

parties, and because the plaintiff is not entitled to maintain an action in its own name.

Lucien Eaton, for plaintiff.
James Carr, for defendant.

Before DILLON, Circuit Judge, and TREAT, District Judge.

DILLON, Circuit Judge. The property destroyed exceeded in value the amount insured, and the rule of law has been long settled that the insurance company, on the payment of the loss, cannot sue the wrongdoer who occasioned it in its own name. The suit, though for the use of the insurer, must be in the name of the person whose property was destroyed. The wrongful act was single and indivisible, and gives rise to but one liability. If one insurer may sue, then, if there are a dozen, each may sue, and if the aggregate amount of all the policies falls short of the actual loss, the owner could sue for the balance. This is not permitted, and so it was held nearly a hundred years ago, in a case whose authority has been recognized ever since, both in Great Britain and in this country. *London Assur. Co. v. Sainsbury*, 3 Doug. 245, 1783, in which the exchequer chamber unanimously affirmed the judgment of the king's bench for the defendant; *Rockingham Mut. Fire Ins. Co. v. Bosher*, 39 Me. 253, and cases cited; *Hart v. Western R. Corp.*, 13 Metc. [Mass.] 99, where the subject is fully gone into by Chief Justice Shaw; *Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co.*, 25 Conn. 265, 278; *Peoria, M. & F. Ins. Co. v. Frost*, 37 Ill. 333; *Fland. Ins.* pp. 360, 481, 591. But it is insisted that the provision of the Missouri statute, that every action shall be prosecuted in the name of the real party in interest, though it declares that the provision shall not authorize the assignment of a thing in action not arising out of contract, (Gen. St. 1865, p. 651, § 2.) changes the rule. However it might be if the amount paid by the insurer to the assured had equaled or exceeded the value of the property, and the assured had made a full assignment, it is plain that this case falls within all the reasons of the rule itself, as expounded by Buller and Mansfield in the case in Douglas above cited, and which is the foundation of the law on this subject. The demurrer to the petition is sustained.

Judgment accordingly.

NOTE, [from original report.] Leave was given the plaintiff to amend and make Balcom plaintiff on the record, but as the latter, as well as the defendant, was a citizen of Missouri, no amendment, so as to give the court jurisdiction, was practicable, and the plaintiff submitted to a nonsuit. As to subrogation of insurer to rights of assured against wrongdoer, see cases cited in *May, Ins.* § 453 et seq. As to suits in name of "real party in interest" see *Weed Sewing-Mach. Co. v. Wicks*, [Case No. 17,348.]

AETNA INS. CO., (JONES v.)

[See *Jones v. Aetna Ins. Co.*, Case No. 7,453.]

AETNA INS. CO., (LEE v.)

[See *Lee v. Aetna Ins. Co.*, Case No. 8,181.]

AETNA INS. CO., (MURRAY v.)

[See *Murray v. Aetna Ins. Co.*, Case No. 9,955.]

AETNA INS. CO., (PORTER v.)

[See *Porter v. Aetna Ins. Co.*, Case No. 11,286.]

Case No. 97.

AETNA INS. CO. v. SABINE.

[6 McLean, 393.]¹

Circuit Court, D. Indiana. May Term, 1855.

PRINCIPAL AND AGENT—ABUSE OF POWERS BY AGENT—RATIFICATION BY PRINCIPAL—PLEADING.

1. An action being brought against the defendant, charging him with an abuse of his powers, as agent of the plaintiff, [an insurance company,] it is essential that he should be alleged to have acted as agent of the company.

2. Unless he was authorized to act as agent of the company, he could not bind it; and any ratification of the contract would relieve the defendant from an alleged abuse of his powers.

3. If the plaintiff ratified what the defendant had done, and which did not bind the company, except by such ratification, the defendant is not chargeable with any remissness of duty.

[At law. On demurrer to declaration. Demurrer sustained as to three counts, and overruled as to the fourth.]

Mr. Henderson, for plaintiff.

Mr. Crawford, for defendant.

THE COURT. This action was brought on a policy of insurance against defendant for having exceeded his powers, &c., by which plaintiff was injured. The declaration contained four counts. The defendant filed a general demurrer to the declaration.

To the first count it was objected, on demurrer, that plaintiff alleges no authority to the agent to make the insurance; and on this it is argued that the plaintiff could not be liable on the policy until a ratification of it was proved; and, if there were a ratification, the plaintiff would be estopped to charge the defendant, as the validity of the policy depended not on the original contract, but on the subsequent ratification of it by the plaintiff. The declaration, it is said, does not state the case of an agent who has a general authority, but acts in violation of his private instructions in not taking good security for the payment of the premium, and in the insurance of Kentucky flatboats. If, while the agent is exercising general powers, he has private instructions, the agent could bind the company, but would be liable to it for any abuse of his power; but, in the

¹[Reported by Hon. John McLean, Circuit Justice.]

first count it is alleged he had no power at all. By reason of this defect, the ground for a recovery is not laid, and consequently the demurrer is sustained as to this count.

The second count is also subject to exception, as the allegation of the defendant's agency is not made, which was essential to establish his liability. If he be not authorized to act, the policy is not binding on the plaintiff, and a ratification of the policy by the company would relieve the defendant from responsibility, and remove from the plaintiff all ground of complaint.

The same objection applies to the third count as is above stated to the first.

In regard to the fourth count, it appears there is a sufficient allegation of the agency, as it is stated that defendant, while acting as agent for the company, received large sums for insuring, which he has failed to account for or pay over to the plaintiff. If, under such circumstances, he has received money on account of the plaintiff, he is bound in good conscience to pay it over. This count, the court think, is sustainable, and as to it the demurrer is overruled; but it is sustained as to the first, second, and third counts. The court will give leave to amend the declaration generally.

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AFFLICK, (THOMPSON v.)

[See Thompson v. Afflick, Cases Nos. 13,939 and 13,940.]

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AGAWAM WOOLEN CO., (JORDAN v.)

[See Jordan v. Agawam Woolen Co., Case No. 7,516.]

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Case No. 98.

The A. G. BROOKS.

The ALICE.

[1 Low. 299.]¹

District Court, D. Massachusetts. Feb., 1869.

COLLISION—BETWEEN SAILING VESSELS—LOOKOUT.

1. One vessel has no right, without necessity, to tack so near another vessel that the pilot of the latter cannot, in the exercise of ordinary skill, avoid her.

2. When a vessel is tacking, and is out of command, other vessels must avoid her.

3. A vessel sailing in a harbor in the daytime must have a lookout forward.

[Cited in The Columbia, Case No. 3,035.]

4. As a general rule a vessel going free should pass under the stern rather than across the bows of one close-hauled.

[In admiralty. Cross libels for collision. Decree for libelants, and cross libel dismissed.]

Cross libels for damage done on the first

¹[Reported by Hon. John Lowell, LL.D., District Judge, and here reprinted by permission.]

day of August, 1868, in the harbor of Boston, at about four o'clock in the afternoon. The weather was fine, with a five or six knot breeze. The brig Alice was sailing down the harbor on her voyage to Surinam, and the schooner A. G. Brooks was coming up on a coasting voyage from a port in Maine to Boston. The collision occurred in the Narrows, between Galloupe's island and Lovell's island. On the part of the brig, the allegations in the record were that she was close-hauled on the starboard tack, and her pilot saw the schooner coming towards him with a free wind, on the port tack; that the brig kept her course until it became apparent that the schooner would not clear her, and then her helm was put to port, but too late to prevent the collision. On the other side, it was pleaded that the schooner was beating up to the town, and when near Galloupe's island, came about from the starboard to the port tack in the regular course of navigation, and that before she could gather full headway again was struck by the brig; that she had the right of way both because she was close-hauled and because she was in stays, and that she had no duty to perform and did nothing.

J. C. Dodge, for the schooner.

H. C. Hutchins and A. S. Wheeler, for the brig.

LOWELL, District Judge. I have endeavored to find out the truth from the very conflicting evidence given in, and will now state my conclusions. The preponderance of the evidence seems to me to show that the schooner was beating, and was close-hauled on the starboard tack not long before the collision, and when in that position was seen about three points on the lee bow of the brig, and from one-third to one-quarter of a mile distant. At this time the brig had come round Nix's Mate, and braced up her yards on the same tack. When the vessels were thus situated the pilot of the brig and her master appear to have thought that the schooner was bound out on nearly the same course with themselves, though they must probably have seen that she was lying nearer the wind than they were. Whether this circumstance should have warned them of the probability of her tacking I cannot say; but they observed that she did tack, and they say they observed it immediately on its taking place, and that it was made off the west end of Lovell's island, on the extreme leeward side of the channel; and that the distance of the vessels and their relative position was such that it was more prudent for the brig to keep close to the weather side of the channel, although this would bring her across the bows of the schooner, rather than to attempt to pass under her stern, which might result in cutting her in two; that they accordingly brought the brig close to the wind, and

kept her to the weather side of the channel, and, finding that notwithstanding this precaution there was still danger, they put their helm hard aport, and brought her in stays; and yet the collision occurred, though it was not very severe.

If it is true that the schooner tacked in a narrow channel when so near the brig that it was not possible to avoid her, or when it was so doubtful which course would best avoid her, that a skillful pilot acting with coolness was deceived, and in good faith and with reasonable skill chose one which resulted ill, it would be impossible to hold the schooner blameless, unless her going about was absolutely necessary to avoid the shore or some other danger. It would not then be a question who was free and who close-hauled, but why such a tack was made at that time and place. And on the other hand if it should be apparent that the schooner went in stays at a proper time and place, giving room enough and ample opportunity to avoid her, and had not got fully around on her new tack when she was struck, the question would still be not whether or no the brig was close-hauled, but why a vessel under command failed to clear a vessel which was, comparatively speaking, unmanageable.

Upon the whole evidence I am not able to say that the schooner was wrong in tacking. The libel against her, which was made soon after the occurrence, does not allege it; but says she was sailing up the Narrows with a free wind. This fact, I confess, has a good deal of weight with me as showing the opinion formed at that time; and it would seem that at a third or a quarter of a mile distant the brig might, have gone astern of the schooner if it was her duty to clear her. Some experts have testified that this would be impossible; but when they afterwards give the distance in lengths of the brig it seems contradictory of their first opinion; for they give three or four lengths as being necessary for her to fall off three points, and this is less than a third of a mile. And when we add the distance that the schooner would go, which is said in testimony to have been in fact the whole width of the channel, there would seem to be no doubt that she must have cleared her, if she had starboarded as soon as she might have done. The pilot of the brig allowed what he considered to be ample room for the schooner to go about in, and she took more; and so they came together by the head. If he had undertaken to run under her stern no such nice calculation would have been necessary. I cannot but believe that either the position of the schooner, or her speed, or the course she intended to take, were misunderstood on board the brig. Nor can I doubt that the duty of making way was on that vessel. She had braced up her yards on rounding Nix's Mate; but upon the preponderance of the evidence she was not as near the wind as the schooner was,

nor as near as she could go; but whether so or not, the schooner was tacking so near her that it became her duty to avoid the probable danger, because it would arise and be imminent before the new course had been fully defined, and before the schooner could go to port or starboard as the case might require. In other words, it seems to me that the case presents the second of the predicaments which I above supposed; that is, of a vessel fully manageable and one not wholly under command. There is some reason to suppose that a lookout on the brig's deck, forward, might have called attention to the schooner earlier. Certain it is that the men were all forward, and were busy with one of the anchors, and in fact gave no report about the schooner, and although the master and pilot say they observed the tack as soon as it was made, yet that is a point on which they might easily be mistaken. It reconciles a good many of the contradictions to suppose that when they first saw that the schooner had tacked, it was too late to do anything except to port helm; but that if they had seen her a little sooner, and starboarded, they would have gone clear. This not only reconciles some contradictions, but reconciles the result with the acknowledged skill of the professional pilot who had charge of the brig's helm. And this general view of the obligations of the parties tallies entirely with the acts of both. The evidence is clear that the brig kept her course, so far as she did keep it, not because the pilot thought he had the right of way, but because he thought there was ample room for the schooner to go about, and that he in fact did not keep his course entirely but gave a little more room to the schooner by bringing his ship still nearer the wind than she already was. In my experience, I have found nearly as many collisions (though perhaps not the most serious) to result from slight miscalculations on the part of skillful men, as from the blunders of novices. To justify a close run in cases of this kind it is necessary to reckon on the performance of both vessels, and this is where, I suppose, the mistake is sometimes made. At all events it seems to me that the duty was on the brig, and that she has failed to perform it. The very fact of want of a lookout is evidence against her until it is shown that no harm came of the neglect.

Interlocutory decree for the libellants in the first cause; libel in behalf of the brig dismissed.

AGNELLY, (GAINES v.)

[See Gaines v. Agnelly, Case No. 5,173.]

AGNES, The, (EGLESTON v.)

[See Egleston v. The Agnes, Case No. 4,308.]

AGNES, The, (MENZIES v.)

[See *Menzies v. The Agnes*, Case No. 9,430.]

Case No. 99.

The AGNES H. WARD.

[Blatchf. Pr. Cas. 197.]¹

District Court, S. D. New York. July, 1862.

PRIZE—VIOLATION OF BLOCKADE—ENEMY PROPERTY.

Vessel and cargo condemned as enemy property, and for a violation of the blockade.

In admiralty.

BETTS, District Judge. This vessel and cargo were libelled on the 6th of June last, and an attachment was issued, returnable on the 1st of July instant, and was returned on that day. The vessel and cargo were captured on the Atlantic ocean, two hundred miles from Cape Hatteras, and off the coast of South Carolina, by a merchant steamer, on the 27th of May, 1862, and were sent into this port for adjudication. The vessel and cargo were owned by residents in Wilmington, North Carolina. The schooner sailed out of Wilmington for Nassau, N. P., under the Confederate flag, and had no other on board. She left the mouth of Cape Fear river for Nassau, N. P., with a cargo of cotton and turpentine, to avoid the vessels blockading the port of Wilmington, and was to return to the same port. The master and all the persons on board knew of the blockade of the port of Wilmington when the voyage commenced. The register and shipping articles, and the other ship's papers, show that the vessel was documented as an enemy vessel, and the testimony of the master and mate proves her evasion of the blockade, well knowing its existence.

Upon proofs, the vessel and cargo are clearly subject to condemnation and forfeiture, both as enemy property and for being sailed from a blockaded port with intent to violate the blockade. Decree accordingly.

AGNES, (The LOUISA.)

[See *The LOUISA AGNES*, Case No. 8,531.]

Case No. 100.

AGNEW v. DORMAN.

[Taney, 386.]²

Circuit Court, D. Maryland. April Term, 1838.

APPEAL—JURISDICTIONAL AMOUNT—AMENDMENT OF PLEADINGS.

1. A libel was filed in the district court, by a seaman, against the master of a vessel, to recover a balance of \$30.95, claimed to be due

¹[Reported by Samuel Blatchford, Esq.]

²[Reported by James Mason Campbell, Esq., and here reprinted by permission.]

for wages; and also damages for an assault committed upon the libellant by the master, without claiming any particular amount of damages: the libel was dismissed by the district court, and in the circuit court, to which the case was taken by appeal, a motion was made to dismiss the appeal, on the ground that the record did not show that the sum in controversy amounted to \$50: a motion was thereupon made by the appellant, to amend his libel, by inserting that he had sustained damages, by the assault, to the amount of \$300: one of the witnesses had proved that he would not have run the risk of the blow given to the libellant for \$100: *Held*, that the amendment asked for could not be made; that the circuit court had no authority to review the decree of the district court, unless the sum in controversy amounted to \$50; and that the court could not permit an amendment to be made, the object of which was to change the record so as to give the court jurisdiction, in a case where, according to the record before them, they had none.

2. If the case showed that the appeal was legally before the court, then, having jurisdiction over it, the court could permit the pleadings to be so amended as to enable it to do justice between the parties; but it cannot acquire jurisdiction, by altering the record which has come to it from the district court.

3. The deposition of the witness does not show the amount of damages claimed by the libellant; and it is the claim of the libellant, and the answer of the respondent, denying the claim, that make the controversy, and ascertain the amount in dispute.

4. Where property is in dispute, and the value of it is not averred, and does not appear in the record, parol testimony has been received in the supreme court, upon appeal, to show its value, and to show the jurisdiction of the court.

5. And so too, as to the value of an office, where the right to the office is the matter in controversy.

6. But where the controversy relates merely to the amount of money which one party is entitled to recover from the other, the record must show the amount in dispute, in order to give jurisdiction to the appellate court.

7. In all cases in the supreme court, where the appeal is dismissed for want of jurisdiction, the court gives no costs; and that being the rule in the supreme court, it is proper that the circuit court should adopt the same rule in analogous cases.

[Appeal from the district court of the United States for the district of Maryland.]

[In admiralty. Libel by Robert Agnew against Hezekiah Dorman, master of the schooner Octavia, for wages and damages. From the decree of the district court dismissing the libel, libellant appealed. Respondent moves to dismiss the appeal, and libellant moves to amend the libel. Appeal dismissed.]

This was a libel filed in the district court for the Maryland district, by a seaman against the master of the schooner Octavia, to recover a balance of \$30.95, which the libellant alleged to be due to him for wages, and also to recover damages for an assault and battery committed on him by the master. He did not, in the libel, claim any particular amount of damages for the assault, but prayed the court to give him heavy damages for it against the master. The respond-

ent in the district court, in his answer, objected to the libel, upon the ground that the claim for wages and the claim for damages for the assault and battery could not be united together in the same libel, and prayed that the same might be dismissed. The respondent, after taking this objection, proceeded in his answer to deny that anything was due to the libellant for wages, and insisted that the blow he gave him was justified by his improper and disobedient conduct. Testimony was taken in the district court, and at the hearing the court dismissed the libel, on the ground that the claim for wages and for damages for an assault and battery could not be united in the same suit. The libellant appealed to the circuit court, and the appellee now moved to dismiss the appeal, on the ground that there was nothing in the record to show that the value in controversy amounted to \$50, and that the circuit court, therefore, had no jurisdiction of the appeal; the balance for wages claimed being only \$30.95, and no particular sum being claimed as damages for the assault and battery. The counsel for the appellant thereupon moved to amend his libel, by inserting an averment that the libellant had sustained damages by the assault and battery, to the value of \$300; the averment was objected to by the counsel for the appellee.

N. Williams, for appellant, cited [The Marianna Flora,] 11 Wheat. [24 U. S.] 1; Dunl. Adm. Pr. 211.

J. Glenn, for appellee, cited *Jenks v. Lewis*, [Case No. 7,279.]

TANEY, Circuit Justice. The amendment cannot be made. If the court had jurisdiction of the case, that is, if enough appeared in the record to show that the circuit court had a right to review the decision of the district court in this case, there is no doubt the court would have the power to allow any amendment necessary to bring the justice of the case fairly and fully to trial. But this court has no authority, by law, to review the decree of the district court, unless the matter in controversy amounts to \$50; the record does not show that it amounts to this sum; and the object of the amendment is to change the record, in order to give the court jurisdiction in a case where, according to the record before them, they have not jurisdiction; the court think this cannot be done. If the case showed that the appeal was legal in this court, then having jurisdiction over it, the court could permit the pleadings to be so amended, as to enable the court to do justice between the parties; but we cannot acquire jurisdiction by altering the record which has come to us from the district court.

Mr. Williams then suggested that one of the witnesses whose deposition was contained in the record, stated that he saw the assault and battery, and that he would not have run

the risk of the blow given to the libellant for \$100.

TANEY, Circuit Justice. The deposition of the witness does not show the amount of damages claimed by the libellant, and it is the claim of the libellant, and the answer of the respondent denying the claim, that make the controversy, and ascertain the amount in dispute. Where property is in dispute, and the value of it is not averred, and does not appear in the record, parol testimony has been received in the supreme court, upon appeal, to show its value, and to show the jurisdiction of the court; and so too, as to the value of an office, where the right to the office is the matter in controversy. But where the controversy relates merely to the amount of money which one party is entitled to recover from the other, the record must show the amount in dispute, in order to give jurisdiction to the appellate court; and the amount in dispute is shown by the claim made by one, and the denial made by the other. The damages might in fact have amounted to \$100, and yet, if the libellant claimed but \$10, as his damages, \$10 would be all that was in controversy.

The circuit court dismissed the appeal, for want of jurisdiction, without costs; saying, that in all cases in the supreme court, where the appeal was dismissed for want of jurisdiction, the court gave no costs, and as that was the rule in the supreme court, it was proper that the circuit court should adopt the same rule in analogous cases.

AGNEW, (LELAND v.)

[See *Leland v. Agnew*, Case No. 8,236.]

AGRY, (WALLACE v.)

[See *Wallace v. Agry*, Case No. 17,097.]

AGUILLA, The.

[See *The Aquila*, Case No. 500.]

Case No. 101.

AGUIRRE v. MAXWELL.

[3 Blatchf. 140.]¹

Circuit Court, S. D. New York. Dec., 1853.

CONSTITUTIONAL LAW—TONNAGE DUTY ON FOREIGN VESSELS—DUTIES ON EXPORTS.

1. The provision of the constitution of the United States, (article 1, § 9,) that "no tax or duty shall be laid on articles exported from any state," does not apply to the imposition of taxes on foreign vessels.

2. The act of June 30th, 1834, (4 Stat. 741.) concerning tonnage duty on Spanish vessels, is constitutional.

¹[Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

3. The method of determining the amount of such tonnage duty is wholly within the discretion of congress.

This cause was brought into this court by certiorari, from the supreme court of New York. It was an action [by Peter A. Aguirre and others] against [Hugh Maxwell] the collector of the port of New York, to recover back an excess of duty. The plaintiffs, in November, 1851, exported to Cuba a cargo of domestic produce, in a Spanish brig, of 147 63-95 tons burthen. The collector imposed \$363 13 extra tonnage duty, which was paid by the plaintiffs under a protest in writing against the charge, "because, under the constitution and laws of the United States, such exactions are illegal."

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. The duty in this case was levied under the act concerning tonnage duty on Spanish vessels, approved June 30, 1834, (4 Stat. 741.) The first section enacts "that from and after the first day of March next, Spanish vessels coming from the island of Cuba or Porto Rico, either directly or after touching at any port or place, shall pay, in the ports of the United States, such further tonnage duty, in addition to the tonnage duty which may be payable under any other law, as shall be equivalent to the amount of discriminating duty that would have been imposed on the cargoes imported in the said vessels respectively, if the same had been exported from the port of Havana in American bottoms." The second section provides "that, before any such vessel shall be permitted to clear out or depart from a port of the United States, with a cargo which shall be directly or indirectly destined to either of the said islands, the said vessel shall pay such further tonnage duty as shall be equivalent to the amount of discriminating duty that would be payable for the time being upon the cargo, if imported into the port of Havana in an American bottom."

It is not questioned that this vessel came within the terms of that statute, nor that the amount of duty charged was correct, if there was authority of law to justify its being levied. The provision of the constitution, (article 1, § 9,) that "no tax or duty shall be laid on articles exported from any state," does not apply to the imposition of taxes on foreign vessels. It is within the discretion of congress to totally inhibit the import or export trade in foreign vessels to or from our ports, or to grant them the privilege of bringing in or carrying out cargoes on such conditions and under such restrictions as may be regarded most beneficial to the United States. Congress has never revoked the legislation of 1834 in this respect. On the contrary, the act of August 3, 1846, (9 Stat. 50,) reaffirms the discrimination in relation to vessels coming from Cuba to Porto Rico. As the power exists, to impose the duty on vessels, the meth-

od of determining the amount, whether to be measured by the rate of taxation the cargo would be subjected to, if coming from Cuba or Porto Rico, or by the value of the ship or cargo, in gross or on a ratio estimated, as with domestic vessels, by the capacity of the vessel alone, is at the discretion of congress.

We think there is no foundation in law for the exception taken to the levy of the tonnage duty in this case. Judgment for defendant.

Case No. 102.

In re AH FONG.

[3 Sawy. 144; 13 Amer. Law. Reg. (N. S.) 761; 7 Chi. Leg. News, 17; 3 Amer. Law Rec. 403; 9 Amer. Law Rev. 350; 20 Int. Rev. Rec. 112; 1 Cent. Law J. 516.]

Circuit Court, D. California. Sept. 21, 1874.

POLICE POWER — EXCLUSION OF FOREIGNERS — TREATY WITH CHINA OF JULY 28, 1868 — FOURTEENTH AMENDMENT — CONFLICT OF STATE STATUTE WITH ACT OF CONGRESS.

1. The police power of the state may be exercised by precautionary measures against the increase of crime or pauperism, or the spread of infectious diseases from persons coming from other countries. The state may entirely exclude convicts, lepers and persons afflicted with incurable disease; may refuse admission to paupers, idiots and lunatics and others, who from physical causes are likely to become a charge upon the public until security is afforded that they will not become such a charge; and may isolate the temporarily diseased until the danger of contagion is gone.

2. The extent of the power of the state to exclude a foreigner from its territory is limited by the right of self-defense. Whatever outside of the legitimate exercise of this right affects the intercourse of foreigners with our people, their immigration to this country and residence therein, is exclusively within the jurisdiction of the general government, and is not subject to state control or interference.

3. The sixth article of the treaty between the United States and China, adopted on the twenty-eighth of July, 1868, provides that Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by citizens or subjects of the most favored nation, and as the general government has not seen fit to attach any limitation to the ingress into the United States of subjects of those nations, none can be applied [by a state] to the subjects of China.

[See *Chae Chan Ping v. U. S.*, 9 Sup. Ct. Rep. 623, 130 U. S. 581.]

4. The fourteenth amendment to the constitution declares that no state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws: *Reid*, that this equality of protection implies not only equal accessibility to the courts for the prevention or redress of wrongs, and the enforcement of rights, but equal exemption with others of the same class from all charges and burdens of every kind. Within these limits the power of the state exists, as it did previously to the

¹[Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

adoption of the amendment, over all matters of internal police.

[Cited in *Re Tiburcio Parrott*, 1 Fed. Rep. 511; *The Railroad Tax Case*, 13 Fed. Rep. 773; *In re Lee Sing*, 43 Fed. Rep. 362.]

5. On the thirty-first of May, 1870, congress passed an act declaring that "no tax or charge shall be imposed or enforced by any state upon any person immigrating thereto from a foreign country which is not equally imposed or enforced upon every person immigrating to such state from any foreign country, and any law of any state in conflict with this provision is hereby declared null and void." *Held*, 1. That the term charge, as here used, means any onerous condition, and includes a condition which makes the right of an immigrant, arriving in the ports of the state, to land within the state depend upon the execution of a bond by a third party, not under his control, and whom he cannot constrain by any legal proceedings; and, 2. That the statute of California, which prohibits foreign immigrants of certain classes, arriving in the state of California by vessel, from landing until a bond shall have been given by the master, owner or consignee of the vessel that they will not become a public charge, and imposes no condition upon immigrants of the same class entering the state in any other way, is in conflict with the act of congress.

Application for discharge on writ of habeas corpus. The facts are stated in the opinion of the court.

T. I. Bergin and Leander Quint, for petitioner.

Thos. P. Ryan, Dist. Atty. of City and County of San Francisco, and M. M. Estee, contra.

FIELD, Circuit Justice. The petitioner alleges that she is illegally restrained of her liberty by the coroner of the city and county of San Francisco, and asks to be discharged from such restraint. The facts of the case, as detailed in the proceedings before us, are briefly as follows: The petitioner is a subject of the empire of China, and came to the port of San Francisco as a passenger on board of the American steamship Japan, owned by the Pacific Mail Steamship Company, and under the command as master, of J. H. Freeman. On the arrival of the steamship at this port, which was on the twenty-fourth of August last, she was boarded by the commissioner of immigration of California, who proceeded, under the provisions of a statute of the state, to examine into the character of the petitioner and other alien passengers. Upon such examination, the commissioner found, and so declared, that the petitioner and twenty-one other persons, also subjects of the Empire of China, arriving as passengers by the same steamship, were lewd and debauched women. He thereupon prohibited the master of the steamship from landing the women, unless he or the owner or consignee of the vessel gave the bonds required by the statute. Neither of the parties designated would consent to give the required bonds, and the women were consequently detained by the master on board of the steamship. They

thereupon applied for a writ of habeas corpus to a district court of the state to inquire into the cause of their detention, alleging in their petition its illegality, on the ground that the statute, under which they were held, was in contravention of the treaty between the United States and the Empire of China, and in conflict with the constitution of the United States, and denying, also, that they were either lewd or debauched women. The district court granted the application, and heard the petitioners, and after the hearing, remanded them back to the charge of the master of the steamship, holding that the statute of California was neither in violation of the treaty nor the constitution, and that the evidence presented justified the finding of the commissioner, that the petitioners were lewd and debauched women. The petitioners thereupon applied to the chief justice of the state for another writ of habeas corpus, alleging the illegality of their restraint on grounds similar to those taken in the petition to the district court, and also alleging that they were, since the order of the district court remanding them to the custody of the master of the steamship, about to be forcibly returned to China against their will and consent. They therefore prayed that with the writ of habeas corpus a warrant might issue to the sheriff of the city and county of San Francisco to take them into his custody. The chief justice granted the writ, returnable before the supreme court of the state, and at the same time issued a warrant commanding the coroner of the city and county to take the parties into his custody and bring them before the court.

Under this warrant the parties were taken into the custody of the coroner, and in his custody they still remain. The supreme court sustained the ruling of the district court, and denied the application of the parties to be discharged, holding that the statute of the state, under which they were detained, was valid and binding under the treaty between the United States and China and the Constitution of the United States, and that the evidence justified the finding of the commissioner of immigration as to the character of the women. It therefore made an order directing that the coroner return the parties to the master or owner or consignee of the steamship Japan, on board of the steamship, and requiring such master, owner, or consignee to retain the parties on board of the steamship until she should leave this port, and then to carry them beyond the state. The order further provided, that in case the steamship Japan was not in the port of San Francisco, the coroner should retain the parties in his possession until the arrival in port of the steamship, and then enforce the order returning the parties to the vessel, or retain the parties until the further direction of the court. The petitioner is one of the women thus held by

the coroner, and she now invokes the aid of this court to be released from her restraint, alleging, as in the other applications, that the restraint is illegal, that the statute which is supposed to authorize it is in contravention of the treaty with China and the constitution of the United States, and averring that she is not within either of the classes designated in the statute. It further appears, from the special traverse to the return of the coroner, and it is admitted by counsel, that since the judgment of the supreme court, the steamship Japan has sailed from the port of San Francisco, and will not probably return under three months, and that Freeman has been discharged from the service of the steamship company, and is no longer master of the Japan. The decision of the district court, and of the supreme court of the state, although entitled to great respect and consideration from the acknowledged ability and learning of their judges, is not binding upon this court. The petitioner being an alien, and a subject of a country having treaty relations with the government of the United States, has a right to invoke the aid of the federal tribunals for her protection, when her rights, guaranteed by the treaty, or the constitution, or any law of congress, are in any respect invaded; and is, of course, entitled to a hearing upon any allegation in proper form that her rights are thus invaded.

I proceed, therefore, to the consideration of the questions presented, notwithstanding the adjudications of the state tribunals.

The statute of the state, under which the petitioner was restrained of her liberty on board of the steamship, is found in the provisions of chapter I, tit. 7, of the Political Code, as amended by the last legislature. These provisions require the master of a vessel arriving at any port of this state, bringing passengers from any place out of the state, within twenty-four hours after its arrival, to make a written report under oath to the commissioner of immigration at such port, stating, among other things, the name, place of birth, last residence, age and occupation of all passengers who are not citizens, and whether any of the passengers thus reported "are lunatic, idiotic, deaf, dumb, blind, crippled or infirm, and not accompanied by any relatives able to support them, or are lewd or abandoned women." Then follow the special provisions which have given rise to the present proceeding. They are contained in section 2952 of the Code as amended. They require the commissioner of immigration "to satisfy himself whether or not any passenger who shall arrive in this state by vessels from any foreign port or place (who is not a citizen of the United States) is lunatic, deaf, dumb, blind, crippled or infirm, and is not accompanied by relatives who are able and willing to support him, or is likely to become permanently a public charge, or has been a pauper

in any other country, or is, from sickness or disease, existing either at the time of sailing from the port of departure, or at the time of his arrival in this state, a public charge, or likely to become so, or is a convicted criminal, or a lewd or debauched woman;" and then declare that "no person who shall belong to either class, or who possesses any of the infirmities or vices specified herein, shall be permitted to land in this state, unless the master, owner or consignee of said vessel shall give a joint and several bond to the people of the state of California, in the penal sum of five hundred dollars, in gold coin of the United States, conditioned to indemnify and save harmless every county, city and county, town and city of this state, against all costs and expenses which may be by them necessarily incurred for the relief, support, medical care, or any expense whatever, resulting from the infirmities or vices herein referred to, of the persons named in said bonds, within two years from the date of said bonds; * * * and if the master, owner, or consignee of said vessel shall fail or refuse to execute the bond herein required to be executed, they are required to retain such persons on board of said vessel until said vessel shall leave the port, and then convey said passengers from this state; and if said master, owner or consignee shall fail or refuse to perform the duty and service last herein enjoined, or shall permit said passengers to escape from said vessel and land in this state, they shall forfeit to the state the sum of five hundred dollars, in gold coin of the United States, for each passenger so escaped, to be recovered by suit at law."

The provisions of this section are of a very extraordinary character. They make no distinction between the deaf, the dumb, the blind, the crippled and the infirm, who are poor and dependent, and those who are able to support themselves and are in possession of wealth and all its appliances. If they are not accompanied by relatives, both able and willing to support them, they are prohibited from landing within the state, unless a specified bond is given, not by them or such competent sureties as they may obtain, but by the owner, master or consignee of the vessel. Neither do the provisions of the statute make any distinction between a present pauper, and one who has been a pauper, but has ceased to be such. If the immigrant has ever been within that unfortunate class, notwithstanding he may have at the time ample means at his command, he must obtain the designated bond or be excluded from the state. They subject also to the same condition, and possible exclusion, the passenger whose sickness or disease has been contracted on the passage, as well as the passenger who was sick or diseased on his departure from the foreign port. It matters not that the sickness may have been produced by exertions

for the safety of the ship or passengers, or by attentions to their wants or health. If he is likely on his arrival to become a public charge, he must obtain the bond designated, or be denied a landing within the state. Nor does the statute make any distinction between the criminal convicted for a misdemeanor, or a felony, or for an offense *malum in se*, or one political in its character. The condemned patriot, escaping from his prison and fleeing to our shores, stands under the law upon the same footing with the common felon who is a fugitive from justice. Nor is there any difference made between the woman whose lewdness consists in private and unlawful indulgence, and the woman who publicly prostitutes her person for hire, or between the woman debauched by intemperance in food or drink, or debauched by the loss of her chastity.

A statute thus sweeping in its terms, confounding by general designation persons widely variant in character, is not entitled to any very high commendation. If it can be sustained as the exercise of the police power of the state as to any persons brought within any of the classes designated, it must be sustained as to all the persons of such class. That is to say, if it can be sustained when applied to the infirm who is poor and dependent, when unaccompanied by his relatives, able and willing to support him, it must be sustained when applied to the infirm who is surrounded by wealth and its attendants, if he is thus unaccompanied. If it can be sustained when applied to a woman whose debauchery consists in the prostitution of her person, it must be sustained when applied to a woman whose debauchery consists in her intemperance in food and drink; and even when applied to the repentant Magdalen who has once yielded to temptation and lost her virtue. The commissioner of immigration is not empowered to make any distinction between persons of the same class; and there is nothing on the face of the act which indicates that the legislature intended that any distinction should be made.

It is undoubtedly true that the police power of the state extends to all matters relating to the internal government of the state, and the administration of its laws, which have not been surrendered to the general government, and embraces regulations affecting the health, good order, morals, peace and safety of society. Under this power all sorts of restrictions and burdens may be imposed, having for their object the advancement of the welfare of the people of the state, and when these are not in conflict with established principles, or any constitutional prohibition, their validity cannot be questioned.

It is equally true that the police power of the state may be exercised by precautionary measures against the increase of crime or pauperism, or the spread of infectious dis-

eases from persons coming from other countries; that the state may entirely exclude convicts, lepers and persons afflicted with incurable disease; may refuse admission to paupers, idiots, lunatics and others, who from physical causes are likely to become a charge upon the public until security is afforded that they will not become such a charge; and may isolate the temporarily diseased until the danger of contagion is gone. The legality of precautionary measures of this kind has never been doubted. The right of the state in this respect has its foundation, as observed by Mr. Justice Grier in *The Passenger Cases*, [7 How. (48 U. S.) 462,] in the sacred law of self-defense, which no power granted to congress can restrain or annul.

But the extent of the power of the state to exclude a foreigner from its territory is limited by the right in which it has its origin, the right of self-defense. Whatever outside of the legitimate exercise of this right affects the intercourse of foreigners with our people, their immigration to this country and residence therein, is exclusively within the jurisdiction of the general government, and is not subject to state control or interference. To that government the treaty-making power is confided; also, the power to regulate commerce with foreign nations, which includes intercourse with them as well as traffic; also the power to prescribe the conditions of migration or importation of persons, and rules of naturalization; whilst the states are forbidden to enter into any treaty, alliance, or confederation with other nations.

I am aware that the right of the state to exclude from its limits any persons whom it may deem dangerous or injurious to the interests and welfare of its citizens has been asserted by eminent judges of the supreme court of the United States. Mr. Chief Justice Taney maintained the existence of this right in his dissenting opinion in *The Passenger Cases*, and asserted that the power had been recognized in previous decisions of the court. The language of the opinion in the case of *City of New York v. Miln*, 11 Pet. [36 U. S.] 141, would seem to sustain this doctrine. But neither in *The Passenger Cases* nor in the case of *City of New York v. Miln*, did the decision of the court require any consideration of the power of exclusion, which the state possessed; and all that was said by the eminent judges in those cases upon that subject was argumentative and not necessary and authoritative.²

But independent of this consideration, we cannot shut our eyes to the fact that much which was formerly said upon the power of the state in this respect, grew out of the necessity which the southern states, in which the institution of slavery existed, felt of excluding free negroes from their limits. As

²[See note at end of case.]

In some states negroes were citizens, the right to exclude them from the slave states could only be maintained by the assertion of a power to exclude all persons whom they might deem dangerous or injurious to their interests. But at this day no such power would be asserted, or if asserted, allowed, in any federal court. And the most serious consequences affecting the relations of the nation with other countries might, and undoubtedly would, follow from any attempt at its exercise. Its maintenance would enable any state to involve the nation in war, however disposed to peace the people at large might be.

Where the evil apprehended by the state from the ingress of foreigners is that such foreigners will disregard the laws of the state, and thus be injurious to its peace, the remedy lies in the more vigorous enforcement of the laws, not in the exclusion of the parties. Gambling is considered by most states to be injurious to the morals of their people, and is made a public offense. It would hardly be considered as a legitimate exercise of the police power of the states to prevent a foreigner who had been a gambler in his own country from landing in ours. If, after landing, he pursues his former occupation, fine him, and, if he persists in it, imprison him, and the evil will be remedied. In some states the manufacture and sale of spirituous and intoxicating liquors are forbidden and punished as a misdemeanor. If the foreigner coming to our shores is a manufacturer or dealer in such liquors, it would be deemed an illegitimate exercise of the police power to exclude him, on account of his calling, from the state. The remedy against any apprehended manufacture and sale would lie in such case in the enforcement of the penal laws of the state. So if lewd women, or lewd men, even if the latter be of that baser sort, who, when Paul preached at Thessalonica, set all the city in an uproar (Acts xvii, verse 5), land on our shores, the remedy against any subsequent lewd conduct on their part must be found in good laws or good municipal regulations and a vigorous police. It is evident that if the possible violation of the laws of the state by an immigrant, or the supposed immorality of his past life or profession, where that immorality has not already resulted in a conviction for a felony, is to determine his right to land and to reside in the state, or to pass through into other and interior states, a door will be opened to all sorts of oppression. The doctrine now asserted by counsel for the commissioner of immigration, if maintained, would certainly be invoked, and at no distant day, when other parties, besides low and despised Chinese women, are the subjects of its application, and would then be seen to be a grievous departure from principle.

I am aware of the very general feeling prevailing in this state against the Chinese, and

in opposition to the extension of any encouragement to their immigration hither. It is felt that the dissimilarity in physical characteristics, in language, in manners, religion and habits, will always prevent any possible assimilation of them with our people. Admitting that there is ground for this feeling, it does not justify any legislation for their exclusion, which might not be adopted against the inhabitants of the most favored nations of the Caucasian race, and of Christian faith. If their further immigration is to be stopped, recourse must be had to the federal government, where the whole power over this subject lies. The state cannot exclude them arbitrarily, nor accomplish the same end by attributing to them a possible violation of its municipal laws. It is certainly desirable that all lewdness, especially when it takes the form of prostitution, should be suppressed, and that the most stringent measures to accomplish that end should be adopted. But I have little respect for that discriminating virtue which is shocked when a frail child of China is landed on our shores, and yet allows the bedizened and painted harlot of other countries to parade our streets and open her hells in broad day, without molestation and without censure. By the fifth article of the treaty between the United States and China, adopted on the twenty-eighth of July, 1868,³ the United States and

³[The fifth and sixth articles of the treaty of July 28, 1868, with the emperor of China are as follows: "Art. 5. The United States of America and the emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration, and emigration of their citizens and subjects, respectively, from the one country to the other, for the purposes of curiosity, of trade, or as permanent residents. The high contracting parties, therefore, join in reprobating any other than an entirely voluntary emigration for these purposes. They consequently agree to pass laws making it a penal offense for a citizen of the United States or Chinese subjects to take Chinese subjects either to the United States, or to any other foreign country, or for a Chinese subject or citizen of the United States to take citizens of the United States to China or to any other foreign country, without their free and voluntary consent, respectively." "Art. 6. * * * And, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions, in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon subjects of China in the United States." 16 Stat. 740. This treaty was afterwards modified by the treaty of November 17, 1880, (22 Stat. 826,) which provides that, whenever the government of the United States is of opinion that the immigration of Chinese laborers is likely to endanger the good order of said country or of any locality within its borders, the government "may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it." It was further provided that the limitation or suspension shall be reasonable, and shall only extend to the class known as "laborers." Privilege was also given Chinese sub-

the emperor of China recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and immigration of their citizens and subjects respectively from the one country to another, for purposes of curiosity or trade, or as permanent residents. The sixth article declares that citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may there be enjoyed by citizens or subjects of the most favored nation; and, reciprocally, that Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by citizens or subjects of the most favored nation.

The only limitation upon the free ingress into the United States and egress from them of subjects of China is the limitation which is applied to citizens or subjects of the most favored nation; and as the general government has not seen fit to attach any limitation to the ingress of subjects of those nations, none can be applied to the subjects of China. And the power of exclusion by the state, as we have already said, extends only to convicts, lepers and persons incurably diseased, and to paupers and persons who, from physical causes, are likely to become a public charge. The detention of the petitioner is therefore unlawful under the treaty.

But there is another view of this case equally conclusive for the discharge of the petitioner, which is founded upon the legislation of congress since the adoption of the fourteenth amendment. That amendment in its first section designates who are citizens of the United States, and then declares that no state shall make or enforce any law which abridges their privileges and immunities. It also enacts that no state shall deprive "any person" (dropping the distinctive designation of citizens) of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws. The great fundamental rights of all citizens are thus secured against any state deprivation, and all persons, whether native or foreign, high or low, are, whilst within the jurisdiction of the United States, entitled to the equal protection of the laws. Discriminating and partial legislation, favoring particular persons, or against particular persons of the same class, is now prohibited. Equality of privilege is the constitutional right of all citizens, and equality of protection is the constitutional right of all persons. And equality of protection implies not only equal accessibility to the courts for the prevention or redress of wrongs, and the enforcement

jects already within the United States to go and come of their own free will and accord, with "all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."]

of rights, but equal exemption with others of the same class from all charges and burdens of every kind. Within these limits the power of the state exists, as it did previously to the adoption of the amendment, over all matters of internal police. And within these limits the act of congress of May 31, 1870, restricts the action of the state with respect to foreigners immigrating to our country. "No tax or charge," says the act, "shall be imposed or enforced by any state upon any person immigrating thereto from a foreign country which is not equally imposed or enforced upon every person immigrating to such state from any other foreign country, and any law of any state in conflict with this provision is hereby declared null and void." 16 Stat. 144.

By the term "charge," as here used, is meant any onerous condition, it being the evident intention of the act to prevent any such condition from being imposed upon any person immigrating to the country which is not equally imposed upon all other immigrants, at least upon all others of the same class. It was passed under and accords with the spirit of the fourteenth amendment. A condition which makes the right of the immigrant to land depend upon the execution of a bond by a third party, not under his control, and whom he cannot constrain by any legal proceedings, and whose execution of the bond can only be obtained upon such terms as he may exact, is as onerous as any charge which can well be imposed, and must, if valid, generally lead, as in the present case, to the exclusion of the immigrant.

The statute of California which we have been considering imposes this onerous condition upon persons of particular classes on their arrival in the ports of the state by vessel, but leaves all other foreigners of the same classes entering the state in any other way, by land from the British possessions or Mexico, or over the plains by railway, exempt from any charge. The statute is therefore in direct conflict with the act of congress.

It follows, from the views thus expressed, that the petitioner must be discharged from further restraint of her liberty; and it is so ordered.

NOTE, [from original report.] The only point involved and decided in the case of *City of New York v. Min*, 11 Pet. [36 U. S.] 102, was the constitutional power of the state of New York to compel the master of a vessel with passengers, arriving at her ports, from any country out of the United States, or from any other state of the United States, to report in writing, on oath, to the state authorities, under a prescribed penalty, the name, place of birth, and last legal settlement, age and occupation of every person brought as a passenger in the vessel. This the supreme court held that the state, in virtue of her general police powers, had the constitutional right to do. In the course of the opinions of Mr. Justice Barbour and Mr. Justice Thompson, general language is used indicating a power in the state to exclude persons from her limits whom she might deem dangerous to the ma-

terial or moral welfare of the state, but the language was wholly unnecessary to the decision of the only point then in judgment before the court. The facts of the two cases known as *The Passenger Cases*, 7 How. [48 U. S.] 283, were briefly these: One of the cases (*Smith v. Turner*) went to the supreme court on a writ of error from the court of errors of New York. The other case (*Norris v. City of Boston*) went to the supreme court of the United States from the supreme court of Massachusetts. The New York case arose substantially upon these facts: A statute of that state authorized the health commissioner to demand and receive, and in case of neglect or refusal to pay, to sue for and recover of and from the master of every vessel arriving in the port of New York from a foreign port, for himself and each cabin passenger, one dollar and fifty cents, and from the master of each coasting vessel for each person on board twenty-five cents; but coasting vessels from New Jersey, Connecticut and Rhode Island, were only required to pay for one voyage in each month. The moneys thus collected were denominated in the statute hospital moneys, and the master was authorized to sue and recover from each passenger the amount paid on his account. To the failure on the part of the master to pay within twenty-four hours after arrival of the vessel, was attached a penalty of one hundred dollars. All moneys collected from this source, in excess of the amount necessary to defray the hospital expenses, were to be paid over to the treasurer of the Society for the Reformation of Juvenile Delinquents, in the city of New York. Upon this statute, *Smith*, the master of the British ship *Henry Bliss*, was sued for \$295. He demurred to the complaint, on the ground that so much of the statute as authorized a recovery was repugnant to the constitution of the United States. The demurrer was overruled in the state courts, and electing to stand upon his demurrer, the case was taken to the supreme court of the United States where the point was thus sharply presented to the court for decision. That tribunal, after the most exhaustive and elaborate arguments upon the question, decided that the act of the legislature of New York, in the particular case under consideration, was repugnant to the constitution of the United States, and void, and accordingly reversed the judgment of the court of errors of New York.

In the case of *Norris v. City of Boston*, the facts were substantially as follows: *Norris*, an inhabitant of St. Johns, in the province of New Brunswick, Kingdom of Great Britain, was master of a vessel belonging to the port of St. Johns; he arrived with nineteen alien passengers at the port of Boston. Prior to landing, he was compelled to pay, under a law of Massachusetts, to the city of Boston, two dollars for each passenger. The statute of Massachusetts authorized the municipal authorities to appoint examiners, whose duty it was to examine the condition of all passengers on board of any vessel arriving in port. If, upon such examination, there were found among said passengers "any lunatic, idiot, maimed, aged or infirm person," incompetent, in the opinion of the examining officer, to maintain himself, or who had been a pauper in another country, the passenger was not permitted to land, until the master, owner, consignee or agent of the vessel gave to the city a bond in the sum of one thousand dollars, with sufficient sureties, that such lunatic or indigent passenger would not become a city, town or state charge within ten years from the date of the bond, and for all alien passengers, other than those already specified, the master was required to pay two dollars for each passenger before they could land. Appropriate penalties were contained in the statute to secure compliance with its terms. *Norris* paid the two dollars for each passenger, as prescribed by

the statute, under protest, landed his passengers, and thereupon instituted suit for the recovery of the money he had thus been compelled to pay. In the state courts judgment passed in favor of the defendant, when the case was taken to the supreme court of the United States upon a writ of error, where the judgment was reversed; that court holding the statute of Massachusetts, under which payment of the money was compelled, was unconstitutional and void. In the opinions of the justices in these celebrated cases, language is also used as in the case in 11 Pet. [36 U. S.] expressive of the right of the state, in exercise of its police power, to exclude persons from her limits; but from the statement of the cases, it is obvious that no such question was before the court.

Mr. Justice Wayne, one of the judges composing the majority of the court which decided the *Passenger Cases*, sums up the conclusions of the court, as follows (7 How. [48 U. S.] 412):

1. That the acts of New York and Massachusetts imposing a tax upon passengers, either foreigners or citizens, coming into the ports in those states, either in foreign vessels or vessels of the United States, from foreign nations or from ports in the United States, are unconstitutional and void, being in their nature regulations of commerce contrary to the grant in the constitution to congress of the power to regulate commerce with foreign nations and among the several States.

2. That the states of this Union cannot constitutionally tax the commerce of the United States for the purpose of paying any expense incident to the execution of their police laws; and that the commerce of the United States includes an intercourse of persons, as well as the importation of merchandises.

3. That the acts of Massachusetts and New York in question in these cases, conflict with treaty stipulations existing between the United States and Great Britain, permitting the inhabitants of the two countries "freely and securely to come, with their ships and cargoes, to all places, ports, and rivers in the territories of each country to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of said territories, respectively; also, to hire and occupy houses and warehouses for the purposes of their commerce, and generally the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject, always, to the laws and statutes of the two countries, respectively;" and that said laws are therefore unconstitutional and void.

4. That the congress of the United States having by sundry acts, passed at different times, admitted foreigners into the United States with their personal luggage and tools of trade, free from all duty or imposts, the acts of Massachusetts and New York imposing any tax upon foreigners or immigrants for any purpose whatever, whilst the vessel is in transitu to her port of destination, though said vessel may have arrived within the jurisdictional limits of either of the states of Massachusetts or New York, and before the passengers have been landed, are in violation of said acts of congress, and therefore unconstitutional and void.

5. That the acts of Massachusetts and New York so far as they impose any obligation upon the owners or consignees of vessels, or upon the captains of vessels or freighters of the same, arriving in the ports of the United States within the said states, to pay any tax or duty of any kind whatever, or to be in any way responsible for the same, for passengers arriving in the United States or coming from a port in the United States, are unconstitutional and void; being contrary to the constitutional grant to congress of the power to regulate commerce

with foreign nations, and among the several states, and to the legislation of congress under the said power, by which the United States have been laid off into collection districts, and ports of entry established within the same, and commercial regulations prescribed, under which vessels, their cargoes and passengers, are to be admitted into the ports of the United States, as well from abroad as from other ports of the United States. That the act of New York now in question, so far as it imposes a tax upon passengers arriving in vessels from other ports in the United States, is properly in this case before this court for construction, and that the said tax is unconstitutional and void. That the ninth section of the first article of the constitution includes within it the migration of other persons, as well as the importation of slaves, and in terms recognizes that other persons as well as slaves may be the subjects of importation and commerce.

6. That the fifth clause of the ninth section of the first article of the constitution, which declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another state; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another," is a limitation upon the power of congress to regulate commerce for the purpose of producing entire commercial equality within the United States, and also a prohibition upon the states to destroy such equality by any legislation prescribing a condition upon which vessels bound from one state shall enter the ports of another state.

7. That the acts of Massachusetts and New York, so far as they impose a tax upon passengers, are unconstitutional and void, because each of them so far conflicts with the first clause of the eighth section of the first article of the constitution, which enjoins that all duties, imposts, and excises shall be uniform throughout the United States; because the constitutional uniformity enjoined in respect to duties and imposts is as real and obligatory upon the states, in the absence of all legislation by congress, as if the uniformity had been made by the legislation of congress; and that such constitutional uniformity is interfered with and destroyed by any state imposing any tax upon the intercourse of persons from state to state, or from foreign countries to the United States.

8. That the power in congress to regulate commerce with foreign nations and among the several states includes navigation upon the high seas, and in the bays, harbors, lakes, and navigable waters within the United States, and that any tax by a state in any way affecting the right of navigation, or subjecting the exercise of the right to a condition, is contrary to the aforesaid grant.

9. That the states of this Union may, in the exercise of their police powers, pass quarantine and health laws, interdicting vessels coming from foreign ports, or ports within the United States, from landing passengers and goods, prescribe the places and time for vessels to quarantine, and impose penalties upon persons for violating the same; and that such laws, though affecting commerce in its transit, are not regulations of commerce prescribing terms upon which merchandise and persons shall be admitted into the ports of the United States, but precautionary regulations to prevent vessels engaged in commerce from introducing disease into the ports to which they are bound, and that the states may, in the exercise of such police power, without any violation of the power in congress to regulate commerce, exact from the owner or consignee of a quarantined vessel, and from the passengers on board of her, such fees as will pay to the state the cost of their detention and of the purification of the vessel, cargo, and apparel of the persons on board.

Case No. 103.

AHL et al. v. THORNER.

[2 Bond, 287; 3 N. B. R. 118, (Quarto, 29); 16 Pittsb. Leg. J. 78; 2 Amer. Law T. 104; 1 Chi. Leg. News, 337; 1 Amer. Law T. Rep. Bankr. 129.]

District Court, S. D. Ohio. June Term, 1869.

BANKRUPTCY—FRAUDULENT TRANSFERS—PREFERENCES.

A payment by the maker of a promissory note to an indorser, the maker knowing his insolvency at the time, and the indorser receiving such payment, having reasonable cause to believe the maker to be insolvent, is a fraudulent preference of such indorser within the meaning of section 35 of the bankrupt act; and the assignee in bankruptcy may sue for and recover the amount so paid, for the benefit of all the creditors.

[Cited in *Graham v. Stark*, Case No. 5,676; *Martin v. Toof*, Id. 9,167; *Goodenow v. Milliken*, Id. 5,535; *Hall v. Wager*, Id. 5,951; *Thomas v. Woodbury*, Id. 13,916; *Sill v. Solberg*, 6 Fed. Rep. 477. Distinguished in *Blair v. Allen*, Case No. 1,483.]
[See *Webb v. Sachs*, Case No. 17,325; In re *George*, Id. 5,325; *Giddings v. Dodd*, Id. 5,405; *Silverman's Case*, Id. 12,855.]

[In bankruptcy. Petition by Daniel Ahl, Jr., and Alexander Buchman, assignees of Sugarman & Frank, against Samuel Thorner, to recover money paid in fraud of the bankrupt act. Decree for plaintiffs.]

Moulton, Bateman & Johnson, for plaintiffs.

Long & Hoeffler, for defendant.

LEAVITT, District Judge. This is a petition in chancery, prosecuted by said Ahl and Buchman, as assignees in bankruptcy, to recover from the defendant, Thorner, the sum of \$4,990, which they allege to have been paid by said Sugarman & Frank to Thorner, in fraud of the bankrupt law of the United States. The material facts involved may be comprehensively stated as follows: In July, 1867, the said Sugarman & Frank were doing business in Memphis, in the state of Tennessee, as partners. Some time during that month, at the request of Sugarman, the said Thorner, residing at Cincinnati, and the brother-in-law of said Sugarman, and then a member of the firm of Heidelberg, Seasongood & Co., indorsed the promissory note of Sugarman & Frank for \$5,000, payable to the order of Thorner ninety days after date. This note was discounted by Espy, Heidelberg & Co., bankers at Cincinnati. Not being paid at maturity, on October 21, 1867, a renewed note for the same sum, at ninety days, was given by Sugarman & Frank, and indorsed by Thorner. This note, by its terms, would have been due January 23, 1868. On the 16th of that month the defendant Thorner received from Sugarman & Frank bills or drafts on a house in New York for \$5,300, with instructions to apply them to the note held

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by Espy, Heidelbach & Co. These bills or drafts were accepted by said bankers in payment of said note, and the note was taken up and canceled. The difference between the proceeds of the drafts or bills remitted to Thorner, and the sum due on Sugarman & Frank's note, was paid by direction of Sugarman to his wife, then living at Cincinnati. The bill sets forth that on May 11, 1868, a petition was filed in this court by certain creditors of the said Sugarman & Frank, alleging various acts of bankruptcy by them, and praying that they might be adjudged bankrupts. And on the 21st of September, in the year last named, the firm, and the individual members of the firm, were decreed to be bankrupts, and the said Ahl & Buchman were duly appointed and qualified as their assignees. They allege in their bill that at the time Sugarman & Frank remitted to Thorner the drafts to pay the note for \$5,000 held by Espy, Heidelbach & Co., they were insolvent, and that Thorner had just cause to believe them to be insolvent, and that, therefore, the payment of the note was an unlawful preference to Thorner, and illegal and void as in violation of the bankrupt act. And the assignees allege a right to recover from Thorner the sum so paid, to be applied to the claims of the firm creditors of Sugarman & Frank.

Before referring to the evidence, and with a view to a more intelligent application of the law to the facts, it may be well to notice briefly the provisions of section 35 of the bankrupt act, so far as they apply to the transactions in question. That section declares: "That if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor, or person having a claim against him, or who is under any liability for him, . . . makes any payment, pledge, assignment, transfer, or conveyance, . . . the person receiving such payment, pledge, assignment, transfer, or conveyance, having reasonable cause to believe such person is insolvent, and that such . . . payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property or the value thereof, from the person so receiving it, or so to be benefited thereby." The section then provides, that if any person being insolvent, or in contemplation of insolvency within six months before the filing of the petition by or against him, shall make any payment or transfer of property to a person having reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, transfer, etc., is made with a view to prevent his property from coming to his assignee, or prevent the same from being distributed under the act, or in any

way to impede, impair, delay, or defeat the operation of the act, the same shall be void, and the assignee may recover the property or the value as assets of the bankrupt.

In deciding whether the transaction involved is within the prohibitions of section 35, and therefore void, the following inquiries necessarily arise: 1. Was the firm of Sugarman & Frank insolvent, or acting in contemplation of insolvency in the payment of their note, on which Thorner was liable as indorser? 2. Was the note paid with a view to a preference to Thorner over other creditors of Sugarman & Frank? 3. Had Thorner reasonable cause to believe that Sugarman & Frank were insolvent? 4. Was Thorner under such a liability as indorser for the firm, as that the payment of the note inured to his benefit within the meaning of said section of the bankrupt act?

I. As to the insolvency of the firm of Sugarman & Frank, on January 16, 1868, when Thorner paid their note to Espy, Heidelbach & Co., with the proceeds of the drafts remitted to him by Sugarman & Frank, there is no room for doubt. The evidence proves conclusively that in December, 1867, the firm was unable to meet its liabilities. There were large debts owing to Cincinnati houses, which were past due and unprovided for. The debts of the firm then were in excess of \$100,000, and their assets and means of payment, according to the estimate of witnesses well acquainted with their affairs, would not pay more than twenty-five or thirty cents on the dollar. It is in evidence, by Seasongood, a witness in the case, that in December, 1867, Sugarman admitted to him that the firm were unable to pay their debts. The same witness states that he considered the firm insolvent in the spring of 1867.

II. The second inquiry is, whether Sugarman & Frank, in paying the note to Espy, Heidelbach & Co., on which Thorner was indorser, intended a preference to him, within the meaning of section 35 of the bankrupt act. This is a question of intention, which can only be determined by a reference to the facts connected with the transaction. And here the familiar principle, that every man intends what he knows must be the necessary result of his acts, applies. Sugarman & Frank must have known the firm was hopelessly insolvent when the note in question was paid. It is impossible, therefore, not to infer that in paying this note they were virtually preferring Thorner to other creditors. The effect of the payment clearly was to withdraw so much from the assets of the firm, which should have been applied to the equal benefit of all its creditors. This was clearly in conflict with the policy and the requirements of the bankrupt law. Thorner, as their indorser, had no privilege or immunity superior to those of the general creditors.

III. The next inquiry is whether Thorner had reasonable cause to believe Sugarman & Frank were insolvent at the time the note was paid. On this point the evidence is clear and conclusive. Thorner was apprised of the fact that the claim of Seasongood, Heidelbach & Co., of which he was then a member, against Sugarman & Frank for upward of \$6,000, was entered in the books of the former firm to the account of profit and loss, with the consent and knowledge of Thorner. It is also in evidence that one of the firm of Seasongood, Heidelbach & Co. offered to sell the claim of that firm on Sugarman & Frank to Thorner at fifty cents on the dollar, which Thorner declined. It is also proved that during the month of December, Sugarman was in Cincinnati asking his creditors for an extension, and that several meetings of the creditors were held to confer on that question, at several of which Thorner was present. It is also in evidence that Thorner visited Memphis some time before these meetings of creditors, and upon his return admitted in conversation that he had advised Sugarman & Frank to apply for the benefit of the bankrupt act. These facts, with others that might be referred to, prove conclusively not only that the firm was notoriously insolvent, but that Thorner was fully advised of its insolvency.

IV. The only remaining question is, whether Thorner's liability, as indorser for Sugarman & Frank, was such that the payment of the note inured to Thorner's benefit within the meaning of section 35 of the bankrupt act. On this point, there seem to be no decisions of any of the courts in bankruptcy that are directly applicable. And the court is called upon to decide the question in view of the construction to be given to the section referred to. The first part of that section before quoted, provides that any payment, pledge, assignment, transfer, or conveyance by a person being insolvent, or in contemplation of insolvency, if the person to whom the same is made is to be benefited thereby, and has reasonable cause to believe such person to be insolvent, and that the same is made in fraud of the provisions of the law, shall be void; and the assignee is authorized to sue for and recover the value from the person receiving the same, "or so to be benefited." And as throwing some light on the question of the construction of these provisions of section 35, it is proper to note that by section 39, which enumerates the causes for which a person may be declared a bankrupt, it is provided that a payment, transfer, etc., to any person or persons who are or may be liable as "indorsers, bail, sureties, or otherwise, with intent to defeat or delay the operation of the act," or to give a preference to any creditor, shall be a ground for an adjudication of bankruptcy. This is only referred to as showing that although the term "indorser" is not specifically used in section 35, it was the clear intention of the

law to make any payment or preference to an indorser or other surety fraudulent and void, where the other elements in the transaction existed to give it that character. The only question, therefore, arising under the fourth inquiry suggested is, whether the sending the eastern drafts, by Sugarman & Frank, to Thorner, to be applied by him to the payment of the \$5,000 note held by Espy, Heidelbach & Co., on which Thorner was indorser, was a payment to him, as the person to be "benefited thereby," within the clause of section 35 referred to. The argument mainly insisted on by the counsel for the defendant is, that as the note held by the bankers on Sugarman & Frank was taken up by Thorner a few days before its maturity, he was then under no liability as indorser, and the payment of the note by Sugarman & Frank did not inure to his benefit, in the sense of making the payment with an intent to give a preference within the meaning of the law. It seems to the court this construction of the statute is too limited to meet either the spirit or intent of the law. While it is true Thorner's legal liability could not be legally enforced, as indorser, until the maturity of the note and demand of the maker, and notice of non-payment, yet, in the statutory sense of the term, there was a liability by Thorner from the date of the indorsement. He was the person to be benefited by the payment, whether made before or after the maturity of the note. He was thereby relieved from his liability, and therefore beneficially interested in the payment. And if Sugarman & Frank were insolvent at the time of the payment, and Thorner had reasonable cause so to believe, it was a fraudulent preference within the meaning of the law, without reference to the means or agency by which Sugarman & Frank made the payment. They were in a condition of insolvency, in which any appropriation of their means to pay or indemnify a creditor, who was aware of such insolvency, is condemned by the statute. It was a preference to one liable for him, and to be benefited thereby, which he had no right to make.

It is further contended by defendant's counsel that if the payment of the note imports a fraudulent preference, it was a preference to the bankers who held the note, and not to Thorner, the indorser. That this view can not be sustained is clear from two considerations: First, there is no proof or pretense that Espy, Heidelbach & Co. were apprised of the insolvency of Sugarman & Frank, and therefore the payment to them was not a preference in fraud of the law; second, they were not the parties benefited by the payment, as Thorner's indorsement made them wholly safe, as he is admitted to have been entirely solvent, and able to meet any demand against him. It was therefore, of no importance to them whether Sugarman & Frank paid the note, either before or at its

maturity, as they would have been paid at once by the indorser when the note became due. The court, from the views stated, must hold the defendant liable for the amount paid to Espy, Heidelberg & Co., to be appropriated by the plaintiffs as assignees of Sugarman & Frank, for the equal benefit of all their creditors entitled to make proof of their accounts and claims.

Case No. 104.

In re AH YUP.

[5 Sawy. 155; 6 Cent. Law J. 387; 17 Alb. Law J. 385; 24 Int. Rev. Rec. 164.]

Circuit Court, D. California. April 29, 1878.

NATURALIZATION—CHINESE—ACT 1875.

1. A native of China, of the Mongolian race, is not entitled to become a citizen of the United States under the Revised Statutes as amended in 1875. Rev. St. § 2169; Amend. Rev. St. p. 1435.

[Cited in Re Ah Chong, 2 Fed. Rep. 739.]

2. A Mongolian is not a "white person" within the meaning of the term as used in the naturalization laws of the United States.

[Cited in Re Camille, 6 Fed. Rep. 256.]

Application for naturalization by a native of China.

B. S. Brooks, for petitioner.
S. Heydenfeldt, Jr., contra.

SAWYER, Circuit Judge. Ah Yup, a native and citizen of the empire of China, of the Mongolian race, presented a petition in writing, praying that he be permitted to make proof of the facts alleged, and upon satisfactory proof being made, and his taking the oath required in such cases, he be admitted as a citizen of the United States. The petition stated all the qualifications required by the statute to entitle the petitioner to be naturalized, provided the statute authorizes the naturalization of a native of China of the Mongolian race. The petitioner was represented by B. S. Brooks, a counsellor of this court. This being the first application made by a native Chinaman for naturalization, the members of the bar were requested by the court to make such suggestions as amici curiæ as occurred to them upon either side of the question; whereupon S. Heydenfeldt, Jr., argued the case very fully in opposition to the application. Suggestions were also made by other members of the bar present. The only question is, whether the statute authorizes the naturalization of a native of China of the Mongolian race.

In all the acts of congress relating to the naturalization of aliens, from that of April 14, 1802, down to the Revised Statutes, the language has been "that any alien, being a free white person, may be admitted to become a citizen," etc. After the adoption of the thirteenth and fourteenth amendments

to the national constitution; the former prohibiting slavery, and the latter declaring "who shall be citizens, congress in the act of July 14, 1870, amending the naturalization laws, added the following provision: "That the naturalization laws are hereby extended to aliens of African nativity, and to persons of African descent." 16 Stat. 256, § 7. Upon the revision of the statutes, the revisors, probably inadvertently, as congress did not contemplate a change in the laws in force, omitted the words "white persons;" section 2165 of the Revised Statutes, being the section conferring the right, reading: "An alien may be admitted to become a citizen," etc., etc. The provision relating to Africans of the act of 1870, is carried into the Revised Statutes in a separate section, which reads as follows: "The provisions of this title shall apply to aliens of African nativity, and to persons of African descent." Section 2169. This section was amended by the "act to correct errors and to supply omissions in the Revised Statutes of the United States," of February 13, 1875, so as to read: "The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity, and to persons of African descent." Rev. St. (1st Ed.) p. 1435; 18 Stat. 318. And so the statute now stands.

The questions are: 1. Is a person of the Mongolian race a "white person" within the meaning of the statute? 2. Do these provisions exclude all but white persons and persons of African nativity or African descent. Words in a statute, other than technical terms, should be taken in their ordinary sense. The words "white person," as well argued by petitioner's counsel, taken in a strictly literal sense, constitute a very indefinite description of a class of persons, where none can be said to be literally white, and those called white may be found of every shade from the lightest blonde to the most swarthy brunette. But these words in this country, at least, have undoubtedly acquired a well settled meaning in common popular speech, and they are constantly used in the sense so acquired in the literature of the country, as well as in common parlance. As ordinarily used everywhere in the United States, one would scarcely fail to understand that the party employing the words "white person" would intend a person of the Caucasian race.

In speaking of the various classifications of races, Webster in his dictionary says, "The common classification is that of Blumenbach, who makes five. 1. The Caucasian, or white race, to which belong the greater part of the European nations and those of Western Asia; 2. The Mongolian, or yellow race, occupying Tartary, China, Japan, etc.; 3. The Ethiopian or Negro (black) race, occupying all Africa, except the north; 4. The American, or red race, containing the Indians of North and South America; and, 5. The Malay, or Brown race, occupying the

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islands of the Indian Archipelago," etc. This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of complexion, hair and skull. Linnaeus makes four divisions, founded on the color of the skin: "1. European, whitish; 2. American, coppery; 3. Asiatic, tawny; and, 4. African, black." Cuvier makes three: Caucasian, Mongol, and Negro. Others make many more, but no one includes the white, or Caucasian, with the Mongolian or yellow race; and no one of those classifications recognizing color as one of the distinguishing characteristics includes the Mongolian in the white or whitish race." See New American Cyclopedia, tit. "Ethnology."

Neither in popular language, in literature, nor in scientific nomenclature, do we ordinarily, if ever, find the words "white person" used in a sense so comprehensive as to include an individual of the Mongolian race. Yet, in all, color, notwithstanding its indefiniteness as a word of description, is made an important factor in the basis adopted for the distinction and classification of races. I am not aware that the term "white person," as used in the statutes as they have stood from 1802 till the late revision, was ever supposed to include a Mongolian. While I find nothing in the history of the country, in common or scientific usage, or in legislative proceedings, to indicate that congress intended to include in the term "white person" any other than an individual of the Caucasian race, I do find much in the proceedings of congress to show that it was universally understood in that body, in its recent legislation, that it excluded Mongolians. At the time of the amendment, in 1870, extending the naturalization laws to the African race, Mr. Sumner made repeated and strenuous efforts to strike the word "white" from the naturalization laws, or to accomplish the same object by other language. It was opposed on the sole ground that the effect would be to authorize the admission of Chinese to citizenship. Every senator, who spoke upon the subject, assumed that they were then excluded by the term "white person," and that the amendment would admit them, and the amendment was advocated on the one hand, and opposed on the other, upon that single idea. Senator Morton, in the course of the discussion said: "This amendment involves the whole Chinese problem. * * * The country has just awakened to the question and to the enormous magnitude of the question, involving a possible immigration of many millions, involving another civilization; involving labor problems that no intellect can solve without study and time. Are you now prepared to settle the Chinese problem, thus in advance inviting that immigration?" Congressional Globe, pt. 6, 1869-70, p. 5122. Senator Sumner replied: "Senators undertake to disturb us in our judgment by reminding us of the possibility

of large numbers swarming from China; but the answer to all this is very obvious and very simple. If the Chinese come here they will come for citizenship, or merely for labor. If they come for citizenship then in this desire do they give a pledge of loyalty to our institutions, and where is the peril in such vows? They are peaceful and industrious; how can their citizenship be the occasion of solicitude?" Id. 5155.

Many other senators spoke pro and con on the question, this being the point of the contest, and these extracts being fair examples of the opposing opinions. Id. 5121-5177. It was finally defeated, and the amendment cited, extending the right of naturalization to the African only, was adopted. It is clear, from these proceedings that congress retained the word "white" in the naturalization laws for the sole purpose of excluding the Chinese from the right of naturalization. Again, when it was found that the term "white person" had been omitted in the Revised Statutes it was restored by the act passed "to correct errors and to supply omissions" in the Revised Statutes before cited. Upon reporting this bill, Mr. Poland, chairman of the committee, explained the various amendments correcting the errors, and upon the amendment to insert the words "being free white persons," said: "The original naturalization laws only extended to free white persons. * * * A very few years since [in 1870] Mr. Sumner, of Massachusetts, then in the senate, moved to strike out the word 'white' from the naturalization laws, and it was objected to on the ground that that would authorize the naturalization of that class of Asiatic immigrants that are so plentiful on the Pacific coast. After considerable debate, instead of striking out the word 'white,' it was provided that the naturalization laws should extend to Africans, and persons of African descent." After explaining the omission in the Revised Statutes he adds: "The member of our committee who had this chapter on the naturalization laws to examine as a sub-committee, failed to notice this change in the law, or it would have been brought before the house when the revision was adopted." Congressional Record, vol. 4, pt. 2, Sess 1875, p. 1081. Upon this report the amendment was made as it now stands in the statute. Thus, whatever latitudinarian construction might otherwise have been given to the term "white person," it is entirely clear that congress intended by this legislation to exclude Mongolians from the right of naturalization. I am, therefore, of the opinion that a native of China, of the Mongolian race, is not a white person within the meaning of the act of congress.

The second question is answered in the discussion of the first. The amendment is intended to limit the operation of the provision as it then stood in the Revised Statutes. It would have been more appropriately inserted in section 2165, than where it is found in sec-

tion 2169. But the purpose is clear. It was certainly intended to have some operation, or it would not have been adopted. The purpose undoubtedly was to restore the law to the condition in which it stood before the revision, and to exclude the Chinese. It was intended to exclude some classes, and as all white aliens and those of the African race are entitled to naturalization under other words, it is difficult to perceive whom it could exclude unless it be the Chinese. It follows that the petition must be denied, and it is so ordered.

Case No. 105.

The AIGBURTH.

The SARAH STARR.

[Blatchf. Prize Cas. 635.]¹

Circuit Court, S. D. New York. May 19, 1862.

PRIZE—RIGHTS OF CAPTOR—CONDEMNATION—EXPENSES—BONDING VESSEL.

1. Pending the appeals in these cases from decrees of condemnation, an order was made by this court, at the instance of the claimants, for bonding the vessels. They were appraised for that purpose, and the bonds were tendered, when the marshal intervened, and claimed payment of his fees and disbursements in the seizure and subsequent safe-keeping of the vessels, and also for wharfage, towage, &c., or at least that the claimants pay into court a sum of money to cover these fees and expenses: *Held*, that the claimants were, thus far, liable for nothing but the expenses of bonding the vessel.

2. Under the act of March 25, 1862, (12 Stat. 374,) the claimant is not responsible for the costs and expenses attending the seizure, detention, and safe custody of property seized as prize, unless there is a decree of condemnation, or of restitution on payment of costs.

3. All captures made by public armed vessels belong to the government and no title exists in the captors, except to their distributive shares of the proceeds after condemnation.

[Appeal from the district court of the United States for the southern district of New York.]

In admiralty.

NELSON, Circuit Justice. These two vessels were seized as prizes by the government, and were condemned in the court below, and are in this court on appeal. An order was heretofore made, at the instance of the claimants, for bonding them. They were appraised for that purpose, the Aigburth at \$900, and the Sarah Starr at \$2,000, and the bonds were tendered. The marshal has intervened, and claims the payment of his fees and disbursements in the seizure and subsequent safe-keeping of the vessels, and also for wharfage, towage, &c.; or, at least, that the claimants pay into court a sum of money to cover these fees and expenses.

The first section of the act of March 25, 1862, (12 Stat. 374,) provides "that all reasonable and proper claims and charges for

pilotage, towage, wharfage, storage, insurance, and other expenses incident to the bringing in and safe custody and sale of the property captured as prize, shall be a charge upon the same, and, having been audited and allowed by the court, shall, in the event of a decree of condemnation, or of restitution on payment of costs, be paid out of the proceeds," &c. The third section contains a similar provision in respect to another class of expenses. It will be seen, from the above provisions, that the claimant is not responsible for the costs and expenses attending the seizure, detention, and safe custody of the vessel seized by the government, unless there is a decree of condemnation or of restitution on payment of costs. And such would have been the rule in the absence of any statute regulation. The government is the libellant, instituting proceedings against the vessel, and, like any other party instituting a suit, is responsible for the expenses incurred in the progress of litigation, with the right of being reimbursed in the event of success, namely, the condemnation of the vessel, or a decree of restitution to the claimant on terms, such as payment of the costs. The claimant acts on the defensive, and is not subject to any portion of the costs and expenses incurred by the proceedings of the libellant, except his own in the progress of the defence, till they are adjudged against him by the court in the final adjudication. If he is successful in resisting the seizure, and obtains a final decree in his favor, he is, as a general rule, entitled to all his costs and expenses against the adverse party; and if the latter is a private party, to an execution for these costs and expenses. If the government be the adverse party, as no decree for costs can be rendered against it, an application must be made to the proper department of the government, and such application must be made by all officers, or other persons who may have incurred expenses, or been subject to charges, at the instance of the government, in the course of the proceedings. It is true, that these costs and expenses are a charge upon the property seized, whether vessel or cargo, while it remains in the custody of the law; or, on its proceeds, in case of an interlocutory sale; or, on the bond, as representing the property, in case it is bonded; and this charge upon the res continues until the final adjudication of the case. If this is favorable to the libellant, they are paid out of the proceeds; if not, the property or proceeds are exempt, and are restored to the claimant. What these charges are, or may be, I am not now called upon to determine.

I have said that the government is the libellant, and is responsible for all lawful and proper expenses incurred in its behalf in conducting the proceedings. All captures made by public armed vessels belong to the government. By the laws of congress, after the condemnation of prize property, a por-

¹[Reported by Samuel Blatchford, Esq.]

tion of the proceeds is distributed among the officers and crew of the capturing vessel in proportions depending upon the relative force of that vessel and of the captured vessel. Still, the whole property is proceeded against in behalf of the government. No title exists in the captors, except to the distributive share of the proceeds after condemnation; and, until then, the captors have no interest which the court can notice for any purpose. An exception to the above views in respect to costs and expenses exists in cases where the claimant applies to the court for some disposition of the res which may involve expense, such as for an interlocutory sale of the property, or for bonding the same. In such cases the claimant must advance the legal and necessary expenses, in the first instance, subject to a proper adjustment between the parties by the court in the final adjudication.

Applying the principles above stated to the case before me, it is quite clear that the marshal's bill presented, which includes charges for his own services, and for wharfage, towage, &c., cannot be allowed. He must look to the government, the libellant, for these expenses, or postpone his claim until the final adjudication, when, if that be against the claimant, it may be paid out of the proceeds; otherwise, not. The security taken for the vessel represents the proceeds, and is the equivalent for the property restored. The only charges thus far against the claimant are the expenses of bonding the vessel. The above views may be taken as disposing of other cases which have been mentioned to the court in the course of the term.

[NOTE. For opinion of the district court condemning the Sarah Starr and cargo and the Aigburth and cargo as enemy property, and acquitting the vessels on the charge of breaking the blockade, see *The Sarah Starr* and *The Aigburth*, Case No. 12,352; and for opinion of the circuit court affirming the decree of the district court as to the Aigburth and cargo, see *The Aigburth*, Id. 106.]

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AIGBURTH, The.

[See *The Sarah Starr*, Case No. 12,352.]

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Case No. 106.

The AIGBURTH.

[Blatchf. Pr. Cas. 645.]

Circuit Court, S. D. New York. July 17, 1863.*

PRIZE—VIOLATION OF BLOCKADE.

Decree of the district court, condemning the vessel and cargo as enemy property, and acquitting the vessel on the charge of breaking the blockade, affirmed.

In admiralty. [Appeal from decree of condemnation. *The Sarah Starr* Case No. 12,

*[Reported by Samuel Blatchford, Esq.]

†[Affirming *The Sarah Starr*, Case No. 12,352.]

352. Affirmed. For opinion on question of marshal's fees after bonding for appeal, see *The Aigburth*, Case No. 105.]

NELSON, Circuit Justice. The vessel in this case was captured at sea, off the coast of Florida, near Fernandina, on the 31st of August, 1861, by the *Jamestown*, a vessel-of-war. The *Aigburth* was on a voyage from Matanzas, Cuba, to St. John's, N. B., with a cargo of molasses. She left the port of Newbern in July, with a cargo of rice, for Matanzas. At the time of her egress, the port was not actually blockaded. The vessel and cargo belonged, at the time of capture, to C. Gravely, a British subject, but resident and doing business in Charleston, S. C. The court below condemned the vessel and cargo as enemy property, and acquitted the vessel on the charge of breaking the blockade. I concur in that decree.

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Case No. 107.

In re AIKEN.

[1 MacA. Pat. Cas. 126.]

Circuit Court, District of Columbia. 1850.

PATENTS FOR INVENTIONS—DECISION OF COMMISSIONER—REVIEW.

[1. The federal courts, in reviewing the decision of the commissioner of patents refusing an application for letters patent, is limited to the points involved in the reasons of appeal.]

[2. It is no ground for reversing the refusal of the commissioner to grant letters patent that the reasons given by him for such refusal are irrelevant to the subject-matter.]

[3. Act July 4, 1836, § 7, provides that, upon the filing of an application for letters patent, the commissioner shall make, or cause to be made, an examination of the alleged new invention, etc. *Held*, that the commissioner cannot transfer his own power of passing upon the question of patentability to those selected to assist in such an examination, or constitute them a board of examiners known in law as such.]

Appeal from refusal to grant patent.

[Application by Herrick Aiken for a patent for certain alleged improvements in submarine propellers. The application was rejected by the commissioner. Applicant appeals. Affirmed.]

Z. C. Robbins, for appellant.

CRANCH, Chief Judge. Appeal from the decision of the commissioner of patents rejecting the application of the appellant for letters-patent for improvements in submarine propellers. The supervision of the judge is limited to the points involved by the reasons of appeal.

The following are the reasons of appeal filed in the patent office: "1. The reasons assigned by the commissioner for rejecting my application are irrelevant to the subject-matter under consideration, and therefore do not apply, and cannot be properly construed to meet the points in the case. 2.

The commissioner erred in declaring that the patent granted to James Montgomery, August 7th, 1847, was a bar to my application. 3. The commissioner erred in declaring that the rejected application filed by Perry G. Gardner was a bar to my application. 4. The commissioner erred in declaring that the rejected application filed by John Finley was a bar to my application. 5. The commissioner erred in judging of the uses, advantages, and effects of the radical divisions in the cylinders placed in front and rear of the propeller, screw, or wheel operating in the centre cylinder. 6. The commissioner erred in declaring that the patent granted to Thomas Reiley, January, 1842, was a bar to my claims for the radical divisions in the cylinders. 7. The commissioner erred in declaring in his letter of rejection of the 27th of February, 1850, that the rejected application filed by John Finley in 1838 was a bar to my application. 8. The commissioner has not referred to any propeller made in the same way and manner, nor to any propeller proposing the same combination of the several parts, nor that is composed of so few pieces, or that is so little liable to get out of order, or that has the same action upon the water, or that produces the same effect, or will propel a ship or other vessel so fast with the same amount of power applied, or that will propel a ship across the ocean in so short a time. Neither has the commissioner referred me to any submerged propeller professing identity, similarity, or interference with my invention; consequently his references are irrelevant, and do not apply to the subject-matter under consideration, and therefore his decision is contrary to law, and I therefore pray your honor to reverse it."

The first reason of appeal is "that the reasons assigned by the commissioner for rejecting the application are irrelevant to the subject-matter under consideration, and therefore do not apply." They are therefore no ground for reversing the decision of the commissioner. The supervision of the judge is confined to the points involved by the reasons of appeal. In this reason of appeal no point material to the case is involved. It is immaterial what reasons the commissioner assigned for his decision. His reasons might be insufficient, and yet the decision be correct. Such insufficient reasons are no ground to reverse his decision.

The second reason of appeal is "that the commissioner erred in declaring that the patent granted to James Montgomery, August 7th, 1847, was a bar to the appellant's application." No such declaration of decision was made by the commissioner, and there is no such ground for reversing his decision.

The same answer may be made to the third, fourth, fifth, sixth, and seventh reasons of appeal.

The eighth reason of appeal does not involve any point material to the issue in this case.

Mr. Aiken's propeller may possess all the benefits, advantages, and superiority which he claims for it, and yet the decision of the commissioner rejecting his application may be correct. The question is not whether Mr. Aiken's invention is more useful than that of others, but whether it is new and sufficiently useful to justify a patent; and that point is not involved by any of the reasons of appeal. The decision of the commissioner, therefore, in this case is affirmed.

The commissioner, in stating the grounds of his decision to the judge, in writing, in July, 1850, refers to his own letter to the applicant, dated February 27th, 1850, in which the commissioner says: "Your claims to letters-patent for alleged novelties in a submerged propeller have been submitted to a board of examiners, who have decided unanimously that they present nothing essentially new or patentable, and confirm the former decision of this office respecting the same." As this may tend to mislead the public as to the powers of the examiners in the patent office, I deem it proper to say that I have no knowledge of any legal board of examiners in the patent office having power or authority to affirm or reverse the decisions of the commissioner of patents. The powers and authority of the board of examiners provided for in the seventh section of the act of July 4th, 1836, were transferred to the judge by the eleventh section of the act of March 3d, 1839; and so much of the act of 1836 as provided for a board of examiners is repealed by the twelfth section of the act of March 3d, 1839. By the seventh section of the act of 1836, upon the filing of an application, &c., the commissioner is to make, or cause to be made, an examination of the alleged new invention, &c. This examination may be made by the commissioner alone or with the aid of such examiners as he may assign for that business; but he cannot transfer to them, or any of them, his own power to decide. He cannot constitute them a board of examiners, known in law as such. They are but the assistants of the commissioner in the discharge of his duties.

Case No. 108.

In re AIKEN.

[1 MacA. Pat. Cas. 130.]

Circuit Court, District of Columbia. July, 1850.

PATENTS FOR INVENTIONS—PATENTABILITY—COMMISSIONER'S DECISION—APPEAL.

[1. On an appeal from a commissioner's decision rejecting an application for a patent for an alleged invention, no reply to the grounds of the commissioner's refusal to grant the application will be permitted to be filed either in

the office to be recorded with such decision or before the judge.]

[2. When it appears, on appeal from a judgment of the commissioner rejecting an application for letters patent for a certain invention, that the device has not been patented or described in any printed publication in this or any foreign country prior to the application, and had not, with the applicant's consent, been in public use prior to the application, and that it is sufficiently useful and important, the applicant is entitled, under act July 4, 1836, § 7, to letters patent therefor.]

[Appeal by Herrick Aiken from the decision of the commissioner of patents refusing to grant letters patent for an improvement in car wheels. Reversed.]¹

T. Dennis, for appellant.
Senator M. Norris, of counsel.

CRANCH, Chief Judge. This is an appeal from the decision of the commissioner of patents rejecting the claim of the appellant for letters-patent for an improvement in car-wheels for railroads. After this cause was brought before the judge by petition of appeal, and after the commissioner of patents had, on the day assigned for the hearing of the appeal, laid "before him all the original papers and evidence in the case, together with the grounds of his decision fully set forth in writing touching all the points involved by the reasons of appeal," Mr. Dennis, in behalf of Mr. Aiken, offered to file a written argument in reply to the commissioner's "grounds of his decision," but the judge refused to permit it to be filed. The grounds of the commissioner's decision and the reasons of appeal, which are to be set forth in writing, are to be confined to the points involved by the reasons of appeal, to which points the hearing and the decision of the judge are to be confined. No reply to the grounds of the commissioner's decision is contemplated by the statute. There must be a *finis litium* somewhere; and this seems to be implied here, as the statute does not authorize any further proceeding, except the final decision of the judge. No reply can be admitted to the grounds of the commissioner's decision laid before the judge, and no reply can be permitted to be filed in the office to be recorded with the proceedings. The last official act of the commissioner in the cause is to "lay before the judge all the original papers and evidence in the case, together with the grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal." The case is no longer before the commissioner. The applicant has no legal right to reply to those grounds. They are before the judge, and not before the commissioner. The litigation is closed as between the appellant and the office. Nothing further can be done in the case in the office until the

decision of the judge and his proceedings shall be certified to the commissioner.

The appellant filed in the office the following reasons of appeal: "1. The reasons assigned by the commissioner for rejecting my application are irrelevant to the subject-matter under consideration, and therefore do not apply, and cannot be properly construed to meet the points in the case. 2. The commissioner erred in declaring that the patent granted to J. H. Rodgers in February, 1836, was a bar to my application. 3. The commissioner erred in declaring that the patent granted to William Creed in February, 1843, was a bar to my application. 4. The commissioner erred in declaring that the rejected application of Jacob Newhanny was a bar to my application. 5. The commissioner erred in declaring the rejected application filed by Simeon Bedford was a bar to my application. 6. The commissioner erred in declaring the rejected application of William Compton was a bar to my application. 7. The commissioner erred in declaring the patent granted to James Stimpson was a bar to my application. 8. The commissioner erred in declaring that the various devices which are combined in my wheel—which devices he acknowledges were not all to be found in any one wheel, (see his letter of rejection, March 5th, 1850,) which several devices combined constitute the superiority of my wheel over all others—was not the subject of letters-patent. And he further erred in declaring that those devices, claimed in combination, present nothing which the law recognizes as a (patentable) combination, but merely as substitutions of well-known devices. (See same letter.) 9. The commissioner has not referred me to any wrought-iron car-wheels, nor to any other wheel the several parts of which possess the same advantages in the form and shape of the respective parts composing it, nor to any wheel which has the several parts put together in the same way and manner, nor to any wheel possessing equal strength in proportion to its weight." 1. The first reason of appeal is "that the reasons assigned by the commissioner for rejecting the application are irrelevant, and do not apply." But the reasons given by the commissioner may be insufficient or irrelevant, and yet the decision may be correct. The insufficiency of the commissioner's reasons is not, in itself, evidence that his decision was wrong, and consequently is no ground for reversing it. This answer is also applicable to the second, third, fourth, fifth, sixth, and seventh reasons of appeal. It is also a sufficient answer as to these reasons to say that there were no such decisions made by the commissioner. 8. The eighth reason of appeal is "that the commissioner erred in declaring that the various devices which are combined in my wheel—which devices he acknowledges are not all to be found in any one wheel, (see his letter of rejection,

¹[Letters patent No. 7,676 were granted October 1, 1850, to Herrick Aiken, in conformity to the decree in this case.]

March 5th, 1850,) which several devices combined constitute the superiority of my wheel over all others—was not the subject of letters-patent. And he further erred in declaring that those devices, claimed in combination, present nothing which the law recognizes as a (patentable) combination, but merely as substitutions of well-known devices." By the seventh section of the act of July 4th, 1836, it is enacted that on the filing of any such application, description, and specification, and the payment of the duty, the commissioner shall make, or cause to be made, an examination of the alleged new invention or discovery; "and if on any such examination it shall not appear to the commissioner that the same had been invented or discovered by any other person in this country prior to the alleged invention or discovery thereof by the applicant, or that it had been patented, or described in any printed publication in this or any foreign country, or had been in public use or on sale with the applicant's consent or allowance prior to the application, if the commissioner shall deem it to be sufficiently useful and important, it shall be his duty to issue a patent therefor."

It did not appear upon the examination that the matter for which the patent was claimed by the applicant had been invented or discovered by any other person in this country prior to the alleged invention or discovery thereof by the applicant, nor that it had been patented, or described in any printed publication in this or any foreign country, or had been in public use or on sale with the applicant's consent or allowance prior to the application. The decision of the commissioner, therefore, rejecting Mr. Aiken's application must rest only upon the commissioner's opinion that the invention was not "sufficiently useful and important." The degree of usefulness or importance is not described or limited by the statute, nor is it material if it interferes with no prior right or claim, and is in itself innocent. If good may be the result of granting a patent, and evil cannot, I should think it ought to be granted, especially as it is doubtful whether a rejected applicant has any means of having his right to the patent brought before a court of law to be tried by a jury. The decision of the judge upon appeal rejecting the application would seem to be conclusive. Upon examination of Mr. Aiken's specification, models, and drawings, it seems to me that the combination for which he asks a patent, and which in his specification he describes as follows, viz., "the combination of the rim E with the arms D at the ends of the spokes C, by means of the inner flange F and bevel E'," is new and sufficiently useful, and that, as there is no interference, he is entitled to a patent therefor. This decision renders it unnecessary to say anything respecting the ninth reason of appeal.

Case No. 109.

AIKEN v. BEMIS.

[3 Woodb. & M. 348; 2 Robb, Pat. Cas. 644.]
Circuit Court, D. Massachusetts. Oct. Term, 1847.

PATENTS FOR INVENTIONS—INFRINGEMENT—MATERIALS USED—EXCESSIVE DAMAGES—EVIDENCE—RES GESTÆ—DEPOSITIONS—NEW TRIAL—WEIGHT OF EVIDENCE—NEWLY-DISCOVERED EVIDENCE—COSTS.

1. A new trial will not be granted on the ground that the verdict is against the weight of evidence, if there was some to be weighed on both sides, unless some clear mistake is shown, or some manifest abuse of power.

[Cited in Whetmore v. Murdock, Case No. 17,509.]

2. Where the action is for a misfeasance in violating a patent, and \$2,000 damages are given, the court will not set it aside on the ground that they are excessive, unless they are plainly and largely beyond the injury inflicted.

3. The declarations of a person as an agent, in relation to the business entrusted to him, and made at the time when so entrusted, are competent concerning it in an action by a third person against the principal, as a part of the res gestæ, if they relate to the act clearly.

[Cited in Wilkes v. Dinsman, 7 How. (48 U. S.) 123.]

4. A new trial will be granted for newly discovered evidence, if there was not gross neglect in not procuring it at the first trial, and if it is not merely cumulative. Evidence is cumulative if it relates to the same subordinate or specific fact, to which proof was before adduced of a like character, but not when it is a new fact respecting the general question or point in issue.

[Cited in Whetmore v. Murdock, Case No. 17,509; Bentley v. Phelps, Id. 1,332.]

5. Where depositions or affidavits are taken with notice in conformity to a special order, but when the opposite side was not able to confer with his counsel and attend, they will be admitted with the condition that the opposite party have time to take them over again and cross-examine the witnesses.

6. Costs of the former trial must usually be the terms for a new trial on the ground of newly discovered evidence.

7. Where a patent for a saw-set describes it as having a hammer of iron with a steel point, and says nothing of any other material or equivalents, and the evidence was, that a hammer entirely of steel had first been tried and abandoned by the patentee, before taking out his letters in this form, doubts exist, whether saw-sets made by the defendant with hammers entirely steel are a violation.

[Cited in Winans v. Denmead, 15 How. (56 U. S.) 347.]

At law. This was an action on the case [Herrick Aiken against S. C. Bemis] for violating a patent of the plaintiff. The letters were averred to have been obtained May 24th, 1830, for "a new and useful improvement on the saw-set," and the infringement to have been made in A. D. 1837 and 1838. At the trial here, at the last May term, before Sprague, J., the patent was given in evidence and described as consisting of a hammer, a shank, a regulating screw and spiral

¹[Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

spring. It is not necessary to describe either of them, except that the hammer was to be of iron with a steel point. Much testimony was put in tending to prove that saw-sets similar to this had been known and used a few years before the date of these letters, and other testimony by the plaintiff to raise a presumption that some of the saw-set machines, which, by some of the witnesses of the defendant, were sworn to have been used earlier, were probably made by the plaintiff, after his invention and the maturing of his saw-set, which happened about two years previous to the taking out of his patent. The evidence, showing an infringement by the defendant, proved that the hammers in his saw-sets were all made of steel, and not in part of wrought iron, and that the plaintiff, in experiments made before completing his saw-set, found that steel hammers broke frequently, and wrought iron ones enduring longer, his specification was confined to the last with steel points. The defendant therefore moved for a nonsuit on this ground, which the court refused. The plaintiff then offered further proof that the manufacture by the defendant extended to six or seven hundred dozen, and that the profit on the sale of them was \$2.00 per dozen. In the course of this testimony a witness swore that one Call, who made some of these saw-sets, was a foreman for Bemis, and that Call said he had made a certain number of them in all, specifying it, and gave to the witness an order on Bemis for the wages for his work. The admission of this testimony to that statement about the number was objected to, but it was allowed to go to the jury. A verdict was returned for the plaintiff for \$2000 damages.

A motion was made for a new trial by the defendant, assigning the following causes. 1. The refusal to nonsuit the plaintiff for the variance in the hammer described in the specification, from that hammer made by Bemis. 2. The admission of Call's declarations as to the number of saw-sets made by Bemis. 3. The damages being excessive. 4. The verdict being against the weight of evidence. 5. Newly discovered evidence since the trial.

The affidavits as to the newly discovered evidence were numerous. The oath of the defendant showed that this new evidence not known before the trial, though one of the witnesses was named in the notice of the defense, thinking that as a mechanic, he was likely to know something of the subject. But he was not talked with nor summoned. A portion of the other witnesses resided at distances not very remote from the defendant. The substance of the newly discovered evidence was in depositions taken under an order requiring notice to be given to the opposite party. Their use was objected to by the plaintiff, because the notice was so short, that his counsel were unable to see him or confer together before the time arrived, and to reach the place of taking them seasonably.

But the court, on being satisfied no unfairness was intended by the defendant in the notice, stated that the depositions would be admitted conditionally, as they came within the order. In this class of inquiries they might, without a special order, always be *ex parte*. But the court said, that, if admitted, time would be allowed to the plaintiff, under the circumstances, to take the depositions over again, and cross-examine the witnesses, if he desired it. The plaintiff concluded to proceed without doing this. Among the new witnesses was Ealim Stebbins, who testified to seeing a saw-set like this, except brass for iron in the guards, as early as 1820, at Goodnow's, and another, belonging to D. B. Perkins, afterwards. Another witness was D. B. Perkins, who swore to seeing one like this as early as 1816, in Waterville, Me., one in Lancaster, N. H., in 1826, and one bought in Connecticut in 1828. The next new witness was Jethro Latham, who testified to buying another saw-set, like this in principle, between 1824 and 1826, in Rhode Island. Another new witness, O. Dickerson, testified to seeing in 1828 a different, but in some respects similar saw-set. Another, A. Blanchard, swore to the making, by himself and brother, in Palmer, Mass., of a like saw-set in 1826. It was constructed from a description given by his brother. He swore to another made in Springfield, by two machinists, in 1823 or 1825. Eli Parsons testified that he bought another similar one at Springfield in 1827. Horace Lee swore to another still in 1820, in Hartford, Conn., and Dyer White to another, less like the plaintiff's in form, but with some such principles, made by him in 1819.

The motion was argued at an adjourned session in September, 1847, by Bates and B. R. Curtis in its favor, and Hayes and J. P. Hale against it.

Before WOODBURY, Circuit Justice, and SPRAGUE, District Judge.

WOODBURY, Circuit Justice. It may not be amiss for the benefit of these parties, to notice all the grounds assigned here for a new trial, though we decide the question only on one of them. The cause relied on as to the damages being excessive, is not so clearly made out as to justify the setting aside of a verdict in an action for misfeasance. The case might be different in a suit on a contract, as there the rule of damages is more certain. Some of the data in favor of this large amount of damages in the present case, were rather loose, even for a misfeasance, but the sum given in this class of cases must be plainly exorbitant, or what is sometimes called "outrageous," to require the interference of the court. *Allen v. Blunt*, [Case No. 217,] and *Taylor v. Carpenter*, [Id. 13,785,] and cases there cited. [*Leeman v. Allen*,] 2 Wils, 160; [*Beardmore v. Carrington*,] Id. 244; [*Coffin v. Coffin*,] 4 Mass. 43; [*Bodwell v. Osgood*,]

3 Pick. 385; [Shute v. Barrett,] 7 Pick. 82; Washburn v. Gould, [Case No. 17,214.]

Another of the causes assigned for a new trial is, that the verdict was against the weight of evidence. Though this is sustained by some plausible appearances, it is not shown so clearly as to raise a strong presumption that the jury either wantonly abused their powers, or made some inadvertent mistake. These last are the leading tests in such cases. Fearing v. De Wolf, [Case No. 4,711,] [Wendell v. Safford,] 12 N. H. 171; [Jackson v. Loomis,] 12 Wend. 27; [Baker v. Briggs,] 8 Pick. 122. And where evidence existed on both sides which was material, and to be compared or weighed, as it did here, the finding of the jury is not to be disturbed, though the court would have come to a different conclusion upon it from that of the jury. See the cases cited in Fearing v. De Wolf, [Case No. 4,711,] and May [Macy] v. De Wolf, [Id. 8,933,] [Cunningham v. Magoun,] 18 Pick. 13; [Coffin v. Phenix Ins. Co.,] 15 Pick. 291; [Fowler v. Aetna Fire Ins. Co.,] 7 Wend. 270; 1 Sumn. 451, [Alsop v. Commercial Ins. Co., Case No. 262,] [Wendell v. Safford,] 12 N. H. 179.

But the other reasons assigned for a new trial are of a different character, are supposed to be errors in law, and rest on exceptions entirely disconnected with the finding, or the opinion of the jury. One is a question arising on the refusal of the court, in the progress of the trial, to nonsuit the plaintiff on account of a variance between his specification and the form or substance of the machine, which was considered as an encroachment on the patent. It is well settled that if the machine used by the defendant differed materially from that described in the patent, it is not an infringement. Davoll v. Brown, [Case No. 3,662,] Webst. Pat. 11; [Brunton v. Hawkes,] 4 Barn. & Ald. 540. Where the patent is for a new combination, and not for newly invented parts, a violation must extend to the whole. [Prouty v. Ruggles,] 16 Pet. [41 U. S.] 341. The present was a case of the former character, for a combination, and the difference in the patent from the instrument here, consists in this—that the hammer of the saw-set was all made of steel by Bemis, and that all but the point was made of wrought iron in the patent. This locks, at the first blush, as not a very material difference, and one rather colorable or accidental, than designed. 1 Sumn. 485, [Ames v. Howard, Case No. 326,] [Heath v. Unwin,] 13 Mees. & W. 592; Phil. Pat. 372; Pet. C. C. 394, [Gray v. James, Case No. 5,718,] But when we advert to the evidence in the case, it appears that the use of wrought iron was found by experiments to be much better than steel, and was hence patented, and this, without making the specification in terms broad enough to cover steel also. It is a matter

of doubt, therefore, whether the use of an inferior material for the hammer of the saw-set, when the patent covers only a superior one, is a legal violation of it. Why should the plaintiff complain of what he had tried but deemed too useless or valueless to be adopted? Had the patent extended only to the form or parts of the saw-set, combined as set out, and made of any kind of materials, or saying nothing as to the materials, the right would be violated by a machine of like form, as the form would be the sole matter patented. But when the patentee chooses to go farther, and cover, with his patent, the material of which a part of his machine is composed, he entirely endangers his right to prosecute when a different and inferior material is employed, and especially one, which he himself, after repeated experiments, had rejected. Webst. Pat. 27; [Electric Tel. Co. v. Nott,] 4 Man. G. & S. 462; 4 Mason, 1, [Earle v. Sawyer, Case No. 4,247,] [Lewis v. Davis,] 3 Car. & P. 502. The form of the specification in this case, extending to the material at all, was ill-advised, and especially so, without adding, as is usual, if made of any other material in the form and combination described. Webst. Pat. 20; [Prouty v. Draper,] 16 Pet. [41 U. S.] 341; [Brunton v. Hawkes,] 4 Barn. & Ald. 540. But we do not now decide this case on this point, being inclined, if practicable, to let the parties settle their rights on the merits as to the originality of the patent.

Another exception in law to the ruling of the court, is the admission of the declarations of Call. The ground on which their admission was sought to be justified, seems to be that Call was the agent of Bemis, and the declarations of the agent will often bind the principal. This ground is sound whenever the person is proved to have been agent in that particular business, and made the declarations while engaged in it, and in relation to it. They then become a part of the res gestae, and bind the principal as if made by himself. [U. S. v. Gooding,] 12 Wheat. [25 U. S.] 468; [Sundry Goods, etc., v. U. S.,] 2 Pet. [27 U. S.] 364; Story, Ag. § 134; [Haynes v. Rutter,] 24 Pick. 245. I am inclined to think here, that, in truth, these declarations were made under such circumstances. But their admission being an exception to the general rule, that a party is not to be affected by the declarations of third persons, it would have been well to have shown with more distinctness, whether Call's agency extended to this particular business, and whether the declarations were made when he was engaged in it, and not afterwards. 2 Starkie, Ev. 60; Greenl. Ev. 144; Phil. Ev. 103; [Enos v. Tuttle,] 3 Conn. 250; [Sessions v. Little,] 9 N. H. 271; [Pool v. Bridges,] 4 Pick. 378; [Allen v. Duncan,] 11 Pick. 309.

Passing by this last fact as not so clear either way, as to be decisive of the motion,

I proceed to the other cause for a new trial, growing out of the new discovery of material evidence since the trial. On that, it is thought proper the jury should have an opportunity to deliberate, at least once, before disposing finally of the rights of these parties. The rules as to such evidence, when sufficient or not, to require a new trial, were fully considered and explained in *Macy v. De Wolf*, [Case No. 8,933.] The limitations are that—1. The evidence must not have been known before the trial. [*Doe v. Roe*,] 1 Johns. Cas. 402; [*Vandervoort v. Smith*,] 2 Caines, 155. 2. It must be material. 2 Wash. C. C. 411, [*Marshall v. Union Ins. Co.*, Case No. 9,134.] 3. It must not be merely cumulative. [*People v. Superior Court of City of New York*,] 10 Wend. 285.

There is no doubt here, that most of this new evidence has been discovered since the trial, and, indeed, a part of it since the motion. This is sworn to and not contradicted. It is true, that in the notice given one of the witnesses was referred to before the trial, as likely to know something on the subject, and others resided near the parties. But the testimony is, that it was not then known whether any of them could in truth testify to what is material. Nor was that known as to some, even when this motion for a new trial was made. Next did the defendant employ due diligence? In a case like this, where the transactions or matter to be proved about similar saw-sets in use was of such long standing, being twenty years or more old, and where the defendant was not a party to them, nor supposed to possess any peculiar or previous knowledge of them, I do not see sufficient ground for imputing to him such negligence as should bar him from using this evidence. See cases in *Fearing v. De Wolf*. [Case No. 4,711.] And so far from excluding him from the use of any new evidence not discovered when the motion for a new trial was made, but ascertained before the hearing of the motion, and before judgment, certainly when the motion, as here, is broad enough in form, and early enough by our rules, the new evidence ought in justice to be considered and weighed with the rest. It may be regarded as a breach of the rule concerning the proof being newly discovered, that if evidence was not, in fact, known before the other trial, but ought to have been, and probably would have been by the exercise of due diligence, a new trial should not be awarded in consequence of it. It is true here, also, that the new witnesses did not reside very remote. But it is not shown that the defendant knew previously what they could testify, or had any special reason to suppose they were able to give useful testimony. And so far as he might suppose, on general facts and reasoning, that most mechanics would be likely to know something of the subject, he certainly seems to have resorted to enough of them, and used the testimony of enough at the

trial to show due diligence, so far as required by any general information or duty. Nor can there be any question here that the new evidence is material. It goes to the very gist of the claim of the plaintiff, the originality of his patent. It goes, likewise, to several new saw-sets, similar in structure, testified to have been in use some years earlier, besides strengthening the old testimony, as to some of the old saw-sets proved at the former trial. The ends of justice, therefore, render it proper that a jury should, once at least, pass upon this testimony between these parties, as to saw-sets not sworn to, nor known before, unless it is what the law regards as merely cumulative. For it is, as before named, the last and an important condition, as to newly discovered evidence, that it be not merely cumulative. This means, that it be not heaping up farther proof as to the same point or fact, on which evidence was before offered. If it only serve to strengthen such old point or fact, and not to introduce any new one to the jury, a new trial is not allowable on account of it.

The only difficulty under this rule is, what must be considered, in this case, a new point or fact, and what is merely cumulative, as to an old one. When, as here, the general defense is placed on the ground that the patent of the plaintiff was not original, the meaning of the rule cannot be to exclude, as cumulative, newly discovered evidence of subordinate points or facts bearing on that general question. For in such a view, no new trial for new evidence could ever be obtained, all new evidence relating, as it must, if it be pertinent, to the general ground or general fact, put in issue before. But it must mean that new evidence to a subordinate point or fact is not competent when that subordinate point or particular fact was before gone into, because it is then cumulative or additional as to that fact. For example, here it would be a new point or fact, that a similar saw-set had been known and used in Hartford, Conn., in 1820, by the witness Lee, because nothing was proved in respect to that saw-set before. But it would not be a new point or fact, that a similar saw-set was known and used in Springfield, in 1827, by Parsons, because the point or fact was before gone into by the evidence, and further proof as to that would be merely cumulative. Much of this new evidence being then as to subordinate points and particular facts not before agitated, cannot be regarded as cumulative. [*People v. Superior Court of City of New York*,] 10 Wend. 285; [*Porter v. Talcott*,] 1 Cow. 359, 382; [*Randolph v. Inhabitants of Easton*,] 23 Pick. 248; [*Guyot v. Butts*,] 4 Wend. 579. See the precedents on this in *Macy v. De Wolf*, [Case No. 8,933;] [*Warren v. Hope*,] 6 Greenl. 479; 1 Sumn. 451, [*Alsop v. Commercial Ins. Co.*, Case No. 262;] 1 Sumn. 482, 491, [*Ames v. Howard*, Case No. 326;] [*People v. Superior Court of City of New York*,] 10

Wend. 204; [Gardner v. Mitchell,] 6 Pick. 114; [Parker v. Hardy,] 24 Pick. 246-248. The new particular facts or cases of the prior use of such a saw-set sworn to, are on the face of the affidavits very striking and numerous. They may all be disproved or contradicted at the trial, but they are proper to be brought to such a test. They make out, prima facie, one of the strongest cases to be found in the history of new trials for this cause, and require us, therefore, to grant the motion. But in these cases of new trials for newly discovered evidence, the terms are usually that the costs of the former trial be first paid. See the cases in *Fearing v. De Wolf*, [Case No. 4,711.] Another reason for such terms here is the near residence of the new witnesses and not obtaining them before. Though some other causes seem to unite in rendering a new trial just, yet as this is the principal and decisive one, we think those costs ought first to be paid, unless the defendant can offer some satisfactory reason for different terms. If no such reason be offered during the session, the new trial will be allowed on paying such costs.

AIKEN, (CROWE v.)

[See *Crowe v. Aiken*, Case No. 3,441.]

Case No. 110.

AIKEN v. DOLAN

[3 Fish. Pat. Cas. 197; Merw. Pat. Inv. 95.]
Circuit Court, E. D. Pennsylvania. June, 1867.

PATENTS FOR INVENTIONS—ASSIGNMENT—EQUITABLE TITLE—REISSUE—ANTICIPATION—SUCCESSFUL EXPERIMENTS—DISCLAIMER.

1. An assignment of a patent for a knitting needle "to be applied exclusively to the knitting or construction of harnesses for looms, and for other purposes," obviously means harnesses for looms and harnesses for other purposes.

2. Where H. agreed with A. that upon the fulfillment of certain conditions, he, H., would assign to A. the extended term of certain letters patent, if the same should be extended: *Held*: That if the conditions had been fulfilled A. would have become the equitable owner of the extended term.

3. The conditions not having been fulfilled, the former ownership, legal and equitable, was continued as to third parties, and justice does not even require that a decree should be made without prejudice to the rights of A.

4. Whether, under such circumstances, A. ought not to have been made a party complainant or defendant to a bill filed by the assignees of H. to restrain a third party from infringement, quære.

5. The decision of the commissioner, extending letters patent, could not have been made without proof that the patentee had not derived a fair profit from his invention during the first part of the original term.

6. Such decision, having been made after public notice and official investigation, shows

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that throughout the United States he was generally considered, as he was still considered at the patent office, the first inventor.

7. Although the work and product of a prior knitting needle may have been imperfect, yet if both work and product were seen by persons who have not yet lost the recollection of them, and more than one of the needles, and a machine by which some of them were made, have been preserved to the present day, this would constitute a sufficient prior knowledge by others to prevent a subsequent invention from being new.

[Cited in *Electrical Accumulator Co. v. Julien Electric Co.*, 38 Fed. Rep. 131.]

[See *Albright v. Celluloid Harness Trimming Co.*, Case No. 147.]

8. An improvement, though depending upon a change of form, may be, in purpose and effect, a change in a material part of a process of manufacture, and patentable.

9. An invention may be good which remedies a theoretical defect, although no injurious effects have been observed in practice.

10. The original model, deposited in the patent office, may be examined for the purpose of solving any doubt raised by an inspection of the drawings.

11. Where claim was for "the application of a latch or tongue applied to the hook of the needle, and operated as herein described," and the specification stated that the needle was constructed "in the general form shown in the drawings," and it appeared that needles with a latch or tongue and hook were not new, but that needles with a certain curved swell shown in the drawings, but not otherwise referred to in the specification, were new: *Held*: That if the knowledge of needles without this swell had been universal or general, the declaration that the needle was constructed "in the general form shown in the drawings" might have sufficed to restrain the claim to needles made with a swell; but, it appearing that the knowledge of the primitive needle, though sufficient to defeat a subsequent patent, was very limited, the claim was broader than the invention. This defect might be cured by disclaimer.

[Cited in *Electrical Accumulator Co. v. Julien Electric Co.*, 38 Fed. Rep. 134.]

12. The complainant by his counsel, proposing, at the hearing to disclaim any construction of a needle which has not the curved swell or its equivalent: *Held*: That such a disclaimer would deprive the complainant of all right to recover costs in the pending suit, but that there might be a decree for perpetual injunction, each party to pay his own costs, without any actual previous disclaimer of record in the patent office.

13. The defendant having, by the curvature of the swell of his needle, at least partially adopted the patented improvement, both in theory and practice, was adjudged to have infringed the patent.

In equity. This was a bill in equity filed to restrain the defendant from infringing letters patent [No. 6,025] for an "improvement in knitting needles," granted to James Hibbert, January 9, 1849, extended to Peleg Hull, administrator of James Hibbert, deceased, for seven years from January 9, 1863, and on April 22, 1863, assigned to complainant.

Two preliminary questions arose upon two papers executed during the original term of the patent. One of them was an assignment by the patentee in June, 1853, to

Darius C. Brown, the granting clause of which was as follows:

"Now this indenture witnesseth: That for and in consideration of the sum hereinafter mentioned, I have assigned, sold, and set over unto the said Darius C. Brown, all the right, title, and interest which I have in said invention, as secured to me by said letters patent in these United States, to be applied exclusively to the knitting or construction of harnesses for looms, and for other purposes. The same to be held and enjoyed by the said Darius C. Brown for his own use and behoof, and for the use and behoof of his legal representatives and no others, to the full end of the term for which said letters patent are or may be granted."

The other paper was a contract between Peleg Hull, the administrator of Hibbert, and Herrick Aiken, and was, in full, as follows:

"This agreement made and entered into this twenty-third day of September, in the year eighteen hundred and sixty-two, by and between Peleg Hull, of the city and county of Providence, and state of Rhode Island, administrator of the estate of James Hibbert, late of said Providence, deceased, of the first part, and Herrick Aiken, of Franklin, in the county of Merrimack, and state of New Hampshire, of the second part, witnesseth:

"Whereas, the said James Hibbert did, in his lifetime, to wit: on the ninth day of January, A. D. eighteen hundred and forty-nine, obtain letters patent of the United States for an improvement in knitting needles, which letters patent are now about to expire. And whereas, said Peleg Hull, party of the first part, was duly appointed and qualified according to the laws of said state of Rhode Island, administrator of the estate of said James Hibbert, deceased. And whereas, the said Herrick Aiken, party of the second part, is desirous of purchasing the extension or extended term of said letters patent, if an extension of said letters patent can be obtained, and is willing to pay all expenses of every nature and description of obtaining the same, provided the extended term of said letters patent is assigned to him on the terms and conditions hereinafter stated and agreed to.

"Now this agreement witnesseth, that in consideration of one dollar by each of said parties to the other paid, and of other good and sufficient considerations, the receipt whereof is hereby acknowledged, the said parties covenant and agree to and with each other in the manner following, that is to say: First. The said Peleg Hull, administrator aforesaid, party of the first part, agrees to sign all papers, make all affidavits, and do all other lawful acts and things as may be deemed necessary and requisite by counsel in applying for and obtaining an extension of the term of the said letters pat-

ent; and when the said extension shall be obtained, to assign the said extended term of said letters patent (within twenty days from the date of said extension) to said Herrick Aiken, the party of the second part, or his legal representatives. Second. The said Herrick Aiken, party of the second [part] agrees to pay all expenses of every nature and description incurred or to be incurred in applying for and obtaining an extension of the said letters patent, provided the said extended term of said letters patent is assigned to him or his legal representatives as aforesaid. And he hereby discharges said party of the first part, and his heirs and representatives, from all liability for any part of the expense incurred in applying for said extension, provided said extension is not granted. Third. The said Herrick Aiken, party of the second part, hereby agrees to pay said Peleg Hull, administrator aforesaid, party of the first part, upon the obtaining and the assigning to said Aiken or his representatives the extended term of said letters patent, and at the times and in the manner following, the sum of twenty-four hundred dollars, viz: six hundred dollars upon delivery of the assignment of said extension of said letters patent; six hundred dollars in six months from the date of the delivery of said assignment; six hundred dollars in twelve months from the date of delivery of said assignment; and six hundred dollars in eighteen months from the date of the delivery of said assignment; and said Peleg Hull, administrator aforesaid, agrees to accept the said sum in the manner aforesaid, in full for said extended term of said letters patent.

"In testimony whereof, said parties have hereunto interchangeably set their hands and seals the day and year first above written.

"Peleg Hull, [Seal.]

"Herrick Aiken, [Seal.]"

The nature of the invention is fully set forth in the opinion. The claim of the patent was as follows:

"What I claim as my invention, and desire to secure by letters patent, is the application of a latch or tongue applied to the hook of the needle, and operated as herein described."

Injunction granted.

Charles Sergeant, Henry Baldwin, Jr., and Causten Browne, for complainant.

John B. Gest, E. Spencer Miller, and Furman Sheppard, for defendant.

CADWALADER, District Judge. There have been two objections to the complainant's derivation of title from Hibbert, the patentee. One of them is founded upon the assignment to Darius C. Brown of all right, title, and interest in the invention "to be applied exclusively to the knitting or construction of harnesses for looms and for other purposes." This obviously meant har-

nesses for looms, and harnesses for other purposes. The objection, therefore, cannot be sustained. The other objection depends upon the effect of the agreement of September 23, 1862. I will consider this question as it would have been presented if the paper had been produced or its loss proved, and it had been duly verified.

If Herrick Aiken had fulfilled the conditions of this agreement, he would have become the equitable owner of the extended term. But, as he does not appear to have, in any wise, fulfilled them, the former ownership, legal and equitable, has continued as to third persons, if not as between the parties themselves. Justice does not even require that a decree should be made expressly without prejudice to the rights of Herrick Aiken, because, if he has any rights, legal or equitable, in what may be recoverable through this litigation, the complainant will be accountable to him without any such saving clause in the decree. In the mean time, the complainant is the sole party entitled, in the first instance, to redress from other persons. If the right of action had, on the contrary, been divided into fractional shares between the parties to the agreement, the defendant should not have been harassed by a suit in which they were not all made parties. The present is not such a case. Nevertheless, my first impression was that Herrick Aiken ought, according to the rules of procedure in equity, to have been made a party complainant or defendant; and independently of the question of verification, I still have some doubt upon the point. It is to be regretted that the objection has not been removed by amendment. For this, it is perhaps not too late, even now, to apply, if the complainant is desirous to prevent a recurrence of the question in the court of appeal.

The case will next be considered upon the merits of Hibbert's claim to have been the inventor of the latch needle as an optional substitute for the former spring-hook needle in knitting machines. The latch needle has not altogether superseded the spring-hook needle. Both are in use; and the spring-hook needle, though more fragile, may be a preferable implement in the manufacture of certain fabrics of the finer kind. The hook of the latch needle is rigid. The spring-hook needle is hollowed at the proper point for the reception of the end of the hook when depressed. Of this hollow space, and of the machine by which it was made, drawings were published more than a century ago. The hollow thus formed was, long before Hibbert's patent, designated in print as a longitudinal groove. It acquired, however, in the latch needle, the more distinct character of such a groove. In this needle, a pivot passes across the groove through each side of it. On this pivot the latch turns freely, lengthwise, in opposite directions toward and from the hook. It is

thus turned by the loop of yarn passing forward and backward. This alternating longitudinal motion of the latch is arrested in the former direction by the hook, and in the latter direction by the termination of the groove into which the latch falls back. The specification of Hibbert's patent stated that the latch needle was designed to work on the knitting frames theretofore used. It has been objected that the specification does not describe the adaptation of this needle to knitting machines. To this objection a sufficient answer is that he claimed only the invention of a new and improved knitting needle, and not the invention of any adaptation of this improved implement. The latch needles are to this day bought and sold, and imported from abroad, separately from the knitting machine, as the spring-hook needles are, and had previously been. There is no reason to doubt that Hibbert honestly believed himself the first inventor of the latch needle. There is evidence tending to refer the date of his invention to the year 1846. Its true date certainly was not later than 1847. His patent was issued January 9, 1849. The introduction of latch needles into general use was, in the language of the answer in this case, "obstructed, perhaps, and retarded by the necessity of altering machines, changing the nature of the fabrics, and, in some measure, by the doubts and prejudices of manufacturers." But as the answer states, the manufacture and use of such needles gradually increased in extent until 1852, and having by this time become general, afterward increased more rapidly, "causing the alteration of machines and of fabrics to suit" them, etc. The testimony shows that this more rapid increase did not begin till after 1853, and that it may probably have been due mainly to improved adaptations of knitting machines. On December 29, 1862, it was decided by the commissioner of patents to extend Hibbert's exclusive privilege for seven years after the expiration of the first term of fourteen years, and it was extended accordingly. This decision could not have been made without proof that he had not derived a fair profit from his invention during the first part of the original term. The decision, having been made after public notice and official investigation, shows that throughout the United States he was generally considered, as he still was considered by the patent office, the first inventor. This belief may have been confirmed by the knowledge that in February, 1849, the month next after that in which his original patent had been issued, the invention was patented in England to another person as a novelty there. For some time after this extension, the rights of Hibbert appear to have been generally recognized in the United States. A person who, since 1853, has constructed "perhaps 1,000" machines for latch needles, took, in 1864, a license for making and using needles, under Hibbert's patent, at a certain rate or toll. At the date of the answer in this case

(September 6, 1866), an opposition to the patent seems to have been more or less organized. At this time there were, according to the answer, some forty or fifty manufactories in the city of Philadelphia alone, which worked with latch needles, and employed with them from ten to fifteen thousand hands.

Hibbert's invention thus appears to have been original, whether the subject of it was new or not. What has been stated suffices to show that the subject had not been generally known or used either in the United States or in England. From all the proofs in the cause, moreover, it fully appears that the latch needle had never been used with profitable results in either country, certainly not in the United States. The needle and its use may, nevertheless, have been sufficiently known to a few persons to prevent it from being new. The improbability of this may diminish when we recur to the causes which prevented the invention from becoming profitable during several years next after the date of the patent.

A latch needle, according to the general description heretofore given, had been devised by Jeandeau in France, where he obtained a patent for it in 1806. His description of it was published in a printed book in 1831. How far such needles were afterward made and used on the continent of Europe, it would be useless to inquire, because they certainly were made and experimentally used in the United States a great many years before 1846. In one prior instance, at least, they were openly used in making an experimental fabric. The work and its product were imperfect; but both work and product were seen by persons who have not lost the recollection of them; and more than one of the needles, and a machine by which some of them were made, have been preserved to the present day. This was a sufficient prior knowledge by others to prevent the subsequent invention of Hibbert from being new. I have, therefore, not fully considered the objections which have been urged against Jeandeau's description of his invention, though I have not as yet been convinced of their sufficiency.

If the case rested here, the bill must be dismissed. But three questions remain for consideration: 1. Whether Hibbert was not the first inventor of a distinct patentable improvement of the primitive latch needle; 2. Whether, and how, his actual patent can be sustained as to this improvement; and, 3. Whether his limited right to it has been infringed.

I. The primitive latch needle, not only that of Jeandeau, but likewise that made and used as above in the United States, was formed without any elevation or swell at the middle of the groove, and without any depression beyond the pivot to that extremity of the groove which is furthest from the hook. At this extremity of the groove, where the latch falls back, the end of the latch must,

in order that the loop may pass under it and raise it, be above the surface of the needle. This remark applies both to the primitive latch needle, already described, and to the improved latch needle hereafter described. But from this cause, in the primitive needle, the end of the latch when at this extremity of the groove, had necessarily a projection upward from the surface of the needle. Now, in the primitive needle, the yarn when passing backward from the hook, was held down to the surface, first of the needle and afterward of the latch, and was thus, on reaching the projecting end of the latch at the furthest extremity of the groove, jerked over the projection, with more or less of shock immediately following tension. The strain, with shock, must thus have occurred after every stitch. Whether any consequent injurious effect was externally perceptible in the texture of the fabric, is uncertain. There may have been none thus perceptible. But, however this may have been, there certainly was here, in theory, a defect in the operation of the primitive needle—a defect which it certainly was desirable to remedy. A needle of this primitive form was represented in the drawing which accompanied Hibbert's caveat, filed in the confidential archives of the patent office. The date of this caveat was March 31, 1847. In the course of the summer of 1847, Hibbert, when at work in a manufactory of coarse hosiery, made or caused to be made, latch needles with a curved elevation, since called a swell, which was highest at the middle of the groove, and with such a corresponding elevation of the pivot that the end of the latch was depressed when it fell back at that extremity of the groove where the latch of the primitive needle had projected upward. The curvature of the swell was determined so as to effect this depression of the latch with a sufficient longitudinal extension of the latch beyond the furthest extremity of the groove to receive the returning thread underneath. The remedy of the former defect was thus, in theory, complete. The improvement, though depending upon a change in form, was, in purpose and effect, a change in a material part of the process of manufacture. Tension of the yarn occurred at the swell, but was graduated so as to avoid shock. The witness, Emerson, has verified not only one of these working needles which has been preserved, but also a blank, as it is called, of another one, that is to say, an unfinished needle, with the swell prepared for the process by which the groove was to have been made. He states expressly that he commenced making such needles in June, 1847, and continued making them until October, 1847. The earliest construction of a needle with such a swell by any other person was at a later period in that year. Emerson, who worked by the hour for the hosiery company by whom Hibbert was employed, is explicit as to the date of the summer of 1847. Two

other witnesses depose not less explicitly to the making of such needles by Hibbert. One of them says it was in the summer of 1846, and fixes the time by a visit of the third witness to Squam and Cape Ann during that summer. The latter witness deposes that it was in the month of June, immediately after the battles of the Rio Grande, and that he did not know whether it was 1846 or 1847, adding: "I went to Cape Ann on a visit immediately after those battles, and what fixes it in my mind is, the old gentleman whom I visited was much taken up with the matter, and could talk of nothing else; he was very patriotic; and during my stay at Cape Ann, there was one of those needles made and put in the loom." It is to be observed that though the first battles on the Rio Grande occurred in May, 1846, yet, in the following year the campaigns elsewhere in Mexico were probably of quite equal interest to the witness's talkative patriotic friend, and that the witness himself says he does not know whether the year was 1846 or 1847. I would have some difficulty in reconciling 1846 with Hibbert's drawing, which accompanied the caveat of March 31, 1847. There is no such difficulty if we apply the testimony of these two witnesses to the year 1847. Thus understood, they confirm Emerson, and he confirms their statements. The specification of Hibbert's patent was prepared afterward. It stated that he constructed his needle in the general form shown in drawings, all of which represent a needle with such a curved swell. He thus appears, upon the proofs, to have unquestionably been the first inventor of such an improved latch needle. But independently of any question as to the legal sufficiency of the specification, the respondent has relied on the drawings accompanying it as showing an upward projection of the end of the latch greater than consists with his having had the conception of any true theory of this improvement. The drawings were sketched very roughly; and without a comparison of them with the model in the patent office, there might possibly have been some little doubt under this head. The doubt is precisely such a one as a model may properly resolve. The model has been produced. Upon a first inspection of it the doubt seemed to be increased rather than removed, for the latch did not fall back to the bottom of the groove. An examination showed, however, that the latch has not now the free turn, or sweep back, described in the specification. This want of free play in the latch was evidently occasioned by an accidental compression of the groove. The cause of the compression was apparent externally. The latch, when it was gently forced down to the bottom of the groove, where it would have dropped back, if the play were free, had no upward projection. Nor had the latch in the needle produced by Emerson, in which the play was free. The accidental condition of the model is unimportant. Its normal

condition is quite obvious, and when properly considered, removes any doubt which the drawings might otherwise have suggested.

II. But when the actual invention is thus referred to this improvement alone, the claim in the specification is too broad. It states that the invention consists in the application of the latch or tongue in connection with the hook of the needle, sweeping freely back and forth upon the center pin. The general operation of a latch needle is described, without any specific restriction to the form represented in the drawings. Then follow the words: "What I claim as my invention is the application of a latch or tongue applied to the hook of the needle, and operated as herein described." If the knowledge of latch needles of the primitive form had been universal, or even general, among those best acquainted with the use of knitting machines, the declaration that he constructed his needle in the general form shown in the drawings, might perhaps have sufficed to restrain the claim to the specific improvement in the curved needles exemplified in the form with a swell, and including, of course, other curvatures of equivalent effect. But this interpretation is both morally and legally inadmissible. According to the proofs of the state of the art at that period, the knowledge of the primitive latch needle, though quite sufficient to defeat a subsequent patent, was very limited—so limited as to exclude all possibility of the inference of any general knowledge on the subject. The patent is therefore broader than the actual novelty of the invention. By a proper disclaimer of the invention of latch needles without any such curvature, the patent would, however, be sustainable for the actual improvement. The complainant proposes, through his counsel, to disclaim any construction of a latch needle which has not a swell or its equivalent substantially as shown in the drawings, and to repeat, in the words of the original specification, that what he claims as the invention of the patentee is the application of the latch or tongue, etc., operated as therein described. The effect of such a disclaimer will be to deprive the complainant of all right to recover costs in the present suit. But a court of equity sometimes considers that which might and ought to be done as having already been done. There may, therefore, be a decree for a perpetual injunction, each party to pay his own costs, without any actual previous disclaimer of record in the patent office. According to the decision of the supreme court in *O'Reilly v. Morse*, 15 How. [56 U. S.] 121, it might perhaps be supposed that I should go further, and, before any actual disclaimer, decree an account, or order an issue quantum damnificatus. But I do not think that a court, whose decision is liable to revision upon appeal, should, in such a case, make any decree beyond the perpetual injunction without an actual disclaimer previously recorded in the patent

office. In the present stage of the case, therefore, I can do no more than award the injunction, with leave to disclaim, and afterward to move for such further order for an account, etc., as may be deemed proper. Whether an injunction shall be thus awarded depends upon the decision of the third question.

III. Has the defendant infringed the complainant's rights, restricted, as they are, to the specific improvement invented? It will be recollected that the latch needle with a curved swell was used by Hibbert in the manufacture of the coarsest fabrics. Instead of a curved elevation, thus highest where the pivot crosses the groove, the latch needles afterward used for finer work had a curved depression beyond the pivot, toward the extremity of the groove which is furthest from the hook. For the prevention of shock or jerk at the end of the latch, this depression was, in effect, a mere equivalent for the swell. In the application of this remark, the comparison must be with the primitive latch needle. The curved depression was, in another respect, an improvement upon the swell. This improvement consisted in maintaining a more equal tension of the yarn.

The defendant objects that the needle with a swell was unfit for the manufacture of finer fabrics; that for all fabrics the swell was a positive disadvantage instead of an improvement, and that the curved depression is altogether different, and was a real improvement. He admits and justifies his use of latch needles with the latter curvature. On examining these needles, their curvature appears to have been so determined as to become a precise equivalent for the swell in preventing an upward projection of the end of the latch at the extremity of the groove furthest from the hook. Assuming the correctness of his objection to the swell, and of his assertion of the superiority of the depression, these are not absolute, but relative differences between the effects of the two curvatures. The latter curvature was at least a partial adoption of the patented improvement, both in theory and in practice, and was therefore an infringement. The defendant has also used other latch needles with just such a curved swell as the drawings of Hibbert's patent exhibit. This he justifies or excuses upon the allegation that the swell was a mere objectionable excrescence, caused by the method of making the needles. In the language of his principal witness, they are made by swedging out the slit or groove, instead of sawing it out. He describes this process of swedging, and how it may produce the bulge or swell upward. The argument hereupon is, that by filing down the swell, the needles, though impaired in strength, might be more useful for certain kinds of work. To all such arguments, upon the mere question of infringement, the ordinary answer would suffice. Let the swell be filed off, and the needle, without

it, may be used. It is not necessary, therefore, to inquire whether the spring needle might not be preferable for such work as would require the swell to be filed out.

But, upon this part of the case, I was, during the second argument, very desirous to learn whether, before Hibbert's patent, spring needles had been made with such a bulge or curvature. They are now sometimes made with it, and if this had occurred before the patent, I was not quite certain whether it might not, perhaps, with reference to the phraseology of the specification, have some legal operation upon the effect of the complainant's proposed disclaimer. It now appears that spring needles were, of old, made with a lateral or outward bulge; but it has not appeared that they ever had a bulge or swell upward. The inquiry, therefore, does not arise; and this part of the case depends upon the question of infringement alone. Upon this question the argument for the defendant can not be sustained. He should, therefore, be enjoined against making or using any such needles as those of which specimens are exhibited on the paper annexed to the deposition of John Taylor, and against using any needles of such a curvature as to depress the end of the latch where it falls back at the extremity of the groove furthest from the hook, or any curvature of equivalent effect.

[NOTE. Patent No. 6,025 has not been involved in any litigation other than above, so far as shown by reported cases prior to 1880.]

Case No. 111.

AIKEN v. EDRINGTON et al.

[15 N. B. R. 271.]

Circuit Court, S. D. Mississippi. Nov., 1876.

BANKRUPTCY — RIGHTS OF STRANGERS — EQUAL EQUITIES — ASSIGNEE AS AGENT FOR CREDITORS — PLEADING.

[1. E., Sr., desiring to screen his property from creditors, advanced money to pay off certain mortgages, the mortgagee, by procurement of E., Sr., transferred the mortgage debts and security to E., Jr., who was adjudicated a bankrupt on the petition of his creditors, and the assignee in bankruptcy foreclosed the mortgages and received the proceeds. Complainant, an assignee of a judgment creditor of E., Sr., claimed such proceeds as the property of E., Sr. *Held*, that the bill was not demurrable in failing to allege that complainant was the owner of his demand at the time of the fraudulent transfer, he being entitled to all the rights of his assignor in the premises.]

[2. In such case the creditors of E., Jr., could not be affected by any secret trust on his part for the benefit of E., Sr.; and their equities with respect to the fund in the hands of the assignee being equal to those of the creditors of E., Sr., and the mere fact that such fund was in the hands of the assignee amounting to an appropriation thereof to the use of the creditors of the bankrupt, E., Jr., they could not be compelled to surrender the same in favor of complainant.]

[3. An assignee in bankruptcy, in all else than in setting aside property exempt to the

bankrupt, is the agent of the law for the benefit of creditors; and a fund in his hands realized from the assignment is to be deemed appropriated to the use of the creditors, as between such creditors and others having equal equities with respect to such fund, before it passed to the assignee.]

In bankruptcy.

A. H. Handy, for complainant.

Cotchings & Ingersoll and Pittman & Pittman, contra.

HILL, District Judge. This is a bill filed by complainant against said Edrington, Sr., and O'Reilly, assignee in bankruptcy of Steele & Edrington, and who is also assignee of said William H. Edrington, Jr., to subject to the satisfaction of a judgment at law obtained by complainant against W. H. Edrington, Sr., a fund now in the hands of said O'Reilly as assignee of said W. H. Edrington, Jr., and which it is alleged is the money of said Edrington, Sr., and as to the complainant subject to the payment of his judgment. The questions now submitted for consideration arise upon the demurrer of O'Reilly to the bill, and amended bill of complainant.

The first ground of demurrer insisted upon in argument is that the bill upon its face shows that if complainant had any rights, they accrued more than two years before filing his bill, and that his remedy is barred by the limitation of two years provided in the bankrupt law, and that neither the original bill nor amended bill avers sufficient facts in avoidance of the bar. This ground of demurrer is well taken as to the original bill. If, however, the grounds stated in avoidance of the bar applied to O'Reilly, as concealing the alleged fraud between Edrington, Sr., and Edrington, Jr., the demurrer would not be on this point well taken. I am in doubt as to its application to O'Reilly, and therefore think it best to overrule the demurrer on this point, reserving to the defendant the right to set up the same defense in the answer, if an answer shall be required upon other grounds of demurrer being overruled. Another ground of demurrer insisted upon is that complainant does not show by his bill that he was a creditor of W. H. Edrington, Sr., when the fraudulent disposition of his funds was made, and out of which the equitable claim insisted upon is alleged. To entitle the complainant to the relief asked, it is necessary to allege and prove that the demand under which he claims was in existence when the alleged fraud was committed. The bill does not allege that complainant was the owner of the demands when the fraud was committed, and if it depended upon his being the owner of the demands at that time, the demurrer on this point would be well taken, but it is alleged that he is the assignee of these demands and that they did then exist. I am inclined to the opinion that the assignee of

the demands is entitled to the same rights that the assignor would have been had the assignment not been made, and on demurrer hold this objection not well taken. The main ground relied upon is that the bill does not allege such facts as will entitle the complainant to any equitable relief.

The substance of the allegations and charges made in the bill as grounds for the relief sought are, that Edrington, Sr., was the owner of a considerable sum of money which he wished to conceal from his creditors, and especially those whose debts were afterwards assigned to complainant, and, with a view of defrauding them, made an arrangement with Holt and Mrs. Shipp to pay off two mortgages executed the one by Holt and wife, and the other by Mrs. Shipp, to secure certain indebtedness of said bargains respectively to one E. Peal, their commission merchant in New Orleans, and for the foreclosure of which bills were then pending in the chancery court of Adams county. These mortgages conveyed the interest of the bargains in a large tract of land in Issaquena county, as a security for the satisfaction of the mortgage debts. By the arrangement the notes of the parties were executed for the money advanced to Peal, who transferred the mortgage debt and security to W. H. Edrington, Jr., to whom the notes were made payable. The suits for the foreclosure were prosecuted to final decrees, and the land directed to be sold to pay the mortgage debts, or, as between Edrington and the parties, the notes so executed to Edrington, Jr. These notes not having been paid, and Edrington, Jr., having been adjudicated a bankrupt upon the petition of the creditors of Steele & Edrington, which included the individual estate of Edrington, Jr., the interest in the suits for foreclosure of the mortgages having been assigned to Edrington, Jr., proceedings were taken by O'Reilly, assignee in bankruptcy of Edrington, Jr., to enforce the payment of these decrees, as the assets of said Edrington, which resulted in a sale of the lands by the decree of the district court for this district, and that O'Reilly, the assignee, now holds the proceeds in the shape of notes given for the purchase-money. The claim set up by complainant to this fund is, first, that the money was the money of Edrington, Sr., that the whole transaction was a fraudulent contrivance to prevent it from being subjected to the payment of his debts; secondly, that Edrington, Jr., was only the trustee of Edrington, Sr., and that the title to the money realized did not pass to O'Reilly, assignee. It is insisted by O'Reilly's counsel, that, conceding the equity of complainant as to Edrington, Jr., if no bankruptcy had intervened, the equities of the creditors of Edrington, Jr., are equal to those of Edrington, Sr.; that this fund is the result of a litigation commenced by the creditors of Edrington, Jr., and prosecuted by his assignee for the use of his creditors; and

that, their equities being equal to those of complainant, they being first in time cannot be required to give up the fruits of their negligence, [diligence.] Upon the other hand, it is insisted by complainant's counsel that O'Reilly is a mere stakeholder as to this fund, and that he cannot set up any right against complainant that could not have been set up by Edrington, Jr. I am satisfied that if this were a bill against Edrington, Jr., the allegations made in the bill, if not denied and if established by the proof, would entitle the complainant to the relief prayed for. But the assignment having been made to and in the name of Edrington, Jr., his creditors had a right to look to that as a fund for payment of the debts contracted by said Edrington, as much as did the creditors of his father to look to his estate for the payment of their debts. The appropriation of the money so fraudulently made, as alleged, was, if a trust, a secret one and not obligatory upon the creditors of Edrington, Jr., who were ignorant of it. It being fraudulent as charged, Edrington, Sr., was estopped from claiming. I am very much inclined to the opinion that the equities of the creditors of the Edringtons to this fund are at least equal, if those of the son are not superior. But, considering them as equal, the question arises as to the present status of the fund. Have the proceedings had resulted in an appropriation of it to the creditors of Steele & Edrington, or the individual creditors of Edrington? If so they cannot be compelled to part with it to one whose rights are not superior.

The solution of the question presented depends very much upon the relation the assignee sustains to the bankrupt and to his creditors. The only relation he sustains to the bankrupt or office he performs for him is to set aside his exempt property; in all else he is the agent of the law for the benefit of the creditors; in other words, his duty is to collect the bankrupt estate for distribution among the creditors according to their respective rights and priorities. The assignment of the bankrupt's estate to him confers upon him, as a general rule, only such title to the estate legal or equitable as the bankrupt possessed. Whatever that title may be it is his duty to assert for the benefit of the creditors, and as the representative of the creditors he may, and it is his duty to, go further, and recover from the assignees of the bankrupt any property or other assets which the creditors themselves could have recovered, though the bankrupt himself might have been estopped from its recovery. The bankruptcy operates as an injunction against the creditors to proceed by the usual remedies against the bankrupt and his fraudulent assignees; so that this right in the assignee is indispensable to the ends of justice. When the creditor proves his debt it has all the effect of a judgment against the estate of the bankrupt, and

draws to it all the beneficial results of a judgment at law, a decree in chancery, for the satisfaction of his demand as far as the bankrupt estate will afford such satisfaction.

The assignee, for the purpose of obtaining this satisfaction, is required to pursue and take in possession the bankrupt's estate, of whatever kind or character it may consist, and to reduce it into money, and pay the same into court or to such persons as the court by its order may direct; in the performance of this duty he supplies the place of the sheriff or marshal. This being so, the property or funds, when received by him, is in effect an appropriation of the assets to the use of the creditors, as much so as if seized or sold by the sheriff or marshal; and if not recoverable from the sheriff or marshal, if held by them under legal process, cannot be recovered from the assignee. It follows that, if the premise is correct, that the equity to this fund in the creditors of the bankrupt is equal to that of complainant, the logical and legal result must be that they cannot be required to surrender it, although if complainant had first pursued and obtained possession of it, it could not have been taken from him. I have considered the rules of law stated, and so ably presented by the learned counsel of complainant, and at first was of opinion that the demurrer should be overruled, and the defendant required to answer; but having come to the conclusion that complainant has no superior equity to the fund over that of the creditors of the bankrupt, and the further conclusion that there has been an appropriation of the fund in their favor as against all claims not superior to that which they hold, I can see no other result than the defeat of complainant's claim to this fund. If correct in this it will save trouble and cost to sustain the demurrer and dismiss the bill and let the cause go to the supreme court on the question as decided. If the complainant sees proper to take this course the fund will be decreed to await the result. Therefore the decree will be that the demurrer be sustained and the bill dismissed.

Case No. 112.

AIKEN v. FERRY.

[6 Sawy. 79.]¹

Circuit Court, D. Oregon. Nov. 7, 1879.

DECISIONS OF THE LAND OFFICE—RIGHT TO CONTEST—PRE-EMPTION—STATUTE OF FRAUDS.

1. The action of the land office upon the questions of fact arising in the course of its business is conclusive upon other tribunals, unless it appears that such action is the result of fraud or mistake, other than an error of judgment in estimating the value of evidence, or making deductions therefrom; but, for er-

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ror in the construction or application of the law relating to such business, its decisions may be reviewed and modified or annulled by the courts.

[Cited in *Stevens v. Sharp*, Case No. 13,410; *Shively v. Welch*, 20 Fed. Rep. 32.]

2. The pre-emption act requires a pre-emptor to inhabit the tract claimed by him, and this means to abide there,—to actually reside upon the premises until the final proof and payment is made.

3. No one can be heard to question or contest the right of another to a patent for public land until he shows some right in himself in or to the premises.

4. The right of pre-emption is not an interest in the land, but the right to be preferred as a purchaser of a certain portion of the public domain, and it accrues when the settler has complied with the prerequisites of the act by making his settlement and filing his declaratory statement.

5. If a settler under the pre-emption act is a qualified pre-emptor at the time of filing his declaratory statement, he is entitled, as against the United States, to become the purchaser of the premises.

6. The term "proprietor" as used in the inhibition contained in section 10 of the pre-emption act, (5 Stat. 455; Rev. St. § 2260,) means an absolute and legal owner; and therefore where one owns land in trust for another, or has entered public land with cash or scrip, but has not received a patent therefor, he is not such a "proprietor" thereof, and is therefore not thereby disqualified to acquire the right of pre-emption.

7. Upon an erroneous construction of the law relating to the qualification of a pre-emptor, the land office canceled the entry of A., and issued a patent to F., a junior settler, for a portion of the tract entered by A. *Held*, that F. was a trustee for A. as to such portion, and must convey the same to him on receiving the purchase price thereof.

8. A parol contract in relation to lands, if set out in the bill, is to have the same effect, as against the plaintiff, as if it had been made in writing.

[In equity. Bill by James Aiken against James D. Ferry for injunction. Heard on bill, answer, replication, exhibits, and proofs. Decree for plaintiff.]

Walter W. Thayer, for plaintiff.

Rufus Mallory, for defendant.

DEADY, District Judge. This suit is brought to enjoin the defendant from enforcing a judgment of this court for the recovery of the possession of the south-east quarter of the south-east quarter of section 2, and the north-east quarter of the north-east quarter of section 11 of township 27 south, of range 13 west, of the Willamet [Willamette] meridian and that the patent to said premises heretofore issued by the United States to George W. Pratt, the vendor of the defendant, be held to inure to the benefit of the plaintiff, and that the defendant be required to release his interest therein to the plaintiff. The case was heard upon the bill, answer, replication, and exhibits, and the depositions of numerous witnesses.

The material facts established by the testimony are as follows: In 1863, James Aiken,

the plaintiff, made a settlement and residence upon a defined portion of the public lands near the Isthmus slough in Coos county, Oregon, and within what proved to be township 27 south, of range 13 west, of the public surveys, with a view to acquire the title thereto under the pre-emption laws of the United States; and cultivated the same and made substantial and valuable improvements thereon. In the early part of 1869, and after the line between the said township 27 and township 26 had been run, the plaintiff concluded that the area of one hundred and sixty acres, which should include his then dwelling-house, would not extend to his southern and eastern line, and therefore built another dwelling-house upon the tract further east and south, and on what is now known as the south-west quarter of the south-east quarter of section 2 of said township 27, and within the limits of the clearing and cultivation made by him before that time, and moved therein in the month of May of said year, and continued to reside there, and improve and cultivate the premises, including a portion of the legal subdivisions in controversy, until after April 16, 1872.

The eastern line of the plaintiff's original location was a line drawn due north and south from a large dead fir tree standing in the north-east quarter of the north-east quarter of section 11, and two hundred and seventy-four feet west of the east line of said sections 2 and 11.

In March, 1869, George W. Pratt was living in a house belonging to the plaintiff near the Isthmus slough, when, upon the suggestion of the plaintiff, he determined to make a settlement upon a quarter section of the unsurveyed public lands lying immediately to the west of the plaintiff's settlement, and said plaintiff went with said Pratt, upon the land, and showed him said dead fir tree and his east line as aforesaid, and it was then and there understood and agreed, by and between said plaintiff and Pratt, that said line should be the actual boundary between their locations, and that if the line of the public survey should not coincide therewith, and either of them was, therefore, required to go beyond said agreed line to the nearest line of said survey in making his declaratory statement and proof of settlement before the register and receiver, he would, as soon as he obtained title to his pre-emption, release or convey the same to the other back to said agreed line or boundary.

In pursuance of this arrangement, Pratt commenced to improve his location, and during the years 1869 and 1870 cleared three or four acres of the land to the east of the agreed line, and cultivated some portion of the same, but continued to reside with his family in the plaintiff's house on the slough. In June, 1870, Pratt commenced to clear a place for a house a short distance to the west of the agreed line, and in the fall of

that year built a small house of sawed lumber thereon, and moved into the same with his family, where he resided until January, 1871. Between this date and February, 1872, he did not reside upon the location. At the latter date he returned to the place, and resided there until the latter part of the summer of 1872, and during the contest between himself and the plaintiff before the register and receiver, when he left the premises permanently. In September, 1870, when Pratt commenced to build this house, the plaintiff went upon the ground and protested against the act as a violation of his right and a breach of the agreement between them. Pratt admitted the agreement, but justified his conduct upon the ground that the plaintiff could not hold the land any way.

Township 21 was surveyed in October, 1871, and the plat and survey were approved in March, 1872.

On June 21, 1869, the plaintiff filed with the register and receiver his declaratory statement as a settler upon "unoffered and unsurveyed" lands, describing therein the premises by metes and bounds, and as "containing one hundred and sixty acres, more or less;" and on March 30, 1872, made his declaratory statement before the same officers as a settler upon lands "not subject to the private entry," and described as the south half of the south-east quarter of section 2, and the north half of the north-east quarter of section 11 in said township 27, and alleging a settlement thereon, on May 20, 1869; and on April 16 thereafter made final proof and payment therefor, and obtained a certificate from the officers aforesaid, to the effect, that he had become the purchaser under the pre-emption laws of the said legal subdivisions of the public lands. On April 17, 1872, Pratt made a declaratory statement before the register and receiver as a settler under the pre-emption laws, for the south-west quarter of the south-west quarter of section 1, the south-east quarter of the south-east quarter of section 2, the north-east quarter of the north-east quarter of section 11, and the north-west quarter of the north-west quarter of section 12, alleging a settlement thereon March 1, 1869; and on the thirteenth of May thereafter made final proof and payment therefor. After Pratt had filed his declaratory statement, alleging a settlement prior to that claimed by the plaintiff in his statement, the latter filed an amended statement, alleging that his settlement actually commenced in 1863, and that he had not deemed the date of the commencement of his settlement material, and asked to have his declaratory statement amended accordingly. On August 2, 1872, the commissioner of the general land office suspended Pratt's entry because it was in conflict with the plaintiff's, and directed the register and receiver to appoint a day to hear the parties to the conflict. The contest was

then heard before the register and receiver, who thereupon transmitted the case to the commissioner with their opinion in favor of the entry of Pratt.

On June 24, 1874, the commissioner decided the contest in favor of Pratt, upon the ground "that at the time Aiken filed for the tract claimed by him he was not a qualified pre-emptor, and has no right to the land in dispute," because on January 22, 1872, he "was the owner in his own name" of section 36, township 26, range 13 west, although on March 12 of the same year he had sold and disposed of an undivided three-fourths of the same; and because on June 1, 1871, he, jointly with five others, located two thousand and eighty acres of public lands in the district of lands subject to sale at Roseburg, Oregon, upon agricultural college scrip issued to the state of Texas, and on the same day entered with said others for cash, at the land office in said district, three thousand five hundred and twenty acres, and on February 1, 1872, entered at the same place and in like manner one thousand five hundred and twenty acres, of public land, thereby becoming the owner of a one-sixth interest in seven thousand one hundred and twenty acres of land, which entries and location were then in force and the interest of Aiken therein still owned by him. On August 5, 1875, the acting secretary of the interior affirmed the decision of the commissioner, and on October 1, 1875, a patent was issued to Pratt in accordance therewith. The opinion of the commissioner also finds that Pratt commenced "a bona fide settlement on the tract claimed by him," on March 1, 1869, but that his residence thereon did not commence until 1870. It ignores the amended declaratory statement of the plaintiff, and gives the date of his original one incorrectly as April 5, instead of March 30, 1872; and also states the number of acres of land located by the plaintiff and others with agricultural college scrip incorrectly at two thousand two hundred and eighty acres instead of two thousand two hundred and forty. But the decision of the commissioner in favor of the entry of Pratt and against that of the plaintiff was not made upon the question of the priority of settlement, but solely and explicitly upon the ground that Aiken was disqualified to enter lands as a pre-emptor on account of his interest in other entries and locations aforesaid; which decision is alleged by the plaintiff to have been erroneous.

On December 22, 1875, Pratt conveyed the premises included in his entry to the defendant for the nominal consideration of eight hundred dollars cash in hand, but in fact for three hundred dollars cash and a promise to pay the remaining five hundred dollars when the right to the eighty acres, involved in this suit, should be finally determined in favor of Pratt, and the same is not yet paid.

This court is now asked to review the action of the land office in this matter, and the question arises at the threshold of the inquiry how far such action is binding and conclusive upon the courts. The general rule on the subject is very clearly laid down by the supreme court, but, owing to the nature of the subject, some difficulty and differences of opinion will sometimes rise in the application of it. In *Johnson v. Towsley*, 13 Wall. [80 U. S.] 83, Mr. Justice Miller, in delivering the opinion of the court, after admitting "the general doctrine that, when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal within the scope of its authority is conclusive upon all others," and that the action of the land office in issuing a patent for any of the public land, subject to sale, is conclusive of the legal title wherever this title must control, defines and limits the scope of judicial inquiry in such cases as follows:

"On the other hand, there has always existed in the courts of equity the power, in certain classes of cases, to inquire into and correct mistakes, injustice, and wrong in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments, issuing from the crown or other executive branch of the government, have been corrected or declared void, or other relief granted. No reason is perceived why the action of the land office should constitute an exception to this principle. In dealing with the public domain under the system of laws enacted by congress for their management and sale, that tribunal decides upon private rights of great value, and very often, from the nature of its functions, this is by a proceeding essentially *ex parte*, and peculiarly liable to the influences of frauds, false swearing, and mistakes. These are among the most ancient and well established grounds of the special jurisdiction of courts of equity, just referred to, and the necessity and value of that jurisdiction are nowhere better exemplified than in its application to cases arising in the land office."

In the subsequent case of *Shepley v. Cowan*, [91 U. S.] 340, Mr. Justice Field, in speaking for the court, says, that if the officers of the land department "err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts; * * * but for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the depart-

ment, and perhaps, under special circumstances, to the president."

Guided by the rule furnished by these cases, it is evident that this court can not review the action of the land office, however erroneous, if fairly and regularly had, upon the mere question of fact, as to which was the prior settler upon the disputed premises, Aiken or Pratt. And therefore, although to my mind it is as plain as proof can make it, that Pratt did not even commence to make his settlement upon the disputed premises until long after Aiken did his, and that he did not commence to inhabit it or actually reside upon the same, or erect a dwelling thereon, until the fall of 1870, at least eighteen months after the plaintiff had made his actual residence thereon, and years after he had cultivated and improved the same, still this court can not disregard or set aside a contrary finding by the officers of the land office, unaffected by fraud or mistake other than error in estimating the value of evidence. But if the determination of that question hinged upon a question of law,—as for instance, is it not absolutely necessary, to constitute a settlement under the pre-emption law, that the pre-emptor should erect a dwelling on the land and actually reside upon the same?—and the decision of the land office thereon was erroneous, then this court, upon a proper case made, would set it aside. Now, in this case, so far as appears, there was no actual decision as to which, Aiken or Pratt, was the prior settler in fact, but the contest seems to have been made upon the point that Aiken was not a qualified pre-emptor, and therefore could not make a legal settlement. The right of pre-emption is given by section 10 of the act of September 4, 1841, (5 Stat. 455; section 2259, Rev. St.,) which provides that any one of a specified class of persons who may perform certain acts with reference to the public lands, shall be entitled to enter not more than one hundred and sixty acres thereof at the minimum price. These acts are: 1. Make a settlement in person on such lands; 2. Inhabit and improve the same; and 3. Erect a dwelling thereon. Now, nothing short of the performance of these acts makes a person a qualified pre-emptor of the public lands, or constitutes a settlement thereon. Inhabitan- cy, an abiding or actual residence upon the land, is required, and until this begins a settlement is not made. Therefore, admitting the facts which the commissioner says are shown by the evidence, as a matter of law, it is plain that Pratt did not make a settlement upon the disputed premises until the fall of 1870, when he erected a dwelling thereon and commenced to inhabit the same; and that is confessedly long subsequent to the date of Aiken's settlement. But if the plaintiff was not a qualified pre-emptor, he cannot be heard to object to the validity of Pratt's entry, which is, so far as he is concerned, a matter wholly between the lat-

ter and the United States. The plaintiff must first show in himself some right in or to the premises before he can question the validity of the defendant's title. *Stark v. Starrs*, 6 Wall. [73 U. S.] 418.

The material question, then, to be considered is, was the plaintiff a qualified pre-emptor? The pre-emption act (section 10, supra; Rev. St. § 2260) provides that "no person who is the proprietor of three hundred and twenty acres of land in any state or territory of the United States * * * shall acquire any right of pre-emption under this act." This "right of pre-emption" is not an interest in the land, but only the right to be preferred as a purchaser of a certain portion of the public lands at the minimum price, irrespective of its real value. *Myers v. Croft*, 13 Wall. [80 U. S.] 296; 10 Op. Atty. Gen. 57. Such right must accrue upon the performance of the acts on account of which it is given. These are the settlement on the land, including its improvement and inhabitation, and the filing of the declaratory statement. If upon the filing of this statement the settler is a qualified pre-emptor, as against the United States, he is entitled to make the purchase, although he may not have been so when he went upon the premises, and by a parity of reasoning if thereafter and before he makes the entry he should become the owner of three hundred and twenty acres of land by inheritance or otherwise, he would not be thereby disqualified to make the purchase. True, the proof of the performance of these acts and the qualification of the settler must be furnished to the officers before the purchase can be made or the right of pre-emption exercised. But this is only the appointed means of making evident to the land office the facts which already exist, and on account of which the right of pre-emption is given.

Tried by this construction of the law, was the plaintiff a qualified pre-emptor when he filed his declaratory statement, and thereby made his claim to be a pre-emptor on March 30, 1872? And first as to his alleged interest in section 36 aforesaid. The fact is, as it clearly appears from the evidence, that the plaintiff did not acquire the whole of this section in January, 1872, from the state of Oregon, but only the southwest quarter thereof on January 22 of that year. The other three quarters of the section were conveyed to him by different persons on February 12, 13, and 16, 1872, respectively, but, in fact, in trust for others who furnished the money to pay for them, to whom the plaintiff conveyed the same immediately; but there being some defect in the conveyance, it was returned and another given in its place, which was not accomplished until March 12, 1872. A person who owns land in trust for others is not a proprietor of such lands within the inhibition of the pre-emption act, and is therefore not thereby disqualified from becoming a pre-emptor. But it

does not appear that the evidence showing that the plaintiff held the three quarters of this section in trust only was before the land office, and therefore it does not appear that the question whether a mere trustee is a "proprietor," within the meaning of the pre-emption act, was before the commissioner or passed upon by him.

But the commissioner did find that the plaintiff had disposed of three quarters of this section, on March 12, 1872, and therefore was only the proprietor of one hundred and sixty acres of the same when he made his declaratory statement. His interest, then, in this section did not disqualify him from acquiring the right of pre-emption when and as he attempted to, and the ruling of the land office to the contrary was erroneous.

As to the scrip and cash entries for seven thousand one hundred acres of land, the case stands thus: Upon the evidence it clearly appears that the plaintiff, on February 19, 1872, conveyed all his interest in these entries to his brother, A. G. Aiken, who on October 12, 1875, reconveyed the same to him; so that upon the face of the record, the plaintiff had no interest in these lands when he filed his declaratory statement. The bona fides of these conveyances has been questioned by counsel, but the only ground for suspicion is the admitted facts and circumstances of the transaction. And I think that these are enough to put the party asserting that they were made in good faith to the proof of the same.

Upon this view of the matter, evidence has been offered tending to show the bona fides of the transaction. But it is not necessary to pass upon this question here. It does not appear that these conveyances were before the land office; and if they had been, and a question arose there as to their integrity, the decision thereon would not be subject to review here, upon the question of fact simply.

And this brings me to the question whether, on March 30, 1872, the plaintiff was the "proprietor" of the one sixth or any portion of the land included in the entries of June 1, 1871, and February 1, 1872. An entry of lands for cash or scrip gives the party making it a right to a patent therefor, if it be found regular and valid. But it does not pass the title which remains in the United States, until the patent issues. The person making the entry, if there be no valid objection thereto, as against the government, has a right to a conveyance of the legal title, but as the government cannot be sued without its consent, such a right is little else than a mere moral one. After the entry, and notwithstanding it, congress has the power to withdraw the land from sale, reserve it for public purposes, or dispose of it to another. True, in the latter case, a court of equity may compel the patentee to convey to the one who has the prior equity by reason of his prior entry. Be-

sides, the entry may prove illegal and unauthorized, and therefore be canceled and set aside.

I am aware that some expressions in the opinion of the court, in *Frisbie v. Whitney*, 9 Wall. [76 U. S.] 191, and the *Yosemite Valley Case*, 15 Wall. [82 U. S.] 86, particularly the latter, are to the effect that when a settler under the pre-emption law has complied therewith, and paid the price of the land, he has a vested interest in the premises of which he cannot be deprived. But certainly this interest is not the legal title or estate which is necessary to make one a proprietor or owner in the full and legal sense of the word. Such an interest is nothing but an equity which there is no means of enforcing, at least so long as the government retains the legal title. In my judgment, the proprietorship contemplated by the pre-emption act is a legal and absolute one, and not the mere equity of a land office entry, which may or may not ripen into such ownership.

It follows from these premises, that the plaintiff at the time of filing his declaratory statement, or at any time thereafter pending his entry and contest, was not the proprietor of three hundred and twenty acres of land, and therefore not disqualified to acquire a pre-emption right. The patent to Pratt so far as it includes the south-east quarter of the south-east quarter of said section 2, and the north-east quarter of the north-east quarter of said section 11, was therefore wrongfully issued upon an erroneous construction of the law, and he took the same in trust for the plaintiff, who was entitled to the patent therefor. The defendant took his conveyance from Pratt of this eighty acres without consideration and with knowledge of all the circumstances.

The equity of the case is with the plaintiff, and the only question is whether the defendant shall be required to convey to him the whole of this eighty acres, or only that portion of it lying to the west of the boundary agreed upon between Aiken and Pratt. Pratt having repudiated the agreement and the defendant denied it, the latter can not well now ask for its recognition and enforcement by the court. It may also be objected that the agreement is invalid, not being in writing. But so far as the plaintiff is concerned, that difficulty is obviated by the fact that the agreement has been set out by him in his bill, and thereby established with the same certainty and effect as if originally reduced to writing. Therefore, in granting him the relief sought, effect will be given to this agreement as set forth in his bill. Story, Eq. Pl. §§ 761-766.

The decree of the court will be that the defendant be enjoined from enforcing his judgment in this court against the complainant, except to recover the possession of that portion of the south-east quarter of

the south-east quarter of section 2, and the north-east quarter of the north-east quarter of section 11 aforesaid, lying east of the line running parallel to the eastern boundary of said legal sub-divisions and one hundred and seventy-four feet west of the same; and that within sixty days hereof, the defendant convey to the plaintiff by a proper conveyance, with sufficient covenants against his own acts, to be approved by the master of this court, the remainder of said legal subdivisions—the plaintiff first paying to the defendant the sum of one dollar and twenty-five cents an acre therefor, either in lawful money or by applying such an amount upon the costs and expenses incurred by him in the prosecution of this suit, and that the defendant pay the plaintiff said costs and expenses.

Case No. 113.

AIKEN v. MANCHESTER PRINT WORKS.

[2 Cliff. 435.]¹

Circuit Court, D. New Hampshire. May Term, 1865.

PATENTS FOR INVENTIONS—ASSIGNMENT AND LICENSE—RIGHT OF PURCHASER TO USE PATENTED MACHINE—REPAIRS.

1. Where a person has purchased of the owner of the invention certain knitting-machines, with which the vendor was accustomed to send a package of the needles used in the same, it was *held*, that the sale of the machines did not carry with it a right to the purchaser to manufacture new needles of the same construction as those sold him, when those which he had bought were worn out, although the machines could not be operated without them, and the needles were the patented invention of the seller; the needles, however, being the subject-matter of a different patent from that covering the machines.

[Cited in *Singer Manuf'g Co. v. Springfield Foundry Co.*, 34 Fed. Rep. 395.]

2. The grant of a machine, with the right to use it, does not import the same privileges under the patent as the sale of the right to make and vend the patented machine.

[Cited in *Adams v. Burks*, Case No. 50; *Singer Manuf'g Co. v. Springfield Foundry Co.*, 34 Fed. Rep. 395.]

3. In the latter case the purchaser buys a portion of the franchise, and the right he acquires necessarily terminates at the time limited for the continuance of the patent; but in the former, the machine sold passes outside of the monopoly, and is no longer under the protection of the patent act.

[Cited in *Adams v. Burks*, Case No. 50.]

4. Redress for injury in such case must be sought in the state courts, under state laws, and not under the special jurisdiction conferred on the federal courts by the patent act.

5. In this case the purchasers could repair the machines and the needles, or improve them (if in so doing they infringed no patented right,) because both needles and machines had paid the royalty to the patent, and were outside the limits of the monopoly, and the property of the purchaser; but the purchase of these particular machines and devices conferred no power to

¹[Reported by William Henry Clifford, Esq., and here reprinted by permission.]

manufacture new ones to take their places when once worn out or destroyed.

[Cited in *Young v. Foerster*, 37 Fed. Rep. 204.]

[See note at end of case.]

[At law. Action by Walter Aiken against the Manchester Print Works for infringement of patent No. 6,025. Judgment for plaintiff.]

Trespass on the case for the alleged infringement of a patent on knitting-machine needles. The action was in the name of the assignee of the patent. The inventor was James Hibbert; and the original patent was issued to him on the 9th of January, 1849. Subsequently the inventor deceased, and the patent on the 9th of December, 1862, was reissued to his administrator, and extended for a further term of seven years. The administrator assigned the patent, and the first assignee assigned to the plaintiff, who was the legal owner of the entire interest. Plea was the general issue with notice of special matter, that the original patentee was not the first and original inventor of the improvement; but the actual defence set up at the trial was that of license from the plaintiff. The extended patent was introduced by the plaintiff, and he also offered evidence to show that the defendants had made and used the patented device, as alleged in the declaration. The invention was stated in the specification to consist of a latch or tongue in connection with the hook of the needle, sweeping freely back and forth upon a center pin; and it was not controverted that the invention was well described. The claim of the patent was for the application of a latch or tongue to the hook of the needle, and operated as therein described; and the claim was, in the view of the court, in exact accordance with the description in the specification. The defendants offered to prove that they purchased certain knitting-machines of the plaintiff, with the right of using the same, and that the needles made and used by them were used in such machines as they had purchased of the plaintiff, or which he had manufactured for his brother, who had sold the machines to the defendants with the knowledge and consent of the plaintiff. The parties conceded that the knitting-machines were also the subject of certain other patents, and that the plaintiff was in whole or in part the legal owner of such patents. The evidence showed that the several knitting-machines purchased by the defendants contained a full set of needles, and that the purchase and sale embraced a surplus number of the same tied up in a small bundle attached to each machine, and which were delivered with the machines as part of the purchase and sale. New needles, it appeared, would last about four weeks, and the machines could not be operated as knitting-machines, without the needles. The defence was, that the sale of the machines by the

plaintiff to the defendants gave them the right, when the needles which were made part of the purchase were worn out, to manufacture others and to replace those worn out, and to use the same for the purposes for which the machine was originally constructed. But the court instructed the jury that the sale by the plaintiff, and the purchase by the defendants, of the knitting-machines and the needles in and accompanying the same, did not confer upon the defendants any right, after the needles were worn out, or had become useless, to manufacture other needles, as patented to the plaintiff, and use the same in the machines so sold and purchased. Under the ruling of the court, a verdict was rendered for the plaintiff, subject to the opinion of the court upon the question of law reserved, with power in the court to render judgment on the verdict, or to set the same aside and to enter judgment for the defendants; but reserving the right to either party to turn the case into a bill of exceptions.

Causten Browne and Daniel Barnard, for plaintiff.

S. N. Bell and D. Clark, for defendants.

CLIFFORD, Circuit Justice. The proposition of the defendants is, that the sale of the machines implies the right to use the same, and that, when the needles were worn out, so that the machine could not be operated, it carries with it the right to manufacture new ones as the necessary means to enable them to enjoy the right of use implied by the purchase. Take the question as stated, and it is certainly one of importance, and one which deserves to be carefully considered. Analogous questions, however, have several times been presented to the supreme court, and the views of the court, as expressed in those cases, will aid very much in reaching a right conclusion as to the rights of the parties in this controversy. An intelligent discussion of the question requires that the distinction between the grant of the right to make and vend the patented machine, and the grant of the machine with the right to use it, should be kept constantly in view. Such a question first came before the court in the case of *Wilson v. Rousseau*, 4 How. [45 U. S.] 646, where it was much considered, and it was generally conceded that the true distinction was there maintained, but it must be admitted that there are some expressions in the opinion of the court not quite satisfactory. Subsequently the same question was again presented to the same court in the case of *Bloomer v. McQuewan*, 14 How. [55 U. S.] 549, which places the question upon its true foundation. Patentees acquire the right under a patent to exclude every one from making, using, or vending the thing patented without their permission, and they acquire nothing more. When the patentee sells the exclusive privilege of

making, using, or vending it for use in a particular place, the purchaser buys a portion of the franchise; but the interest he acquires necessarily terminates at the time limited for the continuance of the patent, unless it be otherwise specially stipulated in the contract. But the purchaser of the implement or machine, for the purpose of using it in the ordinary pursuits of life, stands on different grounds. When the patented machine rightfully passes from the patentee to the purchaser or from any other person by him authorized to convey it, the machine is then no longer within the limits of the monopoly. Then the machine so sold passes outside of the monopoly, and is no longer under the protection of the patent act. Redress, in such cases, in case of injury, must be sought in the courts of the state, according to the laws of the state, and not in the federal courts, under the special jurisdiction conferred for the protection of patent rights. Repeated decisions of the supreme court have laid down this doctrine, until it cannot any longer be regarded as an open question. *Chaffee v. Boston Belting Co.*, 22 How. [63 U. S.] 217; *Bloomer v. Millinger*, 1 Wall. [68 U. S.] 351. Able counsel, in the case last named, desired the court to qualify the previous decisions upon this subject; but the unanimous opinion of the judges was opposed to the suggestion, and held that such a purchaser may continue to use the machine until it is worn out, or he may repair it or improve upon it, as he pleases, in the same manner as if dealing with property of any other kind. [Crane v. Price,] *Webst. Pat. Cas.* 413, note p. Great care must, however, be observed in applying that rule to the present case. Undoubtedly both the machines and the needles purchased by the defendants fall within the rule. The defendants may repair them or improve upon them as they please, so that they do not infringe any patent right, because the machines and the needles, having paid the royalty imposed under the patent act, are no longer within the limits of the monopoly. These articles have become private, individual property, not protected by the laws of the United States, but by the laws of the state in which the property is situated. The indubitable right of the defendants is to repair or improve the articles as long as they will last, but they cannot make new ones, nor can they, in the exercise of their right to repair the old ones, infringe another man's patent. Right to repair is limited by the same rules that operate in the repair of other property. The owner may repair, but he cannot appropriate the materials belonging to another man, in effecting the purpose. Purchasers in this case may repair the needles they purchased, but they cannot manufacture new ones, without license. Reference is made to the case of *Wilson v. Simpson*, 9 How. [50 U. S.] 123; but a careful examination of the case will show that it affirms

the very rule here maintained. When we speak of the right to restore a part of a deficient combination, we mean, say the court, the part of one entirely original, and not of any other patented thing, which has been introduced into it to aid its intended performance. The cutters and knives, in that case, were not subject to a patent, and of course the respondent had a right to use them as materials to repair his machine; but unfortunately for the defendants in this case, the needle is subject to a patent, and in making and using it they have infringed the right of the plaintiff.

In view of the whole case, we are clearly of the opinion that there must be judgment on the verdict.

[NOTE. "Patented implements or machines sold to be used in the ordinary pursuits of life become the private individual property of the purchasers, and are no longer specifically protected by the patent laws of the state where the implements or machines are owned or used. Sales of this kind may be made by the patentee with or without conditions, as in other cases; but where the sale is absolute, and without any conditions, the rule is well settled that the purchaser may continue to use the implement or machine purchased until it is worn out, or he may repair it, or improve it as he pleases, in same manner as if dealing with property of any other kind." Mr. Justice Clifford, in *Mitchell v. Hawley*, 16 Wall. (83 U. S.) 544. See, also, *Adams v. Burke*, Case No. 49, note, and same case on appeal in 17 Wall. (84 U. S.) 453; *Nixon v. Paper-Bag Mach. Co.*, 105 U. S. 771; *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. Rep. 244.]

[Patent No. 6,025 was granted to J. Hibbert, January 9, 1849, and was judicially construed in *Aiken v. Dolan*, Case No. 110.]

Case No. 113a.

AIREY v. The ANN C. PRATT.

[10 N. Y. Leg. Obs. 199.]

District Court, D. Maine. July Term, 1852.¹

SEAMEN—WAGES—FORFEITURE.

[A vessel, in poor repair, was blown off by stress of weather from an island on which the master was left; and the mate, on assuming command, bore away to a distant island with the assurance of favorable wind and weather, instead of returning to rejoin the master, which the condition of the vessel and the state of the weather rendered practicable, though perhaps imprudent. *Held*, that wilful misconduct and a fraudulent motive cannot be imputed to the mate so as to forfeit his wages.]

[In admiralty. Libel by Richard R. Airey against the brig Ann C. Pratt and Leonard B. Pratt, master and claimant, for seaman's wages. Decree for libelant. Affirmed on subsequent appeal to the circuit court. *Airey v. The Ann C. Pratt*, Case No. 114.]

The libel of Airey, for his wages, was argued and heard at the same time and on the same evidence with that on the bottomry bond. But in considering the mate's claim for wages, his own deposition, which was admitted in the case of bottomry, (The Forti-

¹[Affirmed by circuit court in *Airey v. The Ann C. Pratt*, Case No. 114.]

tude, Case No. 4,953,) must be excluded. The exclusion, however, of this part of the evidence does not materially change the aspect of the case. The objection to the mate's libel is that he forfeited his wages by misconduct, and the facts relied upon to show his alleged misconduct sufficiently appear from the testimony of the other witnesses. The principal cause of forfeiture insisted upon is the alleged misconduct of Airey at St. Michael. When blown off by stress of weather from the island, it is said that it was his duty to bring the vessel back, and restore the command to the master, and that, the condition of the vessel and the state of the weather being such as to render this practicable, if not clearly the safest and most prudent course to be taken, his determination to bear away for the distant island of St. Thomas can reasonably be accounted for on no other supposition than a determination to leave the master, and assume for the remainder of the voyage the command himself. If such was the fact, it was a gross violation of duty, and the lightest penalty with which it ought to be visited would be a forfeiture of his wages.

Two experienced shipmasters were examined as experts on this question; and with all the facts explained to them with respect to the condition of the ship and the state of the weather, they expressed a clear opinion that the vessel might with safety have been carried back to the island, and that a judicious and prudent navigator would have done this rather than bear away for a distant port, as that of St. Thomas. Their opinion is undoubtedly entitled to much consideration; but it cannot, even admitting its correctness, be held to be decisive of the present case.

The question here is not precisely whether this on the whole was the most advisable and prudent course to be taken, but whether it was so clearly and manifestly so, that no man of ordinary judgment could have mistaken it. Airey, like every other man, is entitled to the ordinary presumption in his favor, that he has acted fairly and honestly, until this is overcome by satisfactory evidence. But Airey, also, like every other man who offers himself for a particular service, engages and pledges himself both for his competency and his fidelity. A mate may be degraded and put before the mast as well for want of skill as want of faithfulness. And we are bound to suppose that he had a reasonable degree of skill and experience in seamanship and navigation to enable him to take the command and manage the vessel on the happening of any casualty which separated the master from the ship. This is one of the contingencies that is contemplated by his contract. Up to this time the conduct of the mate seems to have been entirely unexceptionable, and we are not justified in imputing to him willful misconduct on doubtful and inconclusive evidence. By a casualty, for which no blame attached to him, he was left in the command of the vessel, and was obliged to

act under trying circumstances, and such as involved considerable danger. Taking all the evidence together, it appears to me that there was but one of two courses which could with propriety be taken: Either to return to the island and rejoin the master, or bear away for a West India port. Had he attempted to return, and the weather continued as it had been for the preceding fortnight or three weeks, the vessel and the lives of all on board would have been exposed to no inconsiderable danger. The brig had, during the whole voyage, leaked badly, and she had shown herself unfit to contend with tempestuous weather. By steering for St. Thomas, it was known that in a short time he would take the trade winds, when the wind would be in their favor, with an assurance of favorable weather. They might then with confidence calculate on saving themselves and the ship. We have the opinion of two respectable and experienced shipmasters, that under all the circumstances, the proper course would have been to return to the island. Airey chose the other. If it be admitted that the opinion of the shipmasters is the most probable, is the case so clear as to leave no room for an honest difference of opinion? So clear that we are driven to impute the conduct of the mate to dishonest and fraudulent motives? I think not. Granting that it might have been more judicious to have attempted to return to the island, the determination of Airey to proceed to St. Thomas at the worst was but an error of judgment, and such an error as it would be very harsh to ascribe to a fraudulent and dishonest purpose.

In procuring the repairs to be done at St. Thomas, I see nothing in the evidence that gives serious countenance to the charge of fraud. The expense was probably somewhat more than the same labor and materials would have cost in her home port, perhaps something more than would have been the cost, if the owner had been present to superintend the repairs. But this is, I presume, not unfrequently the case when vessels are repaired under such circumstances. On the whole, I find nothing in the mate's conduct which will justify the court in refusing to him his wages; but they are allowed on the contract price, and nothing can be given in this case extra for his service as master.

Case No. 114.

AIREY v. The ANN C. PRATT.

[1 Curt. 395.]¹

Circuit Court, D. Maine. Sept. Term, 1853.²
SEAMEN—FORFEITURE OF WAGES—MISCONDUCT OF
MATE TEMPORARILY IN COMMAND.

In a suit in rem by a mate, to recover his wages under the shipping articles, the court

¹[Reported by Hon. B. R. Curtis, Circuit Justice.]

²[Affirming Airey v. The Ann C. Pratt, Case No. 113a.]

cannot investigate an allegation of misconduct as master, while in the temporary command of the vessel as master, in a voyage, during which the master was not on board, with a view to inflicting a forfeiture of wages as mate.

[Appeal from the district court of the United States for the district of Maine.]

This was a libel in the admiralty [by Richard R. Airey against the brig Ann C. Pratt, (Leonard B. Pratt, master and claimant.)] The case is stated in the opinion of the court. [Decree for libellant. Claimant appeals. Modified and affirmed.]

Rowe, for libellant.

W. P. Fessenden, contra.

Before CURTIS, Circuit Justice, and WARE, District Judge.

CURTIS, Circuit Justice. The libellant claims his wages, as mate, for the voyages of the brig Ann C. Pratt, which are described in the opinion of the court in the case of Carrington et al. against that vessel, (1 Curt. 340, [The Ann C. Pratt, Case No. 409,]) decided at the last term of this court. The claimant alleges a forfeiture of the wages by three different instances of misconduct.

The first is, that the libellant did not bring the brig back to St. Michael, when driven to sea from that island. The facts, upon which this cause of forfeiture depends, have been already considered in the case, upon the bottomry bond, [Id.] and the conduct of the libellant found not open to serious objection.

The second ground relied on by the claimant is, that when the brig was driven to sea, there was on board, in a trunk belonging to the master, specie "to the amount of \$1,000, or near that sum;" that the libellant broke open the trunk, took the money into his own possession, and has not accounted for it. That such a trunk was on board, containing some specie, which the libellant took possession of, is admitted. The evidence concerning his having broken the trunk to obtain it is conflicting, and the fact, standing by itself, does not seem to me material. Because, in the actual circumstances in which the libellant was placed, he had a right to take and use this specie. He had become the temporary master of the brig, which needed repairs. This money was on board, and belonged to the owner of the vessel. It was the duty of the libellant to use it in payment for the repairs. If, as the claimant asserts, the trunk was locked, and Captain Pratt had the key, the libellant might properly force the lock. If, as the libellant alleges, the key was left in the lock, he could have no motive to use force upon it, and it would be difficult to believe he did so. I do not pause to determine this question of fact, for the reasons above indicated, which are in accordance with the ground assumed in the answer. That alleges it to

have been the duty of the libellant to apply the specie to make payment for the repairs; and if this be so, the particular mode in which the libellant got it out of the trunk is unimportant, unless it be connected with some other circumstance tending to prove fraud.

In the account of the disbursements for the repairs of the brig at St. Thomas, the sum of \$307.10 is credited to the vessel, as so much cash received from the libellant; who admits that he retained, for his own use, fifty dollars, and says he paid the sum of \$192.90 "to the crew, and to disburse the vessel," and that this accounts for the whole of the specie which was on board, amounting to the sum of five hundred and fifty dollars only, and not the sum of one thousand dollars, as is alleged in the answer. Considering that the accounts of Carrington & Co., who were the consignees of the vessel, show large disbursements for the vessel, including payments to and for the seamen, I confess this account by the libellant of these funds, is not entirely satisfactory to my mind. But the claimant has offered no other legal evidence of the amount of the specie on board, or of its disbursement or retention by the libellant. The answer simply declares that there was on board, in specie, the sum of \$1,000, or about that sum, and that the libellant has not accounted for it. Unless the deposition of the libellant, taken in the suit on the bottomry bond, is invoked into this case, I find no evidence whatever to show the amount of specie on board; because this suit being against the master, as well as the brig, his deposition is not evidence. And if the libellant's deposition is to be considered as put in evidence, the whole of it must be read, and taken to be true, unless shown by satisfactory evidence to be false. Though clouded by some grave suspicions, I cannot say that the case affords sufficient grounds upon which to rest a charge of fraudulent misappropriation of money left on board, contrary to the sworn statements of the libellant in his deposition; and, therefore, I do not find this ground of forfeiture to be made out, in point of fact.

It remains to consider the last alleged cause of forfeiture, which is the same investigated in the suit on the bottomry bond. It appears that the libellant, while acting as temporary master at St. Thomas, in concert with the bottomry holder, gave a bottomry bond on the brig for a larger sum than was actually advanced, for the purpose of defrauding the underwriters on the vessel. The question is, whether this misconduct forfeits the wages claimed in this suit.

Forfeiture of the wages of seamen, though in some cases regulated by positive law, rests upon violation of contract, the performance of which is enforced by the marine law by means of this species of punishment. Consequently, before such a forfeiture can

be adjudged, it must appear that the contract, under which the wages are claimed, has been violated. It is not enough that some other contract, between the same parties, has been broken, however gross the wrong may be. Now, this is a libel in rem by the mate, to recover the wages due to him in that capacity. The claim for wages, as temporary master, can not be enforced against the vessel. It is no part of the subject-matter of this libel, which does not allege it, but confines the demand to the wages due to the libellant as mate, pursuant to his written contract in the shipping articles. The libel lays no foundation for any inquiry into an implied contract, arising out of the emergency of a temporary command, either for the purpose of awarding or withholding compensation, for services rendered in that command. That is a subject, the merits of which can be investigated only in a suit founded on that contract. If it is found to have existed, and to have been so violated as to come within the principles upon which the marine law inflicts a forfeiture, and the pleadings lay the necessary foundation for such an adjudication, a forfeiture of rights, under the implied contract, for a gross breach of its duties, would follow. But in a suit founded on a very different contract, to recover compensation for services which are unconnected with the duties alleged to have been neglected, I cannot see how a forfeiture can be inflicted. Such is this case; for in his capacity of mate, it is not alleged the libellant was guilty of any neglect of duty. The charge is, that after he had succeeded to the command, and in the course of exercising it, he failed in the honest performance of its obligations. This charge does not seem to me to meet the claim, and, therefore, without prejudice to any rights of the claimant in any suit arising out of the implied contract, I am of opinion it must be dismissed. I think it proper to add, however, that if it had appeared that the misconduct of the libellant had occasioned damage to the claimant, I should have thought it proper to suspend the decree until he could have an opportunity to bring a suit for its recovery, to the end that a set-off might be made; and also, that, as the libellant admits he appropriated to his own use the sum of fifty dollars, he must be taken to have done this in the only way in which it was honest for him to do it, and that was as part payment of his wages; and so, this amount must be deducted from the amount of his wages. I do not think he can qualify his own wrong, in taking this money from the funds of the vessel, and sending it home, by alleging he did it in his capacity of temporary master, and so will account in that capacity, and not as mate. He had no right to take it in the capacity of master or mate; and I consider it my duty to treat it as part payment of his wages; the only debt, so far as now ap-

pears to the court, due to him from the vessel or the owner.

As this deduction does not appear to have been made in the district court, its decree must be altered in this particular; in all other respects, it is affirmed. I allow no costs on the appeal to either party.

Case No. 115.

AIREY et al. v. MERRILL.

[2 Curt. 8.]¹

Circuit Court, D. Maine. Sept. Term, 1854.*

SHIPPING—CHARTER-PARTY—DESTRUCTION OF VESSEL.—APPEAL.

1. Under a covenant in a charter-party to restore the vessel to the owners, "dangers of the seas excepted," the charterer is liable for the value of the vessel in case of its destruction by an accidental fire originating on board, such fire not being one of the dangers of the seas, within the exception.

[Cited in *Salmon Falls Manuf'g Co. v. Tangier*, Case No. 12,265; *McCann v. Conery*, 11 Fed. Rep. 749.]

[See *The Peytona*, Case No. 11,058.]

2. The fact that the vessel, when burned, was lying on a shoal on which she had stranded, is not ground for reducing the damages, where it is not alleged nor satisfactorily proved that her value was materially diminished by the stranding, as the burden is on the charterers to bring the case within the exception of dangers of the seas.]

[3. The charter money for the time preceding the destruction of the vessel may be allowed as damages.]

4. If the libellant does not appeal from a decree of the district court, he cannot ask to have the damages increased here.

[Cited in *Allen v. Hitch*, Case No. 224; *Bush v. The Alonzo*, Id. 2,223; *The Wm. Bagaley v. U. S.*, 3 Wall. (72 U. S.) 412; *The Stephen Morgan v. Good*, 94 U. S. 604; *Shaw v. Folsom*, 40 Fed. Rep. 512.]

[Appeal from the district court of the United States for the district of Maine.]

[In admiralty. Libel by Chandler R. Merrill against James Airey and others for breach of a covenant in a charter party. Decree for libellant. *Merrill v. Airey*, Case No. 9,468. Respondents appeal.]

Before CURTIS, Circuit Justice, and WARE, District Judge.

CURTIS, Circuit Justice. This is a libel on a charter-party filed by the appellee against the present appellants. It is founded on a covenant contained in the charter-party, by which the schooner *William Henry* was let by the libellant to the respondents for voyages from Frankfort, in Maine, where the vessel lay, to the Chesapeake bay, or any southern port or ports in the United States; the charterers to victual and man the vessel and appoint the master. And the charterers covenanted "to deliver the said schooner to the owner aforesaid,

¹Reported by Hon. B. R. Curtis, Circuit Justice.]

²[Affirming *Merrill v. Airey*, Case No. 9,468.]

at said Frankfort, in as good order as she shall be in when delivered to them, ordinary wearing, and dangers of the seas excepted." During her first voyage the schooner was destroyed by fire; and the first question to be determined is, whether fire, other than from lightning, is one of the "dangers of the seas," within the meaning of that phrase in the charter-party.

Neither the researches of the learned counsel, who have evidently carefully examined the books, nor my own, have enabled me to find any precedent, on which I can rely. For though the phrase "perils of the seas" has been long in use, and has been often adjudicated upon, it has been only in reference to the liabilities of carriers, under bills of lading, and of underwriters upon policies of insurance. In *King v. Shepherd*, [Case No. 7,804.] Mr. Justice Story, in commenting on these words as interpreted when occurring in bills of lading and policies of insurance, says: "The rules which regulate losses under policies of insurance, are by no means the same as either necessarily, or ordinarily govern in cases of common carriers. Each contract has its own peculiar principles of interpretation, and it is not safe, in many instances, to reason from one to the other." And this is true also when applied to charter-parties; at least so far as to admonish us not hastily to adopt an interpretation of the phrase, "perils of the seas," in a bill of lading, or policy of insurance, and apply it to an exception in a covenant in a charter-party. The responsibility of carriers is rested by the common law upon grounds of public policy which have materially influenced the interpretation placed upon the exceptions to their liability. And undoubtedly the great object of policies of insurance, indemnity of the assured, and the practical necessities of commerce under them, have greatly affected their interpretation. I have not felt at liberty therefore to assume that these words must or do import the same in a covenant by the charterer with the owner, as in a policy or bill of lading. But I have also looked at the natural and fair import of the words, the connection in which they occur, the office they were designed to perform, and the obligations which belong to the relation in which the parties stood to each other under the contract.

And first, as to the natural and fair import of the phrase "dangers of the seas," I think it must be admitted that it indicates only those perils which are peculiar to the sea. So it has been generally understood. Story, *Bailm.* § 512; 3 *Kent*, *Comm.* 275. It is true that a broader meaning has, in many cases of insurance, been given to it; and it would not be practicable to fix any definition of the phrase which would be justly applicable to it in all contracts. The words have a strict sense, in which they include only the natural accidents peculiar to the

sea. They have also a more extended sense in which they import accidents occurring upon the sea. And the true question here is, whether they should receive one or the other interpretation when they stand as an exception in a covenant by the charterer to restore the vessel to the owner.

It is a sound rule of construction, that a covenant, introduced *ex industria* into an instrument, shall be deemed to have been inserted for some purpose, and that the purpose was, not to leave the rights of the parties, as they would have been, had no such covenant existed. Now if this covenant had not been inserted, it would have been the duty of the charterer to restore the vessel to the owner, at the expiration of the voyages for which she was hired, excepting only ordinary wear, and such losses as the charterer, by the use of due diligence, could not guard against. Such are the obligations attached by the law, independent of all stipulations, to the contract of hiring a thing. Story, *Bailm.* § 397-400. And if this exception is to receive a lax interpretation, the covenant adds nothing to the obligations of the charterer. He is only bound to restore the vessel, excepting ordinary wear and such losses upon the sea, as the charterer could not, by using due diligence, prevent. For I suppose it cannot be maintained that a casualty would be deemed a peril of the sea, within this exception, if the charterer, by the use of due diligence, could have guarded against and prevented it. Otherwise, the covenant, instead of adding anything to the obligations of the hirer, has lessened those obligations. It does not seem to me probable that the parties have inserted this covenant intending to lessen the obligations attached by the law to the contract of hiring, or to leave those obligations unchanged. And this view is strengthened by the form and nature of the covenant and the exception out of it, and the rule of interpretation applicable to such an exception. By the covenant the charterer makes himself an insurer; by the exception he excludes certain risks. The rule of construction as to exceptions is, that they are to be taken most strongly against the party for whose benefit they are introduced. This rule has been repeatedly applied to contracts of insurance. The court of exchequer rested its decision upon it in *Blackett v. Royal Exch. Assur. Co.*, 2 *Crompton & J.* 251. In *Donnell v. Columbian Ins. Co.*, [Case No. 3,987.] Mr. Justice Story held it properly applicable to such contracts, as he also did in *Palmer v. Warren Ins. Co.*, [Id. 10,698.] It is a settled rule of construction which is applicable to this covenant. These words of exception being introduced by the covenantor for his own benefit, if they are capable of bearing a more or less extended meaning, the rule requires that meaning to be allowed to them which is least beneficial to the covenantor.

It is a circumstance of some importance in my judgment, though for reasons before suggested not decisive, that accidental fire, occurring through human agency, has never been held to be a peril of the sea under any marine contract. I am aware that in *Plaisted v. Boston & K. Steam Nav. Co.*, 27 Me. 135, it is said by the court to be settled, that fire is a peril of the sea within a policy of insurance. It is true, that the risk of fire is assumed by marine policies, because fire is one of the perils expressly enumerated in such policies. Mr. Phillips in his last edition, (volume 2, note 1099,) says it would have been included, if not expressly mentioned. Perhaps this is a fair deduction from the nature and objects of the contract of insurance; but so far as I know, it never has been included; and the fact that the risk of fire, *eo nomine*, is taken, in addition to perils of the seas, has some tendency to show that this phrase has not generally been understood to embrace fire, even in such contracts. And I think he would be a bold man who should now venture to strike out from the enumerated risks on a marine policy, the word fire, trusting to the courts to insert it by construction. I should apprehend some difficulty in making such a construction at this day. Taking a more practical view of this question, it does not seem to me that a contract by the charterer to be responsible to the owner for losses by accidental fire is in its nature unreasonable or unlikely to be made. The hirer, in this case had the entire possession, command, and navigation of the vessel. He appointed the master and hired the crew. They were his servants. The owner might well say to him, if a fire occurs through the negligence of your servants on the high seas, or in a distant port, I shall have no proper means of proving that negligence. I do not choose to leave any such question open. You must take the responsibility for loss by fire. It was upon grounds of public policy, similar to these, that the common law held carriers liable for accidental fire, and though that public policy did not embrace charterers of vessels, it shows that owners may find reasons of a similar character for protecting themselves by contract from similar dangers. Upon the whole, my opinion is, that the fire by which this vessel was destroyed, was not a peril of the sea within the exception in the covenant, and consequently the charterer was liable for the loss.

As to the damages, as the libellant did not appeal, he cannot claim greater damages in this court than were allowed in the district court. *Stratton v. Jarvis*, 8 Pet. [33 U. S.] 4; *Canter v. American Ins. Co.*, 3 Pet. [28 U. S.] 318. The respondents have made some suggestions, by way of argument, to reduce the amount of damages decreed below; but I think the decree should not be disturbed in this particular. The

respondents did not assign as error in that decree, that the damages, if any should be allowed, were excessive. But if they had done so, I do not think any error has been shown. It is urged that the value of the vessel as she lay on the shoal should be taken, and this is correct, provided the stranding was not upon a well-known shoal, or was effected by causes beyond the control of the master. There is difficulty in coming to a conclusion, favorable to the respondents, on either of these points. I have not thought it necessary to go into a minute examination of the evidence concerning them, because I am of opinion that I cannot treat the value of the vessel as materially diminished by the stranding. It is not so pleaded in the answer, which admits her value to be \$2,000, the sum fixed upon by the district court. Nor does the evidence satisfactorily show, that the position of the vessel on the shoal was such, as exposed her to much peril, or would have occasioned any considerable expense to get her off. There is not a little discrepancy between the evidence which comes from the vessel and the shoresmen who went on board. And, considering that the burden is on the respondents, to bring the case within the exception in their covenant, by showing that the vessel's value was reduced, before she was burnt, by a danger of the sea, I am not satisfied that they have sustained that burden. The libel claims the charter money for one month and a half, and the answer denies that any thing ever became due on this account. But it does not allege that the vessel was unseaworthy when she sailed on her voyage from Frankfort, and if she were not, I perceive no reason why this monthly hire was not properly allowed by the district court. The decree of the district court is affirmed with costs.

Case No. 116.

AITKEN v. The MAY POWELL.

District Court, S. D. New York. 1852.

[Nowhere reported; opinion not now accessible.]

Case No. 117.

The AJAX.

[1 Adm. Rec. 431.]

Superior Court, S. D. Florida. Dec. 7, 1836.

SALVAGE—AWARD—PARTIALLY DAMAGED CARGO.

[This was a libel for salvage by Richard Roberts and others against the cargo and materials saved from the ship *Ajax*, (Charles A. Hiem, claimant.) The vessel was lost on Carrysfort Reef, off the coast of Florida. Part of the cargo was saved dry and uninjured, and part in a wet and damaged condition. The decree allows the salvors "thirty-five per centum of the net amount arising from such portions of said cargo as were saved dry and uninjured, and fifty per centum upon the net amount of

sales arising from that portion of said cargo which was taken from said ship in a wet, damaged, and perishing condition, and also fifty per centum upon the net amount of sales of the materials saved from said ship; to be paid to said salvors according to their respective interests therein.”]

[Cited in *Baker v. The Slobodna*, 35 Fed. Rep. 542; *The John and Albert*, Case No. 7,333.]

[Nowhere reported; opinion not now accessible.]

Case No. 118.

The A. J. VIEW.

[Blatchf. Pr. Cas. 143.]¹

District Court, S. D. New York. April, 1862.

PRIZE—VIOLATION OF BLOCKADE—ENEMY PROPERTY.

Cargo and appraised valuation of vessel condemned as enemy property, and for a violation of the blockade.

In admiralty.

BETTS, District Judge. The above vessel, owned by a citizen of New Orleans, and registered there, by authority of the Confederate States, on the 20th of November, 1861, was captured by the United States public ship *New London* on the 28th of November, 1861, in Mississippi sound, laden with a cargo of turpentine and tar. The cargo was the property of Black, the supercargo. Neither the manifest nor any other papers on board the vessel designate the voyage contemplated to be made; but it appears, from the testimony of the master and the mate, on their examination, and by the written parole given by the supercargo on the arrest of the vessel, that the cargo and vessel were destined for Balize, in Honduras. The evidence in the case is unequivocal that the voyage was undertaken by the mutual concurrence of the owner of the vessel and the owner of the cargo, to evade the blockade at the port of New Orleans, and that they were both of them, at the time, residents of that place, and well aware of the existence of the blockade. The supercargo was an Englishman by birth, but had been, for many years prior to the seizure of the cargo, residing with his family at New Orleans, and doing business there. The owner of the vessel, though a native of the state of New York, had been for many years settled in business in New Orleans, and a resident there with family. He purchased the vessel, and had her registered to him in his own name, and on his oath that he was a citizen of the Confederate States, on the 20th of November, 1861. *Jecker v. Montgomery*, 13 How. [54 U. S.] 498; *Id.*, 18 How. [59 U. S.] 110; *Fay v. Montgomery*, [Case No. 4,709.]

After the capture, the flag officer of the United States squadron ordered an appraisal of the vessel, and appropriated her to the use of the United States government, and

¹[Reported by Samuel Blatchford, Esq.]

transmitted her cargo and officers, on the United States' vessel supply, to the port of New York, to the cognizance of the United States prize court. The prize was thus brought fully under the cognizance of this court. *Proceeds of Prizes of War*, [Case No. 11,440.]

Upon the proofs in the suit produced by the attorney for the United States, no one appearing to contest the same, it is ordered that a decree be entered condemning the appraised valuation of the vessel and the cargo seized on board of her, with costs, and directing a distribution of the proceeds thereof, according to law.

AKEN, (WARBURTON v.)

[See *Warburton v. Aken*, Case No. 17,143.]

Case No. 119.

AKERLY v. VILAS.

[1 Abb. U. S. 284; 2 Biss. 110; 1 Chi. Leg. News, 161; 8 Amer. Law Reg. (N. S.) 229.]

Circuit Court, Seventh Circuit, D. Wisconsin. Feb. Term, 1869.

REMOVAL OF CAUSES—TIME OF MAKING APPLICATION.

1. A state court has no power to entertain an appeal or other proceeding to review an order made in such court granting a petition to remove a cause from the state court to a court of the United States; nor can the state court withhold or delay the transfer of the record from its clerk's office to the United States court pending any such review.

2. An application in a state court for the removal of a cause to a United States court, made after trial and judgment in a state court of original jurisdiction, and judgment of a state court of appellate jurisdiction, which in effect reverses the judgment below and orders a new trial or hearing, is in season, where the application is made under the act of March 2, 1867, (14 Stat. 558),—which authorizes the petition to be filed at any time “before the final hearing or trial” of the suit. The reversal and order for a new trial or hearing open the case to litigation the same as if no judgment had ever been rendered.

[3. Cited in *Kellogg v. Hughes*, Case No. 7,662; *McCallon v. Waterman*, *Id.* 8,675. Questioned in *Hancock v. Holbrook*, 27 Fed. Rep. 402, as to the point that it is not necessary that the plaintiff or defendant, consisting of more than one party, should be collectively so situated as to authorize a removal.]

This was a motion by the plaintiff, a citizen of the state of New York, for an order allowing him to file in this court copies of the process, pleadings, depositions, testimony and other proceedings in this cause, the clerk of the state court from which removal was sought having refused to make and certify such copies. This case had been pending in the circuit court of Dane county, which on

¹[Reported by Josiah H. Bissell, Esq., and also by Benjamin Vaughan Abbott, Esq., and here compiled and reprinted with permission. The syllabus is from 1 Abb. U. S. 284, and the statement from 2 Biss. 110.]

the 28th of October, 1869, had on petition and papers filed by the plaintiff required the defendant to show cause why the case should not be removed to the circuit court of the United States. On the 8th of November the following order was entered: "And the court having heard the counsel of the parties, and being sufficiently advised therein, ordered and declared that in this action now pending in this court there is a controversy between Jay Camiah Akerly, the plaintiff, a citizen of the state of New York, and Levi B. Vilas, one of the defendants, a citizen of the state of Wisconsin; that the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs; that the plaintiff has made and filed in this court an affidavit as required by the act of congress, approved March 2, 1867, and in all other respects complied with said act. And it is further ordered, that this court doth accept the surety offered by the plaintiff, and that all proceedings in said cause be and they are hereby stayed, and this cause is hereby removed into the circuit court of the United States, in and for the district of Wisconsin." On the 26th day of December, 1868, application was made by the plaintiff to the clerk of the circuit court of Dane county for a certified copy of the record and proceedings in this case, for the purpose of transferring it to this court, according to the order of that court, and the bond of the plaintiff, according to law, and the fees of the clerk for making and certifying a copy were tendered, which he refused to accept; he also refused to furnish the copies demanded, stating that he was bound to obey an order of the Dane county circuit court, prohibiting him from making such copies. The state court, in addition to the order of removal, had made an order allowing an appeal from said order of removal to the state supreme court, and enjoining its clerk from furnishing copies and proceedings pending said appeal. [In its various phases, the case is also reported in 15 Wis. 401; 21 Wis. 88, 382; 23 Wis. 207, 628; 24 Wis. 165; 25 Wis. Append. A. 703.]

Finches, Lynde & Miller, for complainant.
 Spooner & Vilas, for defendants.

MILLER, District Judge. This motion is made under the act of March 2, 1833, § 4, (4 Stat. 634,) which enacts that "in any case in which any party is, or may be, by law entitled to copies of the records and proceedings in any suit or prosecution in any state court to be used in any court of the United States, if the clerk of said court shall upon demand, and the payment or tender of the legal fees, refuse or neglect to deliver to such party certified copies of such record and proceedings, the court of the United States in which such record and proceedings may be needed, on proof by affidavit, that the clerk of such court has refused or neglected to deliver copies thereof on demand as afore-

said, may direct and allow such record to be supplied by affidavit or otherwise, as the circumstances of the case may require or allow, and thereupon such proceeding, trial and judgment may be had in the said court of the United States, and all such process awarded, as if certified copies of such records and proceedings had been regularly before the said court." The conditions of removal of causes from a court of the state to a court of the United States, according to the act approved March 2, 1867, (14 Stat. 558,) are that where a suit is pending in the state court at the time of the application for removal, in which there is a controversy between a citizen of the state in which the suit is brought, and a citizen of another state, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, such citizen of another state, whether he be plaintiff or defendant, if he shall make and file in such court an affidavit stating that he has reason to, and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court, may, at any time before the final hearing or trial of the suit, file a petition in such state court for the removal of the suit into the next circuit court of the United States, to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court on the first day of its session copies of all process, pleadings, depositions, testimony and other proceedings, &c. And it shall be thereupon the duty of the state court to accept the surety, and proceed no further in the suit.

The circuit court of Dane county was satisfied that all the requirements of the act were complied with by plaintiff, and on inspection of the record found that there had not been a final trial or hearing of the suit. The court then accepted the surety offered, and ordered that all proceedings in the suit be stayed. In section 12 of the act of 1789 (1 Stat. 73) is the same provision in respect to the surety upon an application for the removal of causes from state to United States courts, "that it shall be the duty of the state court to accept the surety and proceed no further in the cause." The supreme court of the United States in *Gordon v. Longest*, 16 Pet. [41 U. S.] 97, decided that when the application for the removal of a cause is in proper form, and the facts on which the application is founded are made to appear according to the requirement of the act, the party is entitled to a right to have the cause removed under the law of the United States, and the judge of the state court has no discretion to withhold the right. And when, on application for the removal, it is shown that the case is one embraced by the act, and that the party has complied with the required conditions, it is the duty of the state court to proceed no further in the cause, and every step further taken in the case, whether in the same court or in an appellate court, is coram non judge

and, of course, nugatory. See, also, *Kanouse v. Martin*, 15 How. [56 U. S.] 198. Submitting to the authority of the act of congress, and of the decisions of the supreme court of the United States, I have no other discretion than to decide that the clerk of the circuit court of Dane county was not justified in withholding the transcript from the plaintiff, either under the prohibition of the court, or by reason of the appeal after acceptance of the surety, and the order of removal of the cause to this court.

I will dispose of the remaining positions of the defendant's counsel as if upon a motion to remand the cause to the Dane circuit court.

It is objected that all the defendants are not citizens of the state of Wisconsin. Levi B. Vilas and Esther G. Vilas, his wife, are the principal party defendants. They are the parties to the mortgage in suit. It is alleged that Martin T. Vilas, one of the defendants, is a citizen of the state of Vermont, and is the owner of the equity of redemption of the mortgaged premises. Thomas Reynolds and Leonard J. Farwell, the remaining defendants, are citizens of this state. It is set out in the petition for removal that the persons named as defendants, except Levi B. Vilas and wife, have been either personally served with process issued in the cause, or have voluntarily entered their appearance, and that all the defendants except Levi B. Vilas have, by the rules and practice of the court, confessed and admitted the plaintiff's cause of action, by not answering the complaint of plaintiff, as required by law and rules and practice of the court. The state court finds that in this action now pending there is a controversy between Jay Camiah Akerly, plaintiff, and Levi B. Vilas, one of the defendants. From this it would seem that the allegation of the petition that the complainant had been taken as confessed against all the defendants except Levi B. Vilas, is correct. The service and appearance of those defendants may possibly require them to appear and answer a new bill to be brought in this court, or, in default of an answer, to let the bill be taken as confessed against them. But whether such be the practice or not, I need not now determine. At the final hearing a question may be raised whether a decree can be made irrespective of these defendants. At present they do not appear to be necessary parties. See *Wood v. Davis*, 18 How. [59 U. S.] 467.

Another objection to the removal of the cause to this court is, that the application was not made "before the final hearing or trial in the state court."

It appears from a report of the case in 21 Wis. 88, that the suit is for foreclosure of a mortgage given by Levi B. Vilas and wife, to secure the payment of certain bonds. That the cause came on to be heard between

the plaintiff and Vilas, the defendant, and a decree was rendered against the plaintiff, the court holding that the bonds and mortgage were invalid, from which decree the plaintiff appealed to the supreme court. And the defendant also appealed for alleged error of the court in striking out his counter-claims, and rejecting evidence in support of them. The supreme court decided that the bonds and mortgage were valid, and that one of the counter-claims was improperly stricken out, and reversed the judgment of the circuit court on both appeals. The cause came on a second time to be tried before the circuit court, when a decree was rendered in favor of plaintiff, from which defendant Vilas appealed upon the ground of the rejection by the court of a certain counter-claim set up in his answer. The supreme court reversed that judgment or decree, and remanded the cause to the Dane circuit court for further proceedings according to law. If the cause had been finally determined by either judgment of the circuit court, or by order of the supreme court, then the application for removal would not have been filed before "the final hearing or trial." But the last order of the supreme court, reversing the judgment of the circuit court, and remanding the cause to that court for further proceedings according to law, opened the whole case to litigation, the same as if no judgment had ever been rendered. The supreme court in effect ordered a *venire facias de novo*, which required the circuit court to hear the cause as if no hearing or trial had taken place. The whole proceedings were in fieri when the petition for removal was presented to the circuit court. I am, therefore, of the opinion that the petition was presented before the final hearing or trial of the cause.

The motion of plaintiff is granted.

NOTE, [from original report in 2 Biss. 110.] At the September term of the U. S. circuit court, present, Justice Davis and District Judge Miller, a motion of defendants for an order rescinding the above order was denied.

The opinion of the supreme court of Wisconsin in this case will be found in 24 Wis. 165.

That the state court has no discretion, a proper petition being filed. *Matthews v. Lyall*, [Case No. 9,285;] *Fisk v. Union Pac. R. Co.*, [Id. 4,827.] And no action of the state court can affect the right. *Hatch v. Chicago, R. I. & P. R. Co.*, [Id. 6,204.] After judgment rendered in the state court and exceptions have been overruled in the appellate state court, the case cannot, pending a motion for a new trial on the ground of excessive damages, be removed into the federal court. *Bryant v. Rich*, 106 Mass. 180. Consult also *Kingsburg v. Kingsbury*, June, 1871, to appear in a subsequent volume of these Reports, [Case No. 7,817,] where it is held that where the decree of the court below was reversed by the supreme court of the state with instructions to dismiss the suit, an application for removal came too late; that it was not the intention of congress that a party dissatisfied with the rulings of the state courts might have a rehearing in the federal courts. Where in a proper case the necessary steps are taken for removal, the state court has no further jurisdiction, and any subsequent steps are coram

[2 Biss. 114, gives "complaint."]

non iudice and void. *Bell v. Dix*, 49 N. Y. 232. For proper practice where the plaintiff persists in proceeding in state court consult *Id.* Where the defendant, a citizen of another state, regularly files his petition and bond in the state court, in accordance with the provisions of the judiciary act, for the removal of the cause to the U. S. circuit court, the state court is ipso facto ousted of jurisdiction. Any further proceedings are coram non iudice and void. *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149.

NOTE, [from original report in 1 Abb. U. S. 234.] Subsequent to this decision, the appeal was moved, on behalf of the plaintiff, in the supreme court of the state, and a decision rendered reaching the general results that the order of removal was reviewable on appeal in the state court, and that it was improperly made and should be reversed. We give so much of the opinion in the state court as relates to these two points:

PAINE, J. The application for removal was made by the plaintiff under the act of congress of March 2, 1867, and the appellant claims that the order was erroneous upon two grounds: 1st. That the case was not within the act; 2nd. That if it were within it, the act itself, so far as it professes to authorize a nonresident plaintiff who had commenced his suit in the state court to obtain removal, is invalid.

The respondent's counsel have declined to argue either of these questions, but have contented themselves with simply submitting and briefly discussing the proposition that this court has no jurisdiction to hear and determine this appeal. Of course, this question must be determined upon the hypothesis that it is possible that the case may not have been within the act of congress, and that even if within it, the act may have been invalid. Counsel assume this possibility, for they say that the appellant's remedy "(if indeed he has any) is to apply to the federal court to remand the case to the state court." In support of the position they refer to two classes of authorities. But these wholly fail to sustain it, and in truth warrant directly the opposite conclusion. And it would seem impossible to have drawn any such inference from them, except by confounding the distinction between the two classes, and applying the doctrines of both indiscriminately to each. Thus they first refer to several cases, holding that where a proper application for a removal is made, in a case where the party is entitled to a removal by law, the jurisdiction of the state court ceases, and every subsequent step, except that of sending the case away, is coram non iudice and void. They next cite another class, holding that where the order of removal was improperly made, in a case where the party was not entitled to it, an application may be made to the federal court to dismiss it for want of jurisdiction, and they then seek to transfer to the latter class of cases the doctrines of the former, and to hold that the jurisdiction of the state court ceases, and every step subsequent to the application for removal is equally unauthorized and void in those cases where the order of removal is improper and the party not entitled to it by law, as in the others. Such a conclusion is in conflict with both classes of cases. Both proceed upon the express assumption that it is only when the removal is authorized by law, and the application properly made, that the jurisdiction of the state court is divested and that of the federal court attaches. Both proceed upon the assumption that where this is not the case, the jurisdiction of the state court remains, and the federal court acquires none whatever. And yet we are now asked to hold, that although this case may have been one of the latter class—though it

may be one in which there was no law authorizing a removal, and in which, consequently, the federal court acquired no jurisdiction, yet that by some unaccountable process the state court lost it, so that between the two the jurisdiction has lapsed entirely. Such a conclusion would be extraordinary indeed, and it has as little support in authority as it has in reason.

If there was no law authorizing the removal, and there was none if either of the positions taken by the appellant is true, then the jurisdiction of the state court remained unimpaired, and there was no obstacle in the way of its exercise, except the erroneous order that the case be removed. And the idea that the appellate power of the state court cannot be invoked to correct this error—that it remains in abeyance, suspended by such an unauthorized application, that the court which has jurisdiction must decline to exercise it, until the court that has none shall see fit to disclaim it—is one that cannot be supported upon any reasoning. But if the right to appeal exists in a case where the removal is unauthorized, then it must also exist even when the order of removal is proper. The question whether the court has power to hear and determine the appeal, cannot depend upon the conclusion to which it may come on the merits of the order to be reviewed. Nothing is better settled in legal practice, than that an order by which a subordinate court dismisses a case for want of jurisdiction, or in any way divests itself of jurisdiction, is subject to review on appeal. It is within the express provision of our statute that allows an appeal from any order which prevents a judgment from which an appeal might be taken. It is the common practice of all courts. The case of *Mayor v. Cooper*, 6 Wall. [73 U. S.] 247, cited by the respondent, is one where the supreme court of the United States reviewed such an order, made by the United States circuit court. It is true in that case the order or judgment of dismissal was reversed, the court holding that the circuit court had jurisdiction. But if they had held differently, they would have affirmed the order, and not have dismissed the writ of error. This is the invariable practice. And this shows that the exercise of the power to hear and determine an appeal from an order by which a subordinate court attempts to divest itself of jurisdiction, is not an assertion of jurisdiction in the case subsequent to and in defiance of the application for removal. It is merely the decision upon that application itself. And that decision, whether the power be exercised by a subordinate or appellate court, is not the exercise of jurisdiction in the case. It is the determination of an independent preliminary question, and one which every court, from the necessity of the case, has the power to determine whenever presented. And whoever invokes the exercise of this power on the part of a subordinate tribunal of the state, must invoke it subject to all the conditions imposed upon that tribunal by the law of its existence; and one of those conditions is that an order made upon such an application is appealable.

That the power to hear and determine an appeal from such an order is entirely independent of the question of jurisdiction to proceed upon the merits of the action, the case of *Nelson v. Leland*, 22 How. [63 U. S.] 48, is an express authority. A motion was there made to dismiss the appeal on the ground of a want of jurisdiction originally in the subordinate court, and the chief justice delivered the opinion of the court, "that the question of jurisdiction in the lower court is a proper one for appeal to this court, and for argument when the case is regularly reached, and that this court have jurisdiction on such appeal." The motion was therefore denied, and upon the express ground that their jurisdiction of the appeal

was wholly independent of the actual jurisdiction of the lower court, to try the action upon its merits. And if this is so, the exercise of this appellate power is not the exercise of that jurisdiction of which it is claimed the state court is divested by the presentation of a proper application for removal. It is true that if the appellate court should sustain the jurisdiction of the state tribunals, they might proceed subsequently to attempt to exercise it. But the mere determination of the question whether such jurisdiction had ceased or continued is not an exercise of it, any more when made by the appellate than it was when made by the subordinate court. Indeed, the right and the duty of the state courts to exercise such appellate power has been expressly decided by the supreme court of the United States in *Kanouse v. Martin*, 15 How. [56 U. S.] 198. The court of common pleas in the city of New York had denied an application for removal, and afterwards proceeded to try the action on the merits, and rendered judgment. It was taken by appeal to the superior court, which affirmed the judgment. And the supreme court of the United States reversed that judgment, not on the ground that the superior court erred in taking jurisdiction of the appeal, but in neglecting to reverse the judgment of the common pleas for refusing the application for a removal. They say: "The error of the superior court was, therefore, an error occurring in the exercise of its jurisdiction, by not giving due effect to the act of congress under which the plaintiff in error claimed," &c. And it made an order remanding the case to the superior court, with directions for further proceedings in conformity to the opinion. And such further proceedings would consist wholly of an exercise of the appellate power of the superior court to reverse the judgment of the common pleas. And yet we are referred to this case by the respondent's counsel to support their assertion, that this court will "stultify itself by taking jurisdiction of this appeal."

This court certainly is not oblivious of the fact, that if it should hold that a removal of this suit was unauthorized, and should subsequently proceed to render final judgment after such further trial as may be necessary, the supreme court of the United States may assert its appellate jurisdiction over that judgment, may reverse it, and remand the case with directions similar to those in *Kanouse v. Martin*, as counsel suggest. But we feel very confident that if it should do so, it will not be because this court erred in assuming jurisdiction of the appeal, but because it will think this court erred in holding the plaintiff not entitled to a removal.

I have thus endeavored to state the distinction between the exercise of the power to decide upon the application for a removal, whether by the subordinate or appellate court, and the exercise of jurisdiction over the merits of the action, for the purpose of showing that the broad language used by the court in *Gordon v. Longest*, 16 Pet. [41 U. S.] 104, cannot in any event be applicable to the exercise of such appellate power. But it is perhaps doubtful whether the same language would be now used by that court. The subsequent case of *Kanouse v. Martin* seems studiously to avoid it, and makes no suggestion that the judgment of the court of common pleas, and of the superior court were void for want of jurisdiction, but speaks of them throughout the opinion as merely "erroneous." And the same view is also supported by the case of *Hadley v. Dunlap*, 10 Ohio St. 1. I come, therefore, to the conclusion that this order is appealable, and that it is a duty of this court from which it cannot shrink, to proceed to a determination of the questions presented.

Was the case within the provisions of the act of congress? The act provides that the non-resident party to a suit in a state court, be-

tween a citizen of that state and a citizen of another state, shall be entitled to a removal, on making the proper application, "at any time before the final hearing or trial of the suit." The question arises upon this language, "Was the application here made "before the final hearing or trial," in accordance with its intent and meaning?"

What was its intent? I think it will not be claimed that the word "final," as used in this provision, applies to or qualifies the word "trial." The word "hearing" has an established meaning as applicable to equity cases. It means the same thing in those cases that the word "trial" does in cases at law; and the words "final hearing" have long been used to designate the trial of an equity case upon the merits, as distinguished from the hearing of any preliminary questions arising in the cause, and which are termed interlocutory. This use and meaning of the words are too well established and too familiar to require reference. I assume, therefore, that the meaning of the statute is the same as though these words were transposed, and it provided that the application might be made at any time "before trial or final hearing," and that no implication can be raised by attempting to apply the word "final" to the word "trial," that congress intended to distinguish between those trials which might only partially dispose of the case, and such as might occur afterwards, and to allow this right of removal so long as any question yet remained to be tried, in order to the complete disposition of the suit. It will be observed that in the act of 1866, of which this is amendatory, the words were so transposed, and the application was required to be made "before trial or final hearing;" and their transposition in the present statute was evidently merely casual, not designed to effect, and not effecting any change whatever in their meaning. The obvious intention of the statute was to require the party desiring to apply for a removal to do so before trial in actions at law, and, what is the same thing, before final hearing in actions in equity. The reason and justice of this, if a removal is to be allowed at all, are apparent. Only the non-resident can apply for it. And it would constitute the very essence of injustice to give him the right to experiment upon the decisions of the state tribunals, obtaining those which if in his favor would be binding and conclusive upon the other party, but which if against himself, he could repudiate and take his chances again in a new tribunal. The statute did not intend to provide for any such wrong, but on the contrary clearly designed to exclude the possibility of it, by requiring the application to be made before trial or final hearing. It seems clear, therefore, that whenever in any state court there has been a trial in an action at law, or a final hearing in an action in equity, the result of which was an adjudication, which upon the principles governing judicial decisions would be final between the parties, as to any portion of the merits of the action, the case has passed beyond the stage when it was within either the letter or the spirit of the law. How was it with this suit in that respect? It was an equitable action, brought in 1860, to foreclose a mortgage in the circuit court of Dane county. The defendant, in accordance with the practice prevailing in this state, interposed by way of defense certain counter-claims, growing out of and connected with the transactions in which the mortgage originated. To these there was a demurrer by the plaintiff, which was overruled, and the order overruling it was affirmed on appeal to this court. Various proceedings were subsequently had, and the case was then brought to final hearing, and a decree rendered in favor of the defendant, dismissing the complaint. That was reversed on appeal to this court, and another final hearing was had, in which the plaintiff obtained a judgment. That was reversed by

this court, and the cause remanded for further proceedings; and at that stage of it this application for a removal was made. It will be seen, therefore, that instead of being made before final hearing, it was not made until after there had been two final hearings. And it is no solecism to speak of two final hearings in an equity case, any more than it is to speak of two trials in an action at law.

It is material, then, to consider what was the effect of the several decisions of this court in respect to the rights of the parties as to the matters involved in them. No doctrine is better settled here than that the matters decided become *res adjudicata*; those decisions became the law of the case, binding upon the parties, binding on the subordinate court, and disposing finally of the questions decided. Whatever further proceedings might be necessary to the ultimate disposition of the case, those questions were no longer open. *Luning v. State*, 1 Chand. 264; *Parker v. Pomeroy*, 2 Wis. 112; *Downer v. Cross*, Id. 371; *Cole v. Clarke*, 3 Wis. 323; *Reed v. Jones*, 15 Wis. 40. If this rule were peculiar to this state, still the decisions of this court would govern, as to the effect of our own judicial proceedings between the parties. But the same rule prevails everywhere; and it has been asserted by the supreme court of the United States quite as strongly as by any other tribunal. In *Martin v. Hunter*, 1 Wheat. [14 U. S.] 304, counsel raised a question as to the propriety of a former decision, the case having already been before the court on a former writ of error. On page 355, the court say: "In the next place, in ordinary cases, a second writ of error has never been supposed to draw in question the propriety of the first judgment, and it is difficult to perceive how such a proceeding could be sustained upon principle. A final judgment of this court is supposed to be conclusive upon the rights which it decides, and no statute has provided any process by which this court can revise its own judgments. In several cases which have been formally adjudged in this court, the same point was argued by counsel and expressly overruled. It was solemnly held that a final judgment of this court was conclusive upon the parties, and could not be re-examined." So it was held that the same rule prevailed in equity, and that a second appeal to that court brought up only the propriety of the proceedings in the court below, subsequent to the mandate on the first. *Hopkins v. Lee*, 6 Wheat. [19 U. S.] 109. In *Ex parte Sibbald*, 12 Pet. [37 U. S.] 492, that court said, "a final decree in chancery is as conclusive as a judgment at law. Both are conclusive of the rights of the parties thereby adjudicated." See also, *Bridge Co. v. Stewart*, 3 How. [44 U. S.] 413; *Roberts v. Cooper*, 20 How. [61 U. S.] 467. It appears, therefore, that by the principles universally recognized as applicable to the effect of judicial proceedings, there had been several trials of this case, both in the subordinate and appellate courts of this state, and several judgments by the latter, which, so far as our judicial system is concerned, were final and conclusive between the parties, as to the questions decided.

It is true, those judgments did not finally dispose of the case. But that fact does not at all impeach their finality as to the matters disposed of by them. There are few important cases but what are carried more than once into the appellate courts. But the fact that the judgments of those courts do not in the first instance completely dispose of the case, has never been supposed to annul their effect entirely, and to place the case, when it got back into the subordinate court, precisely as it would be if there had never been any trial or appeal whatever. On the contrary, as the authorities above referred to fully show, when the case gets back into the inferior court it carries with it the judgment of the superior as the established law of the case, and no questions

are open to further examination except those which that judgment has left open.

A trial or final hearing consists of the examination and determination both of questions of law and fact. In equity cases the court may determine both. On appeal this court may determine both. But the case may have been so presented that we could only properly determine the questions of law, leaving a further trial upon a part or all of the facts necessary for a complete adjustment of the controversy. This was true in this suit. The struggle in the case was upon the questions of law growing out of the defendant's counter-claims. Those questions were fully considered, and finally decided on the last appeal to this court; and the case was remanded for such further trial upon the questions of fact, as was necessary to its final determination. And yet after all these years of litigation, these repeated hearings and judgments, both of the subordinate and appellate courts of this state, it is now claimed that this application for a removal was made, "before trial or final hearing." If such had been the intention of congress, I cannot think it would have stopped where it did. If it would set aside and destroy the effect of repeated trials and judgments, why hesitate before the last one? If it would intervene after all the most important questions in the case had been tried and passed into judgments, binding and conclusive on the parties, why pause before the fact that some question, perhaps a minor and unimportant one, still remained to be tried, in order to a complete disposition of the case? When tried, the judgment concerning it could be no more final, no more binding, than the previous judgments had been as to matters involved in them. Hence, if they were to be overthrown, why not overthrow the whole, and allow the party to remove his case, and try it anew in a court of original jurisdiction, after it was finally and wholly disposed of by the judgment of the state court? There could be no greater objection to the justice of such a law than there is to it as it now stands. If it is to have the effect contended for. If the effect of two trials and judgments in all the state courts was to be annulled, there could be no reason why the same thing should not be done as to three or any other number necessary to dispose of the case.

But the act furnishes no evidence of such intention. On the contrary, both its letter and spirit exclude it. The law had formerly allowed only non-resident defendants to apply for a removal. And they were required to be prompt, and to make their election at the outset, and before taking any steps which could be construed into a voluntary submission to the jurisdiction of the state court. This act designed to extend the right to non-resident plaintiffs as well. It designed to extend the time, so that the application might be made at any time before trial or final hearing. But it did not design to go so far as to allow the party actually to submit his case to the judgment of the state court on the merits, and then, if its judgment should be against him, but should not happen to finally determine the case, to exercise his right of removal. To induce a court of justice to infer a design to effect such an object, to borrow the language of Chief Justice Marshall, "the intention should be expressed with irresistible clearness." But here, so far from that being the case, congress has explicitly required that the application shall be made "before final hearing or trial." And the spirit and object of the act unite with its letter, in conducting imperatively to the conclusion that its meaning was to require it to be made before the party had voluntarily submitted his case to any trial or final hearing whatever in the state court.

Nor is this conclusion at all impeached by the rule that has been established by the federal and other courts, under statutes authoriz-

ing appeals or writs of error from final judgments or decrees. It is generally held there, that the decree or judgment must be one purporting a full and final disposition of the case, and not on its face reserving a part of it for future decision by the court; yet, even in those cases, the rule has not been held with unreasonable strictness, but those decrees which substantially dispose of the merits of the controversy are held final so as to allow an appeal, although some matters essential to a complete execution of the decree are reserved for further examination and decree. Thus, in *For-gay v. Conrad*, 6 How. [47 U. S.] 201, a decree was passed disposing of the general merits of the action, but directing an account of rents and profits, and reserving that subject for further decree. A motion was made to dismiss, on the ground that the decree was not final. The court said: "The question upon the motion to dismiss is, whether this is a final decree within the meaning of the acts of congress. Undoubtedly it is not final within the strict technical sense of that term. But this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature." See, also, *Bronson v. Railroad*, 2 Black, [67 U. S.] 524, 531. But even if, under this class of statutes, it were held that the decree or judgment must be absolutely final to authorize an appeal, no argument could be drawn from it by analogy against the conclusion already arrived at. The difference in the objects of the two statutes would at once furnish an answer. The one is designed to regulate the exercise of an appellate jurisdiction, by which the judgments of an inferior tribunal may be reviewed. It is natural in such case to require the inferior court first to dispose, substantially at least, of the whole case, before the appellate power could be invoked. But the object of the other statute was not to provide for a review of the decisions of an inferior tribunal, but for the exercise of an election by a party to a suit in a state court, to transfer it to another court of original jurisdiction for trial. The design was to authorize an election between the two; not to give him a chance at both. And this object can only be accomplished by requiring, as the statute does, the application to be made before any trial or final hearing in the case. The object of the one statute was to prevent an appeal until everything had been decided. The object of the other was to authorize a removal only before anything had been decided.

It seems to me clear, therefore, that this case was not within the act of congress, and that the order for removal was unauthorized. I am aware that the learned judge of the district court of the United States for this district has reached a different conclusion. His opinion upon the subject is published in the *American Law Register* for April, 1869. Upon this point he says: "If the cause had been finally determined by either judgment of the circuit court, or by order of the supreme court, then the application for removal would not have been filed before 'the final hearing or trial.' But the last order of the supreme court reversing the judgment of the circuit court, and remanding the cause to that court for further proceedings according to law, opened the whole case to litigation, the same as if no judgment had ever been rendered. The supreme court in effect ordered a venire facias de novo, which required the circuit court to hear the cause as if no hearing or trial had taken place." If this is so, then this court has been laboring under a great delusion. If, after a case has been three times in this court, twice on appeal from final judgments in the court below, if after the essential vital legal questions upon which its de-

cision depends have been solemnly adjudicated by this court, and the cause remanded to the circuit, it starts there anew with nothing settled, "the whole case opened to litigation, as if no judgment had ever been rendered," then are not only our labors fruitless indeed, but those of the unfortunate litigants in the state courts are vainer than the labors of Sisyphus. We have not so understood the law. We have uniformly applied to our decisions, so far as relates to matters within our jurisdiction, the same rule which the supreme court of the United States applies to its decisions; and have held that they become the law of the case, binding on the parties and the subordinate courts, and that the questions decided are not open to further litigation. We cannot have erred in this, unless the decisions of this court constitute an exception to the rule by which those of all other courts are governed.

I cannot but regret that this difference of opinion has arisen between this court and the learned judge of the district court. It may be the cause of much embarrassment and expense to the parties. But inasmuch as the difference does exist, I know of no way to avoid its consequences, whatever they may be. There seems but one course open to this court, consistent with its duty to itself and to the state, when its appellate power is invoked in the regular course of judicial proceedings, and that is, to exercise the jurisdiction which it believes itself to possess, according to its best judgment, whether that be well or ill founded.

The remainder of the opinion relates to the question whether it is competent for congress to authorize a non-resident plaintiff, who has voluntarily brought his suit in the state court, to obtain a removal.

[Akerly v. Vilas, 24 Wis. 165.]

Case No. 120.

AKERLY v. VILAS.¹

[3 Biss. 332; 5 Chi. Leg. News, 73; 16 Int. Rev. Rec. 154.]

Circuit Court, W. D. Wisconsin. Sept., 1872.

REMOVAL OF CAUSES—ORIGINAL PLEADINGS—DEFENSES PRESERVED—INTERLOCUTORY ORDERS—ESTOPPEL.

1. An action removed after issue joined, from the state to the federal courts, under the act of July 27, 1866, as amended by the act of March 2, 1867, must be tried in the federal courts upon the pleadings certified from the state courts, and the same force and effect must be given to them by the federal courts as in the state courts if the case had remained there.

2. In such a case the cause stands in the federal courts as it stood in the courts of the state, the former clothed with the powers of the state courts, and all rights acquired by, and all defenses allowed under the state laws are to be recognized in this court.

3. Congress did not intend by these statutes to allow either party to obtain a practice or ruling more favorable to them, or when dissatisfied in the state court to obtain a trial de novo.

4. The decision of a court upon a motion does not partake of the quality of a judgment in such a sense as to preclude the same court from a further examination of the same question. The proceedings before judgment are within its control, and orders made may be revised, and vacated or set aside.

¹[Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

5. The doctrine of estoppel does not go so far as to preclude a further inquiry and a rehearing of a motion upon an enlarged state of facts, nor prevent this court from revising an order made in the case while pending in the United States circuit court for the district from which it had been removed.

6. The doctrine of *res adjudicata* considered.

[7. Cited in *Wolff v. Connecticut Mut. Life Ins. Co.*, Case No. 17,924, to the point that, where a suit comes into the federal court by removal, it brings along with it as an incident all the costs which accrued or attached under the state law during the time it remained in the state court.]

In equity. This was an action commenced in the circuit court of Dane county, in the State of Wisconsin, in 1860, to foreclose a mortgage given by the defendant to plaintiff and one Mrs. Lord, she having assigned her interest to plaintiff. The defendant answered, setting up various defenses and counter claims, among others an alleged breach of covenant by the plaintiff, for which he claimed damages in the sum of \$100,000, stating that the mortgage was given to secure a part of the purchase price of certain real estate conveyed by plaintiff to defendant by deed, containing covenants of quiet enjoyment and general warranty, and averring a breach thereof by the plaintiff. The circuit court struck out the counter-claim, but on appeal the supreme court of the state held it well pleaded under the state practice, and remanded the case for further proceedings. After such decision, and after the testimony had been taken upon the issues made up in the state court, the plaintiff procured a removal of the case to the United States circuit court for the district of Wisconsin, under the act of March 2, 1867. For opinion on this removal consult 2 Biss. 110, [*Akerly v. Vilas*, Case No. 119.] The plaintiff, by reason of an order of the state circuit judge, prohibiting the clerk from furnishing copies of the pleadings and proceedings in the case in that court, was unable to obtain certified copies of the record, etc., from the state court, but the United States court allowed sworn copies to be filed in lieu thereof, and thereupon entered and docketed the case. The plaintiff then filed a new bill and the court entered an order or rule that defendant plead or demur thereto. Defendant moved to strike it from the files, which motion was denied. The defendant then answered on the merits and plaintiff excepted. Before the exceptions were passed upon, the defendant obtained an order, under the 6th section of the act dividing Wisconsin into two districts, transferring the case from the eastern to this district. After the transcript of the record of the eastern district was filed in this court, the defendant moved for an order that plaintiff procure and file certified copies of the process, pleadings, etc., from the state court, which motion was granted, and such copies were procured and filed. The defendant then moved for an order striking out all the pleadings filed in the

federal court, and directing the action to be tried on the pleadings and issues made up in the state court. The plaintiff, at the same time, moved that his exceptions to the defendant's answer (which contained the same matters of defense and counter claims as the answer filed in the state court) be allowed. The case is reported in its various phases, in 15 Wis. 401; 21 Wis. 88, 377; 23 Wis. 207; 25 Wis. Appen. A. 703.

Finches, Lynde & Miller, for complainant.
Wm. F. Vilas & P. F. Spooner, for defendants.

Before DRUMMOND, Circuit Judge, and HOPKINS, District Judge.

HOPKINS, District Judge. This case, as presented by the motions of the respective parties, involves but two questions requiring consideration at this time.

First. Does the act of July 27, 1866, (2 Brightly, 115; 14 Stat. 306,) as amended by act of March 2, 1867, (2 Brightly, 116; 14 Stat. 558,) providing for the removal of certain cases from the state to the federal courts for trial, authorize or allow the parties to file new pleadings in the federal courts, or to change the issue, made up in the state courts before removal?

Second. If not, is this court estopped by the orders made while in the circuit court of the United States, before the removal of the cause to this district, one, requiring the defendant to answer the new bill filed in that court, and the other, denying a motion made by the defendant to strike such bill from the files? Another important question might arise, if the court should reach that point, viz.: Whether the decision on those motions involved or settled the kind of answer, or the matter of the answer, the defendant might put in. It seems to me, if it should be necessary to consider this, that the alleged estoppel might be found not to extend to or embrace the questions presented on this motion.

The defendant answered, setting up the history of the case in the state courts, and the same defenses that he set up in the state court, upon which the various proceedings recited therein had been had.

The complainant filed exceptions to that answer, which present the question, for the first time, it seems to me, as to the kind of defense and answer the defendant might interpose in this court; or, in other words, whether the case should be tried upon the issues made up in the state court, or whether it should be considered as commenced *de novo*, and new pleadings be filed containing only such matters of defense as are permissible under the practice and pleadings of this court in cases originally commenced herein. This is the important question and it requires careful consideration. The practice, where a case was removed to the federal court, under the judiciary act of 1789,

(1 Brightly, 128; 1 Stat. 79), in states where the statutes had changed the common law forms, was to file new pleadings. That act, however, only required the party removing to file copies of the process. Section 12. And, as under that, the application had to be made on the defendant's entering his appearance, it was before he had plead, or taken any steps in the case. So the courts had to treat it as a case just commenced in the federal courts, and apply to it the practice existing there.

The act under which this case was removed is essentially different from that in many respects, and requires a very different practice.

The act under which this case was removed authorizes the application to be made after issue joined, and requires the party petitioning for removal to give ball to enter in the federal court copies of all process, pleadings, depositions, testimony, and other proceedings in said suit. The act to which this is amendatory declares that "all pleadings filed or entered as aforesaid in the United States court by the defendant applying for the removal of the cause, shall have the same force and effect in every respect and for every purpose as the original pleadings would have had by the laws and practice of the courts of such state if the cause had remained in the state court." In that act, as in the amendment to it, the following provision is contained: "And said copies being so entered as aforesaid, in such court of the United States, the cause shall then proceed in the same manner as if it had been brought there by original process." This, the plaintiff's counsel claims, makes it necessary to treat the case as just commenced in this court by the service of process, and to take the usual proceedings as from that point. I cannot concur in that view. Full effect is given to that provision by holding it to mean that the jurisdiction of the court over the parties and the subject matter is as complete when brought in in that way, as when obtained by the service of original process.

The same phrase or sentence is in the original act of 1789, and in the act of 1866, and congress could not have intended it should receive any such construction, for then it would conflict with the provision in the last act declaring what were the force and effect of the pleadings filed in the state courts. The act of 1867 being an amendment of the act of 1866, according to the rule for the construction of amendments to statutes, is to be read as if incorporated into the original act, which would make the clause in that act prescribing the effect to be given to the pleadings in the state courts applicable alike to cases of removal under the amended act.

Thus construed, they mean that all proceedings necessary after the removal to a final trial or hearing shall be conducted in the same manner, and the case, as to such proceedings, shall be regarded as if origi-

nally commenced in this court. In the language of the statute, "the state courts shall proceed no further therein, and the suit shall thereafter proceed in the federal courts." If it were not so, and the proceedings were not to stand as the pleadings in the cause, why require copies to be filed? What was the object of this change from the judiciary act of 1789? That only required copies of the process to be filed; this, copies of the process, pleadings, depositions, testimony and proceedings.

I cannot construe the statute otherwise than that the issues made up in the case on its removal remain and constitute the issues to be tried in the federal courts; and as a necessary consequence, all the rights secured by either party under the practice and laws of the state where the suit was commenced, are impressed upon the case, and as full effect must be given to them in the federal as would have been given by the state courts if tried there. And by this is meant nothing more than this—that when the case is removed, it stands in the federal court as it stood in the inferior and appellate courts of the state, the federal courts clothed with the powers of all the state courts through which the case might pass, but subject of course to the limitations existing under our mixed system, and giving the proper effect only to the adjudications of the highest court of the state, as well in the past as in the future progress of the case. There is no hardship in this construction. A non-resident plaintiff voluntarily commences a suit in the state court when he might sue in the federal court. He therefore has no reason to complain. A non-resident defendant, when sued in the state courts, may remove before pleading, if he chooses; so he cannot complain. Therefore, to hold, after such voluntary action of the parties, that all rights acquired by, and all defenses allowable under the state laws, are to be recognized and preserved in the federal courts, is not inflicting any hardship upon either party, certainly not on the party entitled to a removal.

The opinion of the court, by Chase, Ch. J., in *West v. City of Aurora*, 6 Wall. [73 U. S.] 139, a case removed from the state court of Indiana on application of plaintiff after plea by defendant, seems especially applicable upon this point. In that he says: "They (the plaintiffs) were bound to know of what rights the defendants to their suit might avail themselves under the code (of Indiana.) Submitting themselves to its (the state's) jurisdiction, they submitted themselves to it in its whole extent." The same doctrine is laid down in *Thompson v. Railroad Co.*, Id. 134. By the statutes of Ohio, a suit was authorized to be prosecuted in the name of the real party in interest, which was not the rule in the United States courts. The case was properly commenced under the Ohio statute, and the supreme court, in passing upon the effect to be given to that

statute, say: "If they could have maintained it in their names in the state court, they had an equal right to maintain it in their names when it arrived in the federal court."

So the fact that the defendant's answer contains defenses which would not be allowable in actions originally commenced in this court, does not determine the question of his right to interpose such an answer. If such defenses are pleadable in the state courts, they must be allowed in this court, for all the rights acquired by the defendant under the state laws before removal, are, and must be, recognized and preserved here as sacredly as in the state courts. In such cases the federal courts have to look to the state laws and practice to determine the sufficiency of the pleadings. This construction prevents abuse, while the other would allow parties to speculate and experiment upon their chances in the state courts, and, if they found the state law gave their adversaries more privileges than they would have under the practice and system of pleadings in the federal courts, they would remove their cases to that court, and thus strike out the pleadings and defenses they might not like, and commence and continue their case upon a theory better suited to their purposes.

The act does not permit any such injustice. It allows the removal of the case to the federal courts for trial in the condition it is in when removed, and provides for finishing it up from that point in those courts.

It does not confer upon the court appellate, but only original jurisdiction, concurrent with the state courts. The case is transferred cum onere. It may, therefore, be conceded that the defenses set up in this answer would not be admissible under the system of pleadings and practice of this court. But that does not dispose of the question under consideration, for congress has the power to change the form of pleadings, and adopt any system of practice and pleadings it may choose. That matter is wholly within its discretion. This it has recently done in cases other than those of equity and admiralty, and there is no doubt it could change the forms of pleadings in those cases also. Act of June 1, 1872. And it may fairly be held that by providing for the removal of cases after issue joined, they intended to establish or allow a different practice in such cases; to accept the pleadings made up in the state courts, and to try such cases on those pleadings, and, to that end, the pleadings, testimony, and all proceedings were required to be certified so that the federal court can take up the case in the condition it receives it, and try it, so far as the pleadings are concerned, as it would have been tried in the state courts, preserving to the respective parties all their constitutional rights. This construction gives force and effect to all of the provisions of the act, and seems to be its natural meaning.

The removal is allowed because it is feared that a fair trial cannot be had from "prejudice or local influence," not because the statutes of the state in reference to the practice of its courts are different from the practice of this court. Congress did not intend to condemn the codes and mode of procedure in the state courts, either as unsuited or inadequate to the attainment of justice.

The object of the statute was to secure an impartial trial of the case, having reference to the tribunals, the courts, or juries, not the systems of practice that might exist in the several states. It did not intend to allow a case to be removed because a state might adopt the code, or allow to defendants additional defenses to those permitted in the federal courts.

This case would furnish as striking an illustration of the injustice of an opposite construction as could well be supposed. It had been pending and severely litigated in the circuit and supreme courts of this state for a period of eight years before removal. It had been repeatedly before the supreme court of the state. The pleadings had been considered and sustained by that court, as in accordance with the statutes of the state. The testimony bearing upon the issues had been taken by both parties. Now, to allow a removal of the case, at that stage, to this court, and to reject all the pleadings, decisions and proceedings had in the case before removal, and commence de novo, would be a reproach upon our system of jurisprudence. But it is argued by the plaintiff's counsel, that if this construction is correct, as an original proposition, the court is estopped from so holding, because of the order of the circuit court of the United States, before removal here, denying the motion to strike from the files the bill filed therein, after the removal from the state court. It therefore becomes necessary to examine whether or not this court is thus restricted. It is undoubtedly true that courts very seldom rehear a matter or review a decision made upon a motion upon the same facts; yet they may. The conclusive effect of a judgment of a court of competent jurisdiction is not questioned. But the question here is, whether that rule embraces this case. Did that decision partake of the quality of a judgment in such a sense as to bring it within the doctrine of res adjudicata, so as to preclude that court, if this cause had continued before it, from further examining the question presented here; and if it did not, then this court is not estopped, for it has the same control over the case as the other court would have had, and is not estopped to any greater extent than that, and it is its duty to decide all questions that may be presented, and it cannot avoid that responsibility on the ground of estoppel, unless the decision clearly brings it within the established rules on that subject. It cannot rightly withhold its judgment on the

ground of courtesy or comity unless the former decision is final. The most generous comity does not require one court to give to the decision of another court of concurrent jurisdiction any greater force than the court pronouncing it. Comity does not enlarge the conclusive operation of the doctrine of res adjudicata.

It therefore becomes necessary to examine the cases and ascertain what are the rules on the subject of res adjudicata, and to what cases, and under what circumstances they are to be applied. The reported cases have left the question in some doubt and confusion. The United States supreme court, in *Breedlove v. Nicolet*, 7 Pet. [32 U. S.] 413, in effect hold that decisions upon motions are not final or absolutely binding upon the court in the further progress of the cause. In that case, after several pleas in bar, the defendant offered, and was allowed by the court, to plead in abatement to the jurisdiction; and afterwards, and on the trial, that plea was disregarded and taken from the files of the court, although it had been placed there by order of the court. On error to the supreme court the point was distinctly taken, "that the plea to the jurisdiction was lawfully filed, and ought not to have been taken from the files by the court." On that question, Marshall, C. J., said: "All the proceedings are supposed to be within the control of the court while they are in paper, and before a jury is sworn or a judgment given. If so, the orders made may be revised, and such as in the judgment of the court may have been irregularly and improperly made, may be set aside." In that case, the court had ordered the plea to be filed, which was on the trial disregarded and taken off. In this case the court denied the motion to strike the bill from the files. No distinction is perceivable in the cases, so far as the question of the power of the court is concerned, and it seems to me, according to the doctrine of that case, that the orders relied upon in this do not deprive the court of the power of reconsidering those questions and of vacating those orders, if it thinks it right to do so. Such being my understanding of that case, the plaintiff's objection on the ground of estoppel cannot be sustained. Nor is this doctrine without support in other well-reasoned cases. In *Simson v. Hart*, 14 Johns. 62, 76, Spencer, J., who delivered the opinion of the court of errors, in speaking of decisions upon motions, says: "In the same court these decisions are not considered as so final and decisive as to furnish a bar to another and further decision of the question. Courts, to prevent vexatious and repeated applications upon the same point, have rules which preclude the agitation of the same questions upon the same state of facts. These rules are for the orderly conduct of business, and are not founded upon the principle of res adjudicata."

This language was used in the case of a bill in equity, filed to set off judgments obtained in different courts. It was objected that because a court of law which had jurisdiction had denied a motion to accomplish the same object, that a court of equity could not grant the relief asked. But the court held that the decision of the motion did not bar the suit; that such application, and the decision thereon, did not partake of the quality of a judgment, so as to be a bar, on the ground among others, "that the same court might, with entire propriety, hear a new discussion of the question." See, also, *Dickenson v. Gilliland*, 1 Cow. 495; *Arden v. Patterson*, 5 Johns. Ch. 52.

But there is another answer to the pretended estoppel. The doctrine of estoppel does not, within any rule, go so far as to prevent further inquiry and a rehearing of a motion upon an enlarged state of facts. "The decision of a court upon a motion is received as an estoppel only upon facts exactly similar. The case must be exactly commensurate with what it was when the prior order was made." *People v. Mercein*, 3 Hill, 399, 416. By this language it will be seen with what strictness the courts apply the rule when they recognize its existence. *Mitchell v. Allen*, 12 Wend. 290; *Dollfus v. Frosch*, 5 Hill, 493. That construction defeats the estoppel set up here. This case is changed; it is not in the exact condition it was when the orders relied upon were made. At that time certified copies of the pleadings in the state court were not filed. Since then the defendant has answered, and the plaintiff has excepted to it, and this court has granted an order after argument requiring the plaintiff to procure and file copies of process, pleadings, etc., which has been done, so that the pleadings and proceedings had in the state court are now for the first time before this court in an authentic form. I think, therefore, the case is so far changed on this motion that this court, within the most generous extension of the doctrine of res adjudicata, is not estopped from entertaining and deciding the questions now presented. But, as I at first suggested, I do not see how the decision relied upon could be extended so as to include and determine the question as to what kind of an answer the defendant might interpose. That could not properly be considered until the answer was filed. I therefore think the motion of the defendant should be granted.

NOTE, [from original report.] The federal courts follow the state practice in cases removed under the acts of congress. *Republic Ins. Co. v. Williams*, [Case No. 11,707.] Also, in many respects, in pleadings and practice in bankruptcy proceedings. In *re Findlay*, [Id. 4,789.] That congress did not intend to allow a party dissatisfied with the ruling of the state court to obtain a more favorable tribunal, or a trial de novo, consult *Kingsbury v. Kingsbury*, [Id. 7,817.] That at any time previous to final decree, all interlocutory orders are subject to

examination and revision, see *Pullan v. Cincinnati & C. A. L. R. Co.*, (May term, 1873,) [Id. 11,461.] After a judgment in the state court which has been reversed by the appellate court and a new trial ordered, the case can be removed. *Dart v. McKinney*, [Id. 3,583.] But if in a chancery proceeding the decree is reversed, and the cause remanded with instructions to the court below to dismiss the bill, an application for removal comes too late. *Boggs v. Willard*, [Id. 1,603.]

Case No. 121.

AKIN v. LIVERPOOL & LONDON & GLOBE INS. CO.

[6 Ins. Law J. 341.]

Circuit Court, E. D. Arkansas. Oct. Term, 1876.

INSURANCE—INSURABLE INTEREST—RENEWAL OF POLICY—CONDITIONS—WAIVER—PROOF OF LOSS.

[1. A holder of a policy of fire insurance assigned it to the mortgagee of the property to the extent of his interest therein, with the assent of the company, and thereafter paid the premium required for the renewal of the policy, taking the usual renewal receipt. By mistake, the company, instead of renewing the policy, made out a new policy to the mortgagee, which was never delivered, and of which neither mortgagee nor mortgagee had any knowledge. *Hell*, that the contract of insurance was complete between the mortgagee and the company, and an action at law thereon would lie for the recovery of the mortgagee's interest therein.]

[2. Where a fire insurance policy provides that no action shall be brought unless within a year from the date of the loss, and a complaint was filed within the year, but, at the request of the agent and attorney of the company, who agreed to enter the appearance of the defendant, no summons was issued, the company cannot thereafter set up the year's limitation as a defense.]

[3. The refusal of an agent of an insurance company for adjusting losses to recognize the right of the insured to prove for his admitted loss, he being ready and willing to do so, is a waiver by the company of such proof; the more so when proof has been furnished by the mortgagee of the destroyed property, to whom, by mistake, a policy thereon had been made out.]

[See *Bennett v. Maryland Fire Ins. Co.*, Case No. 1,321; *Rumsey v. Phoenix Ins. Co.*, 1 Fed. Rep. 396; *Norwich & N. Y. Transp. Co. v. Western Mass. Ins. Co.*, Case No. 10,363.]

[At law. Action by C. C. Akin against the Liverpool & London & Globe Insurance Company on a contract of fire insurance. Trial by the court. Judgment for plaintiff.]

[C. C. Akin, the holder of a fire insurance policy on an hotel and furniture, had mortgaged the property to Wassel & Moore, and, with the consent of the company, assigned his policy to them to the extent of their interest. Thereafter Akin paid to the local agent at Hot Springs the premium for the

renewal of the policy, and took a receipt in the following form:

["Hot Springs, Ark., July 9th, 1872. \$176.50. Rec'd of John L. Miller, for the use of C. C. Akin, one hundred and seventy-six 50-100 dollars for the renewal of a policy of insurance on the Akin House and furniture, issued in the Liverpool and London and Globe Insurance Company, on five thousand dollars. J. J. Sumpter, Agent."]

[Wassel & Moore, wishing to make sure of the renewal of the policy, made application therefor to the agent at Little Rock, but, on being informed of the action of Akin, were satisfied therewith, and took no further steps. By mistake the company made out and executed a policy to Wassel & Moore, instead of to Akin, and sent it to their agent at Little Rock, in whose office it remained until after the property was destroyed by fire, unknown to either Akin or Wassel & Moore.]

CALDWELL, District Judge. It is contended that plaintiff has mistaken his remedy; that, upon the facts proved, the case is one of exclusively equitable cognizance. This contention is based on the assumption that an action at law will not lie upon a contract of insurance unless a policy has been issued and the action is founded on such policy. It is well settled that where there is a valid agreement for insurance, the failure of the insurer to issue a policy, is no impediment to a recovery of the amount of insurance, in case of loss, in an action at law upon the contract. *McCulloch v. Eagle Ins. Co.*, 1 Pick. 277; *Lightbody v. North American Ins. Co.*, 23 Wend. 18; *State Fire & Marine Ins. Co. v. Porter*, 3 Grant, Cas. 123; *Eureka Ins. Co. v. Robinson, Rea & Co.*, 56 Pa. St. 256; *Benjamin v. Saratoga Mut. Fire Ins. Co.*, 17 N. Y. 415; *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216; *Kohne v. Insurance Co. of North America*, [Case No. 7,920;] *American Horse Ins. Co. v. Patterson*, 23 Ind. 17; *New England Fire & Marine Ins. Co. v. Robinson*, 25 Ind. 536; *Fland. Fire Ins.* 118.

The plaintiff has a good cause of action at law on the contract for the renewal of the policy. The premium was paid for the renewal for one year, of an existing policy, the precise terms of which were known to both parties, and when the premium was paid by the plaintiff, and accepted by the defendant, upon such an agreement, the contract of insurance was complete; there remained no more for the plaintiff to do, and in case of loss, the legal liability of the defendant was perfect.

It is common practice to renew, or continue in force, existing policies by means of what is termed a renewal receipt. This is what was done in this case. The plaintiff is not to be prejudiced by the mistake of the defendant in making out a policy

to Wassel & Moore; and certainly the defendant will not be heard to say that the plaintiff shall not have the benefit of his contract until he has gone into a court of equity, and annulled or reformed a policy in which he is not named, and has no interest, which he never asked to be issued, which was never delivered to him, and of the very existence of which he was ignorant.

2. The defense that the action was not brought within one year from date of loss, is not sustained. The complaint was filed within the year, but no summons was issued, because the then agent and attorney of the defendant requested that none should be issued, and agreed to enter the appearance of the defendant, and plead to the action, and took the complaint off the files for that purpose. This took place before the year expired, and for the purpose of disposing of this question, the subsequent appearance of the defendant must have relation back to the date of the agreement.

It would be gross fraud to allow the defendant to come in by other counsel, after the year had elapsed, and set up that the suit was not brought within the year, because no summons had issued on the complaint, when the plaintiff had refrained from issuing such summons at the request of the defendant's agent and attorney, and upon the assurance that defendant's appearance should be entered with like effect as if summons had issued on filing the complaint.

3. After the loss, the agent of the defendant for adjusting losses and the plaintiff met in this city. The plaintiff was ready and willing to furnish the requisite preliminary proofs of loss, in accordance with the terms of defendant's policy; but the defendant's agent misconceived the rights and duties of the parties, took the ground there was no contract of insurance existing between the plaintiff and defendant, and refused to recognize plaintiff's right to prove for his admitted loss, on that ground. By this action the defendant waived the production of preliminary proofs of loss by the plaintiff. *Fland. Ins.* 541.

Besides, under the advice and direction of plaintiff's agent, Wassel & Moore, whom the agent insisted were the only proper parties to do so, did make out and furnish the preliminary proofs of this very loss.

The defense is without merits, and judgment will be entered in favor of the plaintiff for \$7,469, being the amount of the policy and interest thereon from date of loss, less the sum of \$3,875 paid with plaintiff's assent to Wassel & Moore.

AKRON CEMENT & PLASTER CO., (CUMMINGS v.)

[See *Cummings v. Akron Cement & Plaster Co.*, Case No. 3,473.]

Case No. 122.

The ALABAMA.

The GAMECOCK.

[1 Ben. 476.]

District Court, S. D. New York. Oct., 1867.³

COLLISION—TOW AND TUG—LOOKOUT—LIGHTS—PILOT—PLEADING.

1. The bark *Ninfa de los Mares* was coming up the Narrows into the harbor of New York, about 200 yards from the west shore, in the evening. She was towed by the steam tug *Gamecock* at the end of a hawser. She had the regulation lights set. The tug, however, did not carry the two white lights required by law to be carried by a steam vessel having another in tow, but had the lights required to be carried by all steam vessels. The steamer *Alabama* was going down the Narrows to sea. She was in charge of a pilot, but had no lookout stationed forward, the quartermaster in the wheelhouse, who was assisting the man at the wheel, being the only lookout. She saw the lights of the tug, and directed her course so as to pass her some fifty or a hundred feet to the eastward, but she did not see the lights of the bark in tow until she was very near the tug, when the latter gave two whistles, and a voice from her shouted that the steamer would run into the bark. The steamer's helm was at once put hard a starboard, but she ran into the bark, striking her on her starboard bow, and sinking her in a few minutes. The libel was filed against both the steamer and the tug to recover the damages. *Held*, that the *Alabama* was in fault in not having a proper lookout, and that her going so close to the tug, when there was abundant sea room, was, to say the least, not evidence of very careful management on her part.

[Cited in *The Ancon*, Case No. 348.]

2. That the fact of her being in charge of a pilot was no defence.

[Cited in *The Ancon*, Case No. 348.]

3. That the tug was also in fault in not having the lights required by law, and that the collision was the result of these faults on both vessels.

4. That where injury is done by or received by a vessel in tow of another, the inquiry, by which the responsibility of either vessel is to be determined, should always be as to which party is the principal and which is the servant.

5. That in this case the tug was the principal, and the *Alabama* could not charge the tug's negligence as a fault upon the bark.

6. That the fact that the libel did not specify the want of proper lights on the tug as an element in her negligence made no difference, there being no dispute as to what lights the tug had, and no surprise upon her as to the evidence given about her lights. That, if desired, an amendment of the libel to that effect would be allowed.

[In admiralty. Libel for collision. Decree for libellant. Modified on appeal by circuit court, in *The Alabama*, Case No. 123, but afterwards affirmed by supreme court, (92 U. S. 695.)]

¹[Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

³[Decree of district court modified by circuit court in *The Alabama*, Case No. 123, but affirmed by supreme court, 92 U. S. 695.]

This was a libel for a collision brought by Nicholas de las Casas, the owner of the Spanish bark Ninfa de los Mares against the steamer Alabama and the steam tug Gamecock, both of them American vessels. The collision occurred about six o'clock P. M. on the 15th of December, 1865, in the Narrows, a little below Fort Richmond, on the Staten Island side, and about 200 yards easterly from the shore. The bark was on a voyage from Havana to New York, and was in tow of the tug going up through the Narrows to New York. She was towed by a hawser about fifty or sixty fathoms long, running from the stern of the tug to her port bow. The Alabama was proceeding to sea from New York on a voyage to New Orleans. The Alabama and the bark came into collision, and the result was that the bark was cut to the water's edge, on her starboard bow, near her fore-rigging, and sank, and was totally lost. The bark charged the fault on both of the other vessels. The case made by the libel was, that some ten or fifteen minutes before the collision, the port light of the Alabama was observed from the bark, bearing from one and a half to two points on her starboard bow, and apparently approaching in an opposite direction; that the bark had her proper lights set; that her course was about north to north half-east; that her movement was wholly dependent upon that of the tug, her master having employed the tug about 1 o'clock P. M. of that day to tow her to New York; that a few minutes before the collision a double whistle was heard from the tug, as a signal for the Alabama to pass the tug and bark on their starboard side, and for the bark to starboard her wheel, and that the tug would starboard her wheel; that this was done by the tug, but that the Alabama came right on into the bark, although the bark, by starboarding her wheel, in obedience to the signal of the tug, did all that she could to avoid the collision; and that there was no fault on the part of the bark. In regard to the fault of the other vessels, the libel averred that the collision happened "wholly through the carelessness, mismanagement, and improper seamanship of those in charge at the time of the said steamer, and of the said tug boat, in suffering their respective vessels to approach so near each other, and then on the part of those in charge of the said tug boat, in permitting the said bark to be so hit, and on the part of those in charge of the said steamer, in permitting her to so hit the said bark." The answer of the Alabama set up, that she left her dock in New York about five o'clock P. M., under charge of a pilot; that her lights were set and burning, and she was going at a slow rate of speed, and had a competent lookout properly stationed and faithfully attending to his duty; that shortly after 6 o'clock P. M., when the Alabama was near Fort Richmond, she discovered the tug a considerable distance off, bearing on her port

bow; that, as the vessels approached each other, the tug changed her course suddenly, without giving any warning, and attempted to cross the Alabama's bow, and pass on her starboard side; that as soon as that intention was manifested, every effort was made by the Alabama to avoid a collision, and she cleared the tug, but collided with the bark; that the night was dark, and the fact that the tug was towing the bark on a line could not be seen or known from the Alabama before the vessels came together, or so nearly together that it was impossible to avoid a collision with the bark; that the bark had all her sails furled and could not be distinguished from a vessel at anchor, and had no proper lights or lookout, and no warning was given that she was moving astern of the tug; that the bark was responsible for the conduct of the tug, and the tug and the bark were respectively improperly and unlawfully navigated; and that the collision occurred through the fault and improper navigation of the bark, individually or in common with the fault of the tug, and not by the fault of the Alabama.

The answer of the tug averred that the towing was to be and was performed in the usual manner; that the collision did not occur through the fault of those on board of the tug; that when the Alabama was first observed from the tug she bore on her starboard bow, sailing in an opposite direction; and that she should have stopped or passed the tug and bark at a safe distance to the eastward, as she was well able to do, in which case the collision would not have taken place. The bark had a pilot on board, and was steering as nearly as possible in the wake of the tug. Her proper lights for a sailing vessel being towed were set and burning, that is, a green starboard light and a red port light, and they were properly arranged. She carried no light calculated to mislead the Alabama. The tug had the proper green and red side lights, but she did not have the two white mast-head lights arranged vertically, which were required by law to be carried by a steam vessel, when towing another vessel, in addition to the colored side lights, in order to distinguish her from other steam vessels. Instead of those lights she had a single white light on a flag pole aft. The Alabama had her proper colored side lights and her white foremast light. In this condition of the lights on the vessels they approached each other.

The pilot of the Alabama testified, that he was heading south half-west when he first saw the lights of the tug, two miles or more away; that he was then a little above Clifton, and about a quarter of a mile from the shore, and the tug's lights bore south half-east, half a point or a little more on his port bow; that he then saw her green and red lights and her white light above; that, on seeing those lights, he ordered the man at the wheel to look out for his port wheel so as to

pass to the right; that he then discovered that the tug was trying to cross his bow, the tug being to the eastward of the lights on Sandy Hook and the Navesink Highlands, and those lights being half a point to the eastward of the course of the Alabama, and the tug appearing to him to be drawing across those lights to go to the westward of the Alabama; that he then ordered the man at the wheel to keep his helm starboard, and it was kept starboard until he discovered that the tug would go clear of the Alabama, and then he told the man at the wheel to steady; that the next thing he heard was two blasts from the steam whistle of the tug, which came when the tug was not more than sixty feet from the Alabama; that at that time he saw the green and white lights of the tug; that at the time the whistles blew he heard a hail from the tug, warning him that he would be on the bark; that the helm of the Alabama was immediately put hard to starboard, and her engine was slowed, and stopped and backed, but she struck the bark within a minute after the hail; that he did not know until the hail that the tug had a vessel in tow; and that he saw no lights on the bark. On his cross examination he said that when he saw the tug drawing to the westward he starboarded to let her go to the westward of him, and straightened on his course when he thought the tug had room enough to go clear on the westward; that the whistles blew right after he straightened on his course; that he arrived at the conclusion to let the tug pass to the westward of him from three to five minutes before the tug blew the whistles; and that he expected the tug to pass him from fifty to one hundred feet off.

The captain of the tug testified that he was as near the Staten Island shore as he considered it safe to go with the bark; that up to the time he blew his whistles the Alabama was all the time on his starboard bow; that he did not change his course up to the time he blew his whistles; that when he blew his whistles he starboarded his wheel a little—all he dared, as he was then within two hundred yards of the shore; that when the Alabama was a quarter of a mile away, he saw her white light and both of her colored lights; and that the tug was heading between north and north by west.

E. W. Stoughton and J. E. Parsons, for bark.

Beebe, Donohue & Cook, for tug.

Owen, Nash & Gray, for steamer.

BLATCHFORD, District Judge. I take the testimony of the two witnesses who were piloting the respective steam vessels as showing more clearly than any other testimony the actual course of the navigation of the vessels. The captain of the tug, who was in her pilot house at the wheel all the time, had no apprehension of any collision with the Alabama. He did not put his helm to port,

or change his course, or signify, by giving one blast of his whistle, that he desired each vessel to keep to the right. As to any change of course by the tug, I think the clear weight of the testimony is, that the tug did not change her course before she blew the two whistles at the very moment of peril. The pilot of the Alabama did not blow any whistle as a signal to the tug to take the one side or the other. He arrived at the conclusion that the tug was going to the westward, and, acting on that conclusion, he starboarded his helm until he thought he could go clear of her on the eastward, and then he straightened on his course, intending to clear her by from fifty to one hundred feet. The tug did not port her helm, and thus bring herself and the bark into the danger which the Alabama was trying to avoid. She kept her course, and any apparent drawing of the tug to the westward, as seen from the Alabama, must have been the effect of the starboarding by the Alabama of her own helm, and not the cause of that starboarding. If the Alabama had thought that she and the tug were meeting end on, or nearly end on, so as to involve risk of collision, she would have ported her helm and signalled the tug by her whistle. But the Alabama starboarded her helm and gave no signal, and for the manifest reason that she apprehended no collision; and the tug certainly apprehended none. The Alabama was in no manner thwarted by the movements of the tug or of the bark, in carrying out her purpose of going to the eastward. She elected to go to the eastward a sufficient length of time before the collision to enable her to carry that intention safely into execution, as respected both the tug and the bark, but for two circumstances. These were (1st) the resolve of the Alabama to pass as close to the tug as within from fifty to one hundred feet; (2d) the absence of all knowledge on the part of the Alabama that the tug had a vessel in tow. The intention of the Alabama to pass so close to the tug would not perhaps, of itself, unattended by any other facts, be sufficient to charge her with fault in this collision with the bark. But she had abundance of room to the eastward, and a broad channel in that direction, seven or eight times in width the distance at which the tug was from the western shore, with sufficient depth of water, and it was, to say the least, not evidence of very careful navigation on the part of the Alabama, that she did not try to give a wider berth to the tug. But still the Alabama went clear of the tug, and she would doubtless have gone clear of the bark, if she had known that the bark was in tow astern of the tug. The failure of the Alabama to know that the tug had the bark in tow is shown, by the evidence, to have been owing to two things—(1) the absence, on the Alabama, of a proper lookout, properly stationed and attending exclusively to the proper duties of a lookout; (2) the failure of

the tug to carry the two bright white mast-head lights vertically, so as to distinguish her from other steam vessels. As to the lookout on the Alabama, the evidence is conclusive that the only person who pretended to be discharging the duties of a lookout was Pullin, the quartermaster, and he, instead of being at his proper post on the bow of the vessel, was in the pilot-house assisting the man at the wheel. The rest of the men who were in the watch with Pullin, and some of whom ought to have been on the lookout on the bow of the vessel, were in the forecabin at their supper, and remained there till after the collision. The attempt to show that there was a man on the lookout on the bow of the Alabama wholly fails. No such man is produced as a witness, nor is his name disclosed. Now, if any fact is established by the evidence, it is the fact that the bark had her colored lights properly set and burning. They ought to have been seen from the Alabama, and probably would have been seen if the Alabama had had a proper lookout. It is true that the pilot of the Alabama, and the other persons who were in and about the pilot house of that vessel, saw the lights of the tug and did not see the lights of the bark; but it is extremely probable, from the evidence, that a proper and vigilant lookout on the bow of the Alabama would have discovered the lights of the bark. There was nothing in the character of the night to obscure them. The men on the bark saw the lights on the Alabama at a long distance. Moreover, the evidence goes to show that a proper lookout in a proper place on the Alabama would have discovered the bark herself in season to have enabled the Alabama to clear her. It is impossible to resist the conclusion, that the want of a proper lookout on the Alabama contributed materially to the collision. So, also, the absence of the proper lights on the tug contributed in a great degree probably to the collision. The pilot of the Alabama discovered the lights of the tug at the distance of two miles or more, and saw them accurately, as they were, the two colored lights and the white light above. He recognized them, so far as the evidence shows, for what they indicated—a steam vessel under way. But he did not recognize them as indicating a steam vessel towing another vessel, for the reason that they gave no such indication. The provision for the two vertical white lights is made by law, as the statute expressly says, to distinguish from other steam vessels a steam vessel towing another vessel. The conclusion of fact and of law is, that if the pilot of the Alabama had been advised by the presence of those lights that the tug had a vessel in tow, he would have given her a wider berth than he did, and would have cleared the bark.

It is claimed on the part of the tug that the pleadings do not raise the question of the want of proper lights on the tug. But I think the pleadings are sufficient to raise

that question. The libel does not specify the want of lights on the tug, but it avers that the collision happened through the carelessness, mismanagement and improper conduct of those in charge at the time of the tug, in suffering the tug and the Alabama to approach so near each other. The want of proper lights on the tug was an element and ingredient of the carelessness of those in charge of the tug, which contributed to the near approach of the Alabama. But, if desired, an amendment of the libel in that respect would be allowed, there being no dispute as to what lights the tug in fact had, and no surprise upon her as to the evidence given about her lights.

The bark being wholly without fault, and the collision being due to the negligence of the Alabama and the tug, it would naturally follow that the bark would be entitled to recover from the Alabama and the tug the damages caused by the collision. The answer of the Alabama sets up, however, that the bark was responsible, under the circumstances, for the conduct of the tug; and it is claimed that the tug was the servant of the bark in the towing service; that the bark is liable for the acts of the tug; that the case, so far as respects the Alabama, must be decided as if the only parties litigating were the Alabama and the tug; and that the bark has no greater rights, as against the Alabama, than the tug would have had, if she had been injured by the collision, and her owner were the sole libellant. There is a conflict of decisions on this point, and it is not authoritatively settled for this court. Most of the cases on the subject are cases where the third vessel, neither the tug nor the tow, was the libelling or complaining party. In regard to the question whether the tug or the tow is responsible when a third party sues for a collision with either, the author of Parsons' Maritime Law. (volume 1, p. 208,) cites several of the conflicting authorities, some of them holding that the vessel towing is but the servant of that which is towed, and that the latter is responsible for the acts of the former, as its servant, and others holding that the vessel towed is for the time under the absolute control of the vessel towing, and that the latter is responsible for any mischief done, and draws the conclusion, that it is an error to assume that either of these relations must exist in any particular case, and that the inquiry should always be, which party is the principal and which the servant. Such I conceive to be the sound rule. The language of Mr. Justice Nelson, in the case of *The Express*, [Case No. 4,596,] seems to imply, that where the tug is not in fact, at the time, under the direction and control of the master and hands on board of the tow, the tow will not be responsible for any damage that happens through the fault of the tug. In the case of *Sturgis v. Boyer*, 24 How. [65 U. S.] 110, which was a libel

by a third vessel, against a tug and her tow for a collision between the tow and the third vessel, the supreme court condemned the tug and acquitted the tow. In the course of the opinion of the court in that case, it is said (page 122) that, "whenever the tug, under the charge of her own master and crew and in the usual and ordinary course of such employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such necessary motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels." It is also said, in that case, (page 123) that the owners of the tow do not, by employing a tug to transport their vessel from one point to another, necessarily constitute the master and crew of the tug their agents in performing the service; that they do not appoint the master of the tug or ship the crew, and cannot displace the one or the other; and that the master of the tug, notwithstanding the contract for the service was negotiated with him, continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation. It is true that these observations were made in reference to the liability of the tug and the tow to a third party. But I think that they are also applicable to a case where the tow sues the tug for an injury caused to the tow by a collision between the tow and a third vessel, to which the negligence of the tug contributed, and also to a case where the tow sues the third vessel for such an injury. In the present case, the tug was exclusively under the charge of her own master and crew. She was employed in the usual and ordinary course of her employment, to tow this bark, a foreign vessel, coming into one of our ports. The service was a customary and proper one. The pilot and master and crew of the bark did not direct, or undertake to direct, the navigation of the tug or the arrangement of her lights, and were not bound to do so. The bark did nothing but follow as closely as possible in the wake of the tug, and she made no manoeuvre which contributed to the collision or interfered with the free control of the tug over her own movements and arrangements. To say that, under these circumstances, the bark should be held responsible for the acts or omissions of the tug would be, in my judgment, to violate the sound principles of justice. Such a responsibility on the part of the bark would make her liable to a third vessel, in case the tug had negligently run into and sunk such vessel, the bark having been navigated precisely as she was in this case. A responsibility so broad would be greatly injurious to the interests of commerce, and would effectually put an end to the towing business, for no tow would then be towed unless it had the exclusive control of the tug, and no

tug would surrender such control to the tow.

If applied to this case, the effect of the doctrine contended for by the Alabama, that the tug and the bark are to be considered as one vessel, and that the bark, though personally innocent, is to have imputed to her the acts and omissions of the tug, would be, as against the Alabama, to cause the damage occasioned by the collision to be apportioned between the tug and the bark, considered as one vessel, and the Alabama. I hold that the Alabama is not entitled to the benefit of any such doctrine. The tug does not, in her answer, claim the existence or benefit of any such doctrine, or claim that the bark was responsible for the faults of the tug, or that the tug is not responsible for her own faults to the bark. It is useless to speculate whether, even if, as regards the Alabama, the tug and the bark be considered as one vessel, the tug ought not, as between herself and the bark, both the tug and the Alabama being in fault, to make good to the bark all the damages which she does not recover from the Alabama. As suggested by Mr. Justice Nelson, in the case of *The Express*, (before cited,) there is a difficulty, as between a tug and her tow, in assigning to each vessel its proper measure of responsibility, when either, through the fault of either, comes into collision with a third vessel. Every case of the kind must be decided, as it arises, on the facts attending it.

It is set up as a defence by the Alabama, in her answer, that she had on board, at the time of this collision, a pilot duly licensed under the laws of the state of New York, who offered his services to her, and whose services she was obliged by law to accept; that such pilot took and had the entire control of all her movements until and at the time of the collision; that her master, officers, and crew merely carried out the orders of such pilot, in directing her movements; and that, if the collision was caused by the movements of the Alabama, or by her failure to make proper movements in reference to the tug and the bark, or either, neither the Alabama nor her claimants are responsible therefor. This point of defence does not extend so far as to claim that the Alabama is not responsible for not having a proper lookout, or that the pilot was in any manner charged with the duty of seeing that she had a proper lookout. And in a case where, as here, the fault found against the vessel is not any act or omission for which the pilot is responsible, but is the want of a proper lookout, it would be going too far to say that the vessel is to be exonerated from such fault, because she had a pilot on board charged with her navigation, even if she would be exonerated from a fault in her navigation caused directly by the pilot. If the presence of a pilot is to exonerate the vessel from the fault of not having a proper

lookout, it is difficult to see why it would not exonerate her from the fault of not having her reversing machinery in proper order. Yet, to hold the vessel not responsible for the latter fault, when under charge, as to her navigation, of a regular pilot, would be a violation of all principle. I do not understand that the English rule, which relieves a vessel from responsibility for her navigation while she is under the charge of a pilot, extends any further than to relieve her from the consequences of a fault directly attributable to the bad management or negligence of the pilot. But, however that may be, the law is settled for this court, (*Walsh v. The China*, Cir. Ct. U. S. July, 1866, [Case No. 17,114,]) that a vessel is responsible for the negligence or unskillfulness of a licensed pilot, whose services she is by law bound to accept.

The rules of navigation are now so well settled, and in most cases by positive statute, so far at least as vessels owned by citizens of the United States are concerned, that there can be no excuse for their wilful and deliberate violation. The necessity, especially in the case of a steam vessel, of having a proper lookout, properly stationed and actually and vigilantly employed in his duty, and of having, properly set and burning, the lights required by statute, has been enforced by the courts of admiralty of the United States so uniformly, that it must now be accepted as settled, that wherever the want of a proper lookout, or the want of proper lights, is shown, it will be for the vessel which has not the lookout or the lights to show that any collision which occurs is not in any way attributable to the absence of the lookout or the lights, or she will be condemned in damages. Notwithstanding the serious admonitions which they have received from the courts, large steam vessels are most glaringly remiss in regard to having a proper lookout, and small tugs pay no heed, while towing other vessels, to the statutory requirement making provision that they shall carry two bright white masthead lights vertically, in addition to their green and red side lights, so as to distinguish them from other steam vessels, and convey to other vessels the knowledge that they have vessels in tow. The interests of commerce require that these maritime rules should be strictly enforced.

It results, that there must be a decree condemning both the tug and the Alabama in damages, with a reference to a commissioner to ascertain the amount of the damages to the libellant.

[NOTE. On appeal to the circuit court this decree was affirmed, except that it was held that the steamer could not be required to make up a deficiency caused by the fact that the value of the tug was less than one half of the damages sustained. This was overruled by the supreme court, and the decree of the district court was affirmed. See *The Alabama and The Gamecock*, Case No. 123, and note to that case, 92 U. S. 695.]

Case No. 123.

The ALABAMA.

The GAMECOCK.

[11 Blatchf. 482.]¹

Circuit Court, S. D. New York. Feb. 19, 1874.²

COLLISION—BETWEEN STEAMERS AND TOW—APPORTIONMENT OF DAMAGES.

A steamer collided with a sailing vessel in tow of a steam-tug. In a suit in rem, brought by the owners of the sailing vessel against both of the other vessels, to recover for the damages sustained by them by the collision, it was held, both of such other vessels being found in fault, that each must be held liable for only one-half of such damages, and that the steamer could not be held to make up a deficiency caused by the fact that the value of the steam-tug was less than one-half of such damages.

[See note at end of case.]

[Appeal from the district court of the United States for the southern district of New York.]

In admiralty. In this case, a sailing ship, the *Ninfa de los Mares*, in tow of a steam-tug, the *Gamecock*, was collided with by a steamer, the *Alabama*, and sunk. The owner of the ship libelled both of the other vessels, in rem, in the district court. That court held both of such vessels in fault, and gave a decree to the libellants against each of them, for the full amount of the damages. 1 Ben. 476, [*The Alabama*, Case No. 122.] The steam-tug had been released, on a bond being given in a sum, representing her value, less than one-half the amount of such damages. An appeal was taken to this court on the part of each of the condemned vessels. [Decree of district court modified. Decree of circuit court, so far as it modified decree of district court, reversed by supreme court. 92 U. S. 695.]

John E. Parsons, for libellant.

Edwards Pierrepont and Edward H. Owen, for the *Alabama*.

Charles Donohue, for the *Gamecock*.

WOODRUFF, Circuit Judge, (after affirming the decree on all other points:) In regard to the liability of the *Alabama* for more than one-half of the damages, this court has already decided that her liability cannot be increased by the circumstance, in which she had no agency, that the *Gamecock* is not of value sufficient to pay the other half. *The City of Hartford and The Unit*, [Case No. 2,753.] See, also, *The Atlas*, [Id. 633, Id. 634.] It is urged, that such a holding involves a liability on the part of the *Ninfa* herself, which would make her liable for the fault of the tug, in such a sense, that, if the *Alabama* had sustained the greater damage, the *Ninfa* must contribute there-

¹[Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

²[Decree of circuit court reversed by supreme court, (92 U. S. 695,) in so far as it modified the decree of the district court, (*The Alabama*, Case No. 122.)]

to. Not at all; the holding merely imports that her relations to the tug which she had employed were such that she can recover no more than the tug, if injured to the same extent, could recover, or than the tug, if she had paid to the owners of the Ninfa her full value, in discharge of her own plain liability, could in return recover from the Alabama, towards indemnity. As between the Ninfa and the tug, the latter, under her contract for safe towage, or towage with proper care, prudence and skill, was liable for the whole loss. So that, whether this proceeding against the Alabama is prosecuted by the one or the other, ought not to affect the Alabama. It is very true, that, by the rules of the common law, one who is injured by the concurring fault of two or more may, it is held, recover full indemnity from either or all. But the admiralty does not inevitably follow the common law rules. Where, as between two, each is in fault, at law, neither can recover, but, in admiralty, each contributes. On the one hand, it is not inequitable to say, that the contribution of one ought not to be increased by circumstances which she had no agency in producing; and, on the other, it is not inequitable to say that the tow, as in this case, voluntarily subjected herself to the hazards of the misconduct of the tug, and, therefore, to the contingency that such misconduct might, in case of loss, give her no claim beyond contribution from another vessel. Had the tug discharged her own liability to the Ninfa upon her contract, as she ought, the tug could recover no more. The Ninfa should not be permitted to charge the Alabama more, because the Ninfa may have trusted irresponsible parties.

I am aware that the question is one of great interest and importance. There are, I think, some cases in the supreme court in which it must necessarily be soon considered; and we shall then be instructed whether to follow the views of Dr. Lushington in the case of *The Milan*, 1 Lush. [Adm.] 388, 404, and applied in the cases before cited, or to act upon a different rule in the admiralty courts of this country. For the present, I must say that the opinion in the case of *The City of Hartford* and *The Unit*, [supra.] must be taken as the opinion in this case, upon the point now under consideration.

The decree, therefore, will award to the libellants a recovery from each vessel, of one-half of the damages caused by the collision, as found in the district court, with costs in the court below, but without costs, on the appeal to this court, to either party.

[NOTE. In reversing the decree of the circuit court, Mr. Justice Bradley said that a decree should be made against the Alabama and the Gamecock, "each for one moiety of the entire damage, interest and costs, so far as the stipulated value of said vessel shall extend; and any balance of such moiety over

and above such stipulated value of either vessel, or which the libellant shall be unable to collect or enforce, shall be paid by the other vessel * * * to the extent of the stipulated value thereof, beyond the moiety due from said vessel." *The Alabama and The Gamecock*, 92 U. S. 695. See *The Civita*, 103 U. S. 703; *The North Star*, 1 Sup. Ct. Rep. 41, 106 U. S. 17; *The Sterling and The Equator*, 1 Sup. Ct. Rep. 89, 106 U. S. 647; *The Hudson*, 15 Fed. Rep. 162; *The Franconia*, 16 Fed. Rep. 149; *The Max Morris*, 24 Fed. Rep. 860.]

ALABAMA, The, (SMITH v.)

[See *Smith v. The Alabama*, Case No. 12,998a.]

Case No. 124.

In re ALABAMA & C. R. CO.

[9 Blatchf. 390; 6 N. B. R. 107; 5 Amer. Law T. Rep. 76; 6 Amer. Law Rev. 577.]

Circuit Court, S. D. New York. Feb. 1, 1872.*

INVOLUNTARY BANKRUPTCY—ACT MARCH 2, 1867—
JURISDICTION — FOREIGN RAILROAD CORPORATION.

1. A proceeding in voluntary bankruptcy, under section 39 of the bankruptcy act of March 2d, 1867, (14 Stat. 536,) may be prosecuted in the district in which the debtor has carried on business for the requisite time specified in section 11 of that act, although he resides and may be found in another district.

2. A railroad company, incorporated by the laws of a state, for constructing and operating a railroad, cannot be proceeded against, in bankruptcy, in a district court without the state or states where its railroad is, or is to be, built, maintained and operated, on the petition of a creditor, charging an act of bankruptcy.

3. Allegation and proof that such company kept an office in such district for six months next preceding the filing of the petition, where its officers acted and its board of directors met, and where it contracted debts and made loans, purchases and payments, do not give such court jurisdiction.

4. The business of a railroad company, within the meaning of the eleventh section of the said act, can only be carried on where the railroad is, or is to be, constructed, maintained and operated.

5. Hence, the district court for the southern district of New York has no jurisdiction to adjudge an Alabama railroad corporation a bankrupt, on the petition of a creditor.

In bankruptcy.

Clarence A. Seward, for railroad company.
Enoch L. Fancher, for creditor.

WOODRUFF, Circuit Judge. On the petition of a creditor, the respondent, a corporation created and organized under and by virtue of the laws of the state of Alabama, and owning and operating a railroad in the states of Alabama, Georgia, Mississippi, and Tennessee, was summoned to appear in the dis-

* [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

[Reversing an unreported decree of the district court.]

trict court for the southern district of New York, to show cause why such corporation should not be adjudged a bankrupt. It was alleged in the petition, that the corporation owned property in the state of New York, and had, for the longest period of time within the six months next immediately preceding the date of the filing of the petition, had its principal office, place of business, and domicile in the city of New York, in which the corporation had transacted the ordinary moneyed, commercial and financial business of a railroad corporation.

The corporation pleaded or answered specially to this petition, that the district court for the southern district of New York had no jurisdiction to proceed against the said corporation, upon such petition, or to make any adjudication in bankruptcy against the respondent. After taking proofs touching the carrying on of the business alleged in the petition, by the respondent, within the said southern district of New York, this plea was overruled, and the district court then proceeded to adjudge, and did adjudge, the said corporation a bankrupt. The respondent, the corporation, now seeks a review and reversal of that adjudication; and it was stated by counsel, on the argument, that the question to be considered on the review is this: Had the district court jurisdiction to proceed against this railroad corporation, upon a petition in invitum, because such corporation transacted, within this district, the business alleged in the petition in this case?

If I were charged with the duty of legislating upon this subject, I should hesitate long before I exposed a corporation incorporated in Alabama or California, for the construction of a railroad in those states, and for maintaining and operating the same there, to a proceeding in a distant district, for the settlement of its affairs, the disposal of its property, and the distribution of the proceeds, (operating practically as a dissolution thereof,) as a bankrupt. It would seem to me most inconvenient and disadvantageous to its creditors, most unsuitable, though not wholly impracticable, in respect of the closing of the estate, collecting, managing, and disposing of the assets, and transferring them, under the direction of the court, which ought to be conveniently accessible to all who are interested, needlessly, but inevitably, most expensive, and, presumptively, bringing the parties ultimately interested in its affairs, whether as creditors or stockholders, to a great distance, to protect their respective interests, following to this district the proceeds of the railroad and its equipment, which might well be administered at home. Difficulty will ordinarily exist, also, in effectively reaching the officers, to compel their furnishing accounts and details which the law requires for the settlement of the estate; and, even if they can be compelled to send such information here, or to attend

here in person to give it, this must be needlessly expensive, troublesome and vexatious, and, in case of resistance, will, in general, be very unsatisfactory in the mode of proceeding, and in its results. Presumptively, at least, the property of such a corporation is invested in its railroad, and its equipment, and means of conducting the business for which it was incorporated, which are in the state or district where its railroad is built and is to be operated, under its charter; and it seems to me wholly unfit, that the district court for the southern district of New York should have the duty imposed upon it, of administering the affairs of such a distant corporation. When the fact is recalled, that, probably, no railroad company exists in the United States, which does not habitually transact some business in the city of New York, the burthen and inconvenience of such a jurisdiction, liable to be invoked by any one creditor, on a charge of bankruptcy, becomes apparent, to a degree that makes it incredible that such a jurisdiction, and the consequent duty to exercise it when invoked, have been imposed upon that court.

It is, however, no part of the duty of this court to legislate, but only to ascertain and apply the law as it is; and these suggestions can serve no purpose, unless they shall aid in interpreting the statutes under which the proceedings have been instituted, and which are claimed to sustain them.

The 48th section of the bankrupt law of March 2d, 1837, (14 Stat. 540,) declares, that the word "person," in that law, shall include "corporation." This must, of course, be qualified, in any of the provisions which are necessarily inapplicable to a corporation, and by any provisions that are specially and expressly made for corporations only, if any such there be. But, in respect of the question now before me, I find no such qualification, either express or implied, since no claim is made that the language of the 37th section of the act prevents its application to a railroad corporation, as has sometimes been contended. The 11th section, providing for voluntary bankruptcy, may, therefore, be read as if the words "moneyed, business or commercial corporations and joint stock companies" were inserted therein, and it will then provide, that such corporation, owing debts, * * * may apply by petition, addressed to the judge of the judicial district in which such debtor has resided or carried on business for six months, or for the longest period during the six months, next immediately preceding the time of filing such petition; and jurisdiction is given to proceed, on such petition, to adjudge the petitioner a bankrupt. Nevertheless, it is clear, that a corporation can have no residence out of the state by whose laws it was created, and that, therefore, in virtue of residence, no jurisdiction can be acquired by any district

court outside of such state. And, in construing the words "carried on business," it may be proper to consider what, as applied to a corporation, they reasonably import. Again, the 37th section declares, that, upon the petition of any creditor or creditors of such a corporation as is therein mentioned, * * the like proceedings shall be had and taken as are, in the act, afterwards provided in the case of debtors. This, in terms, subjects the corporations named to a proceeding in invitum for an adjudication of bankruptcy, as fully as other debtors are subjected thereto by the subsequent provisions of the act. Following the act to its subsequent provisions, we find, that, by section 39, any person—and, of course, any such corporation as is before mentioned—who commits any of the acts specified, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions thereafter prescribed, shall be adjudged a bankrupt, on the petition of one or more of his creditors, &c.

Neither in the 37th nor the 39th section, nor in any other section relating to involuntary bankruptcy, is there any express designation of the judge or court to whom the petition shall be presented, or who shall have jurisdiction thereof. The first section of the act makes the several district courts of the United States courts of bankruptcy, and confers on them jurisdiction in all matters and proceedings in bankruptcy, in their several districts. In which of the district courts, then, may proceedings be taken by a creditor, whether against a corporation or an individual? No express terms of the statute give an answer to this question. Certainly, it ought not to be open to creditors, or to a creditor, to select any district court of the United States, at his or their option. It must be such court as, upon the general rules governing the jurisdiction of the district court, can acquire jurisdiction, or such court as may seem to have been intended by congress, in analogy to the jurisdiction given where the proceedings are voluntary. The latter would seem to be the generally received opinion; and, in this district, it has, I believe, been the practical construction of the act. The act having assimilated the proceedings in involuntary bankruptcy, after the respondent has been adjudged a bankrupt, to the proceedings in voluntary bankruptcy, it is not unnatural to infer, that, when congress, by the 39th section, authorized an adjudication upon the petition of a creditor, they meant, upon a petition addressed to the court which, by the previous 11th section, was authorized to adjudge a debtor a bankrupt on his own petition. The supreme court of the United States, in framing the sixteenth of the general orders in bankruptcy, seem to have acted upon this construction of the act, in providing for the contingency of two or more petitions against the same individual, in different districts.

My own unaided examination of the act would have suggested the doubt, whether, although congress had given to the debtor the opportunity to apply to the court of the district wherein he resided, or to the court of the district in which he carried on business, they had not, when they provided for a hostile proceeding against him, intentionally omitted a similar provision, and, in that respect, intended that the proceeding should conform, by analogy, to the 11th section of the judiciary act of September 24th, 1789, (1 Stat. 78, 79,) which forbids that any civil suit shall be brought, in either the district or the circuit court, by original process, against an inhabitant of the United States, except in the district whereof he is an inhabitant, or in which he may be found when served with process. All the provisions of the act concerning involuntary bankruptcy may be harmonized with this construction. If he reside within the district then he may be served personally, or by leaving at his place of abode; or, if he have absconded, or be concealed, or his place of residence cannot be ascertained, then by publication, (section 40.) Although it was the design of congress to enable creditors to compel a debtor who has committed an act of bankruptcy to do that which, in a state of insolvency, he ought to do voluntarily, agreeably to the 11th section, it does not follow that they intended to enable creditors, or a creditor, to call the debtor, on a charge of having committed such an act, thousands of miles from his residence, to contest the charge, merely because he had carried on some business at such remote point. The great hardship of such a call is manifest; and the general tenor of the 40th section indicates, that it is where the debtor resides that the proceeding is, in general, to be conducted, his not being found, by reason of his absconding, or being concealed, or having no known residence, being the excepted cases of service by publication. It does not occur to me that there is any greater fitness or propriety in compelling an alleged debtor to go to a remote district to contest, in the court of bankruptcy, the claim of, or the alleged indebtedness to, a pretended creditor, as well as the truth of the charge of bankruptcy, (for both of these may be involved in the litigation,) than there is in compelling such supposed debtor to go to a remote district to defend an ordinary suit by the same party, under precisely the same circumstances, which, by the judiciary act, is expressly prohibited; and, there being no express provision of the bankrupt law to this effect, I should have been reluctant to indulge in construction not necessarily required by what is expressed, so as to produce a result quite in conflict with the former law. In view of the general construction given to the act, and the sanction such construction has received from the deliberate action of the supreme court of the United States, I do not feel at liberty to dispose of

this case by giving weight to the doubt which I have thus expressed. I must yield that doubt and hold, until otherwise advised, that a proceeding in involuntary bankruptcy may be prosecuted in the district in which the debtor carries on business, although he resides and may be found in another.

The further conclusion above stated—that a corporation included in the provisions of section 37 is in the like condition, in this respect, as a natural person—leaves only one question open—When applied to a railroad corporation, what do the terms, “in which such debtor has resided or carried on business,” mean?

(1.) A corporation has, and can have, no residence, except in the state by whose laws it exists. It cannot, of its own mere motion, change its residence. This has often been decided by the supreme court. This is claimed here by the counsel for the corporation, and it is conceded by the counsel for the creditor. Hence, also, it is well settled, that a corporation created by the laws of one state, cannot be found in another judicial district of the United States, to be served with process, through its officers, in an action in the federal courts of such last-named district. Jurisdiction for the district court cannot, therefore, be maintained in this case on the ground of residence of the debtor, nor on the ground that the debtor, being a corporation under the laws of Alabama, was found in this district.

(2.) Do the facts here show that the corporation, the alleged debtor, carried on business in this district, within the meaning of the said eleventh section of the bankrupt law? In its broadest sense, the term “business” includes nearly all the affairs in which either an individual or a corporation can be actors. Indulgence in pleasure, participation in domestic enjoyment, and engagement in the offices of merely personal religion, may be exceptions, in the case of an individual. But the employment of means to secure or provide for these would, to him, be business; and, to a corporation, these exceptions can have no application. The conduct of any and all of the affairs of a corporation is business. Does, then, the doing of any acts whatever pertaining to the affairs of a railroad corporation constitute “carrying on business,” in the sense of the act? Has the term, “carrying on business,” the same meaning as “transacting any of its business”? If the necessities or interests of a railroad company require that an agent should be sent to a timber region to purchase or otherwise procure (e. g., by cutting, sawing, &c.) materials for its superstructure, is that carrying on business there? If it send an agent or agents to a city, the centre of capital, to negotiate its bonds and raise money in aid of the construction of its road, and such agency be continued for that purpose, and for receiving subsequent remit-

tances and making payments of interest or other indebtedness, at an office provided therefor, is that carrying on business in such city, within the meaning of the act? I am constrained, not only by considerations already suggested, but by what, upon the words themselves, should be deemed their proper interpretation, to answer these questions in the negative. There are, in the carrying on of a business, many affairs which are merely incidental, and which may be, and often are, transacted elsewhere than at the place where the business—that which is the real design and purpose or object in view—is located; and such transactions may be of such frequent, or even daily, occurrence as to require an agency of considerable duration. It would seem to me greatly unjust and unreasonable to regard such transactions as a carrying on of business, in the sense of the law. “Carrying on business” looks to the scheme and purpose to which such transactions tend, and not to the incidental transactions themselves. Thus, the business of a railroad corporation is, by its charter, the construction, maintenance, and operation of a railroad. That is its business. In aid thereof, it may be necessary or expedient to employ agents and agencies—since it can only act by agents—in other places than those in which its business of constructing, maintaining, and operating the road can be done. But, the transactions of such agents are only collateral or incidental. They do not, in a just sense, constitute the business of the railroad company. That business cannot be removed. The company itself cannot transfer it. Agents, or officers who are agents, and only agents, may, from a distance, advise therein, give rules or directions to other agents for its management, but the business of the railroad company can only be done where the railroad is, or is to be, constructed, maintained, and operated.

The petition herein states, that the alleged bankrupt corporation has had its principal office, place of business, and domicile, in the city of New York—in part, at least, a legal impossibility—in which place, and during, &c., such corporation has transacted the ordinary, moneyed, commercial, and financial business of a railroad corporation. There was evidence that what the officers of the corporation called its general office was in New York; that its officers were there, and its board of directors were accustomed to meet at such office; that there the records and various accounts of its affairs and business were kept; and that there the corporation procured loans, or made purchases, in aid of the construction of its railroad and its equipment. Here is but an agency, whether it be minor or major, special or principal. It does not affect the present enquiry, that the agents embrace more or less in number or in authority. It is not here that the business is done, or can be done, for which the company was created, although

here are business transactions, within the power of the corporation, it may be, but only in aid of its substantive business, and incidentally necessary, perhaps, to its accomplishment.

Further illustrations might be drawn from the existence of very numerous banks, and manufacturing and other corporations, in the various states of the Union, which, although carrying on the business for which they are incorporated within the states where they are created, nevertheless have, for very important and necessary incidental transactions continuous agencies in one or more of our principal cities. It was not intended, by reason of such transactions, to subject them to proceedings in bankruptcy where those agencies were maintained, whether there conducted by agents under one name or another, either officers, clerks, or by whatever name or official relation designated.

In view of all the considerations which I have suggested, I am of opinion, that, in reference to a railroad corporation created by the state of Alabama, for the building, maintaining, and operating a railroad in that state, a construction of the act which subjects it to proceedings in bankruptcy in this district is not reasonable, not required by the language of the statute, and not according to its intention. I do not fail to see, that the contrary may be plausibly argued, as, in fact, it has been, possibly and ably, by the counsel for the creditor. But the corporation cannot itself remove to this district. It cannot, in this district, carry on the business for which it was created. It can only, out of sufferance, do here such collateral or incidental things as are not its substantive business, but only aids thereto, or which facilitate its accomplishment.

It follows, that the objection to the jurisdiction of the district court for the southern district of New York should have been sustained, and the petition of the creditor dismissed. The adjudication declaring the company a bankrupt is, accordingly, reversed.

Case No. 125.

In re ALABAMA & C. R. CO.

[Nowhere reported; opinion not now accessible.]

Circuit Court, D. Georgia.

[Cited in Alabama & C. R. Co. v. Jones, Case No. 127.]

ALABAMA & C. R. CO., (BLAKE v.)

[See Blake v. Alabama & C. R. Co., Case No. 1,493.]

ALABAMA & C. R. CO., (DAVENPORT v.)

[See Davenport v. Alabama & C. R. Co., Case No. 3,588.]

Case No. 126.

ALABAMA & C. R. CO. v. JONES.

[5 N. B. R. (1871), 97.]

Circuit Court, S. D. Alabama.

BANKRUPTCY—JURISDICTION OF CIRCUIT COURT—AUTHORITY OF COUNSEL—SUFFICIENCY OF PETITION—REVIEW—CORPORATIONS—SERVICE OF PROCESS.

[1. The statement of counsel that they are authorized by a corporation to file a petition in the circuit court for a review of the proceedings in bankruptcy against the company in the district court, and to appear for the company in the circuit court, must be taken as conclusive evidence of their authority, in the absence of proof to the contrary.]

[2. Service of the petition for review in such case on the attorneys of the creditor on whose petition the proceeding below was begun is sufficient.]

[3. The fact that Act Cong. Feb. 6, 1839, (5 Stat. 315.) § 8, vests the district court for the middle district of Alabama with the jurisdiction of the circuit court, except in cases of appeal and writs of error, does not deprive the circuit court in that district of jurisdiction to review an adjudication in bankruptcy by the district court,—under the second section of the bankrupt act of 1867, giving the circuit court, within and for the district in which the proceeding in bankruptcy is pending, a general superintendence and jurisdiction of bankruptcy proceedings.]

[4. A railroad company is a "business corporation," within the bankrupt act of 1867, § 37, providing that such corporations may be adjudged bankrupt.]

[Cited in New Orleans, S. F. & L. R. Co. v. Delamore, 5 Sup. Ct. Rep. 1011, 114 U. S. 501; In re Pacific R. Co., Case No. 2,315; Winter v. Railway Co., Id. 17,890; Sweatt v. Boston & C. R. Co., Id. 13,684.]

[See, also, Adams v. Railroad Co., Case No. 47.]

[5. A petition for adjudication of bankruptcy against a railroad company, on the ground that it had fraudulently stopped payment of its commercial paper, which fails to aver, in the terms of the act, (section 39,) that the company was a "banker, broker, merchant, trader, manufacturer, or miner," is fatally defective; and where no proof of such facts is offered, the petition should be dismissed.]

[6. Provisions of the charter authorizing the company to erect and carry on machine shops, iron furnaces, rolling mills, etc., to manufacture materials for its equipment, do not constitute the company a "manufacturer," within the act.]

[7. A railroad company was chartered in each of the states of Tennessee, Georgia, Alabama and Mississippi. In proceedings in bankruptcy against it, in a district court in Alabama, an order to show cause was served by delivering a copy to the general superintendent of the company at Chattanooga, Tenn. Held, that the service was not sufficient, under section 40 of the bankrupt act of 1867, providing that "if such debtor cannot be found," or his place of residence ascertained, service shall be made by publication; the language "cannot be found" meaning "found," within the jurisdiction of the court. The service should have been by publication.]

[8. The fact that the railroad was chartered in the four states did not make it one corporate body on which service could be made at its residence in any one of those states.]

[Review of proceedings in the district court of the United States for the middle district of Alabama.]

[In bankruptcy. Petition by the Alabama & Chattanooga Railroad Company for review of a decree of the district court adjudicating the company bankrupt, on petition of William A. C. Jones. Decree reversed.]

WOODS, Circuit Judge. On the eighth day of June, eighteen hundred and seventy-one, the Alabama and Chattanooga Railroad Company was, on the petition of William A. C. Jones, adjudged a bankrupt by the district court for the middle district of Alabama, sitting in bankruptcy. This petition is filed to review and reverse that adjudication.

The facts, as developed by the pleadings and testimony, are these: the Alabama and Chattanooga Railroad Company is a railroad corporation created by the laws of Alabama. A corporation of the same name, and with the same board of directors and the same officers, is also chartered by each of the states of Georgia, Tennessee and Mississippi. The terminus of the road are Chattanooga, Tennessee, and Meridian, Mississippi, and the road traverses the four states above named. The road passes through the counties of DeKalb, Etowah, St. Clair and Jefferson, in the northern district of Alabama, and through the counties of Shelby and Tuscaloosa in the middle district, and Hale, Greene and Sumter in the southern district. The principal office of the company is at Chattanooga, Tennessee, and it has no principal office in the state of Alabama, nor does the president, or any of the directors, or the superintendent, reside in or keep any office of the corporation within the state of Alabama, nor have they or either of them been "found" within the middle district of the state of Alabama. The order to show cause directed to be served upon the corporation in the original proceedings was served, as shown by the affidavit of A. J. Walker, on June third, eighteen hundred and seventy-one, by L. B. Jones, deputy United States marshal for the eastern district of Tennessee, upon J. C. Stanton, in the office of the Alabama and Chattanooga Railroad Company, in Chattanooga, Tennessee, in which said office said Stanton was acting as the general superintendent of said railroad company, and he was at the time of such service the superintendent of said company, managing its affairs through its entire length, including the state of Alabama. The petition of William A. C. Jones, upon which the adjudication of bankruptcy was made, avers, among other things, that he is a creditor of the Alabama and Chattanooga Railroad Company, a corporation under the laws of the state of Alabama, which for a period of six months next preceding the date of the filing of the petition, had carried on business in the state of Alabama and the middle district thereof in its said corporate name; that the petitioner's demand against

the company was a promissory note, dated Boston, December nineteen, eighteen hundred and sixty-eight, made by the Alabama and Chattanooga Railroad Company, for the payment of four thousand and ninety-seven dollars and seventeen cents, to the order of W. A. C. Jones, at the National Security Bank, Boston, two years after date; and that within six calendar months next preceding the date of the petition, the said company had committed an act of bankruptcy within the meaning of the bankrupt act, to wit: That said company, within the period aforesaid, and within said district, to wit: on the third day of January, eighteen hundred and seventy-one, being a corporation under the laws of the state of Alabama, and organized as a joint stock company and carrying on a moneyed business within the limits of said district, had fraudulently stopped or suspended, and had not resumed payment of its commercial paper within a period of fourteen days. Like averments are made as to two other notes of the company held by the petitioner, one for five thousand and sixty-six dollars, and the other for five thousand dollars. On the day upon which the order to show cause was returnable, the company made default, and was, upon proof of the service of the order to show cause made as before stated, adjudged a bankrupt, and Egbert H. Grandin and John F. Bailey, citizens of Alabama, were appointed temporary custodians of the property of the company, and were authorized and directed to take possession thereof. The petition of review states many grounds upon which a reversal of the decree of the bankrupt court is asked. In the view we take of the case it will be unnecessary to notice them all.

Some preliminary questions were raised on the hearing of the petition of review, which the court is required to pass upon.

1. The authority of counsel to file this petition and appear for the railroad company was denied. The counsel for the railroad company thereupon stated professionally that they were duly authorized by the company to institute and prosecute this proceeding. In our opinion this statement must be taken as conclusive evidence of the fact asserted, unless some proof to the contrary is shown. No such proof is offered, and this objection may be well considered as out of the way.

2. The service of the petition of review was made upon Walker and Murphy, who were of counsel for Jones in the original proceeding. It is objected that this is not sufficient; that as soon as the decree of bankruptcy was rendered the case was at an end, and their relation of attorneys ceased. It appears from the proof that an attempt to serve Jones with notice of the petition of review was made, but it is alleged the service was defective. We think the service upon the attorneys of Jones was sufficient. The proceeding in review is a part of the orig-

inal case, and for the purposes of the review the parties are still in court. "The proceeding in bankruptcy from the filing of the petition to the discharge of the bankrupt and the final dividend is a single statutory case or proceeding." York's Case, [Case No. 18,139.] The proceeding in review is intended to be speedy and summary. Reasonable notice to counsel accomplishes the ends of justice. If it were necessary to serve the party himself, he might defeat the reversal of the decree by avoiding service of notice, which it is alleged Jones in this case has attempted to do. The practice of serving the notice upon counsel is now well established in this circuit, and as no injustice can result from the practice, we are not disposed to change it. We consider the service upon counsel sufficient, and this objection is overruled. Even if the service were bad, it has been cured by the appearance of the defendant, Jones, and the filing of his answer to the petition of review.

3. It is suggested that in the middle district of Alabama, neither the circuit court nor a judge thereof has jurisdiction to review the proceeding of the district court for that district sitting in bankruptcy. This view is based upon the act of congress (5 Stat. 315, § 8) which provides that the district court for the middle district of Alabama, in addition to the ordinary jurisdiction and powers of a district court of the United States, shall, within the limits of said district, have jurisdiction of all causes except appeals and writs of error which now are, or hereafter may be, by law, made cognizable in a circuit court of the United States, and shall proceed therein in the same manner as a circuit court.

The fair construction of this act does not make the said district court a circuit court. It remains a district court, but with enlarged jurisdiction. It is not clothed with all the powers of a circuit court, for it is denied jurisdiction in cases of appeal and writs of error. This jurisdiction is necessary to make it a circuit court, as that term is used in the statutes of the United States. It can scarcely be claimed that the judge of the middle district sitting in the district court would have jurisdiction to review and reverse his own decree made as a bankrupt judge. The reasons are obvious. The power of review is conferred by the bankrupt act on the circuit court in term time, or a circuit judge in vacation. The district court of the middle district of Alabama is not a circuit court, nor is the judge thereof a circuit judge. He may sit as a judge in a circuit court, but that does not make him, especially in vacation, a circuit judge, as that term is used in the bankrupt act. Under the bankrupt act of eighteen hundred and forty-one it was held by the United States supreme court ([Nelson v. Carland,] 1 How. [42 U. S.] 265.) that upon questions

adjourned from the district to the circuit court, the district judge could not sit as a member of the circuit court, and consequently the points adjourned could not be brought before the supreme court by a certificate of division. If we are correct in these views, it follows that unless the circuit judge has jurisdiction in this case, the right of review is denied in cases of bankruptcy in the middle district of Alabama, and others where the district court has circuit court powers. The constitution of the United States authorizes congress to establish uniform laws on the subject of bankruptcies, and the bankrupt act of eighteen hundred and sixty-seven is entitled an act to establish a uniform system of bankruptcy throughout the United States. If we yield to the view that the revising jurisdiction conferred by the second section of the bankrupt act upon the circuit court and its judges does not apply to the middle district of Alabama, the law is not uniform, nor is the system uniform. Important remedies are denied to parties in the bankrupt court of this district which are conferred upon parties in other districts, and the bankrupt law is open to the constitutional objection that it is not uniform. We are constrained so to construe the law, if possible, as to make it conform to the constitution, and where two constructions are fairly open for adoption, the one which avoids constitutional objections must be preferred.

There is another view of this question which we think is conclusive. The second section of the bankrupt act provides that the several circuit courts of the United States within and for the district where the proceeding in bankruptcy shall be pending, shall have a general superintendence and jurisdiction, &c., and the powers and jurisdiction hereby granted may be exercised either by said court or by a justice thereof in term time or vacation. By the act of congress passed July third, eighteen hundred and sixty-six, (14 Stat. 209, § 2,) it is provided among other things that the districts of Georgia, Florida, Alabama, &c., shall constitute the fifth circuit. The district court which rendered the decree now under consideration is in the state of Alabama, and consequently within one of the districts comprising the fifth circuit, and therefore the circuit court and the judges thereof for the district of Alabama have by the terms of the bankrupt act jurisdiction of all cases and questions arising under the act, and may hear and determine them upon bill, petition, or other proper process. The objection to our jurisdiction in this case must be overruled.

This brings us to consider the grounds upon which a reversal of the decree adjudging the petitioner a bankrupt is sought. It is objected to the decree that a railroad company is not of such character as to be included within the provisions of the bank-

rupt act. The act, section 37, provides that its provisions shall apply to all moneyed, business or commercial corporations and joint stock companies; and that, upon petition of any officer of such corporation or company duly authorized thereto, or upon petition of any creditor of such corporation or company, made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors. It is said on behalf of the petitioner that a railroad company is not a moneyed, business or commercial corporation. We cannot concur in this view. A corporation carrying on and pursuing any lawful business defined by its charter, and clothed with power to do so, for the sake of gain, is clearly a business corporation and amenable to the provisions of the bankrupt act. *Rankin v. Florida, A. & G. C. R. Co.*, [Case No. 11,567.] The petitioner is authorized by its charter to construct a railroad and to convey thereon, for gain, passengers and freight. Its main and primary object is to do these things for gain. It is, therefore, a business corporation, as the term business is popularly understood. It seems to be the clear intent of the thirty-seventh section to bring within the scope of the bankrupt act all corporations, except those organized for religious, charitable, social, literary, educational, municipal or political purposes. These may all be in one sense, moneyed or business corporations, for they must all have and use money and transact business, to some extent, in order to carry out their objects. But we do not call them moneyed corporations as we would a bank, nor do we call them business corporations, as we would a manufacturing or mining company or express company, because their chief and primary object is not to transact business or make gain. They necessarily transact business in order to accomplish other ends than the mere doing of business and making profit. The building of a railroad is certainly carrying on a business. The transporting of passengers, mails and freight for hire is certainly a business, and a company organized to make gain from these pursuits as its chief and ultimate purpose is clearly a business corporation. The voluntary application of a railroad company to be adjudged a bankrupt would hardly be dismissed on the ground that it was not a business corporation. *Adams v. Boston, H. & E. R. Co.*, [Case No. 47.]

But the petitioner says that admitting it to be a business corporation, it cannot be forced into involuntary bankruptcy on the ground that it has fraudulently stopped payment of its commercial paper, unless it is also averred and shown to be a banker, broker, merchant, trader, manufacturer or miner. In order to compel a corporation into involuntary bankruptcy under the clause of the thirty-ninth section, which this pro-

ceeding in bankruptcy is based upon, three things are necessary to be averred and proven. 1. That the corporation is a moneyed, business or commercial corporation. 2. That it is a banker, broker, merchant, trader, manufacturer or miner. 3. That it has fraudulently stopped payment, or has stopped and not resumed payment of its commercial paper for a period of fourteen days. A moneyed, business or commercial corporation may be forced into bankruptcy under the fifth clause of the twenty-ninth section, if it makes any assignment, gift, sale or conveyance, with intent to delay, defraud, or hinder its creditors; or under the eighth clause, if guilty of any of the acts therein specified, without being shown to be either a banker, broker, merchant, trader, manufacturer or miner. But where the proceeding is based on the ninth clause, as in this case, it is indispensable to aver and prove that the debtor sustained one of these characters. Has this been averred or proved in this case? The petition does not make any such averment, and is, therefore, fatally defective. Has this necessary fact been made out by the proof? The characters and powers of a corporation must be determined by its charter. A corporation authorized to carry on a banking business cannot construct or operate a railroad or carry on the business of a manufacturer or common carrier. A municipal corporation cannot, unless expressly authorized by its charter, carry on the business of a banker, miner or manufacturer.

A corporation is an artificial person, the creature of law. It has no powers except what are given by its incorporating act, either expressly or as incidental to its existence and its express powers. *Beatty v. Knowler*, 4 Pet. [29 U. S.] 152; *Perrine v. Chesapeake & Del. Canal Co.*, 9 How. [50 U. S.] 172; *Russell v. Topping*, [Case No. 12,163;] *Straus v. Eagle Ins. Co.*, 5 Ohio St. 59; *City Council of Montgomery v. Plank Road Co.*, 31 Ala. 76; *Brady v. Mayor of New York*, 20 N. Y. 312; *New London v. Brainard*, 22 Conn. 552; *Com. v. Erie & N. E. R. Co.*, 27 Pa. St. 339; *Caldwell v. City of Alton*, 33 Ill. 416; *Smith v. Morse*, 2 Cal. 524. No vote or act of a corporation can enlarge its chartered authority, either as to the subjects on which it is intended to operate or the persons or property of the corporators. *Salem Milldam Corp. v. Ropes*, 6 Pick. 23. A body corporate can only act in the mode prescribed by the law creating it. To enable its agents to bind the company, they must act pursuant to the incorporating act. [*Head v. Providence Ins. Co.*] 2 Cranch, [6 U. S.] 166. Express powers granted a corporation must be exercised in the manner pointed out in the statute. *Smith v. Eureka Flour Mills Co.*, 6 Cal. 1. The corporation in executing a public work cannot substitute its own more convenient mode of proceeding for that pointed out by its constituting statute. *Reg. v. Manchester &*

L. Ry. Co., 3 Q. B. 528. When a specific act is directed to be done by a particular agent of a corporation, it must be done by that agent. *Maddox v. Graham*, 2 Metc. [Ky.] 56.

These principles and authorities illustrate the rule applicable to the question in hand. If the Alabama and Chattanooga Railroad Company is a banker, broker, merchant, trader, manufacturer or miner, it must be made so by its charter. The company derives its powers and franchises from the act to charter the Wills Valley Railroad, passed by the general assembly of Alabama, and approved February third, eighteen hundred and fifty-two; the act to incorporate the Northeast and Southwest Alabama Railroad Company, passed by the same general assembly, and approved December twelfth, eighteen hundred and fifty-three; and an act, also passed by the general assembly of Alabama, relating to the Wills Valley Railroad Company and the Northeast and Southwest Alabama Railroad Company, approved November eighteenth, eighteen hundred and sixty-eight; which last named act authorized the purchase by the former company of the property and franchises of the latter. Said last named act also authorized the Wills Valley Railroad Company, after said purchase, to change its name to "The Alabama and Chattanooga Railroad Company;" and further provides that the Alabama and Chattanooga Railroad Company should exercise all the corporate authority and functions, rights and privileges of both the Northeast and Southwest Alabama Railroad Company and the Wills Valley Railroad Company. Therefore we must consult the charters of the two latter companies to ascertain the powers and franchises of the Alabama and Chattanooga Railroad Company. An inspection of these charters shows that neither of these companies was authorized to carry on the business of a banker, broker, merchant, trader or miner; and being neither by the law of its creation, it cannot be made such by any act of its officers, agents, or employes, or even by a vote of its board of directors. The twenty-second section of the act to incorporate the Northeast and Southwest Railroad Company provides, however, that "said company shall have power to erect and carry on machine shops, iron furnaces, foundries and rolling mills, and such other mechanical works as may be necessary, and to make, manufacture and furnish iron and other materials for the full equipment of the road, and to continue to make and manufacture the same under the provisions of this charter either for sale or their own use." Clearly this gives authority to the road to become a manufacturer—but this authority does not make the company a manufacturer unless it actually engages in the business of manufacturing. The business must also be carried on for the purpose of selling the products manufactured and not

for the exclusive use of the company, to make it a manufacturer within the meaning of the bankrupt act. A planter who manufactures plows and other agricultural implements, or weaves cloth, as many do, for his own use and not for sale cannot be considered a manufacturer, nor can a railroad company that makes iron rails and cars for its own exclusive use, and not for sale, be deemed a manufacturer. It might do this under its general power to construct, equip and operate a railroad without any special grant for that purpose. If no mode is prescribed for the exercise of a power, the grant of which is clearly defined, the corporation may adopt such mode as in its judgment will secure the purpose contemplated. No proof was submitted to the bankrupt court nor has any been submitted to this court to show that the corporation chartered by the state of Alabama as the Alabama and Chattanooga Railroad Company has ever carried on the business of a manufacturer. Some proof was submitted to us, that in Chattanooga, Tenn., a railroad corporation known as the Alabama and Chattanooga Railroad Company has carried on the business of manufacturing iron rails and cars, but no attempt was made to show that the articles manufactured were for sale and not for the exclusive use of the company. The fair presumption is that this corporation is the one chartered by the state of Tennessee. It is not alleged in the petition filed in the district court that the Alabama and Chattanooga Railroad Company was either banker, broker, merchant, trader, manufacturer or miner, and no proof was offered showing that it was either. The inevitable conclusion is that the petitioner ought not to have been adjudicated a bankrupt upon the petition and proofs submitted to the judge of the district court.

We might leave the case here, but an interesting question of practice is raised which we will proceed to notice. The facts touching the charter of this railroad company by the four states of Tennessee, Georgia, Alabama and Mississippi, where its line runs, and where its principal office is, have already been stated. It has also already been stated how the order to show cause, issuing from the bankrupt court, was served. It is objected that this service was defective and void. The bankrupt act, section forty, prescribes how service shall be made in cases of involuntary bankruptcy. A copy of the petition and order to show cause shall be served on such debtor by delivering the same to him personally, or by leaving the same at his last or usual place of abode; or if such debtor cannot be found, or his place of residence ascertained, service shall be made by publication in such manner as the judge may direct. By the words "if such debtor cannot be found," we understood "if he cannot be found within the jurisdiction of the court." We do not understand that the debtor may

be served, or that the marshal is compelled to serve him in another jurisdiction, even when he knows precisely where he may be found. The words "not found" have a well settled technical meaning, and mean not found in the jurisdiction of the court. If no proper officer of this company could be found within the jurisdiction of the court, that did not authorize service out of the jurisdiction. In such case other modes of service must be resorted to. Service may be made at the last or usual place of residence of the debtor. Was the leaving of a copy of the order at the office of the debtor in Chattanooga, Tennessee, such a service as would bring the party into court? A corporation created by the laws of Alabama may carry on business in another state, but cannot be said to have a residence there. In *Bank of Augusta v. Earle*, 13 Pet. [38 U. S.] 519, held that "the legal person or entity known to the common law as a corporation, can have no legal existence out of the bounds of the sovereignty by which it is created; that it exists only by force of law, and that where that law ceases to operate the corporation can have no existence. It must dwell in the place of its creation." Can a corporation be said to have a last or usual place of residence in a place where it cannot exist? It has been held that a corporation created by the laws of one state, is not rendered liable to be sued by process served in another state, by the fact that it carries on business in this latter state, and that the process has been delivered to its officers and agents found therein. The bankrupt act requires that the petition shall be addressed to the judge of the judicial district in which such debtor has resided for the six months next preceding the time of filing the petition. If, therefore, it is claimed that the order to show cause was properly served by leaving a copy at the residence of the company in Chattanooga, Tennessee, it follows that the petition should have been filed in that district and addressed to the judge thereof. The fact that the Alabama and Chattanooga Railroad Company is also chartered by the state of Tennessee, as well as Georgia, Alabama and Mississippi, does not make it one corporate body, on which service could be made at its residence in any one of those states. In *Ohio & M. R. Co. v. Wheeler*, 1 Black, [66 U. S.] 297, the supreme court "held that a corporation cannot exist as one body under charters from two separate states. It has no legal existence in either state except by the law of the state, and neither state could confer on it a corporate existence in the other, nor add to or diminish the powers conferred. It may be composed of and represent, under the same corporate name, the same natural persons; but the legal entity or person which exists by force of law can have no existence beyond the limits of the state which brings it into life

and endows it with its faculties and powers. The president and directors of the Ohio and Mississippi Railroad Company is therefore a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio." The result is that service was made neither personally nor at the last or usual place of residence of the debtor. As no other service was attempted, there has been no valid service.

It is said that unless the service made is held good there can be no service in this case. We do not so construe the law. Provision is made for service in just such case as this. If the debtor cannot be found, or his place of residence ascertained, service may be made by publication. It is certain that if the jurisdiction of the district court over this case can be maintained, the residence of the debtor is in this district. If the place of that residence cannot be ascertained, as if there is no office of the company within the district and it is uncertain or unascertained where the process should be left, and no person representing the corporation on whom service can properly be made, can be found in the district, then service by publication may and should be resorted to. We think it clear that service upon an officer of the corporation, out of the district and state and circuit, or service at the supposed residence of the corporation, also out of the district and state and circuit, is defective and invalid.

Whether this corporation has any residence at all in this district is a question which admits of debate, but the proof upon this point is meagre, and it is unnecessary to pass upon it.

The adjudication of bankruptcy in the bankrupt court was upon default of the debtor and upon a fatally defective petition. Even if the defect in the petition could be cured on this hearing by proof to establish the act of bankruptcy not averred in the petition filed in the bankrupt court, we think the proof submitted to us fails to show any act of bankruptcy on the part of the debtor. We are also of opinion that no sufficient service was made upon the debtor. For these reasons the decree of the district court for the middle district of Alabama, sitting in bankruptcy, adjudging the Alabama and Chattanooga Railroad Company a bankrupt, is reversed. The custodians appointed under said decree will deliver without delay all the property of said company which they have taken into possession by virtue of that decree, and the petition of William A. C. Jones to have said company adjudged as a bankrupt, will be dismissed at his costs.

[NOTE. A subsequent petition to the circuit court for review of another adjudication of bankruptcy afterwards made by the district court against the same company was dismissed. See *Alabama & C. R. Co. v. Jones*, Case No. 127.]

Case No. 127.

ALABAMA & C. R. CO. v. JONES.

[7 N. B. R. 145.]

Circuit Court, S. D. Alabama.

RECEIVERS—JURISDICTION OF CIRCUIT COURTS AND STATE COURTS—BANKRUPTCY—FILING PETITION—AMENDMENT—REVIEW.

[1. A United States circuit court will not appoint a receiver of the property of an insolvent railroad company of which receivers have been appointed by another circuit court and by chancery courts of other states, having jurisdiction, even though such receivers are delinquent in discharging their duty.]

[Cited in *Young v. Montgomery & E. R. Co.*, Case No. 13,166.]

[See *In re Alabama & C. R. Co.*, Case No. 124.]

[2. Where the record of the district court shows that a petition in bankruptcy was not filed on the same day that an order to show cause was made thereon, if in fact the petition was filed on that day, an order may be entered by the district court nunc pro tunc correcting the date of filing.]

[3. The record of the district court showing that a petition in bankruptcy was filed at a particular time is conclusive, and cannot be contradicted by parol testimony.]

[4. Where the record of the district court shows that the judge ordered a petition in bankruptcy to be filed, and made an order to show cause thereon, it will be presumed that the petition was filed before or contemporaneously with the order to show cause unless the record shows the contrary.]

[5. A person not a party to a bankruptcy proceeding in the district court cannot file a petition in the circuit court for review thereof.]

[6. Proceedings by assignees or registers in bankruptcy, not passed upon by the district court, cannot be availed of as error on review in the circuit court.]

[In equity. Motion for appointment of receiver of property of the Alabama & Chattanooga Railroad Company, and for an injunction to restrain a sale of said property in proceedings in bankruptcy against said company in the district court of the United States for the middle district of Alabama. Heard on reargument of said motion, and also on petition of Sylvester Stephens, for review of the decree of the district court adjudicating the company bankrupt, argued at the same time. For opinion on former hearing of motion, see *Blake v. Alabama & C. R. Co.*, Case No. 1,493; for opinion reversing a former adjudication of bankruptcy against the company, upon petition of the company for review thereof, see *Alabama & C. R. Co. v. Jones*, Case No. 126. Motion denied on reargument, and petition of Stephens for review dismissed.]

Walker & Murphey, for William A. C. Jones, petitioning creditor in bankruptcy, respondent.

WOODS, Circuit Judge. These causes have been argued and submitted together. The first is heard upon a motion for the appointment of a receiver, to take into possession

the property of the Alabama and Chattanooga Railroad Co., and for an injunction to restrain a sale of said property by the bankrupt court of the middle district of Alabama. The question of the appointment of a receiver was long and ably argued at the last term of this court, and the motion to appoint was denied; but on the suggestion of counsel that a new fact had come to their knowledge which would remove the obstacle which the court found to the appointment of a receiver, the motion was continued. It turns out, however, that the supposed fact did not exist, and the motion has now been argued on substantially the same facts as at last term. I have listened with patience to the very able arguments submitted for the motion, but have not been able to reach any different conclusion from that announced heretofore.

The proposition of complainant is that this court shall appoint a receiver who shall wrest the property in controversy from the custody of the circuit court of the United States, for the southern district of Mississippi, and from the state chancery courts of Alabama, Georgia and Tennessee. These state chancery courts are courts of general jurisdiction, with powers just as large as the powers of this court, and just as competent to administer full relief. If this were not true, yet it will certainly not be denied as respects the United States circuit court for Mississippi. The jurisdiction of that court is precisely the jurisdiction of this; it as fully represents the powers of the high court of chancery of England as this. The complainant here could get the same measure of relief in that court as could be administered in this. By what right can he ask this court to stretch its hands beyond the limits of its territorial jurisdiction and wrest property from the court, of which it has acquired jurisdiction, which is in gremio legis and in process of administration by that court? The fact that the complainant raises questions here, as he claims, which are not raised in the suits referred to, does not authorise this court to take from those courts the property which they have under their control. This court may pass upon questions not raised in the other courts, even between the same parties and relating to the same, but no case can be found authorising this court to interfere with the property in the possession of other courts of concurrent jurisdiction.

The fact that the receivers appointed by three other courts are not doing their duty, or have in any degree abandoned the property, does not authorise this court to interfere. The receivers are responsible to the courts which appointed them, and to those courts alone. Appeal should be made to the court which appointed them, and any redress for their misconduct must be sought there. Nor can a question of the jurisdiction of those other courts be made here, so as to

deprive them of their custody of the property. That question should be first made to the courts exercising the jurisdiction, and not here. But as I decided at the last term, and as it is alleged the supreme court of this state recently decided, I believe the jurisdiction of the courts referred to is complete over the subject matter of the suits and the parties. This jurisdiction having been first acquired, controls, and cannot and should not be interfered with by this or any other court. I am therefore constrained, as heretofore, to deny the motion for the appointment of a receiver.

At the last term of this court I expressed the opinion that the adjudication in bankruptcy of the Alabama and Chattanooga Railroad Co., was, as presented at that time by the record of the bankrupt court, a void adjudication. The ground of this opinion was that the order to show cause was made on the fifteenth of September, eighteen hundred and seventy-one, and the petition was not filed, as appeared by the record, until the nineteenth day of September following. The holding was that the commencement of the proceedings was the filing of the petition, and no valid order could be made until the proceedings were commenced. Since the last term of this court, a nunc pro tunc order has been made in the bankrupt court by which the date of the filing of the petition has been corrected. By the record, as amended, it appears that the petition was filed on September fifteenth, eighteen hundred and seventy-one, at twelve o'clock M. This record as amended, if the amendment is properly made, we are bound to take as the record of the court, and to regard it precisely as if it had originally shown the true date of the filing to be September fifteenth. It is objected that the amendment was not properly made, because there was nothing of record to amend by. Whether this is necessary in the mere matter of the date of the filing of a petition, a purely ministerial act, it is unnecessary to decide. It seems to me, however, that there are two sufficient answers to the objection. The first is, that every court has power to alter and amend its records so as to conform to the truth, during the term to which the record relates. In the bankrupt court, so far as relates to each particular case, there is but one term. The terms of the bankrupt court are not divided by vacations. The first section of the bankrupt act provides "that the said (the bankrupt) courts shall be always open for the transaction of business." So that, from the beginning of a proceeding in bankruptcy to its termination, there is but one term. Now, can it be claimed with any show of reason, that during the pendency of proceedings in a particular case, the court could not, upon the representation of the clerk that he had omitted to file-mark a particular paper, or had filed it of a wrong date, and upon being satisfied of the truth of the representation, order him to file the

paper as to [of] the date when lodged in his office? To do this would be exercising a power exercised almost every day by courts in term time; a power, too, generally exercised without the formality of a written order, entered upon the minutes.

But second: it appears from the record that the amendment in question was made upon proof satisfactory to the court, and even if it were necessary to amend by the record, this court is bound to presume that the evidence offered in support of the amendment was legal and sufficient. This court must presume that the bankrupt court acted in good faith, that it did its duty, and when its record shows that a certain fact was found on satisfactory proof—that the proof was legal and conclusive.

So we have the record of the bankrupt court, showing that the petition in bankruptcy was filed on September fifteenth, at twelve o'clock M. Can this record be impeached in this court? The authorities are adverse to the proposition. [Craig v. State of Missouri,] 4 Pet. [29 U. S.] 463; Mankin v. Chandler, [Case No. 9,030;] [Scott v. Shearman,] 2 W. Bl. 977; [The Mary,] 9 Cranch, [13 U. S.] 144; [Williams v. Armroyd,] 7 Cranch, [11 U. S.] 423, 432; [Walden v. Craig's Heirs,] 14 Pet. [39 U. S.] 147; [Com. v. Messenger,] 4 Mass. 467; [Putnam v. Man,] 3 Wend. 202; [Legro v. Lord,] 10 Me. 163. When the court has found upon a jurisdictional fact, it is conclusive. The record here shows that upon proof submitted the fact in question was passed upon by the court. It is res adjudicata, and cannot be contradicted by parol testimony. It is not denied that the petition in this case was filed at some time. The filing of the petition gave the court jurisdiction of the case. It became a case in the court and was properly there. Being a case in court, the court had the power and jurisdiction to make the record of the proceedings conform to the truth, and if the truth was that the petition was filed on a certain day, it was within the power of the court to make the record speak that fact.

We must take it as a conclusively established fact that the petition was filed on the fifteenth of September, eighteen hundred and seventy-one, at twelve, M. The order to show cause, however, states that "before the filing of the petition the same was presented to the circuit judge for his order." But the record also shows that on the same day that the circuit judge made the order to show cause, and prior to making the order, he directed the proofs and petition to be filed. As the present record shows that the petition was filed on the same day at noon, so that it is the result of the entire record either that the petition was filed before the order to show cause was signed, or contemporaneously with the order. This is the way the record reads: "Before the filing of the foregoing petition and proofs the same was submitted to the circuit judge, who, having read

the same, now orders said petition and proofs to be filed." (The record shows this was done at noon of that day.) Then follows the order of the judge to show cause. All things are presumed to be rightly done. It is to be presumed, unless the record show the contrary, that when the judge ordered the petition to be filed it was done either before or contemporaneously with the making of the order. Taking the record as it now stands it is impossible to say that the order to show cause was made before the filing of the petition. The fair intendment of the record is otherwise. The ground, therefore, upon which I expressed the opinion at the last term, that the adjudication was void for want of authorised service upon the bankrupt, is taken away by the amended record now presented. The amendment has been made by the proper court having the authority, and this court is constrained to hold that it was rightly and truthfully done.

But it appears to me that the present petitioner is not authorised to complain of this adjudication in this court. A revisory petition can only be filed by a party aggrieved. Until adjudication there are but two parties to an involuntary petition in bankruptcy—the petitioning creditor and the debtor. The latter, and the latter only, can complain of the adjudication. In the very nature of the case, he is the only party who can be aggrieved by the adjudication. A creditor, even one who has proved his debt, cannot come in after the adjudication and seek to have it reversed, for the obvious reason that he was not a party to the proceedings of which he complains.

The other matters complained of in the petition do not seem to me to present any subject for the revisory power of this court. It is not every proceeding in a bankrupt case that this court is authorised to review. This court is not empowered to pass upon the doings and actings of the registers or assignees or creditors. The "case" or "question" presented here for revision must be a case or question fairly presented to and passed upon by the bankrupt court. That is the court of first resort. To that court first must the question and the proofs be presented, and if that court errs upon the question presented, then, and then only, can resort be had to this court. A party cannot come to this court in the first instance to make his case or question. Thus, in the case of *Bailey v. Whitfield*, [Case No. 748,] this court, when asked to set aside an alleged fraudulent sale of real estate ordered by the bankrupt court and made by the assignee, refused to do so, because the motion had not first been presented to the bankrupt court, holding that we could only review the action of the court and not the action of the assignee.

The result of these views is, that the petition of review, taken in connection with the record of the bankrupt court as now shown, does not present a case which authorises this

court to reverse the bankrupt proceedings. The petition of Stephens must, therefore, be dismissed.

ALABAMA & C. R. CO., (STANTON v.)

[See *Stanton v. Alabama & C. R. Co.*, Case No. 13,297.]

Case No. 128.

The ALABAMIAN.

[2 Adm. Rec. 254.]

Superior Court, S. D. Florida. May 8, 1830.

SALVAGE—RECEIVING CARGO TO LIGHTEN STRANDED SHIP—AMOUNT OF AWARD.

[1. Salvors who render no service to a ship which is aground other than receiving part of the cargo which the master was about to jettison, in order to float the ship, have no claim for salvage against the ship, but only against the portion of cargo thus received and saved by them.]

[2. Where a ship is aground in great peril, salvors who receive her cargo to the value of \$30,000, and thus lighten her enough to get her afloat, and who willingly and in good faith do their utmost to assist the master both by advice and by helping at the pumps until the vessel gets into port, should get the highest possible award against the cargo so received by them, especially when it is probable that the master would have jettisoned a greater amount of the cargo had they not been present to receive it; and in such case an award of \$23,500 is suitable.]

[In admiralty. Libel in rem by William F. English and others against the ship *Alabamian* and cargo for salvage. Decree for libellants as to a part of the cargo.]

Charles Watkins, for libellants.

A. Gordon, for respondents.

MARVIN, Superior Court Judge. The ship *Alabamian*, (Lane, master,) bound from New York to Mobile, laden with an assorted cargo, estimated to be worth \$200,000, about four o'clock in the morning of the twenty-sixth of March, ran on to that part of the Florida reef known as the Washerwoman. The master threw overboard a part of his cargo; and after the arrival of the libellants' wrecking vessels a part was transferred on board of them, and brought to this port. The ship being got off the reef, she, with the cargo left on board of her, was also brought here, and libelled in this court for salvage. The facts and circumstances connected with this disaster—the imminent perils which surrounded the ship and cargo, while upon the reef—the manner and means of her preservation, are sufficiently and well set forth in the pleadings.

The first question to be considered is, are the ship and entire cargo subject to the claim of salvage; or is that part of the cargo transferred on board the wrecking vessels, only, subject to the claim of salvage? "Salvage is a compensation given for saving property exposed to marine peril." This

definition is believed to be correct. The property then must be saved by the persons claiming the compensation; for the compensation is given for saving. It must also be exposed to marine peril. If there be no peril there can be no saving. Marine perils and saving from these perils, by the persons claiming salvage, must concur to entitle them to this extraordinary compensation. The entire property must be saved. In order to charge the entire property with the claim of salvage. The saving of part will not create a claim of salvage against the residue. That these are the fundamental rules upon which the right to salvage is based I have no doubt. They were expressly recognized in the case of *The Elenor*,¹ decided in this court in 1836 by Judge Webb, but held not applicable to that case; as the entire property in that case had evidently been saved by the actors. Let us apply these principles to the case under consideration.—From the testimony in the case I am satisfied that the services of the libellants in no way conducted to the saving of the ship and that part of the cargo left on board of her at the time she came off the reef. They were saved by the coolness and skill of the master, favoring winds, favorable tide, and other auspicious circumstances of nature. Beyond the simple act of receiving a part of the ship's cargo on board their vessels, the services of the libellants were not needed; and under the circumstances of the case, however extraordinary or laborious their exertions to save the ship and cargo might have been, it is evident that their exertions could not save them from the perils which surrounded. The libellants did everything that was wanted—everything that was asked of them—everything they could do to rescue the ship and cargo from her perilous situation. They assisted in lightening the ship. They rescued a part of the cargo aboard their own vessels. But the ship would have been lightened to the same extent by throwing the same quantity of cargo overboard, which could have been done by the master and crew in as short a period of time as was employed in transferring the cargo on board their vessels; and which it is evident the master would have done, from his having commenced such jettison. I am of the opinion that the service of the libellants did not contribute to the saving of the ship, and that part of the cargo left on board of her at the time she came off the reef. It follows that these are not subject to any valid claim on the part of the libellants for salvage, and as to these the attachment of this court against them has im-providently issued.

The next question is, what amount of the value of that part of the ship's cargo, trans-

ferred on board the libellants' vessel ought to be decreed them as salvage? The value of this portion of the ship's cargo cannot be precisely ascertained without considerable delay to the ship's sailing on her voyage, and some expense and trouble. A part of it has been appraised; the rest is estimated. The whole is believed to be worth \$30,000. From the pleadings and proofs it is clear that this amount of the value of the ship's cargo has been saved by the services of the libellants from certain total loss. But for their services this amount of property would certainly have been committed to the devouring ocean. It is quite probable, too, if the libellants had not been at hand to render assistance, that the master, in his anxiety to lighten his ship sufficiently to be sure of her going off the first favorable tide, would have thrown overboard more of his cargo than was saved in the libellants' vessels. The good conduct of the salvors in this case; their prompt readiness and willingness to render all the assistance in their power; their perfect good faith in giving good and withholding bad advice to the master when the ship was exposed to the greatest peril, and when the slightest mismanagement, the least imprudent experimenting in taking in, setting or trimming the sails, would inevitably have lost her; their promptness and willingness in assisting at the pumps to keep the ship free on her way from the reef to this port, and while she was being discharged at the wharf,—induces me to award to them upon the value of the property saved by them the highest rate of salvage which my views of the case and the rules of law will at all justify. By rewarding good conduct, good faith, and promptness to render assistance, when assistance is really needed, with a generous liberality, and by withholding this liberality when these virtues are wanting, or not apparent, I shall teach a moral lesson to the professional wreckers upon this coast that must and will secure comparative protection to the commerce of the Florida gulf. Impressed with these views, I shall in this case decree to the libellants as a salvage compensation the sum of \$23,500. I feel that under the circumstances of this case, this is a large salvage, but as in governments and morals, so also in the decisions of this court, particular interests had better be made, sometimes, to yield to a certain extent to the greater interests of the general whole; and a general policy, which has for its object the safety of commerce through the dangerous Florida gulf, had better be vindicated and sustained, which policy requires that when the conduct of the professional wrecker is good it should be rewarded,—when bad, punished. See [*Mason v. The Blaireau*,] 2 Cranch, [6 U. S.] 240.

The clerk will enter up the decree in form.

¹[Nowhere reported.]

Case No. 129.

The ALASKA.

[3 Ben. 391.]¹

District Court, E. D. New York. Sept., 1869.

PILOTAGE—JURISDICTION—TENDER.

1. Where a pilot boarded a ship, some thirty miles from Barnegat, and the master of the ship proposed that his employment should not commence till the vessel reached pilot ground, whereupon the pilot went to bed, and was called when Sandy Hook hove in sight, and then took charge of the vessel, and thereafter libelled her for the amount of offshore pilotage, awarded by the laws of the state of New York: *held*, that the court had jurisdiction of the action, [as it was on a maritime contract.]

2. That the libellant could only recover for in-shore pilotage, and that, as the amount of in-shore pilotage had been tendered before suit, the decree must be without costs.

[3. Cited in *Ex parte Easton*, 95 U. S. 76, as authority for holding a contract for wharfage to be a maritime contract.]

In admiralty. This was an action to enforce an alleged lien upon the American bark called the "Alaska," for pilotage. The libellant, who was a New Jersey pilot, boarded the bark when some thirty miles south southeast from Barnegat, bound to New York. He did not, however, take charge until Sandy Hook light was just in sight, from which place he acted as pilot until the vessel was moored in the port of New York, which was her home port. For this service he presented a bill for off-shore pilotage. The owners of the vessel refused to pay off-shore pilotage, but, before suit, tendered the regular in-shore pilotage, which was refused, whereupon this action was brought. [Decree by libellant for amount of in-shore pilotage.]

Emerson, Goodrich & Wheeler, for libellant.

F. A. Wilcox, for claimant.

BENEDICT, District Judge. The objection which has been taken to the jurisdiction of the court is not maintainable. A court of admiralty has undoubted jurisdiction to entertain a proceeding in rem against a ship, whether owned in this state or elsewhere, to enforce payment for services actually rendered to such ship in piloting her from sea. If such a service be not maritime, I can conceive of none. *The Rob. J. Mercer*, [Case No. 11,891;] *Hobart v. Drogan*, 10 Pet. [35 U. S.] 120.

Nor can the existence of state pilot laws, regulating pilotage service in and out of the port of New York, have any effect to change the nature of the service. The states cannot, by legislating in regard to services clearly maritime, make them other than what they are. Statutes of the states regulating the appointment and compensation of pilots, have been held to be valid laws for such

purposes, which can be enforced in the tribunals of the states, and are to be looked to as determining the amount of the compensation to be allowed pilots who hold offices under them, whenever the claim to such compensation may be advanced; but they can have no effect to limit the jurisdiction over all causes of admiralty and maritime jurisdiction, which, under the constitution, has been conferred upon the district court of the United States. *Hobart v. Drogan*, 10 Pet. [35 U. S.] 120.

The libellant is, therefore, entitled to maintain his action, founded as it is upon a maritime contract. But upon the facts, as they appear, he is not entitled to recover the full amount which he has claimed. The evidence shows that the pilot, when he went on board the vessel, assented to the proposition of the master, that his employment should not commence until the vessel reached pilot ground. He accordingly went to bed, was waked when Sandy Hook light hove in sight, and then first took charge as pilot.

Under such a state of facts, he must be deemed to have first offered his services as pilot when the vessel reached pilot ground, and to have waived any right which he might have had, if he had held the master to accept or refuse his services when the ship was first hailed.

The decree will, accordingly, be for the amount of the in-shore pilotage, and as the tender of that amount before suit brought is admitted, the decree must be without costs.

Case No. 130.

The ALASKA.

[7 Ben. 183.]¹

District Court, S. D. New York. March, 1874.

COLLISION IN LONG ISLAND SOUND — SCHOONERS CROSSING—12TH (NOW 17TH) RULE.

1. Two schooners, the A. and the H., were beating through Long Island sound, bound to New York, the wind being about west by south. Both vessels were on the port tack, standing off from the Long Island shore, the A. being ahead, and to windward of the H. The H., however, being the faster vessel, passed the A., and came about on the starboard tack, for the purpose, as she said, of avoiding the strength of the ebb tide, and obtaining a more favorable wind nearer the Long Island shore. Shortly after she came on the starboard tack, she was run into by the A., which struck her on the port quarter. She alleged that she had room enough to get by the A., but that the wind headed her off, and favored the A., and that the A. was bound to have kept out of her way, but made no effort to do so. The A. claimed that the H. came on her starboard tack so close to the A. that it was not possible for the A. to go under her stern, although her helm was at once put hard a-port: *Held*. That, if the case were one calling for the application of the 12th rule [now rule 17] for avoiding collisions, the

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burden of proof would be on the A. to show an excuse for not keeping out of the way of the H.;

[See *Bartlett v. Williams*, Case No. 1,081.]

2. But that, on the facts, the H. was in fault, in coming on her starboard tack so close to the A. as to compel the A. to change her course so as to avoid the H. Her manoeuvre was a hazardous one;

3. That, on the facts, the helm of the A. was ported as soon as the H. tacked, and that the A. was free from fault.

In admiralty.

R. H. Huntley, for libellants.

W. R. Beebe and A. J. Heath, for claimants.

BLATCHFORD, District Judge. This libel is filed by the owners of the schooner *Marietta Hand* against the schooner *Alaska*, to recover for the damages sustained by the libellants, in consequence of a collision which took place between the two vessels on the 26th of April, 1872, between 3 and 4 o'clock P. M., in fine and clear weather, in Long Island sound, a little to the westward of Plum Island, and not far from the Long Island shore. Both vessels were bound to New York through the sound, and both were beating, the wind being about west by south, and blowing a fresh breeze. Just before the collision, both vessels were on the port tack, standing off from Long Island shore. At the commencement of the standing of both vessels on such port tack, the *Alaska* was ahead, and to the windward of the *Hand*. While they both continued to stand on such tack, the *Hand*, being in ballast and light, forereached and passed the *Alaska*, the *Alaska* being still to the windward. The *Hand* then tacked and came on to the starboard tack, the *Alaska* still keeping on the port tack. In this condition of things the collision occurred, the *Alaska*, head on, striking the port quarter of the *Hand* a glancing blow near the stern of the *Hand*.

The libel alleges, that the *Hand* stood on the port tack until she had beaten it out; that then, owing to the strength of the ebb tide in the middle of the sound, and to the fact that she could obtain a more favorable wind nearer the shore of Long Island, she tacked, to stand toward Long Island; that, when she so tacked, the *Alaska* was 600 or 700 feet astern of her, and bore about one point off her weather quarter; that, as the *Hand* went about, the wind headed her off on the starboard tack, and thereby favored the *Alaska*, so as to enable her to luff nearer to the position into which the tack just made brought the *Hand*; that, upon discovering this, those on board of the *Hand* hailed the *Alaska* to keep off, but she kept on and ran into the *Hand*; that the collision was caused solely by the negligence of the *Alaska*, in not keeping away, in not having a lookout properly stationed, and in having a load of lumber piled so high on her deck, that those on board of

her could not see the *Hand*; and that, if the *Alaska* had slightly changed her wheel, she would have passed to the leeward of the *Hand*, and thus have avoided a collision. This libel was sworn to by the libellant Hawkins, one of the owners of the *Hand*, six days after the collision, and was drawn up on a statement made by Hawkins, and by Hallock, the master of the *Hand*, who was examined on the trial as a witness for the libellants.

The answer avers that, on the port tack of both vessels, the *Hand* ranged a little ahead of the *Alaska*, and when about once or twice her length ahead, and about three points off the starboard and lee bow of the *Alaska*, the *Hand* suddenly, and without any warning, and when the two vessels were in too near proximity, tacked, apparently attempting to run across the bows of the *Alaska*, and ran into the *Alaska*; that everything that could be done on board of the *Alaska* was done to avoid the collision, but it was inevitable from the instant of the last unseamanlike manoeuvre of the *Hand*, though the helm of the *Alaska* was put and kept hard a-port; and that the collision was wholly the fault of the *Hand*.

The contention on the part of the *Hand* is, that the courses of the two vessels were crossing, and they had the wind on different sides, and it was the duty of the *Alaska*, under article 12, as having the wind on the port side to keep out of the way of the *Hand*, both vessels being close hauled. If the state of things contemplated in article 12 existed, the burden of proof is on the *Alaska* to show an excuse for not keeping out of the way of the *Hand*, as the existence of such a state of things, there having been a collision between the two vessels, is prima facie evidence of fault in the *Alaska*, and conclusive evidence of fault in her, unless successfully rebutted by her. It becomes necessary, therefore, to determine whether article 12 applies to the case. The *Alaska* contends, that it does not apply, for the reason that the *Hand*, when on the port tack with the *Alaska*, and when to the leeward of the *Alaska*, and when only about once or twice the length of the *Hand* ahead of the *Alaska*, and about three points off the starboard and lee bow of the *Alaska*, suddenly, and without any warning, and when the two vessels were in too near proximity, tacked and attempted to run across the bows of the *Alaska*, and caused the collision, although the *Alaska*, from the instant of the *Hand*'s manoeuvre, put and kept her helm hard a-port. With the wind about west by south, the *Alaska*, on her port tack, close hauled and lying say five points to the wind, would be heading about northwest, and the *Hand*, on her starboard tack, close hauled, and lying say five points to the wind, would be heading about south southwest. These courses were crossing.

The libel states, that, when the *Hand*

tacked, the Alaska was 600 or 700 feet astern of the Hand, and bore about one point off the weather quarter of the Hand; and that, as the Hand went about, the wind headed her off on the starboard tack (that is, caused her to head more to the southward than south southwest, as I understand it, so as to diminish her opportunity of crossing ahead of the Alaska), and favored the Alaska, so as to enable her to luff nearer to the position into which the tack just made brought the Hand (that is, so as to enable the Alaska to head more to the westward than north-west). This story of the Hand, told six days after the collision, is a very different one from that told by Hallock, the master of the Hand, at the trial, 20 months after the collision. Hallock was on the deck of the Hand, and at her wheel, and testifies, at the trial, that, when the Hand tacked the last time before the collision, she was from a half to three quarters of a mile ahead of the Alaska, which would be from 2,640 to 3,960 feet ahead, instead of 600 or 700 feet ahead. He also testifies that, after getting on the starboard tack, he stood on it from 10 to 15 minutes before the collision. There is nothing of this in the libel. He also testifies, that he was nearly half a mile to the leeward of the Alaska, when he so tacked; and that he supposed he was far enough ahead to cross the bows of the Alaska. It is impossible, I think, from all the evidence in the case, to resist the conclusion, that the Hand, being light, was not only trying to outsail the Alaska, and did outsail her, but also then undertook to wind her and cross her bows, and to do that in such close proximity to the Alaska, as to compel the Alaska, under the rule of navigation, to depart from her course so as to avoid the Hand. If, as is alleged in the libel, the ebb tide was stronger in the middle of the sound, and the Hand could obtain a more favorable wind nearer the Long Island shore, and these were the reasons why she tacked when and where she did, there is nothing to show that these reasons were not and ought not to have been as controlling before she passed the Alaska as afterwards, and nothing to show why the Hand did not tack at a point where she would have been certain to go under the stern of the Alaska, and where she would not have attempted to cross the bows of the Alaska. The admission by the master of the Hand, that he supposed, when he tacked, that he was far enough ahead to cross the bows of the Alaska, is a confession that he intended to cross her bows. This was a hazardous manoeuvre in a vessel sailing close hauled, and liable to be headed off both by the wind and the tide, and to make leeway enough to disappoint the expectation of crossing the bows of the Alaska. Nevertheless, if the Hand, in fact, tacked far enough off from the Alaska, to make the 12th article applicable, it must be applied, although the Hand, in

tacking when and where she did, did so for the avowed purpose of winding the Alaska. That the wind was likely to head the Hand off, when she got on the starboard tack, was a circumstance which ought to have entered into the calculation of the master of the Hand, before he put his helm down to go about, and there can be no justification for him, if he went about when the Alaska was only 600 or 700 feet astern of the Hand, and then tried to cross the bows of the Alaska. This view, by the time of the trial, came to be controlling, and the witnesses from the Hand depart from the statement of the libel, and place the Alaska, at the time the Hand went about, at a much greater distance astern of the Hand than 600 or 700 feet. Burke, the acting mate of the Hand, who was walking the deck, puts the Alaska at the distance of about half a mile astern of the Hand when the Hand tacked, and says, that when the Hand got filled away the Alaska was about half a mile off in a straight line, and about four points off the lee bow of the Hand, and that, at the time the Hand tacked, they calculated to go ahead of the Alaska. This witness makes ten feet in a rod, and fifty rods in an eighth of a mile.

The libel charges, as reasons why the Alaska did not keep away, her want of a lookout, interception of vision by her deck load of lumber, and failure to port.

Ambrose Strout, the master of the Alaska, who was on her deck, the mate having the wheel, says that the Hand was about twice to three times her length ahead of the Alaska, when she tacked; that the Hand had just got fairly filled away when the vessels struck; that, when they saw the Hand tacking, the Alaska's wheel was hove hard up, and her main sheet was run off; that Ferrin W. Strout was stationed as a lookout on the fore-castle, forward; and that the lookout noticed that the Hand was tacking, and he, the master, saw her himself at the same time, and saw her when she was coming up into the wind. Ferrin W. Strout, the lookout, testifies, that he was on the lookout; that the Hand ranged about twice her length ahead of the Alaska, and then tacked; that she had barely filled away before the collision; that he was standing on the fore-castle deck, when the Hand tacked; and that, when he saw her tack, he halloed to the man at the wheel of the Alaska, and then the wheel of the Alaska was hove up and her main sheet was run off, and she paid off a little, but there was not time to pay off more before the vessels struck. Stover, a hand on the deck of the Alaska, and who saw the collision, testifies, that the lookout on the Alaska sang out to the man at her wheel to port his wheel, that the Hand was tacking under their bow. Uriah W. Strout, the mate of the Alaska, who was at her wheel, testifies, that the Hand ranged ahead, and when she got a lit-

tle on the starboard bow of the Alaska, a mite ahead, if anything, tacked; that they saw her when she tacked, and they went to keep off, and hove their helm hard up, and fell off a very little before the collision; and that the collision could not have been avoided after the Hand went in stays, because, when she tacked, she was so near to the Alaska, being about half a point on the lee bow of the Alaska, and about twice her length ahead.

On the whole evidence, I am of opinion, that the libellants have failed to make out their case against the Alaska, and that she has excused her not avoiding the Hand, by showing that the Hand improperly tacked so closely under the bows of the Alaska as to make it impossible for the Alaska to avoid her by the exercise of reasonable diligence and skill. The Alaska had no reason to suppose that the Hand had beaten out her port tack, or would go about, and there seems to have been no reason for her going about, except a desire to wind the Alaska. The libel must be dismissed, with costs.

Case No. 131.

The ALBANY.

[4 Dill. 439;¹ 15 Alb. Law J. 67; 4 Cent. Law J. 16.]

Circuit Court, D. Minnesota, 1876.

MARITIME LIENS—HOME PORT—RESIDENCE OF OWNER—PLACE OF ENROLLMENT.

1. A material-man has no lien for repairs or supplies to a domestic vessel.

[Cited in *The Mary Chilton*, 4 Fed. Rep. 848; *The Rapid Transit*, 11 Fed. Rep. 329; *The G. F. Brown*, 24 Fed. Rep. 400; *The Menominie*, 36 Fed. Rep. 198.]

2. Whether a vessel is foreign or domestic, depends upon the residence of her owners, and not upon her enrollment, where the two are different.

[Cited in *The Jennie B. Gilkey*, 19 Fed. Rep. 129; *The Thomas Fletcher*, 24 Fed. Rep. 377; *The G. F. Brown*, 24 Fed. Rep. 400; *The Ellen Holgate*, 30 Fed. Rep. 126; *The Menominie*, 36 Fed. Rep. 198.]

3. The Albany was owned at the town of Boscobel, in Wisconsin, and was enrolled at Galena, in Illinois, the nearest collector's office to the residence of the owner; necessary supplies were furnished by the libellant to the vessel at La Crosse, in Wisconsin: *Held*, that the libellant was not entitled to a maritime lien on the vessel.

[Cited in *The Mary Chilton*, 4 Fed. Rep. 848; *The Rapid Transit*, 11 Fed. Rep. 329.]

[Appeal from the district court of the United States for the district of Minnesota.]

In admiralty. A libel in rem was filed in the United States district court for Minnesota, in August, 1875, to enforce a maritime lien for necessary material and supplies furnished by the libellant to the Albany, at the request of the master. These were so fur-

nished by libellant in 1873, at La Crosse, in the state of Wisconsin, where the libellant resided and did business. The owner of the Albany was then, and still is, one Jacob Heime, who resided at Boscobel, in the state of Wisconsin. Boscobel is within the collection district which has its collector's office at Galena, Illinois, where the said Albany was enrolled and licensed, and Galena is the nearest collector's office to Boscobel. The Albany was engaged in navigating the Mississippi river, and during the winters she regularly laid up at Boscobel. She has painted on her stern, as required by the act of congress, the words, "The Albany, Boscobel, Wisconsin." In 1875, the Albany was mortgaged to certain of the claimants, whose mortgages were duly registered just before the seizure of the boat. The mortgagees had no notice of the libellant's claim. The Albany has been at the port of La Crosse as often as once a month during each season of navigation, since the libellant furnished said materials and supplies. There were two main questions argued in the district court: 1. Has the libellant a maritime lien? 2. If so, is the same stale as respects the mortgagees? The district court entered a decree in favor of the libellant. The owner and mortgagees appeal. [Decree reversed and libel dismissed.]

W. P. Warner, for claimants, (appellants.)
J. H. Davidson, for libellant, (appellee.)

DILLON, Circuit Judge. The decisive question in this case is, what was the home-port or state, of the steamboat Albany? It is a question of very great importance, and in respect of which some conflict of judicial opinion appears to exist. It has been deliberately considered, and without spreading upon this opinion all the learning applicable to it, I proceed to state my views concerning it. As strengthening the conclusion arrived at, and illustrating the reasons upon which it is based, it is desirable, briefly, to advert to the general law upon the subject of maritime liens or hypothecations. By the civil law, the material-man, for repairs made or necessary supplies furnished to a vessel, had an implied or tacit lien, whether the vessel was in her home-port or in a foreign port. *Abb. Shipp.* 142; *The Lottawanna*, 21 Wall. [88 U. S.] 590, 2 Cent. Law J. 410. And such is the undoubted rule in the maritime nations of Europe, which have adopted the civil law as the basis of the jurisprudence. It is equally well known that this principle has not been adopted as the law of England, or, rather, after having obtained in the admiralty courts of that country for some time, it was overturned by the hostility of the common law courts. *The Zodiac*, 1 Hagg. Adm. 325.

In the present case, the supplies were furnished to the vessel at the instance of the master, and in the maritime law of Europe

¹[Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

certain limitations upon his power, as between him and the owner, in respect of contracts for supplies or money to obtain them, are declared to exist.

By the celebrated marine ordinance of Louis XIV., whose provisions have been largely embodied in the Code de Commerce, material-men furnishing supplies are entitled to a lien; but this right is subject to the qualification (article 232, Code de Commerce) that the master shall not, in the place of residence (*dans le lieu de la demeure*) of the owners or their agent, without special authority, cause repairs to be made, buy sails, cordage, etc., or take up money for that purpose. But if the master violate this duty, the material-man, acting in good faith, is not deprived of his right or remedies. The words, "the place where the owner resides," are construed in France to comprehend the whole district, but not the whole country. *Selden v. Hendrickson*, (The Richmond), [Case No. 12,639.] But in England there is no implied lien recognized for repairs made or supplies furnished in that country—the principle of the civil law in this respect having been, as above observed, overthrown by the early hostility of the common law courts to the admiralty jurisdiction. But for necessary repairs made and supplies furnished abroad or in a foreign port, the English courts recognize and enforce a maritime lien.

It is important to notice the reasons given in the English courts for this distinction. Lord Mansfield says: "Work done for a ship in England, is supposed to be on the personal credit of the employer"—the owner or master. "In foreign ports," he adds, "the master may hypothecate the ship." *Wilkins v. Carmichael*, 1 Doug. 101. And, finally, the house of lords, in 1789, to conform the law of Scotland to the law of England, in *Wood v. Hamilton*, [3 Pat. App. 148.] decided that persons who had repaired and furnished a ship in Scotland, the place of the owner's residence, had no lien or privilege upon the ship itself. *Abb. Shipp. c. 3, pt. 2, p. 147.*

A maritime lien for supplies and necessary repairs abroad, furnished at the instance of the master, the owner being absent, is allowed from necessity and the encouragement of trade. *Abb. Shipp. 144, 145.*

The question in England, as to what is the place of residence of the owner, has given rise to controversy; but Lord Tenterden says: "I apprehend the whole of England is considered, for this purpose, as the residence of an Englishman; at least before the commencement of the voyage." *Abb. Shipp. 155; Selden v. Hendrickson*, [Case No. 12,639.] where the subject is discussed by Chief Justice Marshall. But the question is now settled in Great Britain by statutable provision. By 19 & 20 Vict. c. 97, § 8, all ports within Great Britain and Ireland, the Channel Islands, and the islands adjacent, if part of the queen's dominions, are to

be deemed home-ports in relation to the rights and remedies of persons having claims for repairs done or supplies furnished to ships.

Such being the state of the law in Europe and England, it became a question in the admiralty courts in this country, soon after their creation under the constitution, what doctrines they would adopt in respect of repairs and supplies. Some followed the more enlarged right given by the continental or general maritime law; others the more restricted right recognized by the English courts. In this condition of the law, at home and abroad, the supreme court of the United States, in 1819, decided the case of *The General Smith*, 4 Wheat. [17 U. S.] 438. In that case a Baltimore merchant furnished supplies to the ship *General Smith*, which was owned at Baltimore, and the court decided that there was no lien upon the vessel. In delivering its judgment, Mr. Justice Story thus states the doctrine of the court: "Where repairs have been made or necessaries have been furnished to a foreign ship, or to a ship in the port of a state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security. But in respect to repairs and necessaries in the port or state to which the ship belongs, the case is governed by the municipal law of that state, and no lien is implied, unless it is recognized by that law." The case of *The General Smith* has been frequently approved by the supreme court, and in the recent case of *The Lottawanna*, 21 Wall. [88 U. S.] 558, it has been solemnly reaffirmed, with but two dissenting judges. In applying the rule of *The General Smith* in other cases, the following language, bearing upon the question in the case under consideration, has been used: "Material-men who furnish materials or supplies for a vessel * * in a port other than a port of the state where the vessel belongs, have a maritime lien on the vessel" therefor. *The Belfast*, 7 Wall. [74 U. S.] 643, per Clifford, J. But not "for materials and supplies furnished to a vessel in her home-port." *Id.* 645. "A maritime lien does not arise for repairs made and supplies furnished in the home-port of the vessel." This "question was put at rest" by *The General Smith*, 4 Wheat. [17 U. S.] 443. Per Clifford, J., in *The Kalorama*, 10 Wall. [77 U. S.] 211; *People's Ferry Co. v. Beers*, 20 How. [61 U. S.] 393, 402.

We are thus brought to the question in the present case, whether the Albany, within the doctrine of the supreme court, belonged to the state of Wisconsin, where her owner resided, and to which she purported to belong, by the words painted upon her stern, or belonged to the state of Illinois, in which she was enrolled. Or, in other words, which is the home-port? 1. Is it the particular town or city in a state in

which the owner resides, and is every other port in the state, as well as elsewhere, foreign? 2. Is the vessel at a home-port at all ports in the state in which her owner actually resides, although she may be enrolled in another state? Or, 3. Does the state in which the enrollment is made conclusively determine the home-port or domestic character of the vessel, irrespective of the residence of the owner?

To solve the questions, let us first seek the aid of adjudged cases. In *The Nestor*, [Case No. 10,126,] A. D. 1831, on which a lien for supplies furnished in the District of Columbia for the *Nestor*, belonging to the port of Portland, Maine, was sustained, Mr. Justice Story said: "The admiralty has a clear jurisdiction to maintain such suits whenever the supplies have been furnished to the vessel in a foreign port; and every port is foreign to her which is not in the same state to which she belongs. So the doctrine was laid down in the case of *The General Smith*, and it has never, to my knowledge, been in the slightest degree departed from." "Ports of states, other than those of the state where the vessel belongs," says Clifford, J., "are considered as foreign ports." *The Lulu*, 10 Wall. [77 U. S.] 200, 202. "The term 'foreign port' in the jurisprudence of the United States," says the same learned judge, in a case on the circuit, "includes all maritime ports other than those of the state where the vessel belongs." *Burke v. The Richmond*, [Case No. 2,161.] And see the same illustration put by the same judge in the case of *The Lottawanna*, 21 Wall. [88 U. S.] at page 594.

The language of the opinion in the case of *The General Smith* and of Mr. Justice Story and Mr. Justice Clifford, above referred to, fairly implies, I think, that the domestic or foreign character of the vessel is determined by the state in which the owner resides, and not by the state in which the enrollment is made. And decided cases, —*The General Smith*, [4 Wheat. (17 U. S.) 438;] *The Nestor*, [Case No. 10,126;] *The Chusan*, [Id. 2,717,]—in the statement of them, show that the residence of the owner was regarded, and not the enrollment.

In the case of *The Golden Gate*, [Id. 6,492;] decided by an able admiralty judge, the precise question was presented, whether the foreign or domestic character of a vessel depended on the residence of her owner, or on the port of her enrollment. Judge Wells decided that where these were different, the residence of the owners governed as respects the rights and remedies of material-men. And the same reason is given by him as the one which is supposed to underlie the rule in this country denying a maritime lien for supplies to a domestic vessel. Judge Wells says: "If the owners reside in a foreign country, or in another state, the material-man is presumed to give

credit to the boat and also to the owners—because he is not presumed to rely alone on the owners who live so remote and who are beyond the jurisdiction of the courts of his state. If the owners reside in the same state with the material-man, the latter can easily resort to them for payment and readily enforce it in the courts; therefore he may well be supposed to give credit to the owners alone. It is apparent, therefore, that the place of enrollment has nothing to do with the credit that is given; and has, therefore, nothing to do with the question of lien."

A similar principle was approved and applied by Judge Leavitt, in the case of *The Superior*, [Case No. 4,115.] He holds that the place of enrollment is only prima facie evidence of the port or state to which the vessel belongs, and denies the soundness of *The Indiana*, [Id. 14,165,] so far as it decided that the vessel necessarily belonged to the port where she is enrolled.

The exact question whether the home-port of a vessel is determined by the residence of the owner or the place of enrollment, arose in *The Mary Bell*, [Case No. 9,199,] and it was decided by Judge Deady that the state in which the owner resided, and not that in which the enrollment was made, governed. Judge Betts made a similar decision in the southern district of New York. *The Kosciusko*, [Id. 13,901.] And in *The Alida*, [Id. 199,] this learned judge says: "Where services or supplies are rendered to a foreign ship, a lien attaches by the general maritime law, and the different states of the federal Union are, in regard to this question, regarded as foreign states to each other." This conclusion accords with the views of Chief Justice Marshall, in *Selden v. Hendrickson*, [Case No. 12,639,] 1819, where, after stating the law of England, he says: "The same principle applied to the United States, requires, I think, that a port in one state should not be considered as the place of residence of owners who live in another state." * * * "If every port, except that in which the owner actually resides, be not for this purpose (the hypothecation of the vessel) a foreign port, I perceive no rule more proper in this country, no rule better adapted to our situation, and to the reason of the thing, than to say that the power of the master to hypothecate exists in every port out of the state in which the owner resides, where he has no agent."

I am aware that in *The Loper*, [Case No. 11,119,] A. D. 1851, Mr. Chief Justice Taney is reported as laying down a contrary doctrine, and as saying: "The circumstance that the owner or charterer (of the *Loper*) was a citizen of another state, would not make her a foreign vessel in the port of Baltimore; the port at which she was enrolled and licensed was her home-port. As she belonged to Baltimore, and the supplies were furnished here, they were furnished at her

home-port, and created no lien upon the vessel. This question was directly decided in the case of *The General Smith*." And this is all of the opinion of the chief justice on this point. He enters into no reasoning, and although great weight is due to every expression of this eminent judge, I think it manifest, from the opinion itself, that his attention was not called to the considerations affecting the question, and that he acted upon the supposition that the case was controlled by *The General Smith*, and decided it by simply citing and following the judgment of the supreme court.

A still different view has been taken as to what constitutes the home-port of an American steamboat engaged in inland navigation, by Judge Deady, in the case of *The Favorite*, [Case No. 4,699,] which was enrolled in Oregon, and whose owner resided at the place of enrollment. The learned judge, after remarking that, "under the ruling of *The Lottawanna* by the supreme court, what constitutes the home-port is yet an open question," says: "I think, upon reason and convenience, the home-port ought to be the one where the vessel is enrolled. Away from that place, whether in or out of the state where her owner resides, she is supposed to be in itinere, and therefore relying upon her credit for the purchase of supplies to continue the voyage." And he held that material-men residing in Oregon were entitled to a maritime lien, if they resided at a town or port in the state different from the one where the owner resided and the boat was enrolled. I do not think the judge intended to overrule his decision in the case of *The Mary Bell*, supra, and however convenient the doctrine he held would be, and however desirable it might be deemed as limiting the doctrine of *The General Smith*, denying a lien upon domestic vessels, I have not been able to persuade myself that it is consistent on this point with the judgments of the supreme court.

All of the adjudications in respect to the rights and remedies of material-men, since the case of *The General Smith*, have proceeded, I think, upon the notion that vessels owned in the state where the credit was given are to be considered as domestic vessels, and there is in such cases no maritime lien; if owned without the state there is a maritime lien, and I shall decide this case upon the assumption that this view is the one we are required to take by the decisions of the supreme court.

I have not discussed the question upon principle. It were profitless to do so. I content myself with the observation that it would doubtless have been better, in view of our local situation, if the supreme court had adopted the rule of the general maritime law, recognizing a lien for proper repairs made and supplies furnished on the credit of the vessel, without respect to the

states in which the creditor and owner of the vessel reside. The doctrine of the supreme court, which it is safe to say would never have been adopted if the court could have had the benefit of the reflected light of subsequent experience, when applied to vessels navigating on lakes and inland waters, traversing several states, has produced, and if it remains will continue to produce, confusion, inconvenience, hardship, and injustice between creditors equally meritorious. But the supreme court, in *The Lottawanna*, in the face of an unanswerable dissent, stands by, rather than vindicates, the doctrine of *The General Smith*, discriminating between the rights and remedies of domestic and foreign material-men. The inferior courts must accept its exposition of the law as authoritative until that tribunal changes its judgment, or congress shall, as in my judgment it ought, make that provision for domestic creditors which is so ineffectually provided by the boat laws of the different states.

My understanding of the decisions of the supreme court as to the rights and remedies of material-men, lead me in this case to these conclusions:

1. That the Albany "belonged" to the state of Wisconsin, and that every port in that state was, as respects material-men, the home-port of the vessel. The libellant, residing in and extending credit in that state, is, under the view of the supreme court, conclusively presumed to have extended it to the owner, who resided in the state, or to the master, and has no implied or maritime lien on the vessel.

2. That as respects the rights and remedies of material-men, the home-port or state of a vessel is the state wherein the owner resides, and not the state or district in which she is enrolled, where the two are different. To hold in such a case that the enrollment controlled, would destroy the only foundation upon which a distinction between the rights of domestic and foreign material-men has been made, viz.: that the former are presumed to extend credit to the owner, whom they are supposed to know, or whom, at all events, they may pursue in the courts of their own state. *The St. Lawrence*, 1 Black, [66 U. S.] 527; *The Lottawanna*, 21 Wall. [88 U. S.] 593. The decree of the district court is reversed, and a decree will be here entered dismissing the libel at the costs of the libellant. Decree accordingly.

ALBANY, The, (BROWN v.)

[See *Brown v. The Albany*, Case No. 1,937.]

ALBANY & CANAL LINE, (DEEMS v.)

[See *Deems v. Albany & Canal Line*, Case No. 3,736.]

Case No. 132.

ALBANY DREDGING CO. v. The GLADIOLUS and The CONCORDIA.¹

[MS.]

District Court, E. D. Pennsylvania. June 5, 1877.²

COLLISION—DREDGE—ADMIRALTY JURISDICTION.

[Cited in *The Ceres*, Case No. 2,555, to the point that a court of admiralty has jurisdiction over every injury committed on the high seas or navigable waters, the character of the thing injured being immaterial.]

[See note at end of case.]

[In admiralty. Libel in rem for collision by Elijah Brainerd and James G. Ketcham, copartners, trading as the Albany Dredging Company, and owners of the dredge Starbuck, against the tug *Gladiolus* and the bark *Concordia*. The case was referred to assessors, whose report is now submitted. Decree for libelants. Affirmed by circuit court, without opinion.]

The tug *Gladiolus* was towing the bark *Concordia* down the Schuylkill on Sunday A. M., Dec. 10, 1876, and the latter vessel ran into the dredge *Starbuck*, which was anchored at the mouth of that river in mid-channel, being pulled out there over Sunday, and held by means of spuds, (i. e., long poles stuck in the mud. The damages to the dredge were assessed at \$1,100. The assessors were of opinion (1) that the dredge was in fault for blocking up so much of the channel on Sunday. (2) The tug was in fault for not keeping further to the westward than she did. (3) The bark was in fault for not keeping in the wake of the tug before they got into close proximity with the dredge.

CADWALADER, District Judge. I concur in the opinion as to the dredge; nevertheless I am of opinion that her fault did not so contribute to the collision as to defeat the right of action at the suit of her owners. The decree is in their favor for their damages to be hereafter ascertained, and to be recovered as may be hereafter decreed. The relation of the tug with the bark will also be defined hereafter if it shall be requested.

[The court is, at present, inclined to the opinion that each is liable for half of the damages suffered by the bark.]

[On the next day the court intimated a doubt whether any amount could be awarded against the tug, but reserved the point for future consideration, saying that in the mean time the amount of damage suffered by the owners of the dredge should be ascertained.]

[NOTE. This case was affirmed by the circuit court without opinion. It is stated in the citation of this case in *The Ceres*, Case No. 2,555, that the jurisdiction was sustained against objection. The only reference to this point in the record briefs or argument is the following clause taken from the answer: "That the dam-

ages claimed for injuries to the said dredge are excessive, and, for want of jurisdiction, cannot be recovered in a suit in rem in this court." The citation in *The Ceres*, Id., is incorrect. It should be No. 2, April Sessions, 1878, instead of 1874.]

Case No. 133.

ALBANY EXCH. BANK v. JOHNSON.

[5 Law Rep. 313.]

District Court, N. D. New York. July, 1842.

INVOLUNTARY BANKRUPTCY—PETITION BY CORPORATION—VERIFICATION.

1. The president, cashier, treasurer, or other officers of a corporation, who undertake to make proof of debts due to the corporation, in accordance with the fifth section of the bankrupt act, must receive a special appointment for that purpose.

2. Whether a petition in invitum, in behalf of a corporation, can properly be received without proof that the persons by whom it is signed and verified are in fact the authorized agents of the corporation,—quaere.

3. By the terms of the fourteenth section of the bankrupt act, partners in trade cannot be decreed bankrupts in invitum, on the ground of insolvency alone.

4. Under the circumstances of this case, it was held, that no act of bankruptcy had been committed by the parties petitioned against.

[Cited in *Re Bonnet*, Case No. 1,632; *Ashby v. Steere*, Id. 576.]

In bankruptcy. This was a petition by the Albany Exchange Bank that Ralph Johnson and Benjamin P. Watrous be decreed bankrupts. The petition alleged that the debtors were merchants, doing business as such in the city of Albany, and composing the firm of Johnson & Watrous, and contained the usual allegations as to their indebtedness. It charged them with having, on the twenty-seventh day of April last, fraudulently executed a bond in the penalty of \$12,000, conditioned for the payment of \$10,000, together with a warrant of attorney to confess judgment thereon, to Andrew J. Johnson, Anthony Ten Eyck and Robert Johnson, on which bond and warrant of attorney a judgment was entered up in the supreme court of the state for \$12,000 besides costs, on the third of May last; and also with having on the same day fraudulently executed another bond in the penalty of \$3,000, conditioned for the payment of \$2,000, together with a warrant of attorney, in favor of Andrew Watrous, on which a judgment was also entered up on the third day of May last, for \$3,000, besides costs. The petition further alleged that writs of fieri facias were issued on each of these judgments on the twenty-seventh of May last, in virtue of which writs the sheriff had sold the goods and stock in trade of said R. Johnson and B. P. Watrous; that as the petitioners are informed and believe, at the time of the execution of the said bonds and warrants, the said Johnson & Watrous were, ever since have been, and still are, insolvent, and that, as the petitioners believe, the said bond and

¹[Not previously reported.]

²[Affirmed by circuit court.]

warrants were executed for the express purpose of securing to the obligees therein named the payment of their claims, and of giving them a preference over the general creditors of the said Ralph Johnson and Benjamin P. Watrous. On the day appointed to show cause, the alleged bankrupts and the judgment creditors above named appeared by their counsel to oppose the granting of a decree of bankruptcy, and put in their answers and objections to the petition under oath. The facts and circumstances relative to the judgments and executions complained of in the petition, as detailed in these answers and the explanatory affidavit of Mr. Ferguson, the attorney for the judgment creditors, were substantially as follows: Prior to and on the twelfth of March last, the alleged bankrupts Johnson & Watrous were retail merchants in good credit, and were solvent or fully believed themselves to be so. The above named Andrew J. Johnson, A. Ten Eyck and Robert Johnson were their indorsers, and Andrew Watrous was also their indorser or acceptor. A short time previous to the twelfth of March last, the alleged bankrupts applied to the said A. J. Johnson, Ten Eyck, and R. Johnson, to continue and also to increase their responsibilities as indorsers, and this "they" consented to do provided the said Johnson & Watrous would give them some kind of security as indemnity against unforeseen accidents or reversions in business." The latter therefore executed to the former, on the twelfth of March last, a bond and warrant of attorney the penalty of which bond was \$12,000, and which was conditioned for the payment of \$10,300. This bond and warrant were designed for the security as well of Andrew Watrous above named, as of the persons therein named, this being expressly understood and at the time of the execution of the bond and warrant. At that time the alleged bankrupts were considered by all parties concerned, and believed themselves to be, perfectly solvent. It was not intended to enter up any judgment on the bond and warrant, unless at some future time there should unexpectedly appear to be a reason for so doing. But on the twenty-seventh of April, in pursuance of the request of Andrew Watrous, and for the sole purpose, as he stated, of giving him a separate, independent security, the alleged bankrupts executed to him the bond and warrant mentioned in the petition and at the same time executed to Andrew J. Johnson and others the other bond and warrant mentioned in the petition, on which judgments were entered on the third of May and execution subsequently issued. The alleged bankrupts expressly averred that at the time these bonds and warrants were executed they believed themselves, and the obligees in the bonds averred that they believed them to be solvent; and the alleged bankrupts denied that they were executed in contemplation of

bankruptcy. Their subsequent failure or apprehension of failure which induced the entry of judgment on the bonds and warrants arose from the failure of one Oliver De Goff to whom they had loaned their notes, for whom they were responsible as indorsers, and in whose solvency they had full confidence until the time of his failure.

Gould, for petitioning creditor.
J. Hammond, for respondents.

CONKLING, District Judge. One of the objections urged at the bar to a decree of bankruptcy in this case is, the want of any sufficient evidence that the two persons who signed the petition, and by whom the debt due to the petitioners was proved, had authority thus to act. To the name of one of them the abbreviation "Cash'r." and to the name of the other the abbreviation "Pres't," is added; and in the jurat of the commissioner, they are respectively denominated the president and the cashier of the Albany Exchange Bank. The fifth section of the bankrupt act provides that "corporations to whom any debts are due may make proof thereof by their president, cashier, treasurer, or other officer, who may be specially appointed for that purpose;" and by one of the rules of the court, petitioning creditors are required to prove their debt before presenting their petition. If, as I think is the case, the qualification "who may be specially appointed," etc. applies as well to the officers named, as to any "other officer" who may undertake to act in behalf of a corporation, it would seem to follow that for the purpose of proving a debt to a corporation, by the oath of one of its officers such officer must receive a special appointment for that purpose. Indeed, independently of the above recited provision of the act, it may well be doubted whether a petition of this nature in behalf of a corporation, could properly be received without proof that the persons by whom it was signed and verified were in fact the official organs or the authorized agents of the corporation. But as this objection was overlooked at the time the rule to show cause was granted, and as at this stage of the proceeding the petitioning creditors ought probably, at any rate, to be allowed to supply the deficiency, I deem it proper, in this instance, to pass over the objection and proceed to a brief examination of the merits of the case.

It is well known that a very large proportion of the commercial and mercantile business of this country is carried on by means of mutual credit, and it cannot, I think, be conceded that a solvent merchant may not lawfully give security in any of the accustomed forms, in good faith, to another, as the condition on which he is from time to time to receive a loan of the credit of the latter, and for the purpose of securing him in anticipation against the vicissitudes of

trade. It is true the practice of giving such security, especially by bond and warrant of attorney, may lead to consequences which it is the policy of bankrupt laws, as far as is consistent with the general interests of trade, to prevent. But such security given to an indorser, is no more obnoxious to this objection than the like security would be if given to secure the payment of money borrowed to be employed in trade. If, therefore, the indorsers in this case, instead of taking the separate bonds and warrants executed on the twenty-seventh of April, as a substitute for the bond and warrant executed on the twelfth of March, had contented themselves with this original security, which there is no just pretence for supposing to have been given in contemplation of bankruptcy, or for the purpose (within the meaning of the first section of the bankrupt act) of willingly or fraudulently procuring the goods of the obligors to be taken in execution, I should not have hesitated to decide that no act of bankruptcy had been committed. The change of security was undoubtedly a hazardous experiment, and the fact that the new bonds and warrants were for a larger sum than that for which the original security was given, is a circumstance which increases the difficulty of the case. But it is to be considered that neither the bond and warrant of the twelfth of March, nor the two bonds and warrants of the twenty-seventh of April, were given to secure any specific or ascertained amount, but only for the purpose of indemnity against contingent liabilities. The motive, if there was any, for thus increasing the amount does not appear, and it seems reasonable to suppose that it was the effect of inadvertence or caprice on the part of the person who was employed to draw the new securities; for when executions came subsequently to be issued, the aggregate amount which the plaintiffs claimed a right to levy, fell short of the amount of the original bond. Upon the whole, therefore, I cannot take it upon myself to decide that the substitution of the securities of the twenty-seventh of April, for the security of the twelfth of March, changed the legal predicament of these debtors, under the bankrupt act. This case differs essentially from that of the Messrs. Loomis, decided last week. In that case the bond and warrant were executed for the avowed purpose of giving a preference to indorsers, for liabilities already incurred, under the apprehension of impending bankruptcy. Perhaps in that case too much importance was ascribed to the fact that execution was immediately sued out, when by a late statute of this state executions are not permitted to be issued until after the expiration of thirty days from the entry of the judgment. On the argument of that cause, I inquired of the counsel whether the act was applicable to judgments confessed under a warrant of attorney contain-

ing the usual release of all errors in the judgment and in the issuing of execution. The answer of the counsel for the petitioning creditors was in the affirmative; and this answer was acquiesced in by the counsel for the debtors, and was corroborated by the opinion of a highly intelligent gentleman of the profession whom I subsequently consulted. On the argument of the present case, however, its correctness was denied. The question does not appear to have arisen in the state courts, and I doubt whether as between the judgment debtor and creditor, the former would be entitled to any relief against an execution issued within the thirty days upon a judgment thus confessed; although as between a judgment creditor of this description and another judgment creditor who had obtained his judgment by the ordinary mode of adverse process, a different rule ought perhaps to prevail. If this be so, the suing out of executions, and the seizure of the debtor's goods a few days before the expiration of the thirty days without resistance on their part, was an unimportant circumstance. My conclusion is. 1. That in the giving of the securities in question in this case, there was no actual fraud: 2. That they cannot be considered as having been voluntarily given in contemplation of bankruptcy for the purpose of giving an unlawful preference; and, 3. That these debtors are not chargeable with having "fraudulently or willingly procured their goods, &c. to be taken in execution."

It remains to inquire whether they are liable to be declared bankrupts in virtue of the fourteenth section of the act. It is very clear that the petition was not drawn with a view to this section, and that the allegation that the debtors are insolvent, was introduced only for the purpose of giving character to the alleged acts of bankruptcy. The argument of the counsel for the objectors, that the debtors ought not upon this petition to be called upon to meet this allegation, therefore, was not without plausibility and weight. But I propose for the present to pass by this objection, and to consider the petition, taken in connexion with the admissions of the objectors, as sufficient to raise the question whether partners in trade can be declared bankrupts on the petition of a creditor, on the ground of insolvency alone. It must be admitted that such seems to be the literal import of the language of the fourteenth section. It declares "that when two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners; upon which order all the joint stock," etc. The question whether this enactment is to receive a literal interpretation with respect to the point now before the court, it will be perceived at a glance, is one of very great importance: for if the provision is to be so in-

terpreted, it will introduce a principle of great comprehension and stringency, which has not hitherto found a place in the bankrupt laws of England, and which had no place in the American act of 1800. Its practical operation would unquestionably be very severe, and it is to be feared, in many instances, unjust. So far as mercantile partnerships are concerned, it would subvert the well settled maxim of English law, that men may be insolvent without being bankrupts, and become bankrupts without being insolvent; for while it would declare that insolvency shall of itself constitute bankruptcy, the absence of any other provisions in the act authorizing proceedings against partners jointly, would leave it at least doubtful whether partners in trade could be jointly decreed bankrupts on the petition of a creditor, on any other ground than that of insolvency. It is obvious, I think, that the execution of the act under such a construction would be attended with numerous and very serious embarrassments. What is to be considered as constituting insolvency in the sense here intended? Is a mercantile firm to be adjudged to have "become insolvent" upon its first failure, and under whatever circumstances, to meet its pecuniary engagements? Few, I imagine, could be found who would assert the reasonableness of such a rule. Is it to be pronounced insolvent whenever its assets are insufficient to discharge all its liabilities, however small may be the deficiency? If so, how is this fact to be ascertained? It would be easy, but it is unnecessary to illustrate the pertinency and force of these questions. Such a construction of this section would also involve what seems to me a striking inconsistency; for if it is just and expedient that partners in trade should be liable to be decreed bankrupts, *in invitum*, on the ground of insolvency alone, why should not individual traders be subject to the same liability? This construction, as already observed, is suggested by the literal import of the phrase "become insolvent;" and it may, I think, be added, that this is the only circumstance by which such a construction is recommended. But if these words are to receive a literal interpretation, I see not why the residue of the clause in which they occur ought not also to receive a like construction; and then it would follow that any insolvent mercantile firm might be decreed bankrupt on the application of any creditor, without regard to the amount of the indebtedness of such firm, or to the amount of the debt owing to the petitioning creditor; for the clause in question contains no limitation whatever, with regard to either of these points. Are we then to conclude that this further innovation and inconsistency were intended? Then again, it declares that in the cases embraced by it, "an order may be made in the manner provided in this act." What order is here meant? To determine this point, resort must be had to the antecedent parts of the act. But the act says

nothing of any "order" adapted to the case. It provides for the granting and entering of decrees of bankruptcy; but these decrees are, I believe, nowhere called orders—while the act does speak of making orders for other purposes. I presume, however, that the phrase "an order may be made," was intended to import that a decree of bankruptcy might be entered. This criticism will serve to show the generality and looseness which characterize the language of this whole provision.

This act is universally admitted to be highly obscure, and much of its obscurity seems to me to have been caused by an attempt to embrace the two descriptions of cases for which it provides, by the same forms of language, instead of keeping them separate, and adapting the phraseology to each, without regard to the other; and the clause under consideration presents, I think, an example of the truth of this remark. Its terms, it will be seen, are perfectly suited to cases of voluntary application. These are all founded on the admitted insolvency of the applicant. It is important to remark, also, that there is abundant scope for the operation of this provision even in regard to compulsory cases, without giving to it the literal construction in question, because the antecedent provisions of the act relate, in terms, only to individual bankrupts, and this provision was proper for the purpose of authorizing proceedings under the act against partners. The clause in question, under this view of its object, forms a natural and proper introduction to the important and more happily expressed provisions which follow, concerning the duties of assignees and the mode of distributing the estates of bankrupt partners. I consider the last provision of this section, moreover, as militating strongly against a literal construction of the first clause. It declares that "in all other respects," (i. e. except as to the duties of the assignee and the mode of distribution,) "the proceedings against partners shall be conducted in like manner as if they had been commenced and prosecuted against one person alone." This provision, it appears to me, goes far towards an express adoption of all the conditions and limitations prescribed by the act relative to individual cases. Upon the whole, therefore, I am of opinion that in respect to compulsory applications, the phrase "become insolvent" in the first part of the fourteenth section of the bankrupt act, is to be interpreted as equivalent to the phrase "shall commit any act of bankruptcy." I am aware that this decision may excite some surprise; but it is the result of mature reflection, and I fully believe it to be sound. This petition must accordingly be dismissed, with costs.

ALBANY RENNELAER IRON & STEEL CO., (TUTTLE v.)

[See Tuttle v. Albany & Rensselaer Iron & Steel Co., Case No. 14,276.]

ALBATROSS, The, (SUTTON v.)
[See Sutton v. The Albatross, Case No. 13,645.]

ALBEE, (INGRAHAM v.)
[See Ingraham v. Albee, Case No. 7,044.]

Case No. 134.

ALBEE v. MAY.

[2 Paine, 74.]¹

Circuit Court, D. Vermont. May Term, 1834.

CONSTITUTIONAL LAW — EX POST FACTO AND RETROSPECTIVE LAWS.

1. A state statute, retrospective in its operation, allowing ejected occupants of land to recover for improvements made by them while in possession, held to be a valid law, not being repugnant to the constitutions of the state or of the United States.

[Cited in Litchfield v. Johnson, Case No. 8,387. See, also, Society v. Wheeler, Id. 13,156.]

[See note at end of case.]

2. By the common law, the owner, when he recovers possession, is entitled to the improvements without paying for them. Its maxim of "caveat emptor" is designed to prevent intrusions on land without proper inquiry as to the title. The civil law, on the other hand, allows a bona fide possessor an indemnity for beneficial improvements, which seems to be an equitable rule; and whether a court of equity, on a bill to recover the rents and profits, would not allow a bona fide possessor to deduct his actual expenses for such improvements? Quere.

3. Retrospective laws divesting vested rights are impolitic and unjust; but they are not ex post facto laws within the meaning of the constitution of the United States, nor repugnant to any other of its provisions; and if not repugnant to the state constitution, a court cannot pronounce them to be void, merely because in their judgment they are contrary to the principles of natural justice. A remedy for such legislation rests with the people, and long acquiescence on their part strengthens the reasons why the judiciary should not interfere.

[Cited in Drehman v. Stifle, 8 Wall. (75 U. S.) 603.]

[See note at end of case.]

At law. This was an action [by Albee and Bundy against May] to recover under the statute of the state passed November 15th, 1820, the value of betterments or improvements made on land. [Judgment for plaintiffs.]

The defendant had recovered the lands in ejectment of the plaintiffs. Afterwards the plaintiffs brought this action, which was tried at the May circuit, 1831, and a verdict taken for the plaintiffs, subject to the opinion of the court upon a case reserving the questions of law. The plaintiffs became bona fide purchasers of the land, and made the improvements prior to the 15th of November, 1820. The act of 15th November, 1820, contained the following proviso: "This act shall not extend to cases arising after

the passing of this act." Page 180. A similar act had been passed in 1800, containing the same proviso, and had with the proviso been several times re-enacted prior to the act of 1820, so that when the improvements were made there was no law giving an action for their recovery; the law then in existence only applying to cases which had occurred previously to its passage.

D. Kellogg, for plaintiffs, cited:

[Cotton v. Wallace,] 3 Dall. [3 U. S.] 302; [Satterlee v. Matthewson,] 2 Pet. [27 U. S.] 380, 412; [Wilkinson v. Leland,] Id. 627; [Sommers v. Johnson,] 4 Vt. 278, 280; [Call v. Hagger,] 8 Mass. 423; [Bacon v. Callender,] 6 Mass. 303; [Patterson v. Philbrook,] 9 Mass. 151; [Locke v. Dane,] Id. 360, 362; [Goshen v. Stonington,] 4 Conn. 210, 222; [Dash v. Van Kleeck,] 7 Johns. 506; 2 Kent, Comm. 274; Vt. State Papers, 395, 442, 500, 539; Comp. Laws Vt. 177; [Dormer v. Packhurst,] 3 Atk. 134; [Murray v. Gouverneur,] 2 Johns. Cas. 441; [Brown v. Storm,] 4 Vt. 37, 45; 1 Gall. 5, [U. S. v. Wonson, Case No. 16,750;] 1 Paine, 559; [Barker v. Jackson, Case No. 989;] [Society for Propagation v. Town of Pawlet,] 4 Pet. [29 U. S.] 509; [Cooper v. Telfair,] 4 Dall. [4 U. S.] 19; [Calder v. Bull,] 3 Dall. [3 U. S.] 386, 395.

J. H. Hubbard, for defendant, cited:

[Dash v. Van Kleeck,] 7 Johns. 477; 2 Inst. 292; [Gillmore v. Shooter,] 2 Mod. 310; [Ogden v. Blackledge,] 2 Cranch, [6 U. S.] 272; [Wilkinson v. Leland,] 2 Pet. [27 U. S.] 627, 657; 2 Gall. 105, [Propagation Soc. v. Wheeler, Case No. 13,156;] [Calder v. Bull,] 3 Dall. [3 U. S.] 386; [Bates v. Kimball,] 2 D. Chip. 77; [Ward v. Barnard,] 1 Aiken, 121; [Staniford v. Barry,] Id. 314; [Town of Bradford v. Brooks,] 2 Aiken, 284; [Cattlin v. Washburn,] 3 Vt. 36; [Keith v. Ware,] 2 Vt. 174; [Lyman v. Mower,] Id. 517.

Before THOMPSON, Circuit Justice, and PAINE, District Judge.

THOMPSON, Circuit Justice. The defendant recovered, in an action of ejectment, the premises on which the improvements now in question had been made, and the present action is brought under the provisions of a statute of this state to recover the value of such improvements. The plaintiffs were bona fide purchasers, supposing themselves to have a good title to the premises.² The improvements were made prior

² There is certainly no reason, in general, why the owner of land should be compelled to pay for improvements which he neither directed nor desired, as a condition on which he is to gain possession of his property. But when an occupant has taken possession under a bona fide purchase, and made permanent improvements, it is very hard for him to lose both land and improvements. If the plaintiff is not content with acquiring possession of his property in au

¹ [Reported by Elijah Paine, Jr., Esq.]

to the act under which the present suit is brought, which bears date on the 15th November, 1820. This act declares that it shall not extend to cases accruing after the passage of this act, and is, therefore, in terms retrospective, and presents the question directly whether this court has authority to declare such law void, and this is the only question involved in the case. By the common law, when the owner recovers his land in an action of ejectment, he is entitled to the possession without paying for any improvements which may have been made upon his land. Such improvements are considered as annexed to the freehold, and to have been made at the peril of the possessor. The civil law, however, in this respect varies from the common law, and, according to the rule which there prevails, a bona fide possessor is entitled to be reimbursed, by way of indemnity, the expenses of beneficial improvements. This would seem to be founded on principles of equity, so far as the actual value of the property is increased by the labor of another. The common law, acting under the maxim of caveat emptor, considered this as too loose a rule, and opening a door calculated to give encouragement to intrusions upon land, without due and proper inquiry into the title. It has, however, been pretty strongly intimated by English chancellors, that when a party is obliged to resort to a court of equity for the recovery of the rents and profits of his land, a bona fide possessor would be allowed to deduct the amount of his actual expenses for beneficial improvements. [Dormer v. Fortescue,] 3 Atk. 134. But this rule, if adopted, ought not to be applied to any case when there was not the most satisfactory evidence that the possession was taken in good faith, and under a full belief that the title had been acquired from the rightful owner.

The law now in question is not repugnant to any express provision in the constitutions of the United States or of the state of Vermont. The only article in the constitution of the United States that can possibly have any bearing upon the question, is that which declares that no state shall pass any ex post facto law, or law impairing the obligation of contracts. Article 1, § 10. This is not an ex post facto law, according to the legal understanding of laws of this description. They relate only to criminal cases and venal statutes. Nor does it impair the obligation of any contract. There is no subsisting contract between these parties which could be

improved condition, after he has neglected to assert his title for a number of years, it is certainly equitable that the defendant should be allowed the value of his improvements, made in good faith to the extent of the rents and profits claimed. This view of the subject is fully supported by Green v. Biddle, 8 Wheat. [21 U. S.] 81, 82, and the authorities there cited, especially Coulter's Case, 5 Coke, 30. And see Jackson v. Loomis, 4 Cow. 168.

impaired.* There is no conflict between the constitution of the state of Vermont and this law. The only provision at all looking to the question is that which declares that the legislative and judicial and executive departments shall be held distinct, so that neither exercise the powers belonging to the other. The subject-matter of this law, if within the legitimate scope of any department of the government, properly belongs to the legislative. It cannot in any sense be considered judicial or executive; and the inquiry is therefore narrowed down to the single question, whether being retrospective in its operation makes it void. As a general and abstract question, the policy and justice of such laws may well be doubted; but how far courts of justice have a right to enter into these considerations, when there is no conflict between the law and the constitution, is a point on which different opinions have been entertained. This court, however, is bound to adopt the view taken of the question by the supreme court of the United States. Although no direct decision upon the point has been made in that court, yet, from what has fallen from the judges on various occasions, when the question has been brought incidentally under consideration, the view evidently taken has been, that the validity of such laws, where no constitutional provision was infringed, did not fall within the province of courts of justice.

This question came under the consideration of the supreme court of the United States, at an early day (1798), in the case of Calder v. Bull, 1 Cond. Rep. 172, [3 Dall. (3 U. S.) 386,] though it was not the point on which the judgment of the court turned. Mr. Justice Chase was of opinion that the courts of the United States have no jurisdiction to determine that any law of a state legislature contrary to the constitution of such state, was void; but that such question belonged to the state courts. What fell from Mr. Justice Paterson in that case, would seem to show that the attention of the convention in the formation of the constitution, was

*An act suspending legal proceedings during an actual invasion, is not a law impairing the obligation of contracts. Johnson v. Duncan, 1 Cond. La. Rep. 157. Whether the legislature can rightfully declare that the result of a litigated suit against one person, shall be evidence against another to affect rights of the latter, which had accrued previous to the passage of the statute? Quaere. Wood v. Byington, 2 Barb. Ch. 387. It is not competent for the legislature, by a retroactive statute, to make the opinion of the attorney-general that a contract between the state and an individual, in relation to convict labor, was illegal, conclusive evidence of such illegality, as against the latter. Trustees, etc., v. Lawrence, 11 Paige, 80. But if the contract was in fact illegal, or if it was originally valid, and the contractors had violated it, so as to authorize the state to rescind it, the inspectors of the prison were, under the act of 1842, bound to act upon the opinion of the attorney-general, and to rescind the contract. Id.

called to this very subject. He was a member of the convention, and "I had," says he, "an ardent desire to have extended the provision in the constitution to retrospective laws in general. There is neither policy nor safety in such laws. It may be truly said of retrospective laws of every description, that they neither accord with sound legislation, nor the fundamental principles of the social compact." But he did not consider all retrospective laws embraced in the prohibition to the states to pass *ex post facto* laws: that these words, when applied to a law, must have a technical meaning, and refer to crimes, pains and penalties. Mr. Justice Iredell says, if a government composed of legislative, executive and judicial departments, established by a constitution which imposes no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power would never interpose to pronounce it void. That if the legislature pass a law within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because, in their judgment, it is contrary to the principles of natural justice.

In the recent case of *Satterlee v. Matthewson*, (2 Pet. [27 U. S.] 413,) the language of the court is very strong in relation to the powers of the courts of the United States to declare state laws of this description unconstitutional. The objection, say the court, most relied upon is, that the effect of this act was to divest vested rights. There is, certainly, no part of the constitution of the United States which applies to a state law of this description. Nor are we aware of any decision of this court, or of any circuit court, which has condemned such a law upon this ground, provided its effect be not to impair the obligation of a contract. Reference is made to what fell from the chief justice in the case of *Fletcher v. Peck*, [Case No. 4,865:] That it might well be doubted whether the nature of society and of government do not prescribe some limits to the legislative power; and he asks, if any be prescribed, where are they to be found if the property of an individual, fairly and honestly acquired, may be seized without compensation? But, say the court, it is nowhere intimated in that opinion, that a state statute, which divests vested rights, is repugnant to the constitution of the United States. So in the case of *Wilkinson v. Leland*, (2 Pet. [27 U. S.] 661,) the court observes: "We cannot say this is an excess of legislative power, unless we are prepared to say, that in a state not having a written constitution, acts of legislation, having a retrospective operation, are void as to all persons not assenting thereto, even though they may be for beneficial purposes, and to enforce existing rights; and we think this cannot be assumed as a general principle by courts of justice.

It may here be remarked, that if the state constitution is entirely silent on the subject, the question stands on the same footing as if there be no written constitution." In the case of *Propagation Soc. v. Wheeler*, [Case No. 13,156,] a law, similar to the one in question, was decided in the first circuit to be unconstitutional, but it was put on the ground that it was repugnant to the state constitution, which forbade retrospective laws.

That the law of Vermont, now in question, is a retrospective law, cannot be doubted. It impairs vested rights acquired under existing laws; it attaches a new disability in respect to transactions already past, and creates new liabilities. But it is not repugnant to any provision in the constitution of the United States or of the state of Vermont; and this is the sole ground upon which I rest my opinion. Wherever there is a conflict between the law and the constitution, both cannot stand; and it is properly within the province of courts of justice to determine the validity of such a law. But when no such conflict arises, it is matter resting in the discretion of the legislature, who are responsible to the people and are not under judicial control; and although not an advocate for the justice or policy of retrospective laws, I feel less repugnance to the one now under consideration, because similar laws have been in existence in this state almost from its first organization, and having so repeatedly received the sanction of different legislatures, and their validity having been in no manner questioned in the courts of justice, there is reason to conclude that they are satisfactory to the public. We are, accordingly, of opinion that the plaintiffs are entitled to judgment.

[NOTE. In *Watson v. Mercer*, 8 Pet. (33 U. S.) 88, Mr. Justice Story, speaking for the court, said: "It is clear that this court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that it divests vested rights of property. The constitution of the United States does not prohibit the states from passing retrospective laws generally, but only *ex post facto* laws. Now, it has been solemnly settled by this court that the phrase '*ex post facto* laws' is not applicable to civil laws, but to penal and criminal laws, * * * which impose punishments and forfeitures, for acts antecedently done, and not to civil proceedings which affect private rights retrospectively." An act passed after the rendition of a judgment in favor of a bank, which authorized the defendant therein to set off against it the circulating notes of the bank which he procured after the judgment, is, as between the bank and the defendant, valid, and does not impair the obligation of the contract sued on, or of the judgment. *Blount v. Windley*, 95 U. S. 180. An act declaring that acts performed by any two of the tax commissioners shall have the same validity as if performed by all three, though retrospective, is not for that reason unconstitutional. *Schenck v. Peay*, Case No. 12,451. As to the validity of retrospective laws which divest vested rights, see *Charles River Bridge v. Warren Bridge*, 11 Pet. (36 U. S.) 540; *Baltimore & S. R. Co. v. Nesbitt*, 10 How. (51 U. S.) 401. There is nothing

in the constitution which prohibits a legislature from passing an act which divests rights vested by law, provided its effect be not to impair the obligation of a contract. *Randall v. Krieger*, 23 How. (90 U. S.) 147. A retrospective statute, remedial in its nature, that confirms existing rights by adding to the means of enforcing existing obligations, may be constitutional. *Peay v. Schenck*, Case No. 12,449; *Griffing v. Gibb*, Id. 5,819; *Schenck v. Peay*, Id. 12,451; *Satterlee v. Matthewson*, 2 Pet. (27 U. S.) 380; *Curtis v. Whitney*, 13 Wall. (80 U. S.) 68. An act imposing a higher tax on an incorporated bank than that contemplated in its charter is unconstitutional, as impairing the obligation of a contract. *Piqua Bank v. Knoop*, 16 How. (57 U. S.) 369.]

Case No. 135.

The ALBEMARLE.

[8 Blatchf. 200.]¹

Circuit Court, S. D. New York. Feb. 6, 1871.

COLLISION—BETWEEN STEAMERS—SIGNALS—DAMAGES.

1. In this case, two steamers were meeting nearly end on, so as to involve risk of collision. One of them gave a signal of one whistle. The other responded by a signal of one whistle. Then both of them ported, but they collided: *Held*, that it was the duty of each to port in due season, and that each of them failed to port soon enough.

[Cited in *The City of Hartford*, Case No. 2,752. Distinguished in *The Sammie*, 37 Fed. Rep. 909.]

[See note at end of case.]

2. *Held*, also, that, if it was erroneous and dangerous to port, the vessel giving the signal as a proposition to the other, was not more culpable for doing so, than the vessel which assented, by the response, to the proposed movement, and that both became parties concurring in a hazardous and erroneous experiment.

[Cited in *The City of Hartford*, Case No. 2,752.]

3. One of the vessels held in fault for not having a proper and vigilant look-out, and both vessels held in fault, and a decree made that both share in the loss.

[Appeal from the district court of the United States for the southern district of New York.]

[In admiralty. Libel for collision. Decree finding both vessels in fault.]

Charles Donohue, for libellant.

Edward H. Owen, for claimants.

WOODRUFF, Circuit Judge. At about 9½ o'clock in the night of the 20th of August, 1867, off the coast of New Jersey, a few miles below Barnegat light, the steamship *James T. Brady*, belonging to the libellant, and the steamship *Albemarle* came into collision. The latter was bound from New York to Norfolk, and the former from Delaware bay to New York. The libellant's witnesses describe the *Albemarle* as approaching in a course heading almost directly towards the *Brady*, but being, when sighted, slightly off the port bow. Those on the

Albemarle describe the *Brady* as seen off the starboard bow, and testify that she continued to approach, opening more and more on the starboard bow. When within 500 yards apart, their speed being, respectively, the *Brady*, 11 or 12 miles, and the *Albemarle*, 8 or 9 miles, the *Brady* blew one whistle, to signify her wish to port her helm and pass to the right. The *Albemarle* responded with one whistle, indicating her assent. On receiving the response, the *Brady* ported and swung towards the east. The *Albemarle*, as her witnesses testify, also ported, but, before her course was much changed, the two vessels came together. The witnesses from the *Brady* testify that the *Albemarle* did not port, but starboarded, and that she ran into the *Brady* on a starboard wheel. The contradiction between the witnesses for the respective parties is not necessarily so great as a cursory perusal of the testimony would suggest, touching the position and course of the two vessels and the bearing of each from the other. Thus, the course of the *James T. Brady* was, as her witnesses represent, north-east by north, and she saw the lights of the *Albemarle* when from 1½ to 2 miles distant, about one point over her port bow, and the bearing continued about the same or diminishing to half a point, until the *Brady* gave the signal, by her one whistle, that she proposed to port and pass to the eastward of the *Albemarle*, and, at some moments, her white light, and then her red and white lights, and then her green and white lights, and for a time all three lights, were visible. The course of the *Albemarle*, as her witnesses testify, was south south-west. She saw the *James T. Brady* at a distance of five miles, seeing first her white light and then her green light. When first seen, the witnesses state, she bore from two to two and a half points on their starboard bow, and her green light continued in view until she ported, in accordance with the signal before mentioned.

Now, if the two courses above stated be assumed to be nearly accurate, and the position of the respective vessels, when the *Albemarle* sighted the *Brady*, was such that the point of intersection of the courses was considerably nearer to the *Albemarle* than to the *Brady*, it would follow that the *Albemarle* would see the *Brady* at about one and a half or two points off her starboard bow, and she would, as they approached each other, continue to bear over such starboard bow; while, also, when the *Brady* reached a point distant two miles from the *Albemarle*, the latter would bear about one point off the *Brady*'s port bow, and that bearing would continue, or gradually draw in towards the bow, until the *Albemarle* reached the point of intersection. The relative speed of the *Brady* being, however, the greatest, they might reach the point of intersection at about the same moment. In such case, if courses and bearings were alone considered,

¹[Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

it is obvious, that, if they were regarded as meeting on opposite courses, nearly end on, so as to involve danger of collision, it would be the duty of each to port and pass to the right; or, if they were regarded as crossing, so as to involve danger of collision, then, as the Albemarle had the Brady on her starboard, it would be the duty of the Albemarle to keep out of the way, and the duty of the Brady to keep her course. The testimony of the witnesses on either side, therefore, in respect to the position and course of the vessels and their respective bearings from each other, is in no conflict that is not entirely reconcilable or that would suggest any distrust of either; and, in this view, the testimony from each corroborates the testimony from the other. It follows, therefore, that the testimony of the witnesses produced from the James T. Brady, that they, when at about one mile, or one mile and a half, from the Albemarle, had her about one point on their own port bow, and that her bearing on that bow was diminished to about half a point, is not only not contradicted but is strengthened by the evidence from the Albemarle; and, at the same time, their testimony that they saw all three of the Albemarle's lights, and that there was such variation as to give them at one time a glimpse of the red without the green, and again of the green without the red, is not improbable. The Albemarle, in the position she was, would show her red light, and, if she first reached the point of intersection, she would next show the green; or, without this, in even a moderate shifting of the vessel by the waves, the lights might be exhibited to the Brady as her witnesses say they saw them. Up to this point then, the witnesses from the Brady not only give a possible, but a probable, account of the position and manner of approach of the two vessels, and of the manner in which the lights of the Albemarle were presented to their view, but the witnesses from the other vessel corroborate them. The conclusion from this would be inevitable, that the vessels, from the time the Brady saw the Albemarle, were meeting nearly end on, so as to involve risk of collision, in which case it was the duty of both to port, without waiting for signals, and that the Albemarle should have done so. But here the harmony of the testimony stops. The witnesses from the Albemarle testify, not only that the Brady's green light was in view, and about two points on her starboard bow, so soon as she came near enough to make colored lights visible, but they further testify that her green light continued to open until it bore about four points on that bow. If the Albemarle had passed the intersection of the two courses, when this last observation was made, she might have brought the Brady's green light four points on her starboard bow. Until she reached that point of intersection, the light of the Brady would close in upon that bow, and, after passing, it

would open, and might open so far as to bear four points off. But this cannot be harmonized with the testimony from the Brady. It would bring the Albemarle largely off the starboard bow of the Brady before she ported. It may be true, but the general conformity of the testimony of all the witnesses in other respects disposes me to think, that, while the witnesses from the Albemarle are correct in saying that they saw the green light of the Brady off their own starboard bow, they have over-estimated the time and degree. This critical examination and comparison of courses, distances and bearings is subject to this obvious remark, that, in practice, it is not to be expected that witnesses will be able to testify to very close mathematical or geometrical observations, and we must regard general conformity in relation to leading facts as usually convincing. I cannot resist the conclusion, that the vessels were so approaching that it was the duty of each to port the helm in due season, and that, in this respect, both vessels were in fault. The movement should have been earlier made.

The prompt and ready response of the Albemarle to the whistle of the Brady is very important in its influence upon the question whether, in truth, the Brady was four points off the starboard bow at that time, and so near that her porting brought them almost instantly together. It must and ought to be taken to be incredible, that, if such was the then position and course of the vessels, the Albemarle would have assented to such a manoeuvre. In that situation, it was grossly improper, and both proposition and assent indicated gross unskillfulness and ignorance, or gross inattention and negligence. These concurring, would, I think, of themselves alone, make a case for contribution to the loss caused by the concurring fault of both. I have, more charitably, I think, regarded the assent of the Albemarle as indicating that the Brady was not in the relative position stated; but, in either view, the Albemarle would not be without fault.

It is doing no injustice to the Albemarle to say, that the assent of her officers to the signal to port the helm, given by the Brady, is strong evidence that, at the time, they did not regard it as an improper movement, and better evidence that the vessels were approaching nearly end on than testimony of those same officers, given on a retrospective view of the occurrence, under a strong motive to cast all the blame upon the Brady. And the alternative again recurs—if the movement was so obviously improper as they now represent, they were concurring actors in the unskillfulness or error which caused the loss. I do not say that the Albemarle, by assenting to the signal of the Brady to port the helm and go to starboard, is estopped to allege that it was wrong in the Brady to do so, or that, in a sudden exigency, caused by the fault of

another vessel, she is to be held accountable for an erroneous judgment formed on the instant. But, here, the Brady gave the signal and waited a reply. That reply assured her that the approaching vessel concurred with her in her opinion as to what was required of both. Then, and not until then, she ported her helm, and the Albemarle did the same; but it was too late to avoid collision. Both being in an open sea, each having the same opportunity to judge what prudence required, I cannot regard the proposition of the Brady, even if it was erroneous, as any more culpable than the assent of the Albemarle, so that, if it was wrong, they shared in the mistake. But, in truth, the grand fault of both vessels was, that they did not act sooner, instead of waiting till instant collision was impending. The rule of the statute is as imperative as any other, that, when approaching so as to involve risk of collision, each should slacken speed, and, if necessary, stop and reverse. This should not be delayed till efforts to slow, stop and reverse will be useless.

That the Brady was not free from fault, on still other grounds, is quite clear. She had no proper look-out; or, if the man at her bow was competent, then he was not vigilant. He ought to have seen the Albemarle as soon, or nearly as soon, as the Brady was seen from the Albemarle. The look-out did not report the Albemarle until within one and a half or two miles distant. True, he says he thinks she was three miles off, but he had only the short experience of three months at sea, and his judgment is contradicted by two experienced pilots on board. He did not report her until she had been seen by the man at the wheel, and the pilot in charge did not discover her until the man at the wheel called his attention to her. This shows great want of vigilance, and, although there was then time to make whatever movement the case required, yet, as they were approaching at a combined rate of twenty miles an hour, it left them a very short time in which to note the position, course and lights of the Albemarle, and apply the discretion which they were bound to exercise.

An alternative view of the duty of the Albemarle, founded upon the rule that, when ships are crossing, so as to involve risk of collision, that which has the other on her starboard, must keep out of the way, and the other should keep her course, will also make the Albemarle a sharer in the fault.

If the view presented by the testimony of her witnesses be adopted, and, when the signal was given by the Brady, the latter bore four points off her starboard bow, it was a clear fault in the Brady to attempt to cross, without first consulting the Albemarle. The Albemarle had the right to insist that the Brady should keep her course. When both agreed that the experiment of crossing should be made, they be-

came concurring parties to the experiment and mutual sharers in the hazard.

The criticism, that it was a perilous movement of the Brady, and that she had no right to put the Albemarle in a critical situation and hold her responsible for a hasty judgment, proves too much. For, if there was, at that moment, no peril, there was nothing in the mere proposition, which required the officers of the Albemarle to act hastily. If the position of the two was such that it was plain that the Brady ought not to port, and that the Albemarle was safe without any change, then her officers acted in no sudden exigency, for the Brady did not change until the assent of the Albemarle thereto was given. The criticism, therefore, involves this, namely, that an exigency had in fact already arisen, in which, and in a consciousness of danger, the Albemarle received the signal, and was called on to exercise instant judgment. This is precisely what has been already above stated, and it puts the Albemarle in fault, in not herself acting sooner, either by slowing, or by changing her course, or by herself signaling the Brady. This view of the subject brings me, as every view of the case which I think warranted by a full consideration of the testimony on both sides does, to the conclusion, that these two vessels were both in fault, and that they should share in the loss which resulted therefrom. A decree must be entered in conformity with that view.

[NOTE. Where two steamers approaching each other were negligent, one in not having her side lights properly screened, and the other in porting instead of starboarding her helm, the loss was divided. *The North Star*, Case No. 10,331. Two steamers collided in a dense fog, both going at the same rate of speed. Libel by one to recover damages from the other was dismissed. *The Sylph*, Id. 13,711. For further cases involving negligence in the disregard of rules, see *The Hansa*, Id. 6,033; *The Cayuga*, Id. 2,537; *Hazlett v. Conrad*, Id. 6,288; *The America*, Id. 280; *The D. S. Gregory*, Id. 4,100; *The Electra*, Id. 4,337; *The Warren*, Id. 17,192; *The Mary Sandford*, Id. 9,225; *The Cumbria*, Id. 3,472.]

Case No. 136.

ALBERS v. FRICK.

[1 Hunt, Mer. Mag. (1839) 351.]

District Court, D. Maryland.

CUSTOMS DUTIES—WORSTED SHAWLS.

[Worsted shawls are not dutiable at 41 per cent. ad valorem as woolen goods, or goods of which wool is a component part, under the tariff act of July 14, 1832, (4 Stat. 583,) but are entitled to entry free of duty.]

[At law. Action by Albers & Co. against William Frick, collector of the port of Baltimore, to recover customs duties alleged to have been illegally exacted. Verdict and judgment for plaintiff.]

Before TANEY, Circuit Justice, and HEATH, District Judge.

This was an action for the recovery of forty-one per cent. ad valorem duty, paid on seventy dozen worsted shawls, imported by the plaintiffs from Bremen, which they had paid to the collector, with protest against their being classed as woolen goods, or goods of which wool is a component part, but that they were free of duty. [4 Stat. 583.] Several gentlemen, conversant with the article, were examined, who stated that the goods in question were composed entirely of worsted yarn, which differed from what is termed "woolen yarn," it being spun from only the longest fibres of wool, which is separated by hackling and combing, while yarn is spun from carded wool, without such separation. It was also shown, that, as these goods had been imported in separate shawls, they did not come under the denomination of worsted stuff goods, which they would be called had they been imported in pieces of thirty or forty yards, when they would be admitted free of duty. The plaintiffs prayed the court to instruct the jury, that, if they believed the shawls to be worsted, they should render a verdict for the plaintiffs as worsted had been decided by Judge Thompson, of New York, and the decision sustained by the supreme court, [Elliott v. Swartwout, 10 Pet. (35 U. S.) 137,] not to be liable to duty. After some remarks from the district attorney, the court so instructed the jury, and a verdict was rendered for the plaintiffs, \$550.

Case No. 137.

ALBERS v. WHITNEY.

[1 Story, 310.]

Circuit Court, D. Massachusetts. Oct Term, 1840.

JUDGMENTS—AMENDMENT—TIME FOR NAMES OF PARTIES.

1. The judiciary act of 1789, c. 20, § 32, [1 Stat. 91,] gives no authority to the courts of the United States to make any amendments in judgments, except as to defects and want of form.

[Cited in *The Illinois*, Case No. 7,003; *Edwards v. Elliott*, 21 Wall. (88 U. S.) 532.]

[See *Bank of U. S. v. Moss*, 6 How. (47 U. S.) 31.]

2. The doctrine of the English courts in all cases of ordinary suits, (excluding fines and recoveries,) is, that judgments and records, are amendable only, (1st.) where the case is within the reach of some statute; and (2d.) where there is something to amend by.

[Cited in *Jenkins v. Eldredge*, Case No. 7,269.]

3. At common law, no judgment was amendable after the term at which it was entered.

[Cited in *Jenkins v. Eldredge*, Case No. 7,269.]

4. Where the name of a party was erroneously stated in the writ to be James H. Alvers, instead of John H. Albers, which was the true name: It was held, that, as the misnomer was a mistake of fact, not apparent upon the record, and not to be amended by any matter ap-

parent in any part of the record, the court were not authorized to make the amendment.

[Cited in *Jenkins v. Eldredge*, Case No. 7,269; *The Illinois*, Id. 7,003; *Edwards v. Elliott*, 21 Wall. (88 U. S.) 532.]

At law. Motion to amend the record of this case, in which judgment was rendered at the last term of this court, and execution issued, upon which one of the defendants was arrested and committed to gaol, and afterwards was sworn out of gaol under the insolvent debtors acts. [Motion overruled.]

The petition was as follows: "Your petitioners, John H. Albers and Christian Born, of the city, county, and state of New York, merchants, under the firm and style of J. H. Albers & Born, respectfully state, that at the last April term of this court, they recovered judgment, as plaintiffs, in a certain action against Albert Whitney, Rufus C. Kemp, and Benjamin L. Mann, all of said Boston, merchants and copartners under the firm of Whitney, Kemp & Co.; that, by a slight clerical error in the writ, the name of said Albers was written James H. Alvers, instead of John H. Albers, and in consequence thereof, so appears in the record of the judgment in said action. Wherefore, they humbly pray, that the record of the proceedings and judgment in said case be amended, by inserting John H. Albers in place of James H. Alvers, where the same occurs."

E. H. Derby, in support of the application, cited the following authorities. *Gay v. Caldwell*, Hardin, 68; *Bowman v. Green*, 6 T. B. Mon. 341; *Probasco v. Probasco*, 2 Penn. [3 N. J. Law, 565] 1012; *Marsh v. Berry*, 7 Cow. 344; [*Hart v. Reynolds*,] 3 Cow. 43, note; *Smith v. Jackson*, [Case No. 13,065;] *Jackson v. Young*, 1 Cow. 131; *Hall v. Williams*, 1 Fairf. [10 Me.] 278; *Bank of Newburgh v. Seymour*, 14 Johns. 219; *Statute of amendment and jeofails*, 10 Johns. 507.

Before STORY, Circuit Justice, and DAVIS, District Judge.

STORY, Circuit Justice. The power of this court to grant amendments is dependent upon statute; and, so far as it has been provided for, it is by the 32d section of the judiciary act of 1789, c. 20, [1 Stat. 91.] That section provides, "That no summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any of the courts of the United States, shall be abated, arrested, quashed, or reversed, for any defect or want of form; but the courts shall respectively proceed and give judgment according as the right of the cause and matter of law shall appear to them, without regarding any imperfections, defects, or want of form, in such writ, &c.," except only such as the party shall specially set down by demurrer as causes thereof. The courts are further authorized from time to time to amend all such imperfections, defects, and want of form, other than those set down by demurrer. The statute then

proceeds to declare, that the courts "may at any time permit either of the parties to amend any defect in the process or pleadings, (not adding, as in the preceding part of the section, 'judgments and proceedings,') upon such conditions as the said courts respectively shall, in their discretion and by their rules, prescribe." Now, upon the foundation of this section, no authority is given to the courts of the United States to make any amendments in judgments, except as to defects and want of form. In the present case, the amendment is not of any matter or defect of form. The form of the declaration is right. The defect proposed to be remedied is a mistake of fact in the christian name of one of the plaintiffs. This mistake, too, is not apparent on the record, nor is it to be amended by any matter, apparent upon other parts of the record. But it is to be made out upon affidavits and evidence allunde to establish the fact. There is, therefore, nothing on the record to amend by.

It is plain, that at the common law no judgment was amendable after the term at which it was entered. And amendments could be made in the process, pleadings, and proceedings only while the cause stood in paper, and before judgment. The authority to amend, then, even in England, in cases of this sort, is dependent upon and limited by statute. Mr. Tidd, in his excellent work on Practice, has laid this down, as the clear doctrine of the courts, in all cases of ordinary suits (excluding fines and recoveries) in the English courts of justice. 1 Tidd, Pr. (9th Ed. 1828.) 711, 712. Judgments and records are there never allowed to be amended, except, in the first place, where the case is within the reach of some statute; or, in the next place, where there is something to amend by, that is, where there is some memorial, paper, or other minute of the transactions in the case, from which what actually took place in the prior proceedings can be clearly ascertained and known. Id. 713, 714. In the case before us, there has been no mistake in the prior proceedings. The mistake is in a fact, that never was brought out in the prior process, or pleadings, or proceedings in the cause. It is a mistake, dehors the record and proceedings, a mistake in the christian name of one of the plaintiffs, which could not be made apparent except by some plea, which should have disclosed it. If known to the defendants, they waived the objection, and submitted to have a judgment against them by default. It appears to me, then, that this is not a case for any amendment, authorized to be made by this court. Neither do I perceive, in what respect the purposes of justice would be aided by the amendment. On the contrary, as one of the defendants has been committed on the execution, which issued on the judgment, and has been discharged under the poor debtors' act

from his imprisonment, there might be danger, that the court might, by the amendment, do injustice or injury to him. Suppose a new execution to issue after the amendment, might not that defendant be taken anew in execution, notwithstanding his former discharge? I do not say, that he could. But we ought not to subject him to the hazard. Besides; the amendment does not seem necessary for any reasonable object. The judgment, as it stands, concludes all the defendants, as to the very defect in controversy; and it is not now open to them to contest the fact, that the plaintiff's name was, as stated in the writ and declaration; at least, so far as this judgment is concerned, its validity on this point cannot be questioned. Motion overruled.

Case No. 138.

The ALBERT.

[Blatchf. Pr. Cas. 280.]¹

District Court, S. D. New York. Dec. 23, 1862.²

PRIZE—BLOCKADE — MUTILATION OF LOG-BOOK—
EVIDENCE—VESSEL PURCHASED FROM ENEMY.

1. Invocations of proofs from another case, on the allegation that the consignor and consignee of the cargo were the same in the two cases, and that the shipments had relation to a common commodity and purpose, a bill of lading found on board of one vessel covering cargo on both vessels.

[Cited in *The Maria*, Case No. 9,073.]

2. False papers as to destination of vessel and cargo.

3. Mutilation and imperfection of log-book.

4. Purchase of vessel from an enemy during the war by a resident in a neutral country with intent to employ her in violating the blockade.

5. Vessel and cargo condemned for an attempt to violate the blockade.

In admiralty. This decree was affirmed by the circuit court. See *Blatchf. Pr. Cas.* 663, [*The Albert*, Case No. 139.]

BETTS, District Judge. In this case, heard at the same term and almost simultaneously with that of *The Maria*, [Case No. 9,073,] the proofs given in the latter suit are invoked by the libellants and made part of the evidence. The vessel and cargo were captured May 1, 1862, at sea, a few miles off Charleston harbor, by the United States gunboat *Huron*, and were sent to this port for adjudication. The libel, demanding their confiscation as prize of war, was filed May 17, 1862.

On the 10th of June thereafter, the master of the vessel, John F. Stein, intervened, and filed claims and answers to the libel, in behalf of Thomas McWilliam, as owner of the vessel, and of Francisco Otero &

¹[Reported by Samuel Blatchford, Esq.]

²[Affirmed by circuit court in *The Albert*, Case No. 139.]

Co. and Rafael L. Sanchez, as owners of different portions of the cargo.

The ship's papers exhibit a British certificate of registry, given at Nassau, April 9, 1862, to Thomas McWilliam, of that port, but a resident of Mantanzas. The vessel was built in New Jersey, and then took the name of Irene. Her crew list bears date April 18, 1862, and is for a voyage from Nassau to New York, without any return port being designated. A clearance of the vessel at Nassau for the port of New York was granted by the receiver general, April 20, 1862. There were on board bills of lading and invoices of portions of the cargo from Nassau and Mantanzas, and a charter-party between Thomas McWilliam and Francisco Otero & Co., executed in Mantanzas, March 20, 1862, letting the vessel to the latter for the transportation of a cargo to be furnished by the hirers at Mantanzas and Nassau on a voyage to New York.

The suit from which evidence is invoked into this case is that of *U. S. v. The Maria*, [before cited.] It was instituted May 21, 1862. The vessel was registered at Nassau, April 16, 1862, to William Smith, of Glasgow, Scotland, as having been built in Charleston, South Carolina, and was cleared at Nassau for New York April 16, 1862, and was captured April 30, 1862, by a United States vessel-of-war, near the coast of South Carolina. She had on board an invoice of forty boxes, containing 80 dozen cotton cards, shipped March 28, 1862, by Rafael L. Sanchez, at Mantanzas, to be delivered at New York to Martinez, Gonzales & Co. The said Sanchez, by his claim and answer, filed in that suit July 8, 1862, claimed the merchandise as his property; and it is alleged by the counsel for the libellants that the consignor and consignees in that suit (the *Maria* and cargo) and the one here on trial (the *Albert* and cargo) are the same parties, and that the shipments have relation to a common commodity and purpose. On that allegation the evidence in the suit of *U. S. v. The Maria* was allowed by the court to become, by invocation, evidence in the present suit.

That evidence, so brought into this case, shows that a Mr. Monet, of the firm of Monet, Jemenez & Co., charterers of the schooner *Maria*, was a passenger on board of that vessel at the time of her capture, and had with him on board a triplicate bill of lading for the cards on the two vessels, in which it was expressed that the cards should be landed in a southern port. It also appears, by comparison of the ship's papers, found on board the two vessels, that the said cards were shipped in both vessels under a common statement in the shipping papers of the destination of the vessels from Mantanzas to New York, and a common letter of instructions by the shipper to the consignees.

This evidence shows satisfactorily, that the shipment of the cards was for some southern port, and that the destination of this vessel, equally with that of her consort, the *Maria*, was simulated and false in that respect. The bill of lading engaging the delivery of one of the shipments at a southern port was carried covertly on board of the *Maria*, by one of the carriers of the goods, as his instructions and guide for the delivery of the cotton cards shipped on both vessels. The log of the vessel, found on board, presents a suspicious appearance in several particulars. The whole front part of the book, consisting of many leaves, is cut out and absent. The first entry remaining bears date April 21, 1862, and appears to be the continuation of a preceding statement. The log does not name the time or place of departure, nor the place of destination; but the first entry implies that the vessel was then underway, and ten miles east of the Hole-in-the-Wall. The latitude and longitude are first noted April 23, and the latitude is recorded each succeeding day in April, but the longitude is not mentioned again. No course or distance run is given in the log. The vessel was captured on the first of May, but no entry is made of the fact. It is manifest that the log was kept with a view to conceal the true nature and intention of the voyage; and its gross mutilation amounts, under the rules of the prize law, to an act of culpability, which incurs the penalty of forfeiture of vessel and cargo.

The purchase of the vessel from an enemy by a resident in a neutral country, and the knowledge by the purchaser and the charterers of the existence of the war and of the blockade, and the intention to employ the vessel in violation of the blockade, are condemnatory facts, and, on the proofs before the court, plainly induce the forfeiture of vessel and cargo.

Again, there are in proof cumulative offenses in the conduct of this voyage and of its antecedent either one of which subjects the vessel to confiscation; and the last one is conclusively criminatory of the cargo. The voyage last preceding this one was made in evasion of the blockade of Charleston, and the present voyage was single and entire, from Mantanzas, with the privilege of stopping at Nassau. From the latter port the voyage was directly and palpably for the purpose of violating the blockade of Charleston. All the witnesses concur in statements of the transaction which denote that intent unmistakably.

There is nothing in the case demanding a more detailed exposition of the reasons supporting the decree which the court feels constrained to pronounce. The adventure is flagrantly one of the many disclosed to the public by the incidents of this war, in which an exceedingly frail covering is paraded to screen a bold determination and effort to

drive a criminal traffic with the rebels from neutral trading points situated in the vicinity of blockaded ports. That traffic is not diminishing in boldness and perseverance, but, though favored with manifold successes in the aggregate, yet the eyes of the law and justice are not so completely purblind but that many efforts to violate the public law and the rights of the government are frustrated, and result in the discomfiture of pursuits which tend to the great wrong of this country, and to a disruption of harmony between the United States and their neutral friends. A decree of condemnation and forfeiture of the vessel and cargo will be entered.

This decree was affirmed, on appeal, by the circuit court, November 11, 1863. Blatchf. Pr. Cas. 663, [The Albert, Case No. 139.]

Case No. 139.

The ALBERT.

[Blatchf. Pr. Cas. 663.]¹

Circuit Court, S. D. New York. Nov. 11, 1863.²

PRIZE—VIOLATION OF BLOCKADE—STRESS OF WEATHER.

1. Decree of the district court, condemning vessel and cargo for an attempt to violate the blockade, affirmed.

2. The excuse set up, that the vessel sought the blockaded port under stress of weather, overruled.

[Appeal from the district court of the United States for the southern district of New York.]

In admiralty. [Decree of condemnation, affirming The Albert, Case No. 138.]

NELSON, Circuit Justice. This vessel and cargo were captured off Rattlesnake Shoals, near the mouth of Charleston harbor, South Carolina, about fifteen or twenty miles from Charleston. The vessel was, at the time, steering a straight course into the harbor. The capture was made on the 1st of May, 1862. The vessel, with part of her cargo, sailed from Matamoras, Cuba, stopped at Nassau, and took in the rest, and started, according to her papers, for the port of New York. The cargo consisted chiefly of coffee, sweet oil, fruits, and salt. The captain admits that he was wide of his regular course to New York at the time of the capture; and also that he was steering, at the time, square into the coast, which, as explained by one of the officers on board of the gunboat Huron, which made the capture, was sailing square into the harbor of Charleston.

The excuse set up is, that the vessel encountered great stress of weather and head winds. But it does not appear that she was in any way disabled or crippled, or that any

reason existed for seeking to enter the port of Charleston.

The whole of the proofs satisfy me that the excuse set up is without any meritorious foundation, and does not reasonably explain the suspicious position of the vessel. She had been previously warned not to enter the port, as it was in a state of blockade, and the warning is noted on her papers. The court below condemned the vessel and cargo. The Albert, [Case No. 138.] I think that the decree was right, and should be affirmed. The vessel and cargo have been sold under an interlocutory order, and the fund remains for distribution.

ALBERT, (BURNAP v.)

[See Burnap v. Albert, Case No. 2,170.]

ALBERT, The, (KISSAM v.)

[See Kissam v. The Albert, Case No. 7,852.]

Case No. 140.

The ALBERT GALLATIN.¹

[MS.]

District Court, S. D. Alabama. Sept. 1, 1869.

SALVAGE—SHIP BURNING AT ANCHORAGE—AMOUNT OF AWARD.

[Cited in Bowers v. The European, 44 Fed. Rep. 491.]

[In admiralty. Libel for salvage by James Coyle, William Lee, and others against the ship Albert Gallatin, her cargo, etc.]

BUSTEED, District Judge. The libels in these cases are filed to recover salvage services rendered to the ship Albert Gallatin, which was struck by lightning on the morning of the 17th of April, A. D. 1868, as she lay at her anchorage in the Bay of Mobile, and fire thereby communicated to her cargo in the hold. At the time of her accident she had upwards of thirty-five hundred bales of cotton on board. It was therefore referred to a master to take the proofs. From these it appears that property was saved of the gross value of three hundred and forty-six thousand six hundred and twenty dollars and sixty-two cents, and that all the salvaging vessels were steamers. It is admitted that the services rendered were of a meritorious character, the only contest between the claimants and the libellants being as to their value.

It may be conceded that the proofs do not show the salvage services imminently jeopardized life or property, but that they were of a most disagreeable and laborious character, and that they involved great personal discomfort and risk to the health, is equally evident. The court does not deem it necessary to refer to the evidence in connection

¹[Reported by Samuel Blatchford, Esq.]

²[Affirming The Albert, Case No. 138.]

¹[Not previously reported.]

with the conclusions which have been reached, and which have been stated below.

[The decree makes a total award of \$84,828.45, which is about 25 per cent. on the gross valuation of the property saved, but 45 per cent. of the proceeds from a subsequent sale.]

ALBERT G. LAWSON, The.

[See The John Sanderson, Case No. 7,364.]

ALBERT, The JOHN.

[See The John Albert, Case No. 7,333.]

Case No. 141.

ALBERTI v. The VIRGINIA.

[2 Paine, 115.]¹

Circuit Court, S. D. New York. 1840.

ADMIRALTY—JURISDICTION—CONTRACT NOT RELATING TO MARITIME SERVICE.

1. If a charter party embraces stipulations merely of a personal nature, having no relation to a maritime service in the safe carrying and delivery of the cargo, courts of admiralty have not jurisdiction to afford relief for a breach of such part of the contract.

[Cited in Peck v. Laughlin, Case No. 10,890; Deely v. The Ernest and Alice, Id. 3,735; The Clytie, Id. 2,914.]

2. Still less have they jurisdiction where such stipulations are contained in an instrument distinct from the charter party.

[Cited in Peck v. Laughlin, Case No. 10,890; Deely v. The Ernest and Alice, Id. 3,735.]

3. The owner of a vessel under charter for the West Indies and a market, agreed by letter that, if a certain price could not be obtained at a designated port, the vessel should proceed to another; which agreement he violated. *Held*, that admiralty had not jurisdiction of the case.

In admiralty. This was an appeal from the district court of the southern district of New York, from a decree dismissing a libel for want of jurisdiction. [Affirmed.]

The libel set forth that Charles Willey, the owner of the brig Virginia, Bethell, master, on the 14th day of March, 1840, chartered said brig to the libellants. This charter party was in the following words:—"This charter party made and entered into, this fourteenth day of March, 1840, by and between Charles Willey of Jacksonville, E. F., owner of the brig called the Virginia, of the first part, and Alberti, O'Neil & Dunbar of Woodstock, E. F., of the second part, witnesseth: The party of the first part agrees to charter to the party of the second part, the said brig for a voyage to the West Indies and a market, and to take a full cargo of pine lumber, two-thirds to be on account of the parties of the second part, one-third on account of said brig and owner. The parties of the second part agree to pay at the rate of fourteen dol-

lars per thousand feet freight. It is understood that the vessel is to proceed as soon as practicable to the St. Mary's River, Ga., and there take in a full cargo of lumber in and under deck, to be furnished by the party of the second part, within reach of the vessel's tackles at their mill. The party of the second part are to allow five per cent. commission to the captain for sale of two-thirds of cargo in the West Indies, no other charge to be made on the portion belonging to the charterers. Alberti, O'Neil & Dunbar. Charles Willey."

The libel also stated that the vessel having been loaded pursuant to the charter party, the libellants gave to said Willey a letter of instructions, and to which they referred as forming a part of the charter party, or as explaining the duty of Willey and the master, under the charter party. The following is a copy of the letter. "Woodstock, S. S. Mill, 22d April, 1840. Capt. C. Willey, Brig Virginia—Dear Sir: Two-thirds of the cargo now on board your vessel is on account and in conformity with the understanding had between us. You will proceed to Guyama and dispose of your cargo, provided you can do so at a price covering invoice price and freight. We furnish you a letter of introduction to Mr. G. W. Gifford, who we would advise you to consult in the disposition of your cargo. Should you sell there, please pay over the proceeds of our portion to Mr. G. W. Gifford, and request him to remit by undoubted draft the proceeds to our agents, Messrs. Nesmith & Leeds, New York; should you not sell, proceed elsewhere with a view of effecting sales on the best terms possible; should you not be able to reach our limit (or even, we will consent to say, one dollar less) short of Jamaica, you will please proceed to Falmouth, and there discharge your cargo, which by letter in your possession is consigned to Mr. Samuel Magnus. Should you sell at any intermediate port between Guyama and Falmouth, please remit the proceeds of our portion by undoubted draft to our agents at New York, or should you sell at a port where the proceeds can be invested in produce to greater advantage for our interest than by bills, you are at liberty to do so, with the understanding the freight to New York is to be customary, and that it be consigned to our agents there, advising them of the shipment, that they may have insurance effected. Should you remit by bills, please send the first and second by different vessels to our agents, and bring the third in your own vessel. It is understood five per cent. is all the charge, excepting duty, we will allow on the sale of our lumber; you will please bear in mind the freight is paid here, hence we are to receive the whole sale of our portion of cargo, after deducting the duty and five per cent. commission. Should you feel disposed, and there is an opportunity of doing well at St. Johns, you may substitute that for Guyama for your first port.

¹[Reported by Elijah Paine, Jr., Esq.]

"Trusting you will find a good market, your ob't servants, Alberti, O'Neil & Dunbar."

The libel further stated that Willey wrote a receipt at the foot of the letter, of which the following is a copy: "I hereby acknowledge to have received, from Alberti, O'Neil & Dunbar, a letter of instructions, of which the foregoing is a true copy, and I promise to comply with its requisitions. Charles Willey."

The libel further alleged that, if the instructions and charter party had been complied with, the lumber would have sold for enough to cover the cost and freight; but that the master, in violation of the charter party and the letter of instructions, and of his duty as master, sailed directly for St. Johns, in the island of Porto Rico, and without making any effort to get the best price he could, or to comply with the letter of instructions, sold the cargo at a great loss, and at a price much less than he would have obtained had he complied with the charter party and letter of instructions. That the libellants had been unable to get any settlement with Willey, and that they claimed of him the invoice cost of their share of the cargo, with the amount of freight they had paid, less commissions, &c. And the libel prayed a condemnation of the record, &c.

The claimants demurred generally and for want of jurisdiction.² By the decree of the court, the demurrer was allowed and the libel dismissed with costs. From this decree the libellants appealed.

T. Sedgwick, for appellants.

The points made by the appellants were:

I. The jurisdiction of the district court, as an instance court of admiralty, extends generally to all maritime contracts. 2 Browne, *Civil & Adm. Law*, 88; *The Mary*, [Case No. 9,187;] *Zarel [Zane] v. The President*, [Id. 18,201;] *The Thomas Jefferson*, 10 *Wheat*, [23 U. S.] 428; *The Orleans v. Phoebus*, 11 *Pet.* [36 U. S.] 175. It is not necessary to review these cases at length. By maritime contracts, our courts have understood contracts relating to the business of the navigation of the sea. Every agreement directly relating to that business has been considered a subject of admiralty jurisdiction.

II. This jurisdiction more particularly embraces charter parties and agreements of an analogous character. *Dunl. Adm. Pr.* 487; 3 *Kent, Comm.* (2d Ed.) p. 220; *De Lovio v. Boit*, [Case No. 3,776;] *The Volunteer*, [Id. 16,991;] *Andrews v. Essex Fire Co.*, [Id. 374.]

III. The charter party and letter of instruc-

² As to the jurisdiction of the district and circuit courts, reference may be made to the following cases in Paine:—*The Amiable Nancy*, [Case No. 331;] *Livingston v. Van Ingen*, [Id. 8,420;] *Denn v. Harnden*, [Id. 4,819;] *Lucas v. Morris*, [Id. 8,587;] *Ward v. Arredondo*, [Id. 17,148;] *Smith v. Jackson*, [Id. 13,064;] *Rabaud v. D'Wolf*, [Id. 11,519;] *Catlett v. Pacific Ins. Co.*, [Id. 2,517;] *The Robert Fulton*, [Id. 11,890.]

tions, in this case, are to be considered as forming but one instrument; or the instructions are merely to be considered evidence construing and explaining the terms of the charter party. Thus far the libellants suppose there can be no doubt. Contracts relating to the navigation of the seas are proper subjects of admiralty jurisdiction. Charter parties form one of the largest branches of this class of contracts. The charter party and instructions here are to be taken together in this case as one instrument; and that a charter party or a contract of an analogous nature being an affreightment of a vessel for a maritime service. But we are now met by the objection that the part or subdivision of the contract here complained of as broken, does not relate to maritime affairs. Let us state the matter as strongly as it can be stated against the libellants. It is said that the maritime contract here, viz., to carry the lumber to the West Indies, was fully performed; and that the sale of the goods on land, for a price below that limited, was an act performed by the master as consignee; and that, consequently, the admiralty has no concern with it. This view of the matter has been taken by the district judge, and, therefore, while I insist with the utmost confidence that it is erroneous, I am bound to do so with deference and respect. I am quite ready to concede that in a charter party stipulations might be inserted which would be of a character wholly unmaritime, (if I may so express myself,) and which would give the admiralty no jurisdiction whatever. If the master were made, properly speaking, consignee of the cargo, if it had arrived at its ultimate destination and was landed, and he should then misapply it or its proceeds, I readily admit that no charter party could give the admiralty jurisdiction. If here, after the vessel had arrived at Falmouth, and the cargo were on shore, he had converted it to any improper purpose, the vessel clearly would not then be answerable. But is that this case? What is the contract here? Simply this: To carry this lumber to Jamaica, provided the price of lumber at the intermediate ports does not reach a certain limit. Has that contract been performed? Not at all. The vessel only carried the cargo to Porto Rico. The vessel has not done what she undertook to do. That must always give jurisdiction to the admiralty in rem. It is all very well for defendants in cases like this to chaunt the praises of the trial by jury; but how are we to get at a case like this with a jury, the most clumsy and awkward engine that justice ever invented or condescended to make use of? When shall we find this Florida gentleman, Mr. Willey, within our territories? The jurisdiction of admiralty in personam may be hedged in with propriety, because the person is there given to the custody of a single judge; but in rem, the jurisdiction of admiralty is wholesome, liberal, almost essential to the interests of commerce and to in-

ternational intercourse. What is the basis, the reason of it? Why, merely that the vessel, the thing, the res, by means of which the benefit is obtained, shall stand security to the other party for the protection of his rights. Now, to apply it to this case, what was the consideration upon which the libellants put the lumber on board the vessel? Was it not that it should go to Falmouth, provided the price could not be got short of there? Is not this a contract to which the vessel is bound? What is the breach of the contract? Why, that the lumber was taken out of the vessel at a port short of her destination. Is not this a breach of the contract, and upon altum mare? The master was not to land the lumber at St. Johns to see what the price was, and then to sell it if it reached a certain point—not at all. The libel distinctly charges that he went to St. Johns, and there, without making any effort to get the price limited, sold it. The distinct breach charged is, then, that the master delivered the cargo at St. Johns, instead of Falmouth. It is not that, acting as consignee, he misconducted himself. He never was consignee. The consignee was at Falmouth, and is expressly pointed out in the letter of instructions; and the master could not be consignee, unless the price limited was reached short of Falmouth, and that case never occurred. He never was consignee, therefore, and the very first stick of lumber that he lifted to land it at St. Johns, was lifted in violation of the contract. If he had been authorized to land and wait for the market, then he would have been consignee, and then the precise case would have arisen which, as the counsel for the defendants suppose, presents itself here. But it was not so. He was only authorized to land the cargo short of Falmouth, under certain circumstances. Those circumstances never existed. The landing of the cargo is, therefore, what we complain of. The voyage that the vessel undertook to make has not been completed. It is precisely as if the instructions had run thus: "You will proceed to St. Johns, and if there you find one of our firm to receive the cargo, you will land it; otherwise, you will proceed to Falmouth." Suppose, with the instructions, the master had gone to St. Johns, and there (although the partner whom he was to meet did not appear) he had landed the cargo and sacrificed it, can there be a doubt the jurisdiction of the admiralty would have attached? The counsel treats the matter as if it was the sale that we objected to. So we do. But it is the landing of the cargo for the purpose of sale, that formed the first violation of the contract, and which gives the admiralty jurisdiction.

F. B. Cutting, for respondents, said:

I. The jurisdiction of the instance court of admiralty over all contracts which are of a maritime nature, may be conceded, without prejudice to the demurrer in this case; for there is nothing concerning navigation or

maritime service involved in the present controversy. The broad proposition that all claims arising out of a contract or course of dealing which embraces any maritime matters may be enforced in the admiralty, is certainly unsupported by authority, and never would be tolerated by such lovers of the common law as the American community. It is not proposed to go into the ancient discussions touching the extent or limits of admiralty jurisdiction, nor yet to burthen the court with an extended review of modern authorities. Such a course is not necessary in this case. The counsel cites *De Lovio v. Bolt*, [Case No. 3,776,] as an authority. This certainly is not extraordinary, since, although that sentence is understood to have been reversed because no counsel could be found hardy enough to argue in support of it, yet the learned judge who pronounced it seems to think that for this very reason its doctrines are not overturned. 1 Sumn. 554, 555, 565, [The Volunteer, Id. 16,991.] Judge Ware, in his reports—with due submission to the tribunal next in authority above him—actually questions the fact of the reversal. 1 Ware, 152, [Drinkwater v. The Spartan, Id. 4,085.] It will, however, be observed that a policy of insurance relates exclusively to a maritime matter—to wit, the perils of the seas; and if admiralty jurisdiction could be sustained in such a case, it would not affect the present question. Even the great champion of admiralty jurisdiction, Judge Story, does not carry his doctrines to the extent required by the libellants. In the case cited from 11 Pet. [36 U. S.] 182, [The Orleans v. Phoebus,] he states expressly that "the admiralty has no jurisdiction at all in matters of account between part owners," such as an account of the vessel's earnings, or for a part owner's services or advances. In the case cited from 10 Wheat. [23 U. S.] 428; see 6 Cond. R. 173, [The Thomas Jefferson,]—he says: "In the great struggles between the courts of common law and the admiralty, the latter never attempted to assert any jurisdiction except over maritime contracts. See, also, 1 Mason, 509, [The Anne, Case No. 412.] Whether the admiralty shall exercise a jurisdiction coextensive with the most enlarged practice of any court of admiralty under the civil law systems of ancient or modern Europe, or be restrained within the narrow limits into which—in maintenance of the sacred right of trial by jury, that safeguard of private right, and palladium of public liberty, equally dear to Englishmen and Americans—it was forced by the firm and steady action of the English courts of common law, need not, we apprehend, now be decided. In different circuits, certainly, very different views are entertained upon it. Mr. Justice Story, with a zeal and learning which does him great credit, stands forth the champion of the former position; but other judges, with equal ability, and, we think, a more sound con-

ception of the principles of our constitution, and the nature of our judicial system, maintain the latter. *Vide Bains v. The Catharine*, [Case No. 756;] *Ramsay v. The Allegre*, 12 Wheat. [25 U. S.] 611; *The Grand Turk*, [Case No. 5,683;] 1 Kent, Comm. (1st Ed.) p. 352. The fate of this question, whenever presented to the court of dernier ressort, admits of little doubt. To say that the admiralty jurisdiction extends to all maritime contracts, is not advancing a step in the argument; for it remains to be determined what are maritime contracts. It seems to us, that the just limit to this jurisdiction, in respect to contracts, is that it embraces all those that relate to the actual operation of navigating the high seas; to this extent it is beneficial, perhaps necessary, to international commerce. Beyond this, the jurisdiction is wholly useless, and is actually forbidden by law; for, in all other cases, the common law is as competent to give relief to the suitor as a court of admiralty. Judiciary Act Sept. 24, 1789, § 9, [1 Stat. 76.] This would include suits for mariners' wages, for supplies and repairs furnished vessels actually engaged in maritime commerce, marine hypothecations, suits in rem to enforce the payment of freight, and controversies between part owners as to the possession and employment of such vessels; but not a policy of insurance, nor a controversy in relation to the sale of a cargo in a foreign port, by the consignee thereof. The counsel for the libellant cites, and the libel seems framed upon the doctrine contained in, a note to *Dunlap's Practice*, 488. Without entering into the question whether those cases are correctly decided or not, let it be observed that they are all decided, with some apparent misgivings on the part of the courts as to the question; and yet, they only assert the jurisdiction of the admiralty to enforce the specific lien given, even by the common law, for freight earned by a vessel for transporting goods upon the high seas. Do these cases assert that every commercial adventure entered into by merchants, in which one of the contracting parties owns a ship that is used in some branch of the operation, may be drawn into the admiralty? Surely not. We presume this court would hardly entertain a suit on a policy of insurance, and yet such a suit would possess much more of a maritime nature than the present libel. The general phrase found in elementary writers, that a charter party is a maritime contract, of which a court of admiralty has jurisdiction, unsupported and unexplained as it is by adjudications on the point, is as unsafe and unsubstantial a basis on which to rest this jurisdiction, as the like remark, in the same "authorities," in relation to a policy of insurance. Surely if the jurisdiction now claimed had any rightful existence, some traces of it would be found in actual adjudication. The silence of Westminster Hall is often appealed to as evidence against a

common law claim. The silence of the admiralty is evidence here.

II. The present case presents a contract for the carriage of a quantity of lumber to the West Indies, and a market; with a letter of instructions, sent, as the libel states, to whoever should go as master in the vessel, appointing him consignee of the lumber, and prescribing the conduct to be pursued by him in respect to the sale of the cargo, and disposition of the proceeds. The vessel performed her voyage, agreeably to the charter party, to a port in the West Indies, a port indicated to the consignee in the letter of instructions, as a market; and there, on land, acting as consignee of the cargo, the master sold the cargo as he was directed to do by his instructions, but below the prescribed price. This is matter of contract or of tort. If of tort, it was not committed by the master, as master, but as consignee, nor was it committed *super altum mare*; and, therefore, the instance court of admiralty has not jurisdiction of it, especially in rem against the property of the owners of the vessel. 1 *Dunl. Adm. Pr.* 50; 2 *Browne, Civil & Adm. Law*, 144; 2 *Pet. Adm. Dec. Append.* 74, [Treatise on Masters of Ships, art. 2, Fed. Cas., Append. to last volume.] If it is matter of contract, then, it is for executing, imperfectly and improperly, a contract made on land, whereby the master was to act as consignee of the cargo, to receive it as such in a foreign port, and there sell it. The whole maritime matter of the case, everything belonging to the seas, or constituting any part of the charter party, or contract of affreightment, is performed; but, after the delivery of the cargo to the consignee, at the market or land by him selected, he has been guilty of a departure from instructions in the manner of sale. Suppose the breach of instructions had consisted of a neglect to advise, as to the return of proceeds invested, by which the libellants omitting to insure had suffered a loss. Surely this would not give admiralty jurisdiction in rem, to enforce a claim for damages against the vessel which took out the original cargo. The characters of master and consignee are altogether distinct and independent, and will be so deemed, even where the offices coincide in the same individual. The law will then regard the individual as holding the one office or the other, according to his actual position and employment at the time of the act to be discussed. Per *Kent, J., Kendrick v. Delafeld*, 2 *Caines*, 72. In this case there can be no doubt on that point; when the master, as consignee, determined to sell at the first port, he acted in his character of consignee; his sale was in the character of consignee. That sale is the act complained of, it is the act of a commercial agent in the land service, having no connection whatever with the navigation of the seas, or any matter maritime, and its legal merits must be tested, by the rules of the

common law, before a jury. The reference in the charter party, to the fact that the master would probably be selling agent, is properly no part of the charter party, as such. If an agreement relative to commerce on land be written upon the same paper with an agreement relative to matters maritime, the jurisdiction over the whole contract would not thereby be conferred upon the admiralty; particularly if the whole matter complained of, and in respect to which the breach occurred, related to the first branch. Even applying to such a case the grasping maxim of chancery, that jurisdiction existing for one purpose, the admiralty may retain it generally, would do the libellants no good; for no breach of the contract is complained of in that part of it which has a maritime aspect. The maritime obligation to carry the goods to the market in the West Indies, which the shipper's consignee should select for its sale, was fully performed. The only object of referring to the sale in the charter party, was to negative the idea of any greater charge than a commission; and that, it will be observed, is to be paid, not to the owner, but to the master: not as freight, but as a commission for selling; it is, by force of that term, a land matter. The shipper need not have selected the master as his consignee; he was at liberty to select whom he pleased for that office. On the whole, it is respectfully submitted to the court, that the libel does not present a claim of a maritime nature, and that the libel was properly dismissed. The sentence should be affirmed with damages, for the vexation and delay of this appeal.

Before THOMPSON, Circuit Judge, and BRISTOL, District Judge.

THOMPSON, Circuit Justice. This case is brought up by appeal from the decree of the district court, dismissing the libel for want of jurisdiction. The argument of the appellant's counsel seems to assume that the letter of instructions is to be taken as a part of the charter party, and to receive the same construction, and be subject to the same jurisdiction, as if incorporated in the charter party. [See note at end of case.] I by no means mean to admit that if this had been the case, it would not have made any difference with respect to the jurisdiction of the court. If a charter party embraces stipulations purely of a personal nature, having no relation to a maritime service, in the safe carrying and delivery of the cargo, the admiralty jurisdiction of the district court could not reach the case and afford relief for a breach of such part of the contract. But it seems to me that the instructions in this case are entirely independent of the charter party; they bear different dates, and were not executed at the same time. The latter bears date the 14th of March, and the former on the 22d of April, 1840. The charter party is for a voy-

age to the West Indies, and a market generally; and the instructions limit the delivery of the cargo to certain specified places. But what is more important in the present case, the instructions contain stipulations for services to be rendered on land in relation to the dispositions of the cargo; and besides, the duty and undertaking of the charterer are not left to rest upon his liability growing out of the charter party, but he enters into a special contract in relation to matters contained in the instructions, which afford a reasonable inference that the parties did not understand the charter party and letter of instructions as one instrument. But this is not the real and fatal objection to the jurisdiction of the court. The nature of the services stipulated to be rendered, which form the subject-matter of the relief sought by the libel, does not belong to the admiralty jurisdiction of the court. It was not of a maritime character; it did not relate to the safe carrying and delivery of the cargo, or anything to be done upon the high seas, but related entirely to the sale of the cargo and matters to be done after the termination of the charter party and safe landing of the cargo. The whole complaint in the libel rests upon alleged violations of these instructions by selling the cargo at a less price than was thereby limited. This is matter belonging entirely to courts of common law. I am accordingly of opinion that the decree of the district judge ought to be affirmed.

NOTE, [from original report.] "The general rule which our courts of law have adopted in the construction of this, as well as other mercantile instruments," says Mr. Abbott, (Shipp. p. 250.) "is, that the construction should be liberal, agreeable to the real intention of the parties, and conformable to the usage of trade in general, and of the particular trade to which the contract relates." "If by the terms of the charter party," says Mr. Abbott, (Shipp. p. 376 et seq.) "a particular number of days is stipulated for the delivery, either generally or by way of demurrage, the master must wait the appointed time for that purpose, reckoning the days from the time of the ship's arrival at the usual place of discharge in the port, and not at the port merely. These charges are in ordinary cases primage, and the usual petty average, as expressed in the bill of lading; in case of any loss that became the subject of general average, the civil law imposed upon the master the duty of adjusting and settling such average, and obtaining from the owners of the cargo saved the sums to be paid as a contribution to the loss, and allowed him to detain the cargo for that purpose. This power of detaining the cargo is also given by the laws of Oleron, and by the French ordinance. It is said to be the practice in this country, in the case of a general ship, for the master to take security from the merchants before he delivers the goods, for payment of their shares of this contribution when the average shall be adjusted. If goods are conveyed in pursuance of a charter party, the right of detention for the freight may depend upon the terms of the particular contract: where there is no special contract, as in the case of a general ship, the master is not bound absolutely to part with the possession of any part of his cargo, until the freight and other charges, due in respect of

such part, are paid. Valin informs us that the entire contents of a single bill of lading are to be considered as one part, although consisting of very different articles, but that the contents of one bill of lading are not bound to the payment due for the contents of another bill of lading, although consigned to the same person. In this country, however, it has been held, that the master may detain any part of the merchandise for the freight of all that is consigned to the same person, which seems to be a more reasonable and convenient rule. The master, however, cannot detain the goods on board the ship, until these payments are made, as the merchant would then have no opportunity of examining their condition. By the ordinance of Wisbuy, and also by the French ordinance, the master may seize and detain the goods in the lighters, or barges, which are [to] transport them to the quay, and by the former he may detain the lighters by the ship's side. Cleirac, in his commentary on the laws of Oleron, says that the same power is given by the ordinance of Philip the Second and by the Consolato del Mare, and that the latter allows him to detain goods equal in value to four times the amount of the freight. The ordinance of Rotterdam allows the master to detain the goods for his freight, but requires him to unload and take care of them, that they may not be diminished or spoiled. In England the practice is to send such goods as are not required to be landed at any particular dock to a public wharf, and order the wharfinger not to part with them till the freight and other charges are paid, if the master is doubtful of the payment. And by the law of England, if the master once parts with the possession out of the hands of himself and his agents, he loses his lien or hold upon the goods, and cannot afterwards reclaim them. If the master land his goods at any particular wharf or dock, in obedience to an act of parliament, he does not thereby part with his lien. If goods are landed or sold by the officers of the customs, the freight not having been paid, the produce of the sale is to be first applied to the payment of the freight."

ALBERTO, The, (PIERCE v.)

[See Pierce v. The Alberto, Case No. 11.142.]

ALBERTY, (UNITED STATES v.)

[See United States v. Alberty, Case No. 14,426.]

ALBIN, (HAUGHEY v.)

[See Haughey v. Albin, Case No. 6,222.]

Case No. 142.

The ALBION.

[Blatchf. Pr. Cas. 95.]

District Court, S. D. New York. Jan., 1862.
PRIZE—VIOLATION OF BLOCKADE — ENEMY PROPERTY.

Vessel and cargo condemned as enemy property, and for a violation of the blockade.

In admiralty.

BETTS, District Judge. The return into court of the proof taken by the prize com-

'[Reported by Samuel Blatchford, Esq.]

missioners having been opened by order of the court, and judgment of condemnation of the vessel and cargo being moved thereon by the United States attorney, and no person appearing to oppose the same, an interlocutory order of condemnation, pursuant to the motion, was granted. On the submission of the proofs so brought in for the consideration of the court, the same were examined, and showed the case to be this: The vessel was captured with her cargo, by the United States ship-of-war Penguin, on the 25th of November, 1861. She was first discovered making for a port six or seven miles off North Edisto, in South Carolina, and twelve or fifteen miles southeast of Charleston; but on being pursued by the Penguin, veered her course northly, in the direction of New York.

She exhibited to the captors a certificate of British registry to Pembroke Saunders, of Nassau, N. P., merchant, executed November 13, 1861, and a certificate of the due clearance of her cargo by the receiver general at that port, November 16, and an affidavit taken before the British consul there resident, of Henry R. Saunders, to the verity of the invoice of the cargo. With these documents were bills of parcels of the cargo shipped, and the shipping articles purporting to have been executed by the master and crew of the schooner, on the 15th of November, for a voyage from Nassau to New York and back to the port of Nassau.

On the 23d of November the schooner was boarded by Lieutenant Wiltse, of the United States navy, from the ship-of-war St. Lawrence, off the coast of Georgia, who indorsed on her register a warning not to enter any port south of Hampton Roads, on account of the blockade.

Two of the seamen, examined in preparatory, testified that they had no knowledge of any attempt or design on the part of the schooner to enter a blockaded port, nor any actual knowledge that Charleston or the contiguous ports were blockaded, and supposed she was truly performing a voyage from Nassau to New York. One of them, however, admits that the vessel had run so near the South Carolina coast, and headed so directly toward it, as to render her movements suspicious.

The other witness, however, on his examination before the prize commissioners, made an unreserved and apparently ingenuous and credible exposure of the enterprise.

He was the mate of the vessel and part owner of her and the cargo. He states that he and her master, and the other owners of the vessel and cargo, have for very many years been residents, with their families, in Savannah, Georgia. The vessel was furnished by them solely with their own funds, as was the cargo.

The voyage commenced from Savannah to Nassau. The vessel was there laden with cargo owned by them, and sailed for their

benefit. They had long known of the blockade of Savannah and Charleston, and of the southern coast generally. Her voyage was to be from Savannah to Nassau, and back from Nassau to Savannah, or some such blockaded port as they could get her into; and, after she departed from Nassau, she was never directed towards New York, nor intended to make that course, further than that, on discovering that she was chased by the United States war-ship which captured her, she assumed a course towards New York, hoping to escape the pursuit.

It is needless to detail the testimony further. There are no facts produced in contradiction of this evidence, and it is conclusive of the criminality and confiscability of the vessel and cargo, both showing it to be wholly enemy property, and as demonstrating that, if it could successfully wear a neutral cloak, it was procured, shipped, and transported for the purpose of evading the blockade it was attempting to run when captured.

Judgment and condemnation as lawful prize of vessel and cargo.

Case No. 143.

The ALBION.

[18 Leg. Int. 405; 4 Phila. 418.]

District Court, E. D. Pennsylvania. Aug. 31, 1861.

PRIZE—EXAMINATION OF PRISONERS—CUSTODY OF SHIP.

[1. When a prize is sent into port, without the prisoners taken in her, whose examination is important, the prize commissioner will be ordered to give the ship and cargo into the custody of the marshal, to be held until the prize master shall have returned to the flag officer, in order that the prisoners, or an affidavit giving the reasons for their detention, may be brought into court.]

[2. Where the prize master was present at the capture, the prize commissioner will be ordered to examine him.]

In admiralty.

CADWALADER, District Judge. In this case the examination of the persons captured in the vessel is of immediate, as well as probable, ultimate importance. The usual and regular course is to send them in her, in the custody of the prize master, to the place of intended adjudication. This course has not been pursued in this instance. The prize master states that these persons were detained in the war steamer *Seminole*, in Hampton Roads, where he believes that they are now are. He does not know why they were not sent in her, nor does he know any reason why they should not be sent hither for examination. The papers of the vessel are all here. To send them away would be contrary to the usual course of practice, and would, unless under extraordinary circumstances, be objectionable. A

commission to take the examinations where the witnesses now are, addressed to a person there, would be inconvenient, as the commissioner would not, without the papers, be able to take the depositions advisedly. The preparation and transmission of copies, besides being attended with delay and expense, might endanger their premature publication. Moreover, a prize commissioner, as the immediate delegate of the judge, ought, if possible, to be a person with whom he can, from time to time communicate, in the progress of the cause. Another course, which might be preferable, would be to send one of the prize commissioners of the court to Hampton Roads for the purpose of taking the examination. But this might be attended with great expense, and, though not necessarily improper, is, I believe, unprecedented.

Under the circumstances of the case, I will make an order that the prize commissioner to whom the papers have already been delivered shall, upon taking possession of the vessel and cargo, deliver them immediately into the custody of the marshal, who will remain in possession under the direction of the commissioner. This will enable the prize master to return with a copy of these proceedings, to the flag officer, under whose order he has brought the captured vessel hither. The flag officer will probably either send the prisoners to this place in the custody of the same prize master, or of another officer, or send an affidavit explaining the reasons for not sending them. The decision of a prize cause is usually pronounced upon the examination of the persons on board of the captured vessel, and of her papers. In this case there may, perhaps, be some special reason for examining the prize master, who states that he was present at the capture. The commissioner may therefore examine him at once, for which this will be his warrant.

Case No. 144.

The ALBION LINCOLN.

[1 Lowell, 71.]

District Court, D. Massachusetts. April, 1866.

SALVAGE—COMPENSATION—APPORTIONMENT—VALUE OF GOODS.

1. Where five distinct sets of salvors took part in stripping and unloading a stranded vessel, they have not separate liens on the several articles saved by each set, but all are entitled to be paid out of all the property saved.

2. The award to each set of salvors who strip and discharge a wrecked vessel does not usually depend upon the value of the goods which each actually saved.

[Cited in *Scott v. Four Hundred and Forty-Five Tons of Coal*, 39 Fed. Rep. 287.]

3. The value of the property saved is usually estimated at the time and place of salvage;

[Reported by Hon. John Lowell, LL.D., District Judge, and here reprinted by permission.]

but where the salvors refused to deliver the property to the owners, and neglected to bring their libels until after the goods had fallen in market value, *held*, that the price was to be ascertained when the libels were filed and the warrants to deliver executed.

[4. Cited in *The Cairnsmore*, 20 Fed. Rep. 524, to the proposition that the reward for salvage service is affected, among other things, by the value of the property saved.]

[In admiralty. Libel for salvage. Decree for libelants.]

Salvage. On Wednesday, January 18, 1865, the bark *Albion Lincoln*, bound from some port in the West Indies for Portland, with a cargo of molasses, got on shore at Nashawena, an island at the entrance of Vineyard sound, lying about fifteen miles from New Bedford on one side and Holmes Hole on the other. The vessel came off the rocks, but had lost her rudder, and was not in a condition to be navigated to a place of safety. Some men from the neighboring island of Cuttyhunk came on board, and were employed to pump. The mate went to New Bedford for assistance, arriving there in the afternoon. Finding that no steamer was to be had, he engaged the libellant Baker, with his pilot-boat *Dragonet*, to go with him and tow off the bark. They were unable to reach the spot that night, but came to anchor at the nearest place of safe anchorage. Early in the morning, the master and crew of the bark came on board the *Dragonet* and informed them that the vessel had gone ashore again during the night, and was fast on the rocks. It was plain that the pilot-boat was not well suited to the service that would now be required of receiving the cargo from the *Albion Lincoln*. Captain Baker, however, was an experienced wrecker, and had vessels and men at New Bedford; and upon a representation of these facts to the master he agreed that Baker should go to work and save what was possible of vessel and cargo, and be paid a reasonable compensation. In the mean time, the schooner *Independence*, belonging to the libellant Cromwell, of Holmes Hole, had arrived with a crew of picked men, accustomed to such service. They had heard of a vessel in the sound with her colors union down, and had come out to her assistance. Making a harbor of necessity the evening before, at Tarpaulin Cove, and arriving very early in the morning, they found the bark deserted. By inquiry on shore, they learned that the master was on the pilot-boat, and Captain Cromwell went to see him. What passed there was stated very differently by different witnesses; Captain Baker said he agreed with Capt. Cromwell to be jointly interested with him in the salvage. Cromwell denied this. There was no doubt, however, that Cromwell's assistance was accepted on some terms, and all went to work to strip the vessel, so far as was proper and prudent, to lighten her; this work, and the

saving of five or six hogsheads of molasses, occupied the whole of that day (Thursday). Towards night, the master of the bark and his crew went to New Bedford with Captain Baker, in the *Dragonet*, intending to return the next day with two wrecking schooners, the *Z. Secor* and the *Experiment*, which belonged to Baker. They procured the vessels, manned them, and started, but were detained by ice, and could not reach the wreck until Sunday afternoon or evening. Monday and Tuesday were stormy; but on Wednesday, Jan. 25, Captain Baker saved some hogsheads of molasses. In the mean time, on the first Friday evening, the *Emma Jane*, a light-draft schooner, able to lie alongside the wreck, arrived, and Capt. Cromwell made a bargain for her assistance, and during Friday and Saturday these two vessels got out a considerable part of all the cargo that was saved. They saved something, though not much, on the second Wednesday and Thursday. Two other vessels, the *Platten See* and the *Martin Van Buren*, also saved some cargo. All this before Captain Baker's return. Captain Church, who came down with the first party on the *Dragonet*, remained during the whole time, and had some sort of charge of the vessel, but not a general supervision of the business. He worked chiefly with the men from Cuttyhunk, who remained during the whole time. By Thursday night, January 26, or Friday morning, it was discovered that the molasses, which had been stowed with the bungs of the hogsheads out, as is usual in voyages from the West Indies, was so far mixed with water, that it was not worth saving, and all parties gave up the work.

T. M. Stetson, for Cromwell.

A. Mackie, for Baker & Church.

T. K. Lothrop and W. J. Forsaith, for claimants.

LOWELL, District Judge. Two libels are brought here. One by Captain Baker, for himself and the several officers and men of his three vessels, with whom joins Captain Church, for himself and the men from Cuttyhunk; the other by Captain Cromwell and Captain Cleveland, of the *Independence* and *Emma Jane*, for themselves and the crews of those vessels. It is said that the master and owners of the *Platten See* and *Martin Van Buren* have arranged with the owners of the molasses for compensation to be paid hereafter. The sails, spars, and rigging, were taken to New Bedford, and sold by auction; the cargo was somewhat scattered, but was collected at Holmes Hole, and eventually sent to New York and sold. The net proceeds of the sale are about five thousand two hundred dollars. And upon this the question is made, what value I am to assume for the property saved. It seems that the market price of molasses fell very rapidly during the interval between the saving

and the sale of this cargo; and the libellants say, this fluctuation of values is at the risk of the general owner. It is undoubtedly true, as a general proposition, that the value, at the time and place of saving, is to be considered rather than the value at any other time and place, because this shows the benefit done to the owner of the property, if he receives it then and there, whatever disposition he may choose to make of it: *The George Dean*, Swab. 290. But in this case, the owners did not receive their property, and the salvors refused to let them take it, and brought their libel after the owners had begun to attempt its removal and had hired a vessel to take it to New York, and this was a long time after the goods had been landed. It is argued that the claimants are responsible for this delay. But the evidence does not bear out this contention. The underwriters' agents appear to have tried, in good faith, to compromise the matter, and to have made an offer which was entirely liberal; but a settlement was prevented by the conflicting claims and pretensions of the different salvors. At all events, no settlement was made; and down to the day the second libel was filed, the owners had not full possession of their property, and were not bound, personally, to pay anything for its having been saved. If it had been destroyed at that time, no action could have been sustained against them for salvage, properly so called, though possibly something might have been recovered for actual expenses. This state of facts raises the distinction between the present case and those cited at the bar, as, for instance, that concerning the conversion of a whale, decided in January last. In this case, there was no contract, and no responsibility for a specific part of the goods deliverable at the time and place of salvage; but only for such sum of money, or such part of the goods or of their value, as might be just and reasonable, and the parties could not agree upon that; but the libellants, being at liberty to apply to the court at any time, neglected to apply until the goods had fallen in value. If the court had then ordered an appraisement, or had decreed to the libellants a specific part of the goods, as is sometimes done, it is seen at once that the salvors would sustain their proportion of the loss, as it is right they should. I cannot hold the owners responsible for the value of goods which they were not allowed to take away.

The property was delivered to the claimants, by the marshal, on the 13th of March, and was sold in New York, early in April. Granting that it could have been as well sold at Holmes Hole, of which there is some evidence, it would be proper, in making the estimate, to disallow the expense of getting it to New York, and to take a somewhat earlier time; but a very considerable fall of prices had occurred before any

proceedings were had. Upon all the evidence, I assume the value as about six thousand dollars. The services performed by the salvors were meritorious, and at great expense of time. The cargo was under water during a part of each tide and the weather extremely cold, the thermometer, on several days, being at about zero of Fahrenheit; and, altogether, the difficulty and labor were very considerable. A great part of the time consumed, however, especially by Captain Baker and his men, was spent in trying to get an opportunity to work. The fund, reckoned on any fair basis, is small, not sufficient to allow of a large salvage reward to any one. This is one of the risks which wreckers take, however, and in the case of most of the libellants, who are often employed in the business, it may be supposed to be made up by the larger reward earned when the property is large.

Another question, much debated in this case, is the principle of the distribution of whatever salvage may be thought reasonable for the whole service. There are five distinct sets of salvors; and most of them have acted upon the theory that their lien and claim are upon the specific goods rescued by them; they put their initials on these casks, and stood guard over them and forbade their removal, have expected a definite part of them for their reward, and have, in one instance, filed their libel against them. This course of proceedings strikes me as novel. I have been accustomed to look upon the vessel, freight, and cargo, or what was saved of them, as one fund, upon the whole of which all the salvors, though not associated by any contract among themselves, had a lien for such sum as, upon the whole, was found due to each. In the case of the vessel and freight this is necessarily so, and I am not aware that any different rule holds with respect to cargo, or to the materials of a ship that has been broken up. The success of the particular salvors, though often a necessary preliminary to the recovery of any reward, is but one element in determining its amount; there are others of great importance, such as the time and labor expended and the risk run. In some reported cases one set of salvors have plainly contributed much more to the safety of the property, and the other set have been allowed as large, and sometimes the larger reward. Success is essential, but that having been obtained, the share depends largely on the nature of the effort: *The Santipore*, 1 Spinks, 231; *The Genesee*, 12 Jur. 401; *The Atlas*, 1 Lush. 518; *The E. U.*, 1 Spinks, 63. As a general rule, the court will not assess a different ratio of salvage upon different parts of the property, according to the labor expended on those parts, though it may do so if the justice of the case requires it. *The Vesta*, 2 Hagg. [Adm.] 189. And the salvor

who happened to find and rescue a very valuable part of the cargo would not usually be compensated in proportion to its value. It is only one of the elements of the computation. Take in this very case the instance of the men from Cuttyhunk. They were on board the vessel before she was bilged, and every day afterwards. It is impossible to say how far they contributed to save all that was saved by their exertions on the first Wednesday. They got out but little molasses considering their numbers, because they worked at the fore hold, from which it was difficult to discharge the cargo. But they had as good a right to work at the after hold as the crews of the Emma Jane and the Independence; any arrangement they may have made for a division of labor, was made, as I must presume, for their common convenience; and they appear to stand very much alike, except that Captain Church's men were able to sleep on shore with their families, and therefore were not subject to so much discomfort, which is a point of some importance; and they furnished no vessels or other appliances.

Coming to Captain Baker's case, we find that he employed nearly as many men as Captains Cromwell and Cleveland, and one more vessel; but he did not arrive in time to save a great deal of the cargo, and his men were not subjected to the same hardship or severity of labor. I do not find that Captain Baker has made good his demand to share equally with Captain Cromwell, on the strength of a bargain with him to that effect. Even setting aside the express denial of the latter, the conversation reported by Baker hardly amounts to such a contract; and when I consider the various circumstances of the case which would render such an agreement improbable, and others which seem to show that the conduct of Cromwell was inconsistent with it, I cannot say that any such bargain was fully understood by him, however it may have been with the other party. But Baker's time, expense, and exertions are entitled to be considered in apportioning the salvage, just as Captain Cromwell's time, trouble, and expense connected with the shipping and care of the steam-pump are to be taken into account. They were all working for a common object, and to that extent are necessarily interested together, whether they intended to be so or not. It is not possible to say precisely how far each contributed to the whole result, nor precisely what one might have saved if the others had not saved what they did. It is upon these principles that I shall divide the salvage: and I am glad to find that, looked at merely as wages, it will not be entirely insignificant. The case does not require me to make distribution to the individuals, but only to the different sets of salvors. I shall decree to the Independence and Emma Jane, \$1500;

to Captain Baker, for himself and his crew, \$600; to Captain Church, and the men from Cuttyhunk, \$350. Decree accordingly.

ALBONI, The, (BRITTAN v.)

[See Brittan v. The Alboni, Case No. 1,902.]

Case No. 145.

In re ALBRECHT.

[17 N. B. R. 287.]

District Court, E. D. Michigan. Dec. 31, 1877.

BANKRUPTCY — DISCHARGE OF GARNISHMENT — RIGHTS OF ATTACHMENT CREDITOR.

[A garnishment in a state court of the defendant's credits in a bank was discharged by his giving a bond required therefor by statute to satisfy the judgment, and the money was drawn by him from the bank, and deposited with a third person as indemnity to the sureties on his bond. *Held*, that the assignee appointed in proceedings in bankruptcy commenced against him more than a year after the garnishment was not entitled to an injunction against further proceedings in the suit in the state court, nor to the money so deposited, as assets of the estate; as the lien of the attaching creditor, acquired more than four months before the bankruptcy proceedings, was not destroyed by the giving of the bond.]

[Cited in Hill v. Harding, 9 Sup. Ct. Rep. 726, 130 U. S. 699.]

[In bankruptcy. Petition of the assignee in bankruptcy of William Albrecht for an injunction to restrain proceedings in a suit against the bankrupt in a state court. Denied.]

[It appeared that the suit in question was brought by one Seeley against Albrecht, in a circuit court of the state of Michigan, and that a writ of garnishment was issued there-in against the bank, as a debtor of Albrecht; that Albrecht obtained the discharge of the garnishment by giving a bond to satisfy the judgment, as required by statute, and drew the money due him from the bank, and deposited it with one Rich as indemnity to the sureties on the bond; and thereafter no further proceedings were taken in the suit. The proceedings in bankruptcy were commenced more than a year after the garnishment. The assignee sought to stay the proceedings in the state court, and claimed the fund deposited with Rich as part of the assets of the bankrupt's estate.]

George W. Bates, for assignee, petitioner.

C. E. Warner, for plaintiff in garnishment.

BROWN, District Judge. This case turns upon the construction given to the several provisions of the bankrupt law with respect to the dissolution of attachments, and the effect of a discharge. [Rev. St.] § 5044, enacts, that the assignment of the bankrupt "shall dissolve any attachment made within four months next preceding the commencement of the bankruptcy proceedings." Section 5106 provides that "no creditor whose

debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor, against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided the suit may proceed to judgment for the purpose of ascertaining the amount due," etc. Section 5119 declares that "a discharge in bankruptcy duly granted, shall release the bankrupt from all debts, claims, liabilities, and demands which were, or might have been, proved against his estate in bankruptcy." A distinction is taken, in the section first above quoted, between attachments issued more, and those issued less than four months before the commencement of proceedings in bankruptcy. While nothing is said, in express terms, with regard to the former, the clear inference is, that the liens acquired by them were designed to be preserved. Such is the uniform course of decision, and, indeed, it was conceded that if the bond had not been given, and the garnishment proceedings thereby discontinued, Comp. Laws, § 6512, the plaintiff would have been at liberty to prosecute his suit, at least so far as to protect his lien upon the money in the hands of the garnishee, and this petition could not have been sustained. *Peck v. Jenness*, 7 How. [48 U. S.] 612; *Davenport v. Tilton*, 10 Metc. [Mass.] 320; *Bates v. Tappan*, 3 N. B. R. 647, 99 Mass. 376; *Bosworth v. Pomeroy*, 112 Mass. 293; *Bowman v. Harding*, 4 N. B. R. 20, 56 Me. 559; *Stoddard v. Locke*, 9 N. B. R. 71, 43 Vt. 574; *Daggett v. Cook*, 37 Conn. 341; *Valliant v. Childress*, 11 N. B. R. 317, 21 Wall. [88 U. S.] 643. It is insisted, however, that as soon as the bond was filed, and the suit in garnishment discontinued, the action became a purely personal one, and subject to be barred by a discharge, as if no garnishment had ever issued. The question does not seem to have been passed upon in the federal courts. The state authorities are in direct conflict. In the case of *Carpenter v. Turrell*, 100 Mass. 450, where the attachment was dissolved by a bond, the court held a discharge in bankruptcy a good plea to the further prosecution of the suit; the argument being, that the bond was not intended as a substitute for the attachment. "It does not merely restore the possession of the property to the debtor, subject to the attachment; it dissolves the attachment utterly. It is not given for the property itself, nor as security for its value; but for the payment absolutely of the judgment, when recovered in the suit, whatever may be its amount." A somewhat similar question had arisen under the insolvent law of the state, in *Loring v. Eager*, 3 Cush. 188. In that case it appeared, however, that the attachment would have been dissolved if no bond had been given, and the court observed,

taking in this regard apparently a different view from that entertained in the latter case, "the bond was a security substituted for the security obtained by the attachment of the defendants' property; and we cannot suppose that the legislature intended that the plaintiffs should have any greater rights under the bond, in a case like this, than they would have had under the attachment."

The case of *Payne v. Able*, 4 N. B. R. 220, 7 Bush. 344, though an apparent authority in favor of the petitioner, is really of no pertinence, as the attachment was levied less than four months before the petition was filed. The case of *Williams v. Atkinson*, 36 Tex. 16, also relied upon by the petitioner here, does not seem to me to have any bearing upon the case. The discharge in bankruptcy was held to be a good plea, notwithstanding the attachment proceedings were commenced more than four months before the bankruptcy, upon the ground that the remedy of the plaintiffs in attachment was in the United States court. In so far as this case is an authority at all, it seems to be in conflict with the other cases above cited upon the same subject. The case of *Carpenter v. Turrell* is criticised by the New York courts, in *Holyoke v. Adams*, 10 N. B. R. 270, in which, under similar circumstances, it was held that the discharge in bankruptcy would not prevent judgment being recovered, and the sureties upon the bond being bound therefor. Motion was made in this case for a stay of proceedings, and the court held that the execution and delivery of the undertaking in attachment, was in legal contemplation a continuation of the attachment proceedings. "The propriety of this is apparent from the obligation assumed by the sureties, which is to pay any judgment that may be recovered in the action, the sureties thus agreeing to do exactly what the property seized would do when applied, viz. pay the judgment obtained, and also from the presumption that the property levied upon would have remained in statu quo until the judgment was recovered, if the undertaking had not been given." The case was carried through the special and general terms of the supreme court, and finally to the court of appeals, the opinion of which is published in 59 N. Y. 233. It is but just to say, however, that the question was not directly passed upon by the court of appeals. The supreme court of New Hampshire, in *Zollar v. Janvrin*, 49 N. H. 114, indicated a very decided opinion in the same direction, although the case went off upon another point. The court observes: "It would seem to be beyond doubt, that if it be the policy of the law to protect such securities, its protection should also be extended to the case where, for the benefit of the debtors, the lien of an attachment is only dissolved by the substitution of another security." In my opinion these cases enunciate the sounder principle. It

was the obvious intent of the legislature to preserve the lien of attachments acquired more than four months before the commencement of bankruptcy proceedings, as well as to annul writs thereafter issued; and we are bound to give effect to this intention, even if, in so doing, we depart from the letter of other general provisions of the statute in sections 5106 and 5119 relative to discharges.

In *Peck v. Jenness*, 7 How. [48 U. S.] 623, it is said: "But it is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other, and if possible, every clause and provision shall avail and have the effect contemplated by the legislature. One portion of a statute should not be construed to annul and destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together." This language was used by the court in an endeavor to harmonize two apparently conflicting provisions of the bankrupt act of 1841, similar to these; one of which declared that a discharge should be deemed a full and complete discharge of all debts provable under the act; and the other of which provided that nothing in the act contained should be construed to annul, destroy, or impair any liens. The language seems to me pertinent to the case under consideration. See, also, *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill. & J. 1152; *Brown v. Somerville*, 8 Md. 444; *Jackson v. Collins*, 3 Cow. 89. I deem it inconsistent with the general purpose of the act to hold that the lien of a creditor, lawfully acquired by his diligence, shall be lost by the debtor giving a bond to saury the judgment, an action entirely beyond the control of the creditor, and one which was designed to secure, not to defeat, the ultimate payment of his debt. The bankrupt law has wisely interposed to protect the property of an insolvent debtor from being swallowed up by attachments issued upon the eve of bankruptcy, but has not interfered with liens acquired in the ordinary course of business, and before insolvency is threatened. But under the construction given by the Massachusetts courts, the preference of the attaching creditor is lost, if the debtor is sufficiently responsible to obtain a bond, while it is preserved, if his situation is so desperate as to make the release of the property impossible. Subsequent cases in the same court indicate the serious consequences likely to follow the practical enforcement of this doctrine. In *Hamilton v. Bryant*, 14 N. B. R. 479, 114 Mass. 543, the bond in attachment was not given until the adjudication in bankruptcy, and two years after the commencement of suit; and yet the court held

the plaintiff was not entitled to a special judgment against the defendant and sureties. *Braley v. Boomer*, 12 N. B. R. 303, 116 Mass. 527; *Johnson v. Collins*, 12 N. B. R. 70, 117 Mass. 343. From this, then, it results that any attachment lien existing on the property of the bankrupt at the time of filing the petition, may be defeated by any person interested adversely to such lien (as, for instance, another creditor or the assignee) giving a bond in the name of the defendant, with sureties, to pay the judgment; in other words, securing the debt by a bond which can never be made available itself, and which destroys the security the plaintiff already had. A more complete subversion of the legislative intent can scarcely be imagined. I think the language used in section 5044 should be construed to qualify the general provisions of the later sections with regard to discharges. It may be the assignee is entitled to a temporary stay of proceedings until the question of a discharge is determined, to enable him to appear, plead the discharge, and raise the question in the state court; but as the petition was not framed upon that basis, and the suggestion was not made upon the argument, it is unnecessary to pass upon this question. The petition must be denied without prejudice.

Case No. 146.

ALBREE et al. v. JOHNSON.

[1 Flip. 341; 6 Chi. Leg. News, 296.]

Circuit Court, N. D. Ohio. April Term, 1874.

HUSBAND AND WIFE — ACTION AGAINST WIFE — JUDGMENT BY DEFAULT — VACATION — CORRECTION BY WRIT OF ERROR CORAM NOBIS.

1. Defendant moved to set aside judgment taken on a promissory note, on the ground that the maker of the note was at the beginning of the suit a married woman: *Held*, that the fact of coverture at the commencement of the suit and entry of judgment are questions of fact, and that a writ of error coram nobis will lie.
2. That on motion and affidavits the same may be reversed and set aside at any time during the coverture and before the satisfaction of the judgment.
3. Coram nobis in cases of coverture to set aside irregular judgments against married women—motion in place of the writ less expensive, and the more modern practice. The appropriate use of the writ of error coram nobis is to enable a court to correct its own errors.
4. To give jurisdiction against a married woman in a suit at law, her liability must appear in the proceedings affirmatively, and will not be inferred.
5. In equity her separate property may be reached, and she may be charged, but at law she cannot confess judgment, and judgment by default may be set aside.

[At law. Action of assumpsit by George Albree and another against Maria E. Johnson. Motion by defendant to stay execution

¹[Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

and set aside judgment, with application for writ of error coram nobis. Motion granted.]

WELKER, District Judge. This was an action of assumpsit commenced by the plaintiffs against the defendant, on the 16th day of September, A. D. 1868, upon a certain promissory note. The declaration alleges "that whereas the said Maria E. Johnson, wife of one W. S. Johnson, by the said W. S. Johnson, her agent, for that purpose duly authorized, on the 7th day of October, 1867, at Pittsburgh, Pa., made her promissory note in writing, and delivered the same to the said George Albree & Son, and thereby promised to pay to the order of the said George Albree & Son, the sum of \$776.56 one day after the date thereof," and alleging promise to pay, and that it was not paid. At the September term, 1868, of this court, judgment was rendered on default against the defendant for the sum of \$826.35, and costs of suit. Execution was issued on the judgment on the — day of —, A. D. 1874, and placed in the hands of the marshal for service. On the 25th day of October, 1874, William S. Johnson and the above-named Maria E. Johnson filed a motion in this court for a stay of execution and to set aside the judgment, and for grounds of their motion allege and state that when the said action was commenced against the said Maria E. Johnson, and at the time when judgment was so rendered against her, she was, and ever since has been and still is, the lawful wife of the said William S. Johnson; and that the said Maria E. Johnson, so being a married woman at the time of the commencement of the action and rendition of judgment, the judgment so rendered against her was without authority of law, and was and is irregular, unauthorized and void. The motion is supported by affidavits showing that the defendant, at the time this suit was commenced, and judgment rendered, was and now is a married woman, the wife of William S. Johnson, who joins her in this motion. The said Maria E. Johnson, with her husband, also at the same time presents an application for the allowance of a writ of error coram nobis, and assigns for error in fact, that she was a married woman at the time of the commencement of this suit and rendition of judgment, and asks, if said motion be overruled, that a writ of error be allowed on her application, and the reversal of the judgment for the reasons aforesaid by this court.

The first question that arises in the consideration of this motion and application, is: Did the coverture of the defendant, Maria E. Johnson, at the time this suit was commenced and judgment rendered, constitute an error in fact, so as to entitle her to a writ of error coram nobis to reverse the judgment rendered by default? Generally errors in fact are such as affect the judgment and do not appear upon the record.

The record in this case nowhere shows that the defendant was a married woman at the time suit was commenced and judgment rendered. It is a fact brought to the notice of the court in this motion by affidavits. The declaration does state that at the time she executed the note sued upon, she was the wife of one W. S. Johnson. The note is dated the 23d of October, 1867, nearly a year before the commencement of suit. The judgment is a personal one against her as though she were a femme sole. It is laid down in many authorities, that among the errors in fact for which error coram nobis lies, are: 1st—The death of one of the parties at the commencement of the suit; the appearance of an infant in a personal action by an attorney, and not by guardian; the coverture of either party at the commencement of the suit when her husband is not joined with her. Bouvier's Dictionary, [Vol. II.] 664, and the authorities there cited. Again, in Pickett's Heirs v. Legerwood, 7 Pet. [32 U. S.] 148, it is said: "The cases for error coram nobis are enumerated without any material variation in all the books of practice, and rest on the authority of the sages and the fathers of the law. I will refer to the pages of Archbold for the following enumerations: "Error in the process or through default of the clerk; error in fact, as where the defendant, being under age, sued by attorney in any other action but ejectment; that either plaintiff or defendant was a married woman at the commencement of the suit, or died before verdict or interlocutory judgment, and the like." In the case of Dows v. Harper, 6 Ohio, 520, it is said: "The supreme court being our highest judicial tribunal, no other court can examine its proceedings, and if the writ of error coram nobis resident is refused in our practice, wrongs resulting from the errors in fact of this court would remain without redress. The supreme court of New York has adopted the like practice. [Dewitt v. Post,] 11 Johns. 460." In this case the error in fact assigned was the death of Payne, one of the plaintiffs, before judgment; and the writ was allowed. In Brock. 162, [Strode v. The Stafford Justices, Case No. 13,537,] Chief Justice Marshall, in a case where the defendant died before judgment, in the circuit court of the United States, in the district of Virginia, after some fourteen years had elapsed, allowed a writ of error coram nobis, to reverse the judgment, on the petition of defendant's administrator, for this alleged error in fact; and on the hearing reversed the judgment for that error. In Harris v. Hardeman, 14 How. [55 U. S.] 337, it was decided, that the circuit court, on motion, may set aside a judgment of a former term, on default of a defendant who had no notice of the action, holding the judgment merely void, and that the court had power summarily to declare it inoperative and stop proceedings under it. These authorities, it seems to me, clearly show that errors in fact can be reviewed on

writ of error coram nobis; and that among the errors of fact against which relief will be granted is coverture of the defendant at the time of judgment.

Can the same thing be effected by a motion for that purpose, supported by affidavits? In 7 Pet. [32 U. S.] 148, already referred to, the supreme court say: "It cannot be questioned that the appropriate use of the writ of error, coram nobis, is to enable a court to correct its own errors; those errors which precede the judgment. In practice, the same end is now generally attained by motion, sustained, if the case require it, by affidavit." It will be remembered that in this case the court enumerated the errors in fact for which error coram nobis would lie, and among them that the defendant was a married woman, etc. In 14 How. [55 U. S.] 346, referred to above, the court say, in relation to the practice of the court: "It is believed to be the settled modern practice, that in all instances in which irregularities could formerly be corrected upon a writ of error coram nobis, or audita querela, the same object may be effected by motion to the court as a mode more simple, more expeditious and less fruitful of difficulty and expense." In this case, the court also say: "In this case the cause was still under the control and correction of the court for the enforcement of its judgment, and the supervision of its own process; and in the exercise of this function, it was competent for it to look back upon the entire progress of the case up to the writ and indorsements thereon, under the rule already stated as applicable to judgments by default, and to correct any irregularities which might be detected." These cases in the federal courts seem to settle that errors in fact may be reached as well by motion as by writ of error coram nobis.

Let us now examine whether a personal judgment can be sustained against a married woman. There is no claim that this judgment is anything but a personal judgment, although it is attempted under it to reach defendant's individual property to satisfy it. This is important as bearing upon the point raised by counsel for the plaintiffs, that a judgment by default should not be set aside unless a good defense is made out for the defendant, as well as with reference to the validity of the judgment rendered against the defendant, then being a married woman. In Swan's Practice, (page 111,) in a note, it is said: "A married woman is not, in general, competent to enter into contracts so as to render her liable to a personal decree or judgment." In *Watkins v. Abrahams*, 24 N. Y. 76, it is said: "I do not understand that a personal judgment can be entered against a femme covert by confession. There are good reasons why this cannot be done. In the first place, the common law courts in England and this country do not allow a judgment in personam to be given against a femme covert. It has been so long and well

settled that such a judgment could not be rendered against her, that it has been held erroneous, and such judgments invariably have been set aside on motion." In the case of *Swayne v. Lyon*, 67 Pa. St. 436, the court say: "An erroneous judgment upon a bad declaration collaterally may be a valid judgment—the declaration showing no legal cause of action whatever. But I apprehend that cannot be as against a married woman. Every judgment against her which does not show on its face her liability, is a void judgment. This is the principle of *Caldwell v. Walters*, 6 Harris, [18 Pa. St.] 79." In *Griffith v. Clarke*, 18 Md. 457, it is decided that "a promissory note signed by a femme covert cannot be enforced against her by any proceeding at law. A judgment by default against her, when sued at law, is a nullity." In *Morse v. Toppan*, 3 Gray, 411, a judgment was rendered against the defendant, a married woman, by default. In a suit on the judgment afterward brought, Chief Justice Parsons said: "The fact that the defendant was a married woman when the judgment was rendered against her, would alone be a good bar to this action. It would be the same as if she had entered into an obligation by bond at the same time, to which she might have pleaded non est factum. A judgment is in the nature of a contract—it is a specialty, and creates a debt, and, to have that effect, it must be taken against one capable of contracting a debt." In *Kerr on Frauds*, (page 148,) it is stated: "At law, a married woman is under an absolute incapacity to bind herself by any agreement. Her separate existence is not contemplated, but is merged by the coverture in that of her husband. But in equity, the case is wholly different. Her separate existence, both as regards her liabilities and her rights, is acknowledged in equity to the extent of the property she enjoys for her separate use. In respect to such property, she is capable of disposition and doing other acts as if she were a femme sole." In the case of *Phillips v. Graves*, 20 Ohio St. 371, the supreme court of Ohio review fully the rights and liabilities of married women at common law, as well as under our statutes. The suit was brought against the wife, joining her husband therein, upon a written contract signed by the wife alone for the purchase of a piano, and the petition alleged and set forth that she had separate property, and intended by the contract to charge that for the payment of the piano so purchased for her separate use. It was a proceeding in equity. In delivering the opinion, the court say: "Thus, a strange anomaly exists in English and American jurisprudence. Courts of law and courts of equity co-exist in the same realm; the former merging the legal existence of the wife in the husband; the latter recognizing her separate existence; the former declaring her incapable of acquiring, holding, or disposing of property; the latter recognizing her ability to ac-

quire, control, and dispose of her estate; the former denying her capacity to contract, or to sue or to be sued; the latter enforcing her agreement by granting relief both for and against her." Again: "While the judge declares her contracts absolutely void, the chancellor proceeds in rem, and charges her separate estate as equity and good conscience may require." In reference to our statutes, "in relation to the rights and liabilities of married women," the court further say: "These statutes do not, nor were they intended to, abridge the powers, or restrain or limit the jurisdiction of courts of equity in relation to the separate estates of married women; but, on the other hand, they do enlarge the jurisdiction of the chancellor, in so far as the general property of married women is charged, by the force of these statutes, to separate property. The legislative intention was to change the legal status of married women, and declare their legal rights and liabilities." This case also settles that the proper remedy to reach the separate property of married women for their liabilities is by proceedings in equity. It is claimed by the plaintiffs that under the Ohio statutes, in force at the commencement of this suit, a married woman was liable to be sued for her contracts, the same as if femme sole; and I am cited to the second section of the act "concerning the rights and liabilities of married women," as conferring the right to sue and be sued. This section provides that under certain circumstances, on application to the court of common pleas, the court may, by an order or judgment, invest her with that power. The declaration in this case does not aver that any such proceedings were had. In the absence of such averment, the court cannot presume such proceedings. To give jurisdiction against a married woman in a suit at law, her liability to be such must appear in the proceedings affirmatively, and will not be inferred. I have examined the authorities cited by counsel for the plaintiffs, and find that they do not materially conflict with those bearing upon the questions involved in this case already alluded to. Most of them are upon the point that judgment will not be disturbed on motion at a subsequent term of the court. But they are in cases where service was properly made, and no disabilities of the defendants alleged as a ground for the motion. On a careful review of the authorities, giving them such examination as seemed to be necessary to fully understand the principles decided by them, I have arrived at the following conclusions:

1st—That the coverture of the defendant at the commencement of this suit, and rendition of judgment herein, is a question of fact that might be remedied by writ of error coram nobis, and same reversed on such writ.

2d—That the same end can be attained by a motion supported by affidavits, at any time before the satisfaction of the judgment, and during existence of the coverture.

3d—The defendant, Maria E. Johnson, on the showing made on the motion, is entitled to have the execution issued upon the judgment set aside, and also the judgment rendered against her on default set aside, and be let in to defend the action; and I direct the order to be accordingly entered.

Case No. 147.

ALBRIGHT v. CELLULOID HARNESS-TRIMMING CO.

SAME v. SAME.

[2 Ban. & A. 629; 12 O. G. 227; Merw. Pat. Inv. 254.]

Circuit Court, D. New Jersey. June, 1877.

PATENTS FOR INVENTIONS — REISSUE — ANTICIPATION—INFRINGEMENT—EXPERIMENTAL USE.

1. It is not necessary that a reissue should embrace everything found in the original, since the prohibition of the act is limited to the adding of new matter to the specifications.

2. There is no obligation upon the patentee to claim all things in the reissue which were claimed in the original invention.

3. On the question of originality, mere experiments never put to practical use, are not anticipations.

[See Aiken v. Dolan, Case No. 110.]

4. He is the first inventor and entitled to the patent, who, being an original discoverer, has first perfected and adapted the invention to actual use.

5. An experimental making and user of a patented article is a technical infringement.

6. Reissued letters patent No. 5,155, granted to complainant, November 26th, 1872, for improvement in dies for finishing rubber-coated harness mountings, held valid.

In equity.

J. C. Clayton, for complainant.

A. S. Hubbell, for defendants.

NIXON, District Judge. There are several suits pending between these parties, and I will first consider the case which was denominated "No. 1" on the argument, and which has been brought against the defendant corporation for infringing certain letters patent, numbered 5,155, for "Improvement in the manufacture of rubber-coated harness-trimmings," being a reissue to the complainant, of the date of November 26th, 1872, the original patent having been granted February 13th, 1872, and antedated January 27th, 1872.¹ The only claim of the reissue is for the dies, a tool adapted to do a particular work, and the complainant states in his schedule to the reissue, that his invention consists in making and using a pair of dies for pressing, finishing, polishing and trimming the edges of the vulcanized coating of harness-trimmings, such as rings, buckles, terrets, hooks and like

¹[Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Partially reported in Merw. Pat. Inv. 254.]

²[See note at end of case.]

articles. The answer of the defendant substantially denies the infringement, and that the complainant was the original and first inventor of the dies described in the reissue, or any material part thereof, alleging that the same was used by a number of persons, whose names and places of business are set forth. It further alleges that the thing patented had been described in printed publications prior to complainant's alleged discovery or invention, and more particularly in a number of English and American patents therein enumerated; that the same had been in public use, or on sale, in this country for more than two years before the complainant made application for his original letters patent; and, also, that the reissue was not for the same invention as was fully described in the original patent. Such grounds of defence necessarily involve the construction of complainant's invention; and in order to construe it intelligently, we must first examine the original patent, including the specifications, drawings, etc., and ascertain, if we can, what the patentee discloses and claims therein to be his invention; then look at the reissue to see whether any other or different invention is set up; and next consider the state of the art at the date of the patent to learn from thence what the patentee is entitled to claim as his own.

The case, as prepared and ably argued by the counsel, covers a very extensive field of investigation, and, having given to it the care and attention which its importance to the parties seems to demand, we shall proceed to briefly state our conclusions, rather than the processes of reasoning by which they have been reached. In the specifications of the patent, the patentee states, that his invention consists of making a pair of dies for pressing, polishing and trimming the edges of the rubber coating of harness-trimmings, so as to imitate stitching, and to finish each article without hand-labor. In other words, he proposes with an instrument or tool to do an old thing in a new and better way. He was not the first to use dies in the manufacture of rings, buckles, terrets or other harness-mountings, nor the first to imitate leather stitching on rubber-coated articles, nor the first to densify and polish with dies plastic compositions, surrounding a metal core, by heat and pressure. Numerous English and American patents—as, notably, the patent to Thomas Deakin, December 22d, 1842, for the use of metallic dies to receive the metal skeleton; the English patent to Newton, September 4th, 1851, and to Moses Poole, March 28th, 1853, for the Good-year invention of applying india-rubber compositions in making and finishing parts of harness; the patent to William Green, August 6th, 1857, in regard to imitation stitching; and the American patent to Welling, dated April 28th, 1862, for pressing and solidifying the mass of any plastic composition around an iron ring by means of dies—reveal

methods of separately accomplishing those different results.

The operation of the invention is simple. A metal ring, buckle or other article is coated with the rubber and placed in one of the dies, and the other die is pressed down upon it. The dies, or the article itself, are moderately heated, so that the pressure of the polished dies will polish or finish the article. The dies are beveled off at a and c of Fig. 2 of the drawings, so as to form sharp edges. These edges a cut off the waste at the inner side of the ring, while the edges c cut off the waste on the outer side. In this way the act of pressing together the dies polishes, trims and finishes each article in the best and quickest manner. e shows the indented lines, which produce an imitation of stitches. The dies touch each other x, y, and z, so that they cannot crush the article placed in them. The claim of the patent in the original is for—"The construction and operation of the dies A and B with cutting-edges a and c, substantially as described, for finishing rubber-coated harness-mountings."

On the 26th of November, 1872, the patent was reissued in two divisions, as is expressly authorized by section 4916 of the Revised Statutes. Of these Division A, numbered 5,155, was for the dies, and Division B, numbered 5,156, for the process of manufacturing metallic harness-trimmings covered with rubber or other known vulcanizable gum. Suit No. 1 was brought for infringement of the reissue No. 5,155. A comparison of the specifications, drawings and claims fails to show that any new matter has been introduced into the reissue which did not appear in the original patent. It is true that Division A does not embrace everything which is found in the original; but it is not necessary that it should, since the prohibition of the act is limited to the adding of new matter to the specifications, and there is no obligation upon the patentee to claim all things in the reissue which were claimed in the original invention. *Carver v. Braintree-Manuf'g Co.*, [Case No. 2,485.] Of what, then, does the invention consist as described in the reissue? We have a die in two parts, so constructed as to press, solidify, polish and trim the edges of a partially made ring with an iron core, and to impart to it by a single operation the desired form, rib and imitation stitch, and at the same time separating the waste material from the article. It embodies the following features: (1) A central cavity for the body of the article to be formed; (2) a recess surrounding the cavity in which to form a projecting rib adapted to receive ornamentation; (3) provision, by grooves, for the escape of the surplus material; (4) cutting or defining edges to separate the surplus material on the inner and outer edges of the article; (5) concentric recesses to receive the waste; and (6) bearing-surfaces to determine the thickness of

the finished article, and to prevent crushing the same. Whether this is a new device or not, does not depend upon the question whether the separate instrumentalities are new, but rather upon the question whether any new and useful result is produced by their combination. The evidence seems to be, that the complainant, who is also the patentee, has been able, by the use of this die, to bring upon the market a better article of rubber-coated harness-trimming, with less labor and expense, than had before been produced. Before its introduction, the workmen were in the habit of placing the soft rubber around the metal core, and, as a preliminary step, of putting it through the process of vulcanization, after which the article was trimmed, polished and finished by hand, and the stitches marked thereon with the sharp-pointed wheel. These separate and laborious methods have been superseded by the complainant's invention. Not much time need be spent upon the inquiry whether the defendant corporation has infringed.

At complainant's request they produced a pair of finishing-dies, such as they used in the manufacture of celluloid-coated harness trimmings, and the same has been marked complainant's Exhibit No. 12. Complainant's Exhibit No. 7 was put in to show the die described and claimed in reissue No. 5,155, and the question is whether the use of the former is an infringement of the characteristic devices of the latter. Their features of resemblance are more numerous than their features of dissimilarity. Even where they are not identical in form, they seem to be so in function. For instance, the sharp cutting-edges described and appearing in Exhibit No. 7, are not described and do not appear in Exhibit No. 12. Their absence, and the substitution in their place by the defendants of the broad bearing-surfaces, was largely commented upon by their counsel on the argument, and it was assumed that such a change effected a substantial difference in the mode of operation of the two dies; but actual experiments shown do not sustain the assumption. It was found that the dividing-ridge in Exhibit 12—the defendant's die—through bearing-surfaces, acted also as cut-offs of the surplus material, and produced substantially the same result at the sharper cutting-edges of Exhibit 7—the complainant's die. A thicker fin was ordinarily left on the outer rim of the article pressed in the one case than in the other, and where a coating material was used less dense than the hard rubber, such as celluloid, it seems that the broad bearing-surface insured a better finish than the cutting-edges, by holding more of the material within the dies for solidification and polish; but the construction and mode of operation of the two dies are so substantially alike that the use of Exhibit No. 12 must be held to be an infringement of Exhibit No. 7.

Nothing was brought forward in the case

which casts serious doubts upon the originality of the complainant's patent, except the Sturgis die, Exhibit No. 18, produced by the complainant. Mr. Sturgis says that, in the spring or summer of 1865, he made a pair of dies to press up a composition with which he wished to coat an iron buckle to imitate the stitched leather buckle. He pressed up different compositions, experimenting with leather and paper and cloth. He never made any quantity, or ever put any on the market, "being a mere matter of experimenting." It does not appear that these experiments were successful, as he testifies that he abandoned them and laid the dies away upon the shelf in his shop, where they remained until they were brought out for the purpose of defence in this case. He did not perfect or adopt his invention, if he made one, to successful use. His dies were first made as molds or stuffing-boxes, with holes at the back, through which he forced the composition around the iron frame previously placed in the die. That mode did not work successfully, as the tendency was for the composition to force the iron frame out of place. He then closed up the openings with solder, and, instead of forcing in the composition, he placed it above and below the iron frame before the die was closed. He experimented alone about a couple of months, and pressed up, with these different materials, probably a half-gross of buckles. He fails everywhere in his testimony to indicate that he regarded his device, whether used as a stuffing-box or a die, as of any practical value, and he ceased for years all efforts to make it successful. Under these circumstances what he did must be put in the category of abandoned experiments. "He is the first inventor," says the supreme court in *Whiteley v. Swayne*, 7 Wall. [74 U. S.] 685, "and entitled to the patent, who, being an original discoverer, has first perfected and adapted the invention to actual use." *Gayler v. Wilder*, 10 How. [51 U. S.] 477; *Washburn v. Gould*, [Case No. 17,214;] *Parham v. American Button Hole, etc., Co.*, [Id. 10,713;] *The Corn-Planter Patent*, 23 Wall. [90 U. S.] 181. Let a decree be entered in case No. 1 for an injunction and account, according to the prayer of the bill of complaint.

It is not necessary to make any extended reference to case No. 2. The suit is brought for the infringement of letters patent No. 137,373, issued to the complainant April 15, 1873, for "improvements in the manufacture of rubber-coated harness-trimmings." The patentee says in the specification that the nature of his invention consists in the formation of a die constructed of two or more pieces for stamping and finishing harness or carriage trimmings, when a metallic body is covered with suitably prepared rubber or other equivalent substances, without having any refuse or surplus material in the die when the process is done, and he alleges

that it is an improvement on the patent issued to him February 13th, 1872, and reissued in two divisions, November 26th, 1872. His claim is for "the die A B, constructed substantially as described, for pressing and finishing composition-coated harness or carriage trimmings without leaving any refuse material in them, as set forth." The improvement, therefore, consists in a die that finishes and polishes the coated article with no provision for waste or surplus material. Have the defendants infringed by making or using such a die? They admit in their answer that subsequent to the date of the said letters patent No. 137,873, among other experiments made or caused to be made at their factory in Newark, in the course of perfecting their manufacture of harness-trimmings coated with celluloid, they tried dies of substantially the form and construction, and having the same operation described in said letters patent; but such use was only experimental, and the said experiments demonstrated the fact that harness-trimmings coated with celluloid cannot be manufactured in dies thus constructed, and that they accordingly abandoned the experiment.

It should be said, in justice to the candor and frankness of the defendant corporation, that this admission on their part is quite as full as the complainant's proofs. Their superintendent, Lockwood, says that prior to July, 1874, he saw in their factory a die similar to Exhibit No. 8, which it is admitted was constructed according to the patent under consideration, and the complainant, Albright, testified that he visited the defendants' rooms in Newark, in October or November, 1873, and saw there one large oval brace-buckle die and one or two ring-dies constructed on the plan of Exhibit No. 8, and also buckles and rings, which, from their general appearance, he believed had been pressed in these dies. That seems to be the extent of the testimony as to the making and using the dies. It is a technical infringement, and is sufficient to authorize an injunction restraining their future use; but no reference will be ordered, as no damage or profits have been shown or suggested.

[NOTE. Patent No. 137,873 was granted April 15, 1873, and, so far as ascertained, was not involved in any reported cases, other than the above prior to 1880. Patent No. 123,603 was granted February 13, 1872, to A. Albright, and was referred to in Albright v. Teas, 23 O. G. 829. This patent was reissued November 26, 1872, No. 5,155.]

ALBRIGHT v. EMPIRE TRANSP. CO.

[See Williams v. Empire Transp. Co., Case No. 17,720.]

ALBRIGHT, (VOORHEES v.)

[See Voorhees v. Albright, Case No. 16,999.]

ALBRO, The EDWARD.

[See The Edward Albro, Case No. 4,290.]

Case No. 148.

The ALBUS.¹

[MS.]

District Court, S. D. Florida. April 1, 1856.

SALVAGE—ANCHOR SERVICE—GETTING SHIP OFF SHOAL—AMOUNT OF AWARD.

[1. Where a salvor employs two other vessels to assist in getting a ship off a shoal by carrying out anchors, when their help is not in fact necessary, the award should not be greater than it would be if one vessel had rendered the whole service.]

[2. Where a ship worth \$20,000 is aground in a perilous position, and employs a schooner to carry out her anchors, and by that means gets safely off, an award of \$2,500 to the salvors is suitable.]

[In admiralty. Libel in rem by Simeon Shaw and others against the ship Albus and cargo for salvage. Decree for libellants.]

Winer Bethel, for libellants.

W. W. McCall, for respondent.

MARVIN, District Judge. This ship, laden with ice, bound to New Orleans, ran ashore upon the American shoal. At 8 o'clock in the morning the schooner Florida arrived at the ship, and was employed by the master to aid in getting her off. The ship was among shoals, touching slightly, but did not need lightening. She needed an anchor, or perhaps two carried out. The Florida dropped her anchor of about one thousand pounds' weight, and ran her chain and hawser to the ship. The Florida failing to get the ship off by twelve o'clock, and it being high water, the Texas and Jane Eliza were also employed. The Texas dropped her heavy anchor, and by the use of the two anchors the ship was heaved off by about three o'clock. The service rendered was purely anchor service, but highly valuable and meritorious. It is doubtful whether the master, in this case, could have run out his anchors, and saved his vessel. But although the employment of the Texas and Jane Eliza was, under the circumstances, very proper, yet still, I think, had the master of the Florida made his plans a little better, that probably he could have extricated the ship without the assistance of the other vessels. Although there is some doubt, yet I think one vessel was enough for the service. The ship was in considerable peril. She may be valued at \$20,000. Twenty-five hundred dollars is a suitable compensation.

It is therefore ordered, adjudged, and decreed, that the libellants receive and recover in full compensation for their services the sum of twenty-five hundred dollars and their costs and expenses of this suit, the proctor's fee for defending the said ship and cargo and

¹[Not previously reported.]

other charges; and that the marshal restore said ship to the master for and on account of whom it may concern.

Case No. 149.

ALCOTT v. YOUNG.

[16 Blatchf. 134; 4 Ban. & A. 197; 16 O. G. 403; Merw. Pat. Inv. 272; 7 Reporter, 552.]
Circuit Court, S. D. New York. March 31, 1879.

PATENTS FOR INVENTIONS—PATENTABILITY—COMBINATION—AGGREGATION.

The letters patent granted to J. Wesley Webber, August 17th, 1869, [No. 93,775,] for an "improved kindling wood," the claim thereof being, "The accompanying or fastening one or more fire-lighters, A, to or with the bundle of the common article of manufacture known as bundle or kindling wood, the fire-lighter to be suitably moulded or pressed, and to be made of a combustible material, such as resin or tar, the ingredients of which I do not claim, my invention consisting wholly of accompanying or fastening a fire-lighter, A, to or with the bundle, or at the string, B, of the bundle of the common article of manufacture known as bundle or kindling wood," are void for want of patentable invention.

[Cited in Faulks v. Kamp, 3 Fed. Rep. 900.]

In equity. [Suit by Charles W. Alcott and Catherine C. Magee against Joseph Young to enjoin infringement of letters patent No. 93,775. Patent declared void.]

Warren G. Brown, for plaintiffs.
Edward Fitch, for defendant.

BLATCHFORD, Circuit Judge. On the 17th of August, 1869, letters patent of the United States were granted to J. Wesley Webber for "a new and useful improved kindling wood." The specification states, that the invention is "a new improvement, consisting of accompanying or fastening one or more fire-lighters to each bundle of the common article of manufacture known as 'bundle or kindling wood,' (see drawing marked 'C,') having for its object, to facilitate the lighting or ignition, by means of the said fire-lighter, of wood, thus saving the consumer the labor of chopping the wood in fine pieces." It further states, that the nature of the "invention or improvement consists in accompanying or fastening one or more fire-lighters, A, in a suitable manner, or to the string of the bundle of the common article of manufacture known as bundle or kindling wood, marked 'C,' in the accompanying drawing." The claim is in these words: "The accompanying or fastening one or more fire-lighters, A, to or with the bundle of the common article of manufacture known as bundle or kindling wood, the fire-lighter to be suitably moulded or pressed, and to be made of a combusti-

[Reported by Hon. Samuel Blatchford, Circuit Judge, reprinted in 4 Ban. & A. 197, and here republished by permission. Merw. Pat. Inv. and 7 Reporter contain partial report only.]

ble material, such as resin or tar, the ingredients of which I do not claim, my invention consisting wholly of accompanying or fastening a fire-lighter, A, to or with the bundle, or at the string, B, of the bundle of the common article of manufacture known as bundle or kindling wood." The drawing represents a cylindrical bundle of kindling wood, consisting of some 50 pieces of substantially uniform length, confined by a string tied around the circumference, and with a fire-lighter fastened to the string. The plaintiffs, as owners of the patent, have filed a bill in equity against the defendant, founded on an alleged infringement of the patent, for an injunction and an account. The defendant has answered the bill. The answer avers, that the defendant is making and selling bundle kindling wood, and that he puts into each bundle so made and sold by him, a kindler made under letters patent of the United States granted to Frederick D. Cordes and Andre Geiger, October 31st, 1876, for an "improvement in fire kindlers." It also alleges, that the invention patented was not in fact patentable, or the subject-matter of invention. The Cordes and Geiger patent is for an invention made by Cordes, which consists in making the fire kindler "of a bundle of parallel pieces of straw, or other tubular palms, which are filled and covered with melted resin, pitch, or other easily combustible material." The defendant inserts his kindler in the bundle, either next the string or in the body. The plaintiffs now apply to the court for a preliminary injunction, to restrain the defendant from infringing the Webber patent, by further making and selling what he has so made and sold.

In April, 1875, James Carrick & Co., being the owners of the said Webber patent for the city and county of Baltimore, in the state of Maryland, brought a suit in equity in the circuit court of the United States for the district of Maryland, against James A. Hooper, Jr., alleging that said Hooper had infringed said patent by making and selling bundles of kindling wood with fire-lighters, arranged in the manner claimed in said patent, and praying relief. In May, 1875, the defendant answered the bill, setting up, as the only defence, non-infringement. An amended answer was filed in November, 1876, denying the novelty of the invention, and giving the names of prior users of it, and averring its public use and sale in this country for more than two years prior to Webber's application for a patent for it, and denying infringement. Neither answer set up that the invention was not patentable, or the subject-matter of invention. The court, on January 7th, 1878, entered a decree for the plaintiffs, for an account of profits and damages, and made a reference to a master to take such account. [Carrick v. Hooper, Case No. 2,411a.] The decree declared the patent to be good and valid,

and awarded a perpetual injunction. The master, by his report, made March 25th, 1878, after hearing evidence, and being attended by both parties, reported, that the defendant had made no profit from his business of selling bundle kindling wood, but had incurred a loss in conducting the same; that he had carried on the business of selling bundle kindling wood in Baltimore city, and had made three kinds, namely, (1) plain, (2) dipped, and (3) with a fire-lighter inserted in the bundle; that the plain was not claimed to be an infringement; that he had made 100,000 bundles of No. 2, and 50,000 of No. 3; that it appeared that the royalty paid in New York by those doing business under the Webber patent, was 5 cents per 100 bundles; that that was a proper sum to allow for a royalty in Baltimore; that, if the court should find No. 2 to be an infringement, the plaintiffs would be entitled to recover \$50 therefor; and that if the court should find No. 3 to be an infringement the plaintiffs would be entitled to recover \$25 therefor. On the 18th of May, 1878, the court made an order that the report assessing the damages at \$75 be confirmed, with costs.

It is shown, on the part of the plaintiffs in this case, that Alcott, one of the plaintiffs in this case, has been receiving royalty for the use of the invention for more than 4 years; and that Alcott's firm made and sold, in 1875, an average of more than 20,000 bundles a week, of bundle kindling wood made under the Webber patent. The advantages of it are set forth to be, that it can be kindled without shavings or paper; that it saves the necessity of splitting any of the wood fine; that it is convenient and economical, as it furnishes the appropriate amount of kindler to each separate bundle; that it is always ready and only requires a match to kindle it; that, since its introduction, it has been very difficult to sell the ordinary bundle kindling wood to those who have used the kindling wood with the fire-lighter in the bundle; and that, when the wood is sold without the fire-lighter, it can only be sold at a considerably less price than the bundles made under the Webber patent.

The specification of the Webber patent states, that the invention consists merely in fastening the fire-lighter to the bundle of kindling wood, or accompanying the bundle of kindling wood with the fire-lighter. It refers to the bundle of kindling wood as a common article of manufacture. Nothing is claimed as new in regard to the construction, or composition, or shape, or manufacture of the fire-lighter. Any old fire-lighter may be used as the fire-lighter of the patent. The ingredients of the fire-lighter are disclaimed. All that is necessary, in respect to the fire-lighter, is, that it should be suitably moulded or pressed, and be combustible and capable of setting fire to the wood.

I do not think that the subject-matter of the claim is a patentable invention. On the part of the plaintiffs, it is sought to distinguish this case from cases in which inventions have been held not to be patentable, by the contention, that, in this case, the uniting of the fire-lighter with the bundle of kindling wood contributes towards the common result of lighting a fire, and that expense is saved and convenience is promoted. It may be true, that, as a matter of trade, a bundle of kindling wood with a fire-lighter inserted in it, or attached to it, will sell more readily than a bundle of kindling wood alone, or than a bundle of kindling wood separately and a fire-lighter separately; and that a bundle of kindling wood with a fire-lighter inserted in it, or attached to it, will bring a higher price than a simple bundle of kindling wood. It may also be true, that the Webber bundle has the advantages in use that are claimed for it. But, there is no patentable invention in accompanying the bundle with the kindler, by attachment or insertion. It might as well be claimed, that it was a patentable invention to tie a match to a cigar, or a straw for drinking to a drinking glass, or a fork to a can of food. The case is not unlike that of *Langdon v. De Groot*, [Case No. 8,059,] where the claim of the patent consisted in folding thread and cotton into skeins or hanks of a convenient quantity for retailing, with a sealed wrapper around the same, and a label containing the number and description of the article. The invention was held not to be patentable. In the present case, the purchaser of the Webber bundle gets a bundle of kindling wood and a fire-lighter. He gets no more than if he purchased the two separately. If he purchases a given number of plain bundles of kindling wood and an equal number of fire-lighters, and has them in his house to be used, one fire-lighter with one bundle of kindling wood, he would infringe this patent, if he should tie the former to the latter or insert the former in the latter. No such result can be admitted. The mere aggregation of the two things is not a patentable combination. Until the kindler is lighted there is no joint result consequent on the aggregation of the two. The lighting or combustion of the Webber kindler presents nothing new, in contrast with the lighting or combustion of a kindler which was never tied to or inserted in the bundle.

It does not appear that the question was distinctly considered in the case in *Maryland*. There are numerous cases in the courts of the United States which show that there is not a sufficiency of invention in this case to support the patent. *Knight v. Baltimore & O. R. Co.*, [Case No. 7,882;] *Bean v. Smallwood*, [Id. 1,173;] *Winans v. Boston & P. R. Co.*, [Id. 17,858;] *Hotchkiss v. Greenwood*, 11 How. [52 U. S.] 248; *Phillips v. Page*, 24 How. [65 U. S.] 164;

Jones v. Morehead, 1 Wall. [68 U. S.] 155; Stimpson v. Woodman, 10 Wall. [77 U. S.] 117; Hicks v. Kelsey, 18 Wall. [85 U. S.] 670; Hailes v. Van Wormer, 20 Wall. [87 U. S.] 353; Rubber Tip Pencil Co. v. Howard, Id. 498; Smith v. Nichols, 21 Wall. [88 U. S.] 112; Milligan & Higgins Glue Co. v. Upton, [Case No. 9,607;] Brown v. Piper, 91 U. S. 38; Reckendorfer v. Faber, 92 U. S. 347; Needham v. Washburn, [Case No. 10,082;] Dunbar v. Meyers, 94 U. S. 187; Mahn v. Harwood, [Case No. 8,966.] The English cases are to the same effect. Brunton v. Hawkes, 4 Barn. & Ald. 541; Saunders v. Aston, 3 Barn. & Adol. 881; Losh v. Hague, Webst. Pat. Cas. 202; Kay v. Marshall, 8 Clark & F. 245; Bush v. Fox, 5 H. L. Cas. 707; Tetley v. Easton, 2 C. B. (N. S.) 706; Brook v. Astor, 8 El. & Bl. 478; [Patent Bottle] Envelope Co. v. Seymer, 5 C. B. (N. S.) 164; Ralston v. Smith, 9 C. B. (N. S.) 117, 11 C. B. (N. S.) 471, 11 H. L. Cas. 223; Horton v. Mabon, 12 C. B. (N. S.) 437; Ormson v. Clarke, 13 C. B. (N. S.) 337, 14 C. B. (N. S.) 475; Harwood v. Railway Co., 11 H. L. Cas. 634; Jordan v. Moore, L. R. 1 C. P. 624; Penn v. Bibby, L. R. 2 Ch. App. 127; Fox v. Dellestable, 15 Wkly. Rep. 194; White v. Toms, 17 Law T. (N. S.) 348; Parkes v. Stevens, L. R. 8 Eq. 358, L. R. 5 Ch. App. 36; Rushton v. Crawley, L. R. 10 Eq. 522. The motion for an injunction is denied.

Case No. 150.

The ALDEBARAN.

[Olcott, 130.]¹

District Court, S. D. New York. April, 1845.

ADMIRALTY—PLEADING—TECHNICAL PLEADINGS NOT NECESSARY.

1. Where an answer is made without oath, as authorized by rule 57, it should still respond fully and particularly to every material averment of the libel.
2. Mere narrative statements in a libel, which allege no damages, and claim no particular remedy, need not be replied to specifically by answer.
3. Where a libel alleges a particular agreement was made, and a written instrument was executed, and the instrument embodies the substance of such agreement, an admission by the answer of the execution of the instrument is substantially an admission of the contents of the instrument.
4. The practice in admiralty does not exact a course of technical proceedings.
5. If the answer admits, to a reasonable intendment, facts stated in the libel, it will be sufficient, though loose and informal as a pleading.
- [6. Cited in the J. F. Warner, 22 Fed. Rep. 344, to the proposition that a libel may be filed in rem against the vessel, and in personam against the owner, for breach of a charter party.]

[In admiralty. Exceptions to answer overruled.]

J. B. Parry, for libellant.
Benedict, for claimant.

BETTS, District Judge. This case turns upon a point of pleading. A libel was filed in rem, against the brig, and in personam against her owner, on a charter-party. It charges breaches of the charter-party, and prays the respondent and all others in interest may be cited to appear and answer thereto, and that the brig and parties on intervening may be condemned in damages, &c., but did not demand that the answers should be made on oath. The owner appeared, and filed his answer thereto, without oath. This he was authorized to do by the 57th rule of court, which declares that "an answer need not be put in under oath, unless so required by a sworn libel, or one filed by the United States." Betts, Pr. App. 22. Still the answer, if not attested to on oath, should respond particularly and fully to every material averment of the libel. Betts, Adm. 53.

The libellant takes exception to the answer for insufficiency, in two particulars; that it does not admit or deny the agreement set forth in the fourth article of the libel, that the brig should, for one hundred dollars additional compensation, proceed from Cienfuegos to Havana, and there take in cargo; nor that the one hundred dollars was paid by the agent of the libellant, and received by the agent of the respondent, within the terms and intent of the agreement. It is not plain that this branch of the case is any way material to the libellant's right of action, the run from Cienfuegos to Havana not having been stipulated in the charter-party; and admitting a valid contract to perform that voyage as set forth, yet the libel does not specify any damages accruing out of the non-performance of that stipulation, or other cause of action accruing to him by the neglect or refusal of the respondent to fulfil that engagement. It seems rather introduced as a link in the narrative of the operations of the vessel than as a substantive gravamen in the suit against which any relief or remedy was demanded, and in that point of view the statement does not amount to an allegation which requires a specific answer. But if the averment be regarded material and formal, I am inclined to think the answer is substantially sufficient to meet its requirements for the execution, by the respondent's agent, of the written receipt set forth in the libel, and the payment thereof of \$100, are both admitted, and the receipt embodies the agreement alleged in the libel. This mode of answering, though informal and loose as a pleading, is a substantial admission of the facts stated in the libel, and sufficient, under the liberal practice of admiralty courts, to give the libellant every advantage he could derive from an answer more technical, and exactly adapted to the representations of the libel. The second ex-

¹[Reported by Edward R. Olcott, Esq.]

ception I think supererogatory. The answer to all reasonable intendment sets forth the fact demanded by the exception. It is quite immaterial that the answer should admit or deny in court that the act charged was done "in pursuance of the agreement." The agreement to do the act, and its performance, are both admitted; and if the libellant's case requires that the performance should be "in pursuance of the agreement," the law will intend it was so. I think, therefore, the exceptions must both be disallowed and overruled with costs, to be taxed.

Case No. 151.

In re ALDEN.

[16 N. B. R. (1877), 39; 23 Int. Rev. Rec. 234, 282, 9 Chi. Leg. News, 346; 25 Pittsb. Leg. J. 4.]

District Court, D. Maine.

BANKRUPTCY — SALE OF REALTY BY ASSIGNEE — CONFIRMATION—LIABILITY OF PURCHASER.

[The purchaser of real estate in Illinois from an assignee in bankruptcy in the district of Maine, at a sale ordered by the register in bankruptcy, is not, under the established practice of that district, entitled to a confirmation of the sale by the court wherewith to perfect his title according to the laws of Illinois, but must establish his title whenever the occasion may arise.]

[In bankruptcy. Petition by Edward Alden for a confirmation by the court of a sale to him by the assignee in bankruptcy of Hiram O. Alden of certain real estate in Illinois, in order to perfect his title according to the laws of that state. Denied.]

Upon the application of the assignee of Hiram O. Alden, bankrupt, the register in charge of said cause, March 24, A. D. 1877, pursuant to 19th rule in bankruptcy of said court, issued to said assignee an order concerning sale of property by assignee, by which said assignee was ordered to sell at public auction certain real estate belonging to said bankrupt's estate, situate in the state of Illinois. Under this order of the court, the assignee advertised said property for sale at public auction in the manner provided by law. Said sale being advertised once a week, for three successive weeks, in the Republican Journal, a newspaper published in Belfast, county of Waldo, in said district of Maine, and being the newspaper regularly designated by the judge of said court for the publication of all notices of proceedings in bankruptcy in Waldo county. At the auction sale of the above premises, pursuant to the aforesaid advertisements, the lands in Illinois were bid off by Mr. Edward Alden, of Boston, who, thereupon, petitioned the court to approve and confirm said sale, and grant him a certificate of such confirmation under the seal of said court, with the view of enabling him, said purchaser, as he alleges, to perfect his title to said premises in accordance with the laws of the state of Illinois and the rules of

the courts of said state regulating the transfer of real estate. The register declined to issue such a certificate, and, on application of the petitioner, certified to the court that all the proceedings attending said sale had been regular, and were in accordance with the law and the rules of this court. The court thereupon passed the following order:

FOX, District Judge. The established practice in this district is for the court not to confirm any sales made by an assignee, but to leave the purchaser to establish his title whenever the occasion may arise. Such was the ruling in Donnell's Case, [Case No. 3,986a,] in Cumberland county, and it has ever since been adhered to.

Case No. 151a.

In re ALDEN.

[10 Hunt, Mer. Mag. 469.]

District Court, D. Massachusetts. Jan., 1844.

BANKRUPTCY—PROOF OF CLAIM—LIMITATION.

[On a motion to expunge the proof of a claim against a bankrupt from the record, it appeared from the affidavit in the cause that the bankrupt filed his petition December 30, 1842, and was decreed a bankrupt February 21, 1843. The proof of the creditor was filed August, 1843. A dividend of which due notice was given was declared September 26th. The motion to expunge was made January 30, 1844, a dividend having been allowed and paid on the claim. It further appeared that the amount and nature of the claim was incorrectly entered on the books, though the proof itself and the dividend correctly stated it. It was not denied that the debt was a just and valid one. *Held*, that the motion should be overruled, as the inaccuracy on the record in regard to the claim was not a ground of expunging the proof, and that the statute of limitations did not apply.]

In bankruptcy. This was a motion filed to expunge the proof of Leonard Alden, on the ground that it was barred by the statute of limitations. A preliminary objection was taken to the filing of the motion, upon the ground that the application was too late. It appeared, by the affidavits in the cause, that Francis Alden filed his petition to be declared a bankrupt December 30, 1842, and was decreed bankrupt February 21, 1843. The proof of Leonard Alden was filed August 1, 1843. A dividend was ordered upon his estate September 26th, of which due notice was given; and the motion to expunge the proof was made January 30, 1844, a dividend having been allowed and paid on the respondent's claim.

It further appeared, that before filing the motion to expunge, the counsel for the creditors, objecting to Francis Alden's discharge, at whose request the present motion was made by the assignee, examined the records to ascertain whether a majority in numbers and value of the creditors, who had proved their claims, joined in the objections; and on that examination it appeared that the amount of Leonard Alden's claim was incorrectly entered on the book, though the

proof itself and the dividend sheet correctly stated it. The bankrupt, in his original schedule, had stated Leonard Alden's claim to be upon notes, but the claim moved to be expunged was on account. It was not denied that the debt was originally a just and valid claim, but it was contended that it was barred by the statute of limitations, and that, under the circumstances, the motion was not too late.

On the other hand, it was contended, on behalf of Mr. Alden, that the statute of limitations was a technical defence, and that a party who seeks to set it up should be held to comply strictly with the principles under which it was admissible as a bar; that a decree had been rendered allowing this claim, upon due notice, to all parties, which ought not to be reopened, even if the court could, consistently with established principles, reverse the decree; and that it was never known that a judgment was reversed in order to give a party an opportunity to set up the statute of limitations.

SPRAGUE, District Judge, held that, under the ninth rule in bankruptcy, the court might reverse such a decree upon good cause shown, which must be by an application in writing, supported by affidavits setting forth the grounds upon which a revision was sought; that it was a question to the discretion of the court to be governed by the analogies in cases of bills of review in equity, which might be allowed in cases of newly discovered evidence or error on the face of the record; that it did not appear that the assignee had ever examined this claim, or deemed that it was his duty to examine the claims; that no creditor had ever used any diligence before the dividend was ordered; that the inaccuracy upon the record was not the ground of any omission to move to expunge claim before the dividend was ordered; that the statute of limitations might be a conscientious defence under some circumstances, as where a party knew that the debt was paid, but had lost the evidence of payment, it was perfectly conscientious to set up the statute. But in this case, it was not contended that the debt had ever been paid. The creditor had sworn to its validity, the debtor might be examined by the assignee under oath; and in a matter to be adjudged according to the discretion of the court, his honor would not allow the motion to be received, and sustained the objection taken by Leonard Alden, and dismissed the motion with costs.

Case No. 152.

ALDEN v. BOSTON, H. & E. R. CO.

[5 N. B. R. 230.]

District Court, S. D. New York. Feb. 13, 1871.

BANKRUPTCY—RECEIVERS APPOINTED BY STATE COURTS—INJUNCTION.

[A railroad in the hands of receivers appointed by state courts must be regarded as

being in the possession of those courts, and their possession, management, and control of the railroad cannot be interfered with by subsequent proceedings in bankruptcy unless for some cause rendering the title of the receivers impeachable under the bankrupt act.]

[Cited in *Re Boston, Hartford & E. R. Co.*, Case No. 1,678.]

[In bankruptcy. Petition by receivers, appointed by several state courts, of the property of the Boston, Hartford & Erie Railroad Company, against which a petition in bankruptcy had been filed by James Alden, for a modification of the injunction issued in the bankruptcy proceedings. Injunction modified.]

E. H. Owen, for receivers.

W. E. Curtis, for Alden, petitioning creditor.

BLATCHFORD, District Judge. As the property in the hands of the receivers of the company must be regarded as being in the possession of the several state courts which appointed such receivers, and as such receivers were appointed and entered on their duties as such, and took possession of the railroads and other property of the company before these proceedings in bankruptcy were instituted, and as thus such state courts were in possession of such railroads and other property when these proceedings in bankruptcy were commenced, and have continued in possession of the same ever since, it is not for this court to interfere with such possession, at least until the title of the receivers is impeached for some cause for which it is impeachable under the bankrupt act; nor is it for this court, before such title is thus impeached, to interfere with the management or control of such railroads and other property by such state courts or by such receivers under the orders of such state courts. As to the discontinuance of the suit in New York, in which the receivers were appointed, if such discontinuance has the effect to revoke the appointment and authority of the receivers under the proceedings in that suit, then the injunction of this court does not restrain them from doing anything which they are doing by virtue of such appointment, and such injunction need not be vacated or modified. If the discontinuance of such suit does not render null any title which such receiver acquired through the proceedings in such suit, and they are still acting as receivers under the appointment made in the proceedings in such suit, they must be regarded as so acting on behalf of the court in which such suit was pending, and as its agents as to property in its custody, notwithstanding the suit is discontinued. With these views, it is proper that the injunction heretofore issued herein on the third of January, eighteen hundred and seventy-one, be so far modified that the making and entering by the receivers into the contract, and the giving by them of the securities authorized by the decree of the supreme judi-

cial court of Massachusetts, made on the twenty-third of December, eighteen hundred and seventy, shall not be deemed or taken to be a violation or contempt of such injunction, and that in all other respects such injunction be continued in force.

[NOTE. For other proceedings involving the same company, see *In re Boston, H. & E. R. Co.*, Case No. 1,679; *Id.* 1,680; *Sweatt v. Boston, H. & E. R. Co.*, *Id.* 13,684.]

Case No. 153.

ALDEN v. DEWEY.

[1 Story, 336; 2 Robb, Pat. Cas. 17; 3 Law Rep. 383; Merw. Pat. Inv. 649.]

Circuit Court, D. Massachusetts. Oct. Term, 1840.

PATENTS FOR INVENTIONS — INFRINGEMENT — SUBSTANTIAL DIFFERENCE — SUGGESTIONS — ORIGINALITY.

1. In an action for an infringement of a patent right, evidence that the invention of the defendant is better than that of the plaintiff, is improper, except to show a substantial difference between the two inventions.

[Cited in *Agawam Woolen Co. v. Jordan*, 7 Wall. (74 U. S.) 603; *Sewell v. Jones*, 91 U. S. 184, 9 O. G. 49.]

2. Where the defendant offered evidence to show, that the invention was not original with the plaintiff, but that the improvement, for which he had taken out letters patent, had been suggested to him, although the precise mode of carrying it into operation had not been suggested; the court instructed the jury, that the true question was, whether the improvement was substantially communicated to the plaintiff, so that, without more inventive power, he could have applied it, or not.

[Cited in *Allen v. Blunt*, Case No. 217; *Watson v. Belfield*, 26 Fed. Rep. 539.]

3. In considering the question of the originality of an invention, the oath of the inventor, made prior to the issue of the letters patent, that he was the true and first inventor of the improvement, may be opposed to the oath of a witness in the case, whose testimony is offered to show, that the invention was not original.

[Cited in *Woodworth v. Rogers*, Case No. 18,013; *Worswick Manufg Co. v. City of Kansas*, 38 Fed. Rep. 250; *In re Wagner*, Case No. 17,038.]

[4. Cited in *Allen v. Blunt*, Case No. 217, to the point that a verdict for damages in a patent case should not be set aside because of the court's opinion that a less amount should have been awarded, if it appears that the matter was submitted to the fair judgment of the jury.]

At law. This was an action for an infringement of a patent right for an improvement in scythe snathes. The original patentee was Dexter Peirce, who took out letters patent, March 11th, 1837, (No. 144.) He afterwards assigned his right and interest under these letters patent to several persons, who again assigned to the plaintiffs in the present case. The special improvement, which formed the subject matter of the present suit, was described in the claim as fol-

lows: "What I claim as my own invention and not previously known, and desire to secure by letters patent, is my constructing the nib or thole irons and woods, so as by the extension of the iron beyond the wood, with a screw and nut to regulate and fasten the nibs or tholes in any situation desirable on the snead." Before the patent of Peirce, the nibs of scythes had been clumsily fastened to the snathe by means of an iron ring, tightened by wedges. These wedges were easily loosened by the use of the scythe. The defendants manufactured and sold a large number of nibs, which were secured to the snathe by a ring at the end of an iron stem. This stem passed through the wood of the nib, was threaded at the top, and fitted into a nut, which was adjusted in the end of the wood. The wood moved in a brass cellar, which was at the bottom, and being turned by the hand, operated as a wrench upon the nut, and was pressed upon the scythe snathe; and in this way the nib was secured and regulated in any situation, desirable on the snead. The nib used by the defendants, is usually known as Clapp's method or improvement. It was contended, by the plaintiffs' counsel, that this was substantially the same with the improvement of the plaintiffs. Several witnesses were examined, as experts, who testified, that the two differed in certain particulars and details, but that they were the same in principle. For the defense it was urged, that the plaintiffs could not have an exclusive right to the use of the screw for purposes of fastening. But it was answered, that the claim was not for this element, but simply for a combination, into which it entered; and this view was sustained by the court. It was also urged, that the two nibs were unlike; and that the nib of the defendants was not an infringement of the right of the plaintiffs. No witnesses were called to this point by the defendants. Evidence was given to show, that the nib of the defendants was better than that of the plaintiffs, and that it found a reader market. But the court instructed the jury to disregard this consideration, except so far as it went to show a substantial difference between the two nibs. It was no matter, if the defendants' nib was more polished, or even worked better than the plaintiffs', provided it embodied the principle of the plaintiffs'. It did not follow, because the defendants improved the machine of the plaintiffs, that, therefore, they could use it. Another defense was set up, which received particular attention from the court. Daniel Draper testified, that, in conversation with Dexter Peirce, the patentee, sometime at the end of the winter, or beginning of the spring of 1835, he remarked, that he found great difficulty in suiting his customers, in respect to the nibs of scythe snathes; and that he thought they might be improved by the application of the nut and screw to the nib or thole. He did not suggest any mode of doing

[Reported by William W. Story, Esq. Merw. Pat. Inv. contains partial report only.]

this. He never reduced his idea to practice. The witness said, that Peirce treated the idea as impracticable, and laughed at it. It appeared on cross-examination, that the witness had been, in the early part of his life, a tanner, and then went into the patent wood ware business, in which he continued till January 1, 1835, when he formed a copartnership with another person for the manufacture of hammers and scythe snathes; but that he did not continue to make snathes more than six months. The witness knew, that Peirce took out a patent, in March, 1837, for his improvement in the scythe snathe, and that he had assigned the same for a valuable consideration; but he never spoke to him on the subject, or reminded him of the suggestion he had made, though he was in the habit of seeing him from time to time.

Fletcher and Charles Sumner, for plaintiffs.

B. Rand and B. R. Curtis, for defendants.

Before STORY, Circuit Justice, and DAVIS, District Judge.

STORY, Circuit Justice, on these facts, submitted to the jury this question: Did Draper communicate to Peirce substantially the improvement, for which he took out his patent, so that, without more inventive power, Peirce could have applied it? It was not enough, that Draper gave a hint; nor, on the other hand, was it necessary, that he should communicate every minute thing about the invention; but he must have communicated the substance. He further instructed the jury, that the original patentee had sworn, that he was the true and first inventor of the improvement, for which he had taken out letters patent; that this oath was required by law, prior to the issue of the letters patent; so that, supposing the jury should be of opinion, that the asserted communication of Draper covered the substance of Peirce's invention, then there would be oath against oath. If they should be of opinion, that Draper simply gave a hint, which Peirce afterwards reduced to practice, then the two oaths would not conflict. If Peirce swore falsely, that he was the first and true inventor, then he was liable to indictment for perjury. The testimony of Draper with regard to Peirce was in the nature of confessions, and this was always regarded as an uncertain kind of evidence. The conversation was in private, and nobody could contradict the witness. The judge stated, that this was the first time, within his long experience on the bench, that such a conversation had been set up as a ground for destroying the title of a patentee to his invention.

The judge further instructed the jury, that it was not necessary, that the two oaths should be identical, in order to make one an infringement of the other. The true question was: Are the means used substantially the

same, although not in every minute particular? With regard to damages, the jury were told not to give extravagant or vindictive damages; but such as would establish the right of the plaintiffs, and indemnify them against all the expenses of litigating their right. If the defendants were sued a second time for violating the right of the plaintiffs, then it might be proper to give vindictive damages. The jury thereupon found a verdict for the plaintiffs, for \$1167.66.

At a subsequent day of the term, (Dec. 21,) the case came on again, on a motion for a new trial. The motion was grounded upon the following reasons. (1.) That the judge ruled, in the course of the trial, that one Peirce, who was offered as a witness, was interested, and could not be examined as a witness. (2.) That the judge further ruled, that an affidavit, made by the said Peirce, before he took out his patent and in order to obtain the same, was evidence in the cause, although it appeared, that the said Peirce was interested at the time he made the said affidavit. (3.) That the judge instructed the jury, that they were to take into consideration the said oath of Peirce, and that only one witness having sworn, that he communicated to Peirce the substance of the invention, and Peirce having sworn by his said affidavit, that he believed himself to be the original inventor, the jury had oath against oath; and that the jury must decide, whether the solemn oath of Peirce had been thus overcome by the testimony of one witness. (4.) That the damages assessed by the jury were excessive.

B. R. Curtis urged, in support of the first three grounds of the motion, that the ruling of the court was inconsistent with the general principles of the law of evidence; that it conflicted with the rule, requiring an opportunity to cross-examine a witness; also, with the other rule, excluding the testimony of an interested witness. In support of his views, he cited the English cases in actions on the case for a malicious suit. He also relied upon the proceedings of courts of justice under the registry laws, and bankrupt laws. He further urged, that the statute, requiring the oath of the patentee, was intended to secure the public against fraud. But that, if the construction of the court was to prevail, it would operate as a security to the patentee, and would be, not a shield to the public, but a sword against it. He also argued, in support of the last ground of the motion for a new trial, that the damages were excessive.

STORY, Circuit Justice, without hearing the other side, ruled, as at the trial, that the patent was prima facie evidence in the case; that the patent recited the oath, and that the jury had cognizance of it; in short, that the oath was in the case, and the jury were entitled to judge of its force. This was the foundation of the onus probandi, that was thrown upon the defendants in a patent cause. The courts

of the United States had constantly acted upon this view. With regard to the question of damages, the judge confessed, that the damages awarded by the jury were greater than were anticipated. But still there did not seem to be any such gross mistake in the jury, as would authorize setting aside their verdict. It was a matter submitted to their fair judgment. Judgment according to the verdict.

[NOTE. Patent No. 144 was granted March 11, 1837, to D. Peirce, and, so far as ascertained, has not been involved in any other cases reported prior to 1880.]

ALDEN, (HILLS v.)

[See Hills v. Alden, Case No. 6,507.]

ALDEN, (UNITED STATES v.)

[See United States v. Alden, Case No. 14,427.]

Case No. 154.

ALDERDICE v. STATE BANK OF VIRGINIA.

[1 Hughes, 47;¹ 11 N. B. R. 398.]

District Court, E. D. Virginia. 1875.

Circuit Court, E. D. Virginia. 1875.

BANKRUPTCY — PROHIBITED AND FRAUDULENT TRANSFERS — PREFERENCES — PRESUMPTIONS AGAINST CREDITOR.

1. Where a tobacco manufacturer, who has been overchecking to a large amount for several months on a bank, by collusion with a defaulting teller; and who, on his transactions being discovered, fails to pay up his default, but executes a deed of preference to secure to the bank the amount overdrawn, within a month of involuntary proceedings in bankruptcy against him in which the adjudication goes by default; *Held*, that although the general business transactions and condition of the bankrupt, at the time of making the deed of preference (disconnected from the especial transactions with the bank covered by the deed), may not have been sufficient to constitute reasonable cause to believe that he was insolvent and made the deed to defeat the provisions of the bankrupt law; yet, that these especial facts out of which the deed arose, were sufficient to remove all doubt and to constitute reasonable cause of belief in the mind of the president of the preferred bank.

[See Barbour v. Priest, 103 U. S. 293; Paige v. Loring, Case No. 10,672; In re Clarke, Id. 2,843; Sedgwick v. Sheffield, Id. 12,624; Webb v. Sachs, Id. 17,323; Swan v. Robinson, 5 Fed. Rep. 287; Singer v. Sloan, Case No. 12,898; Andrews v. Graves, Id. 376; In re Broich, Id. 1,921; Darby v. Lucas, Id. 3,573; Metcalf v. Officer, 2 Fed. Rep. 640; Lindsey v. Lambert Bldg. Ass'n, 4 Fed. Rep. 48.]

2. *Held*, also, that bankrupt courts, in considering transactions impeached under the 35th section of the bankruptcy act, look primarily to the policy of the law forbidding dealings

with failing debtors; and, if such transactions fall within the conditions specified by the section, will annul them even though positive frauds be not proved upon the beneficiaries of them.

In equity. This bill is brought on the chancery side of this court [by Alderdice, assignee, against the State Bank of Virginia and D. C. Mayo, bankrupt] to set aside a deed of preference, made by said bankrupt to said bank within four months of bankruptcy, as void under the 35th section of the bankrupt act. [Decree for complainant.]

W. W. Crump and H. A. & J. S. Wise, for complainant.

John H. Guy and Ould & Carrington, for defendants.

HUGHES, District Judge. W. C. Mayo filed his petition against David C. Mayo, tobacco manufacturer, of the city of Richmond, on the 27th of November, 1872, containing the usual allegations, and praying that David C. Mayo might be adjudicated a bankrupt. No defence was made, and the adjudication went by default on the 7th day of December, 1872. The property surrendered by the bankrupt was a certain lot of ground in Richmond, on which was his tobacco factory, and the fixtures used in the same, and certain personalty and choses in action.

The leading facts bearing upon the question of solvency are as follows: The assignee has sold the real estate for \$20,200; and the fixtures in the factory for \$14,700. He has also realized from all the other assets surrendered the aggregate sum of \$5,632.30. From the whole assets of every name, surrendered as of the 7th of December, 1872, there has been realized the total sum of \$40,532.30. The bankrupt's schedules of debts show three debts secured by deed of trust, as follows, to wit: a debt due Douglas H. Gordon for purchase-money of the lot, \$7357.50; a debt due Charles E. Whitlock for a loan of \$10,000, at 12 per cent. interest, made in October, 1872; and a debt due to the State Bank of Virginia of \$8280.66. These debts amount in the aggregate to \$27,318.42. The schedules show other debts amounting to \$40,836.28. Of this \$40,836.28, all was contracted in 1872, except \$6000, which grew out of a partnership account, with a partner since deceased, in 1868, of which \$1000 was due in January, 1872, and the residue in 1878, 1879, 1880, 1881, and 1882. The debts are generally an open account; the exact dates at which they were contracted do not reliably appear, except, as already said, that they were contracted in 1872. The number of creditors in the schedules who have proved their debts is over 50, besides a large number of employes. At the time of the proceedings taken in bankruptcy Mayo had discounts to the amount of \$56,880.50. These were ob-

¹[Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 11 N. B. R. 398, contains opinion of the district court only.]

tained on about 44 pieces of paper, on which others than himself were primarily bound, which were drawn on consignees of his tobacco, and which were discounted for him at various dates, from October 5th, 1872, to November 20th, 1872. The discounts had been given him mostly by the Richmond Banking and Insurance Company; the residue by several other lenders. Of these \$56,880.50 of discounts, the sum of \$35,097.77 was obtained after the 28th of October, 1872. Thus it would seem that the question of solvency was doubtful at any period as much as a month before the commencement of proceedings in bankruptcy. One month before the commencement of those proceedings, namely, the 28th of October, 1872, the bankrupt made the deed of trust already mentioned, to secure the debt of \$8280.66, due the State Bank of Virginia; conveying for that purpose his remaining interest in the factory lot, building, and fixtures, which were already incumbered by the two other deeds of trust from himself and wife; the first securing \$7357.50 due to Gordon for unpaid purchase-money, and the other securing \$10,000 of money loaned by Whitlock. The present bill in chancery is brought to impeach the validity of this third deed of trust, made in favor of the State Bank of Virginia, and to set it aside as void under the first clause of the 35th section of the general bankruptcy act. This deed was made on the 28th day of October, 1872, to secure a sum of money, all or most of which was found, on or about that day, to be due the bank from Mayo for money of the bank, which had been fraudulently obtained on overchecks, and used by Mayo for several months preceding, by collusion with its teller, and which, on detection, it would seem that Mayo could not pay.

I will assume that, but for the peculiar circumstances in which it originated, there would not be sufficient reason, to be found in the other transactions of Mayo, for invalidating the deed of the 28th of October, 1872. I will assume that although the bankrupt was in fact insolvent, and must have known his insolvency on the date of the deed, yet there was not, except in the circumstances out of which the deed grew, reasonable cause existing to bring a knowledge or belief of the insolvency home to the mind of the president of the State Bank, Mr. John L. Bacon. I will concede, what the high character of Mr. Bacon forbids me to question, that his action (which was that of the bank) in requiring and accepting the deed of preference from D. C. Mayo, was in fact honest, bona fide, free from all taint of moral fraud. I will concede, what was strenuously insisted by counsel for the bank, that courts of equity look primarily to the good faith of transactions, and are slow to set aside contracts made with honest intent and purpose. The validity of the present deed depends upon the meaning and

intent of the first clause of the 35th section of the general bankruptcy act. The object of that section is to invalidate any deed of conveyance by which a debtor makes over property to a creditor, for the purpose of securing a pre-existing debt, in preference to other pre-existing debts, within the period of four months preceding the commencement of proceedings in bankruptcy, the debtor being insolvent or contemplating insolvency, and making the deed for the purpose of preventing that pro rata distribution of his effects which is contemplated by the bankruptcy act, under circumstances which constitute reasonable cause for the creditor to believe that he was insolvent or contemplated insolvency, and made the deed with such intent. There are many contracts which the law treats as void, however honest may be the intent with which they are made. It does so for sound reasons of public policy. Among such contracts are the five classes declared void by St. 29 Car. II., c. 3, which has been adopted in all the states of the Union, commonly called the statute of frauds. They are called fraudulent contracts, not because they are so in morals, mala in se, but because they were the source of frauds. The object of the statute was to prevent the many abuses which arose from the former legality of those contracts, and it was called the statute of frauds because it was rendered necessary by those abuses, and was enacted to prevent them. I mention this statute only for the purpose of illustration. So, contracts of infants and of married women are held to be invalid by the law, not because many of them may not be strictly honest and even commendable, but because it is against the policy of the law to uphold them. In like manner, such contracts as are declared void by the 35th section of the general bankrupt act, are so treated, not because they may not, as in the instance under consideration, be free from moral fraud on the part of the preferred creditor, but because it is against the policy of the law to allow preferences to be made of one creditor over others, by debtors, within four months of bankruptcy.

As it is the policy of the general law to forbid the making of contracts with minors and women under coverture, so it is the policy of the bankruptcy law to forbid interested persons from securing preferences or transfers of property from failing debtors. As it is the policy of the general law to ignore contracts of certain kinds not reduced to writing, so it is the policy of the bankruptcy law to set aside certain contracts with failing debtors made within certain periods of their bankruptcy. In construing these latter contracts, the bankruptcy court is not bound to search for badges of positive fraud, as the ground for setting them aside, but must look primarily to that just policy of the law which is intended to se-

cure the equal right of all creditors against arrangements by debtors for the exclusive advantage of a few. In *Buchanan v. Smith*, 16 Wall. [83 U. S.] 301, the supreme court of the United States say, what the language of the law shews, that an "equal distribution of the property of the bankrupt, pro rata, is the main purpose which the bankrupt act seeks to accomplish," and it is in order to secure this purpose that the 35th section, rendering void certain deeds of preference, was made a part of it. But for the fact that the laws of nearly all the states permit, if they do not encourage, deeds of preference to be made by failing debtors, it is not probable that any national bankruptcy law would remain upon the statute-book a moment longer than should be necessary to subserve the immediate financial exigency in which each law usually originates. This 35th section of the present act having made a deed of preference, if executed and accepted under certain circumstances, void, it is not sufficient, as counsel for the defence insisted, for me to look into the bona fides of Mr. Bacon in deciding upon its validity. That section makes no use of the term fraud, except in a collateral expression, which refers merely to a contravention of the bankruptcy act, and refrains from treating a deed of preference as an act of moral delinquency.

The bankruptcy law takes the estate of the bankrupt into custody of its court, and transfers it to the assignee, subject to such liens by way of preference as existed more than four months (now two months) before the petition in bankruptcy, and subject to such transfers, other than those for securing pre-existing debts, as were made more than six months (now three months) before the petition. But it says to creditors and transferees: "You shall not take assignments from failing debtors within the respective periods of four and six months, in any case in which you have reasonable cause to believe that they were insolvent at the time of the assignment; you shall not do so, because such transactions contravene my policy of a pro rata distribution, which is a policy of justice." It so declares without any reference to the element of bad or good faith, except as the former may be necessarily involved in the acceptance of such assignments. Formerly, the bankruptcy law of England did not respect liens even older than four or six months, unaccompanied by actual transfers of title. It gave no more dignity to a judgment or a bond under seal than to a note or open account. It treated all these forms of indebtedness as of equal dignity, and distributed the assets in bankruptcy pro rata among these classes of claims. It was enacted in the spirit of the law merchant which treated debt as debt, and it did not give to a bond under seal or to the judgment of a court of record the sanctity of the Apostle's Creed, according to the

old county court lawyer's idea. In this country the influence of the artificial distinctions and arbitrary priorities established by the old common law has dominated in our legislation, and our general bankruptcy law has been interpolated with provisions inspired by the reverence with which the old county courts of the rural districts regard the judgment lien. But this law, while respecting liens acquired beyond the period of four and six months before the bankruptcy, yet for sound reasons of justice and policy will set aside, under certain circumstances, assignments made within those periods, without special reference to the good or bad faith of the parties to them. I am not bound, therefore, to consider this deed with any reference to the moral good faith with which it was accepted by Mr. Bacon.

I am to consider, simply, whether it falls within the description of the first clause of the 35th section of the bankruptcy act. If it does, it is void; if it does not, it is valid. To be void under that clause, the deed must be liable to all the following objections: 1. It must have been made within four months of the commencement of proceedings in bankruptcy. 2. It must be a deed of preference, securing and intending to secure a pre-existing debt over other pre-existing debts. 3. The grantor must have been insolvent at the time of making the deed, or have contemplated insolvency. 4. The beneficiary must have had "reasonable cause to believe" at the time of the deed, that the grantor was insolvent, and made the deed to prevent a pro rata distribution of his effects. It is useless to enter into any inquiry whether this was, and was intended to be, a deed of preference. The fact is patent, and cannot be denied. The deed was also made, not only within four months, but within one month of the commencement of proceedings in bankruptcy.

The only disputed questions, therefore, are as to the insolvency, and as to the existence of reasonable cause for Mr. Bacon's believing the insolvency and the illegal purpose of the deed. As to the first point, there is now no doubt that the grantor in the deed was, in fact, insolvent. His whole assets brought, at what are claimed to have been good sales, forty thousand dollars, and his liabilities were, one month after the bankruptcy, about fifty-four thousand dollars. There is no reason to believe that there was a change for the worse in his affairs in so short a period, or that his energy, skill, and credit could have made good the deficiency after the developments and occurrences of the 28th of October. A creditor, within one month after the deed, filed a petition charging bankruptcy, which was not contested. Mayo was insolvent in point of fact. The only question left, therefore, is whether Mr. Bacon had reasonable cause to believe that he was insolvent, and made the deed to prevent the equal distribution of his effects contemplated

by the bankruptcy act. But for the transactions out of which this deed directly grew, I should strongly doubt whether Mr. Bacon did have reasonable cause to believe the two things mentioned. Looking at the condition of Mayo by the lights existing at the date of the deed, and not by those by which his then condition is now revealed, Mr. Bacon may not have had reason to believe that he was insolvent and made the deed as an insolvent, except for the especial facts out of which the deed directly grew. But those especial facts were sufficient beyond all doubt to create that "reasonable cause" of belief which the law makes requisite in such a case. Mayo had been clandestinely overchecking and fraudulently using the money of the bank for several months before the date of the deed, in collusion with the teller. The question for us is, why had he been thus fraudulently using these funds? His position in society and in business forbids the presumption that anything but necessity had driven him to such a course. We are obliged to conclude that he used the money of the bank because he could not meet his current obligations with money obtained in an honest manner. The Latin word "solvere," when used with reference to debt, means to pay, that is to say, to discharge with money. Insolvency means inability to pay with money. The fact that Mayo was unable to meet his debts with money honestly obtained, and had been so for several months, proves that he was insolvent, in the sense that any trader is insolvent in contemplation of law. Moreover, when his fraudulent dealing with the money of the bank was about to be publicly disclosed in October, any man of his position, pride, and character would have exhausted every effort to pay up all dues on the spot, to save both character and credit, and doubtless he did so exhaust every effort. But he did not pay up on the spot, and the conclusion is irresistible that he did not make his default good in cash, because he could not.

The insolvency which had been concealed by clandestine transactions for months was now developed and undeniably proved. None knew the facts which established it better than Mr. Bacon. The deed in question was taken because the grantor was unable to pay the money which it was given to cover and secure. The deed is itself, under these circumstances, the evidence of insolvency, and Mr. Bacon, in accepting it, accepted the most conclusive confession, proof, and notice of the insolvency which could have been brought to his mind. Being made by an insolvent man, being made to give a preference to Mr. Bacon's bank, it must have been made with the intention of intercepting from other creditors their pro rata share of the assets conveyed, for no principle has been more often decided, than that men must be presumed to intend the natural effects of their acts, and Mr. Bacon not only had reasonable but conclusive cause to believe that

it was such a deed, made for such a purpose. As to the presumption of intention from the act itself, the authorities are too numerous to be cited. Some of them are in [Toof v. Martin,] 13 Wall. [80 U. S.] 40; 1 Low. 409, [In re George, Case No. 5,325;] 1 Dill. 115, [Giddings v. Dodd, Case No. 5,405;] 1 Dill. 203, [Martin v. Toof, Case No. 9,167;] [Wilson v. City Bank,] 17 Wall. [84 U. S.] 473; Trader's Nat. Bank v. Campbell,] 14 Wall. [81 U. S.] 87; 1 Abb. (U. S.) 440, [Driggs v. Moore, Case No. 4,083;] 2 Bond, 244, [Haughey v. Albin, Case No. 6,222;] 2 Bond, 287, [Ahl v. Thorner, Case No. 103.]

The peculiar circumstances out of which the deed in question arose, distinguish the case now under consideration from those of Toof v. Martin, 13 Wall. [80 U. S.] 40; Trader's Nat. Bank v. Campbell, 14 Wall. [81 U. S.] 87; Gibson v. Warden, 14 Wall. [81 U. S.] 244; Tiffany v. Lucas, 15 Wall. [82 U. S.] 411; Buchanan v. Smith, 16 Wall. [83 U. S.] 277; Wager v. Hall, Id. 584; Walbrun v. Rabbitt, Id. 577; Wilson v. City Bank, 17 Wall. [84 U. S.] 473; Bartholow v. Bean, 18 Wall. [85 U. S.] 635; Cook v. Tullis, Id. 332; Tiffany v. Boatman's Sav. Inst., Id. 375; and Clark v. Iselin, 21 Wall. [88 U. S.] 360.

The condition of Mayo in respect to his circumstances and transactions other than those connected with this deed were elaborately discussed by counsel for the defence, and those circumstances were such, I admit, as were hardly sufficient of themselves to constitute reasonable cause to believe that he was insolvent, and that any deed of preference he might make to secure a pre-existing debt must be intended to defeat a pro rata distribution among his creditors. But the especial facts inducing the deed were too cogent to admit a doubt in any dispassionate mind of the insolvency and of the intent necessarily involved in the execution of a deed under these circumstances. I ascribe Mr. Bacon's failure to appreciate the reasonable cause which the facts of the occasion presented to the excitement necessarily controlling the presiding officer of a bank upon just discovering a heavy default, which is popularly reported to have been \$30,000 or \$40,000, in a trusted subordinate. The law does not require that the reasonable cause it specifies shall be perceived by the beneficiary of a deed of preference, but only that it shall exist. [Toof v. Martin,] 13 Wall. [80 U. S.] 40; [Wager v. Hall,] 16 Wall. [83 U. S.] 584; 10 N. B. R. 21. [In re Clarke, Case No. 2,843;] 18 Int. Rev. Rec. 190, [Burpee v. First Nat. Bank of Junesville, Case No. 2,185.] That reasonable cause did exist in this case seems to me to be incontrovertible, and if such a case as the present one do not fall within the meaning of the first clause of the 35th section of the bankruptcy act, I can scarcely conceive how any case likely to be contested at all can be held to do so. I will give a decree setting aside the deed

as void, and granting leave to the bank to appeal to the circuit court within ten days from its date.

Upon appeal the circuit court affirmed the decree in this case in the following opinion by the chief justice:

WAITE, Circuit Justice. We are entirely satisfied with the conclusions reached by the district judge in this case. His findings of the material facts are fully sustained by the evidence, and they need not be recapitulated. There can be no doubt of the actual insolvency of Mayo when he made his mortgage to the bank, though it may not have been generally known. His property, if converted into money, would have fallen far short of the amount necessary to pay his debts. While, therefore, he had not openly stopped payment, he was really unable to discharge his obligations in full. In our opinion, too, the bank had reasonable cause to believe him insolvent. It matters not what the bank officers actually did believe, or what others believed or had cause to believe. The question is, what ought the officers of the bank to have believed from the evidence in their possession? They knew that he owed their bank a debt which had been surreptitiously contracted by corrupting their teller, and they were told by his counsel, in the progress of their negotiations for the mortgage, that similar irregular transactions had been going on for many months previous. In fact they were told that a check for seven hundred dollars, found in the teller's cash drawer, dated a year and more before, was probably "Mayo's fee to the teller for using the bank." While others may have considered him solvent because his paper was not found on the street, they knew that to save his reputation upon the street he was dealing clandestinely with their teller, and obtaining through him accommodations which they were themselves unwilling to grant. This debt, when discovered, he did not offer to pay, but proposed to secure upon long time, and at a reduced rate of interest. They made no examination into his affairs themselves, but trusted entirely to the representation of his counsel. The mortgage was received without being executed by his wife, and there is some evidence to show that this was done because of a fear of the consequences of delay. No examination of the records was made to ascertain the condition of the title to the property, but in this, as in other things, the statements of Mayo's counsel were accepted as true. If an examination had been made, they would have discovered, that within less than a month before, he had obtained a loan of ten thousand dollars, at twelve per cent. interest and secured it by a mortgage upon the property. With even this extraordinary addition to his available capital, he was not relieved from the necessity of "using" their teller. They would also have

discovered an unpaid mortgage of seven thousand dollars and more for purchase-money, which had not been disclosed to them. But there is no use in proceeding further, The evidence of insolvency was open to them in every direction, and they were certainly put upon inquiry. They are, therefore, chargeable with notice of all that, in the exercise of reasonable diligence, they could have known. No prudent business man, with the evidence before him which was within their reach, and which they ought to have considered, could possibly have come to any other conclusion than that Mayo's condition was utterly hopeless.

The mortgage, if sustained, will actually have the effect of giving the bank a preference. The secured debts, at the time the mortgage was executed, amounted to \$17,500 or thereabouts, and the unsecured was \$49,000. The total value of the assets was \$40,500. After the secured debts were deducted, only \$23,000 was left to pay \$49,000. The debt to the bank was \$8000, and when that was secured there remained only \$15,000 to meet the \$41,000. As every man is presumed to intend the necessary consequences of his acts, the presumption is that Mayo, by his mortgage, intended to give the bank the preference it apparently secured. This presumption continues until it is overcome by proof that he was ignorant of his insolvency, and that his affairs were in such a condition that he could reasonably expect to pay all his creditors in full. *Toof v. Martin*, 13 Wall. [80 U. S.] 40. There is no such proof. On the contrary, the evidence is all the other way. Within a month proceedings in involuntary bankruptcy were begun against him to which he made no defence, and the usual adjudication was entered upon default.

As the bank is charged with notice of his insolvency, they must also be charged with notice of his intention to give them a preference contrary to the requirements of the bankrupt law. It follows that under the operation of that law their security must fail. The bank officers have not been guilty of any moral wrong. Finding Mayo a debtor of the bank without their consent, they set about securing protection against loss. Although they knew, or had reason to believe, he was insolvent, they were under no obligation to put him into bankruptcy. A mortgage would be good as against everything but the contingency of his bankruptcy. They had the right to take their chances against the happening of such an event. If he escaped bankruptcy, the debt was secured. If not, what they did would be void. They took the risk, and have lost. A decree may be entered affirming that below.

ALDERMEN.

(Note. Cases cited under this title will be found arranged in alphabetical order under the names of the municipalities.)

Case No. 155.

ALDRICH v. EQUITABLE SAFETY INS. CO.

[1 Woodb. & M. 272.]¹

Circuit Court, D. Massachusetts. May Term, 1846.

MARINE INSURANCE POLICY TO WHOM IT MAY CONCERN—INSURABLE INTEREST.

1. Where an insurance was effected by the owner of a vessel "on account of whom it may concern," "loss payable to the order of H.," who made the insurance and owned the vessel, and a consignee, in Europe, had advanced money to buy all the cargo in India, under a contract to be interested one half in the proceeds, and have the bill of lading of the cargo assigned to him for security, and the insurance to be made by the consignor on the vessel and half the cargo, to be deposited with the agent of the consignee in America, which was done except on freight instead of the vessel; the court held, that the consignee had an insurable interest in the policy, independent of any assignment; and could recover on it in his own name.

[Cited in *Henshaw v. Mutual Safety Ins. Co.*, Case No. 6,387; *The Sidney*, 23 Fed. Rep. 93; *The Samana Co. v. Hall*, 55 Fed. Rep. 663.]

2. The vessel being lost on her way back, but the cargo saved and received in Europe afterwards by the consignee, the latter was allowed to recover so much of the loss, as was necessary to pay the balance due to him in the transaction.

3. The remainder of the loss, H., the consignor, having become bankrupt, was allowed to be retained by the insurance office, in discharge of the premium note, and other demands against H. unsatisfied, and not proved before the commissioner of bankruptcy, a clause existing in the policy allowing the detention of enough of all losses to pay what was coming to the office from the person entitled to it.

4. Nothing could thus be set off against the consignee, except what he owed in his own right, or in equity, viz., the premium note, in this case, by which he had been benefited.

5. Had the consignee claimed under the assignment, and not as a party originally concerned or interested in the insurance, the result might have been different.

[At law.] This was assumpsit [by William L. Aldrich and another against the Equitable Safety Insurance Company] on a policy of insurance, made December 17th, 1841, on the cargo of the ship *Neponset*, to the extent of \$15,000, on one half thereof, from Bremen to the coast of Sumatra, and thence to a port of discharge in Europe, with this provision, viz.: "The balance of this policy to attach to freight after covering property." The insurance was made to Mark Healy "on account of whom it concerns," "loss payable to the order of M. Healy." The plaintiffs claimed, as possessing an insurable interest in the cargo and freight under the following circumstances, and that the insurance was made with a view to cover it. Thus, on the 17th of November, 1841, Mark Healy, being owner of the above ship, and she being at Bremen to obtain employ-

ment, in charge of her captain, one Joseph Powell, a contract was entered into between him and the plaintiffs, that the latter should furnish \$23,000 in specie, and four boxes of opium for the vessel to proceed to Sumatra for the purchase of pepper, and to return with it to Europe, the adventure to be on the joint account of Healy and the plaintiffs. It was further stipulated, that the port charges should be defrayed out of this money furnished by the defendants, and the bills of lading of the cargo be consigned to them for sale, they paying for freight of half thereof, one cent and a half per pound, and that the plaintiffs should remain in advance to Healy for half the specie on the same terms as in the last voyage on their joint account. Healy was left to make insurance, and in the event of making it, the policy for the vessel and Healy's half of the cargo, was to be deposited in the hands of Messrs. N. & P., who were agents of the plaintiffs. A loss of the vessel took place about March, 1843, at the Island of Mauritius, but the cargo was not injured over five per cent., and was obliged to be reshipped and carried to Europe in another vessel, and the freight therefor was paid by the plaintiffs; the *Neponset* losing her freight by the loss of the vessel before reaching Europe. Though the arrangement in the original agreement was for an insurance on the cargo and vessel, Healy made it on the cargo and freight, and lodged it with Messrs. N. & P. for the plaintiffs, and it was accepted by them. The whole loss for which the defendants are liable, exceeds, it is admitted, \$3000, being about \$1680 and interest, since April, 1843, for general average chargeable to the cargo, and about \$1681 on account of freight. But it is contended by them, that Healy in this, insured only his own property; and the plaintiffs had no insurable interest therein; or if they had, that the policy was assigned to them by Healy without the consent of the office, and hence could not be recovered on by them, under an express provision in the following words: "It is also agreed that this policy shall be void in case of its being assigned, transferred, or pledged, without the previous consent in writing of the insurers." It was further agreed in the policy as follows: "And in case of loss, to be paid in sixty days after proof of loss and proof of interest in the said property, the amount of the note given for the premium, if unpaid, and all sums coming due being first paid or secured to the satisfaction of the said company, they discounting interest for anticipating payment." The defendants claimed under this, to set off not only the premium note of \$526, which remained unpaid, but other large sums, due from said Healy to the insurance office, amounting in all to \$5476. Healy had failed, since the insurance, and had taken the benefit of the bankrupt act; but neither party

¹[Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

now claiming proved their debts under the bankruptcy. The amount due to the plaintiffs as the balance of their account with Healy, after selling the cargo, was, in August, 1843, at the time the business closed, \$1727; for which, and interest since they commenced this action, April 9th, 1844, they seek to be indemnified. The case was tried here in April, 1846, at an adjourned term, and a verdict taken by agreement for the plaintiff in blank, to be filled up with such sum as the court, on examination, should deem proper, if the plaintiff was in law entitled to recover. Otherwise, the verdict was to be set aside, and a general verdict to be entered for the defendants.

Phillips, for plaintiffs.

Fiske, for defendants.

Before WOODBURY, Circuit Justice, and SPRAGUE, District Judge.

WOODBURY, Circuit Justice. Most of the important facts in this case are embodied in the statement of it, and on these I shall now proceed to submit briefly my views of the law. The plaintiffs seem to me to have possessed an insurable interest in the cargo and freight, which are covered by this policy. They had agreed to advance \$23,000 on account of the cargo and charges, and did do it, so as to render Healy indebted to them to the extent of \$11,800, and interest thereon. How were they to be secured or paid for this? Clearly in the first instance by an insurance of the cargo and the ship, with a deposit for them of the policy with their agent, and a consignment to them of the bill of lading of the return cargo. This was the original agreement; but the insurance was altered to the freight, instead of the cargo; and the amount made so large as to cover both, and accepted by the plaintiff. Thus, virtually, the plaintiffs, so far as lenders of the \$11,800, had for security a stipulation to consign the bills of lading of the cargo to them, and their own indebtedness to Healy of the freight of their half of the cargo. This would be an ample indemnity, unless the return cargo should, contrary to any fair expectation, sell for less than its cost, and indeed less, to the extent of all the freight on one half of the whole cargo. But should the cargo be lost, or the freight, they held as security the insurance by Healy to the amount of all his share in the cargo, and of his expected freight, an indemnity quite safe against any ordinary contingencies, and more than sufficient in this case, as the event will show, if the plaintiff recovers. The plaintiffs stood, then, in the position of mortgagees, or trustees, or consignees of the half of the cargo and the freight thereon, that belonged to Healy, in order to secure them for the advances they had made in behalf of Healy. This was an insurable interest, whether looking at it in law or equity. 1 Phil. Ins. 107, 114; 2 Phil. Ins. 601; 1 Mason, 127, [Sea-

mans v. Loring, Case No. 12,583;] [Traders' Ins. Co. v. Robert,] 9 Wend. 404; [Ex parte Yallop,] 15 Ves. 60, and other cases cited in Phillips.

Was the fact of an interest in others than Healy as owner and mortgagor, or consignor of the cargo and freight, disclosed in the policy, sufficiently, to entitle others to recover? I think it was. The very terms of the policy being "on account of whom it may concern," distinctly apprized the office, that Healy intended to secure by it any interests of others as well as his own. He was principal for himself as mortgagor, and agent for the plaintiffs as mortgagees. 2 Phil. Ins. 153. He acted with express and previous wishes and authority for them as well as himself, and not without either, as in Foster v. United States Ins. Co., 11 Pick. 85. The plaintiffs also accepted or ratified the insurance after it was made, by taking it through their agent in this country. Under the form of expression used then, with the accompanying facts, no doubt exists that the plaintiffs are entitled to recover on their interest to the extent of their loss, without any assignment of the policy to them in the sense contemplated in the clause of it before quoted. The action can well be brought as now, or in the name of the person who appears on the policy to insure for others, and might be prosecuted for others in his name. Farrow v. Commonwealth Ins. Co., 18 Pick. 53; [Jefferson Ins. Co. v. Cothel,] 7 Wend. 82; [Pigott v. Thompson,] 3 Bos. & P. 149; [Sargent v. Morris,] 3 Barn. & Ald. 281; Hurlbert v. Pacific Ins. Co., [Case No. 6,919.] Their interest attached by the insurance itself, and not by any subsequent assignment; and the indorsement by Healy, and the deposit of the policy with their agent, were merely to authorize the payment of any loss to them, as originally interested, and in conformity with the provision in the policy requiring them to be made on his order, and also in compliance with the original agreement between him and the plaintiffs, that the policy should be deposited with their agent. Wiggin v. American Ins. Co., 18 Pick. 158. Their rights, then, having commenced with the policy itself, and arising in fact under the original insurance, as set out in the declaration, and not under any assignment of it, the case is not open to the objection, that it has been assigned to them subsequently, and without the knowledge or assent of the office, and is, therefore, void. These circumstances settle, also, the other objection concerning the set-off. One object of the provision against an after assignment without the consent of the office, doubtless, was to protect its interests by means of retaining the power, in case of a loss, to set off any demands the office possessed against the original holder of the policy. [Wiggin v. American Ins. Co.,] 18 Pick. 158. Here they have retained that power, so far as regards Healy and his original interests whether as

mortgagor, or cestui que trust or consignor in the property insured. But they have not retained, because they never possessed, any such power against the mortgagee or trustee, beyond his own indebtedness, which was nothing in law or equity but the premium on the property. As to that, such would have been the case, even if the suit had been in the name of Healy for the plaintiffs. *Hurlbert v. Pacific Ins. Co.*, [Case No. 6,919.] It is well settled, that a demand, held in autre droit, cannot be set off, nor one against a person suing in autre droit. Bull. N. P. 179; [Hammonds v. Barclay,] 2 East, 230, 235; Tidd, Pr. 605, and cases cited; [French v. Andrade,] 6 Term R. 582; [Slipper v. Stidstone,] 5 Term R. 493; 5 Mason, 205, [Greene v. Darling, Case No. 5,765.] The defendants, therefore, can set off against the plaintiffs, being originally parties in interest by virtue of what appears on the face of the policy, only what is due from them in law and equity, and not what is due from other persons alone. Indeed, if an insurer knows that the broker is insuring for a third person, he cannot set off a debt due from the broker. *Gordon v. Church*, 2 Caines, 299. The policy in that case was in the name of the broker, and the name of the principal was not disclosed. But "brokers" was inserted in the margin; and it was proved by parol, or admitted that the principals were well known. See also, *Hurlbert v. Pacific Ins. Co.*, [Case No. 6,919.]

There is another question as to what should be done about the mode of deducting the premium note given for this particular insurance. Healy promised to pay it; but not having done so, it should be charged on the sum going to him after paying to the plaintiffs their dues. If there be not enough of that, it, of course, as before suggested, ought to be settled by those who derive the benefits from it, (who in this instance are the plaintiffs to the extent of the balance of their account against Healy.) There is no necessity, here, however, to apportion it, and charge a part to them and the residue to Healy; because the claim of the plaintiffs, though losers, being only a part of what is due on the loss, leaves the residue, being more than enough to pay the premium, for the mortgagor, and thus open to any set-off for this or any other premiums due from him to the defendants.

In many policies there is a special provision to deduct the premium from any loss; and, indeed, on re-examination, such is evidently the design in the present case, independent of the equitable reasons for such a course. Thus, in paying averages, it is to be done, "having been paid the consideration for this insurance by the assured," &c., and in paying a loss, "the amount of the note given for the premium, if unpaid," &c., "being first deducted."

There is another view presented, as to whether the plaintiffs should recover all the

loss, and account for the balance, after deducting their debt, or recover only the amount of their debt. My opinion on this is, that the company should be permitted to retain and set off against Healy or his assignees, so far as he remained interested in the property insured as mortgagor, all which remains covered by the loss after paying the mortgagee, rather than that the plaintiffs should be allowed to recover the whole and pay over the balance left, after they are satisfied, to Healy's assignees. This does exact justice to all concerned—carries out the original intent, as well as the established law on set-offs generally, (*Gordon v. Church*, 2 Caines, 299,) and, at the same time, protects the office in the full enjoyment of their original lien on Healy's interests in any loss, so as to hold it subject to all their claims against him under a set-off of them, when the loss is called for, instead of driving them into a bankrupt court for merely a pro rata share with other creditors, who had not, like them, any specific lien on the balance, after paying the mortgagees. *Hurlbert v. Pacific Ins. Co.*, [Case No. 6,919.] But though in this case the plaintiffs would be liable for the premium on this particular insurance, when not paid by Healy, who gave his note for it, and agreed to pay it; yet as there are funds enough left, belonging to Healy, for the loss, to pay this premium and all due to the plaintiffs, it ought to be charged on those funds. Whether this be done by deducting it from the plaintiffs' balance, and then recharging it as so much more due to them from Healy, or by leaving it to be paid out of Healy's share, is immaterial. Let the computations be made on these principles, and the blank in the verdict filled up for only the sum due the plaintiffs, leaving the residue to be held by the office towards their debts against Healy.

ALDRICH, (SUVDAM v.)

[See *Suydam v. Aldrich*, Case No. 13,652.]

Case No. 156.

ALDRIDGE v. DRUMMOND.

[1 Cranch, C. C. 400.]¹

Circuit Court, District of Columbia, June Term, 1807.

BAIL.

At law. The plaintiff's counsel was absent, but a bond for money was filed as the cause of action.

Mr. Law, for the defendant, offered to appear without bail.

THE COURT said, that he could not appear without bail, until he should be com-

¹[Reported by Hon. William Cranch, Chief Judge.]

mitted for want of bail, when he might appear and plead in custody.

FITZHUGH, Circuit Judge, absent.

ALDRIDGE, (MUIRHEAD v.)

[See Muirhead v. Aldridge, Case No. 9,904.]

ALDRIDGE, (PARKES v.)

[See Parkes v. Aldridge, Case No. 10,755.]

ALDRIDGE, (TURNER v.)

[See Turner v. Aldridge, Case No. 14,249.]

Case No. 157.

The ALEPPO.

[5 Ben. 554.]¹

District Court, S. D. New York. March, 1872.

COLLISION AT SEA—STEAMER AND BARK—FOG—
SPEED—WRONG MANŒUVRE.

1. The bark M. was sunk by a collision with the steamer A., on the 20th of April, 1871, off Boston harbor, in a thick fog. The steamer was bound from Boston to Liverpool, heading about east by south, and going at a speed of at least seven or eight miles an hour. The fog was so dense that objects could not be seen more than fifty yards, and the steamer was blowing her fog whistle at short intervals, and had a lookout stationed on each bow. They reported the bark right ahead, whereupon the steamer's engine was at once reversed, and her helm ported, till she headed southeast half east, when she struck the bark on the port side, cutting in to her main hatch. No sound from the bark was heard on the steamer till after the bark was reported, when the sound of a horn was heard. The bark was heading northeast half east. There was very little, if any, wind. The whistle of the steamer approaching was heard on the bark some fifteen minutes before the collision, and from that time two or three blasts of a fog horn were blown by the bark in response to each blast of the steamer's whistle. Her master, when he saw the steamer, called to her to starboard her helm, and the steamer's lookout also called out "Starboard." *Held*, that the bark was blowing a proper fog signal, and that the speed of the steamer was the cause of its not being heard till the collision could not be avoided.

[For instances of collision and the precautions necessary to be taken in foggy weather, see *The Monticello*, Case No. 9,730; *The Blackstone*, Id. 1,473; *The Matteawan*, Id. 9,233; *The Hammonia*, Id. 6,005; *The Hansa*, Id. 6,037.]

2. That the steamer's speed was too great, and was a fault causing the collision. That, if the steamer had starboarded her helm instead of porting, and swung in the opposite direction as much as she did under her port helm, her direction would have been east northeast, nearly parallel with that of the bark. And that, therefore, the order to port was a wrong one, and contributed to the collision.

In admiralty.

[Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

J. C. Dodge and T. Scudder, for libellants.
D. D. Lord, for claimants.

BLATCHFORD, District Judge. This libel is filed by the owners of the bark Merrimac, and of her pending freight, and by the owners of property and cargo on board of her, and by her officers and crew, to recover the value of the said bark, and of such freight and property and cargo, and of the effects and clothing of the said officers and crew, and the amount of the wages lost by the said officers and crew, in consequence of the sinking of such bark with said cargo and other property, through a collision which took place between her and the steamship Aleppo, on the 20th of April, 1871, off the harbor of Boston, Massachusetts, in the day time, in a thick fog. The amount claimed by the libel is \$134,720.39. About four o'clock on that morning, the bark, which was on a voyage from Montevideo to Boston, made Nansett lights. About half past eleven o'clock, A. M., she was becalmed, so as to lose her steerage way, and a thick fog arose, which continued until the collision. She kept all her sails up except her mainsail and her main-royal. Her yards were braced to the starboard, but there was no wind. When the wind died away it was from about west southwest. At one o'clock, P. M., by sounding, she found twenty-three fathoms of water, with a muddy bottom. Between that time and the time of the collision she did not change her course, and, at the time of the collision, which occurred at twenty-seven minutes past one o'clock, P. M., she was heading northeast half east. The steamer was on a voyage from Boston to Liverpool. The stem of the steamer struck the port side of the bark between the main and mizzen rigging, abreast of the after hatch, the direction of the blow being one point forward of square across, that is, in a direction southeast half east. The side of the bark was crushed in the width of the steamer's bow, and the cutwater of the steamer penetrated to the starboard curbing of the after hatch. The bark sank in from ten to fifteen minutes.

The libel alleges, that the place of collision was about four miles east of Minot's Ledge lighthouse; that the bark was lying dead in the water; wholly becalmed, heading about northeast half east; that the steamer was heading about east by south; that the steamer's whistle was heard for fully fifteen minutes before the collision, and the fog horn of the bark was sounded as required by law, and everything was done on board of the bark, to avoid the collision, that could be done under the circumstances; that the steamship, being under steam, was required by law to keep out of the way of the bark, a sailing vessel, and might easily have done so by observing the rules and precautions which the law and good seamanship required of her; and that the collision and loss

were wholly caused by the negligence of the persons in charge of the steamship.

The answer avers, that the steamer left her dock at East Boston soon after eleven o'clock, A. M.; that, when she left her dock, the weather was somewhat hazy, but not so as to interfere in any way with her navigation until after passing the limits of pilotage waters; that, at about twenty minutes before one o'clock, P. M., she was obliged to stop to replace some packing in one of her engines; that, at one o'clock, P. M., she again proceeded on her voyage, steering about east three-quarters south; that, at that time the wind was light, and the fog, which had begun to thicken very perceptibly soon after she passed Boston lighthouse, became so dense that it was impossible to see objects more than fifty yards distant; that every precaution was taken to avoid accidents, two men were stationed on the lookout, one on each bow, a man was stationed at the steam whistle, which was blown at short intervals, two men were sent to the wheel, to assist the quartermaster who had it in charge, and another quartermaster was stationed at the con, to transmit orders from the bridge, where the captain remained, with the second officer, to see that all hands were attending to their duty; that, by an act of the congress of the United States, sailing vessels are required, whenever there is a fog, whether by day or night, to give warning of their positions by the use of fog horns; that it then was, and, for a long time before the passage of said act, had been, customary for all sailing vessels to blow horns during fogs, as signals of their positions; that the steamer proceeded at half speed, which would have enabled her, without difficulty, to avoid all vessels giving the statutory and customary signals before mentioned, but, although a careful watch was kept, no such signal was heard until a very short time, not three minutes, before the collision, when the lookouts on the forecastle reported a ship right ahead, and close at hand, whereupon the captain instantly ordered the engines reversed and the helm ported, but, before her headway could be stopped, she ran into the bark; that, immediately upon the collision, the officers and crew of the bark got on board of the steamer, and the steamer sent a boat to save what was possible, but the wreck sank before the boat could reach her; that, as the respondents are informed and believe, the steamer's whistle was distinctly heard on board of the bark several minutes before the collision, but no sound was heard from the bark until after she was reported by the steamer's lookouts, when a very faint sound of a horn was heard, mingled with the shouts of the bark's crew; and that the collision was caused by the neglect of those in charge of the bark, either in not having a proper fog horn, or in not blowing it at all, or in not blowing it with strength enough to make it available at the distance at which these horns can usually be

heard. The answer denies that the collision occurred except as above stated, or that it was in any measure caused by, or attributable to, any want of good management or proper care on the part of those in charge of the steamer.

It is to be noted, that the answer gives the condition of the weather as a fog so dense that it was impossible to see objects more than fifty yards distant. It does not state the rate of speed of the steamer, but gives it as "half speed," which is shown by the evidence to be a term of art, not meaning half of the ordinary full speed of the vessel, as would naturally be supposed, but only indicating the point at which the throttle-valve of the engine was set, to give steam to the engine. It assigns, as a reason for maintaining whatever rate of speed the steamer did maintain, the fact that no signal of a fog horn from the bark was heard by the steamer. It states that no such signal was heard until a very short time, not three minutes, before the collision; that, when it was heard, the bark was reported as right ahead, and close at hand; and that, before the headway of the steamer could be stopped, by reversing her engines, the collision occurred. Farther on it states that no sound was heard from the bark until after she was reported, when a very faint sound of a horn was heard. The only excuse which the answer sets up, for the failure of the steamer to discharge the duty imposed upon her by law, of keeping out of the way of the bark, is an alleged neglect on the part of those in charge of the bark, in reference to a fog horn. But that excuse is set up in a very loose, indefinite and tentative form of expression. It alleges neglect, either, first, in not having a proper fog horn; or, second, in not blowing it at all; or, third, in not blowing it with strength enough to make it available at the distance at which these horns can usually be heard. What such distance is, is not averred. The entire purport of the answer is, that, as the sound of a fog horn from the bark was not heard on board of the steamer sooner than it was heard, it follows that the fog horn was not a proper fog horn, or was not blown, or was not blown with sufficient strength to make it heard at the distance at which these horns can usually be heard.

The proofs in the case show, satisfactorily, that, about fifteen minutes before the collision, the steamer's whistle was first heard on board of the bark; that, up to that time, no fog horn had been blown on board of the bark; that, as soon as the whistle of the steamer was heard, the mate of the bark procured the bark's fog horn, and blew it, facing with it towards the direction whence the sound of the whistle came, and which turned out to be the direction from which the steamer afterwards came in sight; and that the mate stood, while so blowing, on the port side of the bark, at first on the poop deck, and afterwards on the top of the after house,

and blew two or three blasts of the horn in response to every blast of the steamer's whistle, continuing to so blow until after the steamer came in sight, and until almost the instant of collision. The sound of the fog horn was not heard on board of the steamer until the bark was seen. But, on the evidence, it was the usual fog horn, and was blown in the usual manner, and with customary and proper force. There is nothing to show that its sound was not heard on board of the steamer at as great a distance off as it could be, in view of the speed at which the steamer was going, and the state of the atmosphere and the wind and the fog. A southeast swell was rolling, into which, some three points on her starboard bow, the steamer was plunging at the rate of at least from seven to eight knots an hour, and it is not at all strange that the sound of the fog horn was drowned by the sound of the waves, and of the steamer's motion through the air and through the water, and by the other noises inseparable from the movement, by steam machinery, of a large vessel. The fact that the fog horn was, under all these circumstances, heard when it was heard, and was then heard by a man on the bridge of the steamer, as well as by men on the bow of the steamer, shows that it was a proper horn and was properly blown.

On the evidence, the collision was due to the immoderate speed of the steamer. If her speed had been less, she would have had more opportunity and time, after hearing the fog horn, to take measures to avoid hitting the bark. Her speed was, at least, from seven to eight knots an hour, at the time of the collision, and, I think, was more. She was navigating at that speed, in a dense fog, of the character described in the answer, in a thoroughfare for vessels, some twenty miles only from Boston harbor, and about half that distance from Boston lighthouse. I have considered this question of speed recently so fully in the case of *The Hansa*, [Case No. 6,037.] in which the same views were urged and considered which have been advanced by the counsel for the claimants in this case, that I deem it unnecessary to add anything to the views contained in the opinion in that case. Here was a bark, becalmed, in a dense fog, within twenty miles of her destination, properly blowing a proper fog horn, and blowing it precisely in response to blasts of a steamer's steam whistle, and yet the steamer, with all the precautionary measures set up in her answer, was going through the fog at such a rate of speed, that she heard nothing from the bark till the bark was seen, and then it was too late, even with the utmost expedition used in stopping and reversing her engines and porting her helm, to avoid the bark, and the speed was so great, that the bark was severed more than half in two. It would seem to be only necessary to state these

premises to reach the conclusion that the steamer was in fault, and solely in fault. Yet, the argument on the part of the claimants advances the proposition, that, even if no fault is imputable to the bark, the collision was the result of an inevitable accident. It was inevitable, probably, at the rate of speed maintained by the steamer. She did not avoid the accident. She probably would have avoided it if she could have done so. In that sense it may have been inevitable. But, in the sense of the rule of law on the subject, this collision was not an inevitable accident. The claimants insist, that the collision was the result of such an accident as could not be avoided by such vigilance and good management as were required by the circumstances of the case. But this proposition is not established by the evidence. On the contrary, it satisfactorily appears, that the collision would have been avoided if the steamer had been going only at such a rate of speed as would have enabled her to stop and reverse, after hearing the fog horn of the bark, or seeing the bark, in season to so check her headway as to put it within her power to stop short of the bark or to turn aside from her.

It is contended, on the part of the libellants, that there was fault on the part of the steamer, contributing to the collision, in porting her helm, when she discovered the bark, instead of starboarding it. The steamer was on a course east three-quarters south. The bark was heading northeast half east. The direction of the blow of the steamer was towards southeast half east, while she was swinging under a port helm. This would show that she had, by her porting, swung two points and three-quarters to starboard. If, by starboarding, at the time she ported, she had swung to port two points and three-quarters from east three-quarters south, it would have brought her to east northeast, at the time of the blow, and she would have been within a point and a half only of being parallel with the bark. I think it is demonstrated by the evidence, in connection with the foregoing facts, that the order to port on the steamer was a wrong one, that the better order would have been to starboard, and that, by starboarding, the collision would probably have been less disastrous. The master of the bark, and the lookout on the steamer, concurred in the conclusion, from their several points of observation, that starboarding was the proper manoeuvre for the steamer, and both of them expressed such conclusion, by shouts to that effect. Yet, the steamer ported. There must be a decree for the libellants, with costs, with a reference to a commissioner, to ascertain the damages.

[NOTE. For a subsequent hearing in this case respecting the measure of damages, etc., see *The Aleppo*, Case No. 158.]

Case No. 158.

The ALEPPO.

[7 Ben. 120.]¹

District Court, S. D. New York. Jan., 1874.
COLLISION—RULE OF DAMAGE—COST OF CARGO AT
PLACE OF SHIPMENT—INTEREST.

1. The barque M., bound from Montevideo to Boston, was sunk in a collision with the steamer A. about twenty miles from Boston harbor. The steamer was held liable for the loss. The commissioner, to whom it was referred to compute the damages, having made his report, both parties filed exceptions to it, bringing up the question, what was the true rule of damages for the loss of the cargo, and as to the allowance of interest: *Held*, that the true rule of damages in such a case, is to allow the cost of the cargo at its place of shipment, with expenses and charges, and insurance and interest.

[Cited in *Guibert v. The George Bell*, 3 Fed. Rep. 585; *The City of New York*, 23 Fed. Rep. 619; *The Umbria*, 46 Fed. Rep. 927.]

[See *The Mary J. Vaughan*, Case No. 9,217; *Dyer v. National Steam Nav. Co.*, Id. 4,225, modifying Id. 4,226. *Contra*: *The Russia*, Id. 12,169; *Swift v. Brownell*, Id. 13,695.]

2. That, where the contract price at which cargo was purchased included the expenses of putting it alongside the vessel, charges for brokerage and commissions and counsel's certificates in purchasing and shipping, if paid, and usual and necessary, are to be allowed, as part of the cost.

[Cited in *The City of New York*, 23 Fed. Rep. 619; *The Umbria*, 46 Fed. Rep. 927.]

[See *The Ocean Queen*, Case No. 10,410.]

3. On cargo bought generally, charges for putting the cargo alongside are allowable also. Charges for putting money at the purchase place to pay for the cargo are not allowable. Interest on the purchase price paid, from the time it was paid, is allowable, and also interest on all other allowable items. But the rate of interest allowed is six per cent.

[Cited in *The Mary Eveline*, Case No. 9,212; *Dyer v. Nat. Steam Nav. Co.*, Id. 4,225.]

4. The allowance of interest in cases of tort is a matter of discretion.

In admiralty.

T. Scudder and J. C. Dodge, (of Boston,) for libellants. D. D. Lord, for claimants.

BLATCHFORD, District Judge. The bark Merrimac was, on the 20th of April, 1871, in daylight, in a thick fog, run down and sunk, with her cargo, by the steamer Aleppo, at a point about twenty miles from Boston harbor, and about half that distance from Boston lighthouse. She had come, with her cargo, from Montevideo, and was bound to Boston. On a libel filed by the owners of the bark, and of her pending freight, and by the owners of property and cargo on board of her, and by her officers and crew, to recover the value of the bark, and of such freight and property and cargo, and of the effects and clothing of the officers and crew, and the amount of the wages lost by the officers and crew, in consequence

of the sinking of the bark, with said cargo and other property, this court held [The Aleppo, Case No. 157] that the steamer was solely in fault for the collision, and rendered a decree that the libellants recover against the steamer the damages sustained by them by reason of the collision, and that it be referred to a commissioner to ascertain and compute the amount of such damages. The report of the commissioner has been made. It is not questioned in any particular by either party, except as to its conclusions respecting the amount of damages by the loss of the cargo, and respecting interest.

The commissioner reports that it was contended on the part of the libellants, owners of cargo, that they are entitled to be paid the market value thereof in Boston, at the time when it was lost, less duties, freight and charges for landing, with interest at 7 per cent. per annum from the date of the loss, being the sum of \$112,147.76, as shown by schedule No. 1 annexed to the report. He further reports that the claimants insisted that the damages should not exceed the actual cost of the cargo at its port of shipment (part having been shipped at Colonia and part at Montevideo), with expenses of lading, and that the interest should not exceed 6 per cent. per annum from the time of the loss, being the sum of \$68,558.34, as shown by schedule No. 2, annexed to the report. He further reports that he has refused to adopt either of the rules above stated, but has allowed to the libellants the actual cost of the cargo, with expenses of lading on board, and such increase in the market value at the port of shipment as occurred previous to the loss of the vessel, with interest at 7 per cent. per annum from the time of the loss, being the sum of \$81,378.46, as shown by schedule No. 3, annexed to the report.

The libellants except to the report, because the commissioner refused to adopt the rule so contended for by them, and because he made the allowance which he did make. The claimants except to it, (1) because he has allowed for the value of the cargo more than its market value at the port of shipment, with interest at 6 per cent. per annum; and (2) because he has allowed to the libellants, in addition to the actual cost of the cargo, an increase in its market value occurring prior to the date of the loss; and (3) because he has allowed 17½ per cent. on the cost of the cargo belonging to three of the owners of cargo, without stating the ground on which such allowance is made; and (4) because there is no evidence to sustain such allowance of 17½ per cent.; and (5) because he has allowed 2½ per cent. on the cost of the cargo belonging to another owner of cargo, for rise in value from the time of purchase to the time of loss; and (6) because he has allowed premiums of insurance in addition to cost and increase in market price to the

¹[Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

time of loss; and (7) because he has allowed, in addition to the cost of cargo and increase in market value to the time of loss, charges for purchasing and shipping cargo, expenses of classification, consul's certificates, commissions for drawing exchange, brokerage on sale of exchange, interest on cost between time of payment and reimbursement by exchange, London bankers' commission and premium of exchange, and because such items are especially improper if the libellants are allowed the market value at the time of the loss; and (8) because he has allowed on the cargo belonging to three of the owners of cargo, the difference between the purchase money and the whole cost of such cargo on board, and because such items are especially improper if the libellants are allowed the market value at the time of the loss; and (9) because he has allowed interest, and at the rate of 7 per cent. per annum, on all the items allowed in his report, as well as on those found in schedule No. 3, no evidence having been given of payment, or loss, of interest, or of any other circumstances justifying the allowance of it, and also because the rate of interest in this court is only 6 per cent. per annum.

The report of the commissioner, in connection with schedule No. 3, shows that he has allowed, as damages, to the four owners of cargo, the actual cost of the cargo, with the expenses of lading on board, and such increase in the market value thereof at the port of shipment, as occurred previous to the loss of the cargo, with interest at the rate of 7 per cent. per annum. The cargo was wool. As to each one of three of the owners, schedule No. 3 shows that the mode adopted of arriving at the amount reported was this: Set down the cost, in gold, of the purchase of the wool, "without charges of shipment or other expenses;" to this add 11½ per cent. thereon, for gold premium; to the resulting sum add 17½ per cent. thereon (for what, is not stated in the schedule); to the resulting sum add an item as "difference between cost of purchase and whole cost of wool on board in currency," and an item as "cost of insurance," and an item as "interest from April 20th, 1871, at 7 per cent." This mode produces allowances to the three owners, severally, of \$17,501.65, and \$20,038.18, and \$29,207.62. As to the fourth owner, schedule No. 3 shows that the mode of arriving at the amount reported was this: Set down the cost, in Montevideo paper currency, of the purchase of the wool; to this add 2½ per cent. thereon, as "rise in value from time of purchase to time of loss," and 1 6-10 per cent. thereon, as "commissions, &c.," and an item as "cost of shipment;" to the resulting sum (which is put down as "total cost, in Montevideo currency") turned into gold at 92 97-100 per cent. thereon, add an item, as "insurance paid, in gold;" to the resulting sum add 11½ per cent. pre-

mium thereon; to the resulting sum (which is put down as "total in United States currency") add "interest from April 20th, 1871, at 7 per cent." This mode produces an allowance to the fourth owner of \$5,541.01.

The exceptions raise the question, whether the allowance for loss of cargo ought to be the market value of it in Boston at the time of the loss, less freight, duties, and charges for lading; or, whether it should be only the actual cost of the cargo when on board of the vessel at the port of shipment (including expense of lading), which may be regarded as its market value when on board, at such port, without any addition for any increase in the market value of like cargo at such port, occurring prior to the time of the loss; or whether it should be what the report allows, namely, the actual cost when on board of the vessel, at the port of shipment (including expense of lading), with the addition of the increase in the market value of like cargo at such port, occurring prior to the time of the loss. The cases in which the question is considered are few in number. The general rule, in cases of collision, is easily stated. In *The Gazelle*, 2 W. Rob. [Adm.] 279, it is said, that "the right against the wrong-doer is for a *restitutio in integrum*," and that the suffering party must be put "as nearly as possible in the same situation in which he would have been if no collision had taken place." In *Smith v. Condry*, 1 How. [42 U. S.] 28, it is said: "It is the actual damage sustained by the party at the time and place of the injury, that is the measure of damages." In *Williamson v. Barrett*, 13 How. [54 U. S.] 101, 110, it is said: "The general rule regulating damages in cases of collision is to allow the injured party an indemnity to the extent of the loss sustained. This general rule is obvious enough; but there is a good deal of difficulty in stating the grounds upon which to arrive, in all cases, at the proper measure of that indemnity." But the question remains—what sum of money, in the given case, will be a *restitutio in integrum*, a replacing of the actual damage, an indemnity to the extent of the loss. Whatever that sum is, it must be fixed, as nearly as may be, as of the time and place of the loss.

The general principle, in cases of cargo lost or damaged by collision, is thus stated in *Lowndes on Collisions* (page 157): "If, by reason of collision, the cargo on board is lost or damaged, the owner of it is entitled to compensation for his actual loss; that is to say, to the sum for which such cargo would have been sold had there been no collision, minus such expenses as must, in that case, have been incurred in order to realize the proceeds, and deducting also the sum for which it may have actually been sold."

In *Murray v. The Charming Betsy*, 2 Cranch, [6 U. S.] 64, in 1804, which was the case of a seizure of a vessel and cargo, by

a United States frigate, as forfeited for a violation of a non-intercourse law, the supreme court, in declaring the seizure to have been illegal, and holding the owner of the vessel and cargo to be entitled to damages for the seizure (the cargo having been procured at St. Thomas, and the vessel and cargo having been seized at sea, and carried into Martinique, and the cargo having been sold at Martinique, by the captain of the frigate, and the vessel having been brought into Philadelphia, and there libelled), decided that the damages for not restoring the vessel and cargo at Martinique should be the actual prime cost of the vessel and cargo, with interest thereon, including the insurance actually paid and such expenses as were necessarily sustained in consequence of bringing the vessel into the United States.

In the case of *The Lively*, [Case No. 8-403,] in 1812, Judge Story says, that "in cases where the vessel and cargo have been captured, and afterwards lost to the owner, the supreme court of the United States have confined themselves to the prime value thereof, and interest thereon, to the judgment." He also says: "I am not aware of a single authority in the higher courts of admiralty, in which supposed profits have formed an item of damage in cases of restitution. * * * I have not been able to trace in later reports a single instance where loss of profits has been allowed." He then examines the question upon principle, and comes to the conclusion that an allowance of damages upon the basis of a calculation of profits is inadmissible, and says, that such a rule has been rejected by the courts of law in ordinary cases, and that, instead of deciding upon the gains or losses of parties in particular cases, a uniform interest has been applied, as the measure of damages for the detention of the property. Much of his reasoning applies as well to the loss of cargo in a case of collision as to a case of illegal capture, which was the case before him. A calculation of profits involves uncertainty, and proceeds upon the contingencies of the market, and is a calculation upon conjecture, and would work injustice if applied to the case of a bad market and a loss thereby, and would be a rule which would always work substantially one way, and would fall heavily on the innocent owner of a colliding vessel held in fault for the negligence of her master. All these considerations lead to the conclusion that profits, on the supposition of the prosperous termination of the voyage, ought not, in any case, to constitute an item of damage.

The case of *The Anna Maria*, 2 Wheat. [15 U. S.] 327, in 1817, was one of marine trespass by a privateer, where a vessel and her cargo were unlawfully captured and sold. The supreme court awarded, as damages, the value of the vessel, and the prime cost of the cargo, with all charges, and the premium of insurance, if paid, with interest.

The case of *The Amiable Nancy*, 3 Wheat. [16 U. S.] 546, in 1818, was one of marine trespass by a privateer, in the seizure and detention of a vessel and her cargo. In rejecting an item for the loss of the supposed profits of the voyage on which the vessel was bound, the supreme court say: "The probable or possible benefits of a voyage as yet in fieri, can never afford a safe rule by which to estimate damages in cases of marine trespass. There is so much uncertainty in the rule itself, so many contingencies which may vary or extinguish its application, and so many difficulties in sustaining its legal correctness, that the court cannot believe it proper to entertain it. In several cases in this court, the claim for profits has been expressly overruled; and in *Del Col v. Arnold*, 3 Dall. [3 U. S.] 333, and *The Anna Maria*, 2 Wheat. [15 U. S.] 327, it was, after strict consideration, held, that the prime cost or value of the property lost at the time of the loss, and, in case of injury, the diminution in value by reason of the injury, with interest upon such valuation, afforded the true measure for assessing damages. This rule may not secure a complete indemnity for all possible injuries, but it has certainty and general applicability to recommend it, and, in almost all cases, will give a fair and just recompense." In allowing interest in this case, the supreme court fixed the rate at six per cent.

The case of *Smith v. Condry*, 1 How. [42 U. S.] 28, in 1843, was one of a collision between two American vessels in the port of Liverpool. The injured vessel had a cargo of salt, and was ready to sail for the United States. She offered to prove that, if she had not been prevented from sailing by the injury complained of, she would have arrived at her port of destination with her cargo in season to have obtained more for it than she received. The evidence was rejected. The supreme court say: "It has been repeatedly decided in cases of insurance, that the insured cannot recover for the loss of probable profits at the port of destination, and that the value of the goods at the place of shipment is the measure of compensation. There can be no good reason for establishing a different rule in cases of loss by collision. It is the actual damage sustained by the party at the time and place of the injury that is the measure of damages."

In *Williamson v. Barrett*, 13 How. [54 U. S.] 101, in 1851, the court considered the question, in a collision case, of the allowance to the injured vessel of compensation, during the time necessary to repair her and fit her for business for the loss of what she would have produced by chartering her to run in the business in which she had usually been engaged. The court followed the principle of the decision in the case of *The Gazelle*, 2 W. Rob. [Adm.] 279. It

conceded that the earnings of a vessel not under a charter party must, in some measure, depend upon the contingency of obtaining employment for her, but it held that the market price of her hire afforded a proper rule for estimating the damage sustained on account of the loss of her service. Three of the judges dissented, holding that the case fell within the rule, that, in cases of marine torts, no damages could be allowed for the loss of a market, or for the probable profits of a voyage. The opinion of the court was delivered by Mr. Justice Nelson.

The case of *The Ocean Queen*, [Case No. 10,409,] in this court, in 1866, was one of collision, where a schooner on a voyage from Baltimore to Providence, with a cargo, was, with such cargo, sunk at sea, by a collision. The commissioner, in assessing the damages to the cargo, took the price it would have brought at the port of destination, instead of the price paid at the port of shipment. The claimants excepted to the report. This court (Shipman, J.) said: "I think the exception on this point is well taken. It is open to the objections stated by Mr. Justice Story, in the case of *The Lively*, [Case No. 8,403.] Though that was not a case of damage by collision, it was a case of damage by another kind of tort. His remarks are, therefore, apt and to the point. To estimate the damages by what the cargo would have sold for, if it reached the port of destination, partakes, in some measure, of conjecture, and assumes that for certain which is, after all, contingent. The schooner, in this case, might never have reached her port of destination, even if she had not collided with the *Ocean Queen*. She was exposed to all the ordinary perils of navigation—collision, fire, and the numberless dangers which attend vessels on the sea. I understand the correct rule to be laid down by the supreme court of the United States, in *Smith v. Condry*, 1 How. [42 U. S.] 28, which is, the value of the goods at the port of shipment. To this should be added the expense of navigating the vessel to the place where the collision occurred, including also the lading of the cargo on board. On this amount, the libellant is entitled to interest at six per cent. from the time of the collision." On appeal to the circuit court by the claimants, that court (Nelson J., 5 Blatchf. 493, [*The Ocean Queen*, Case No. 10,410,]) in 1867, said: "The only question worthy of notice is that of damages in respect to the cargo. The owners of the cargo claim that they are entitled to the market value of the cargo, consisting of flour, corn and feed, at the port of destination, Providence, or, at least, to the general increased market value that took place between the time of the shipment at Baltimore, and the time of the collision. The court below held, that the damages should be ascertained from the value of the goods at the port of shipment, including all expenses of transpor-

tation to the place of collision, and of the lading of the cargo on board, &c., together with interest, at the rate of six per cent. per annum, from the time of the collision. This is the rule, substantially, as settled in the case of *The Anna Maria*, 2 Wheat. [15 U. S.] 327, and in *Smith v. Condry*, 1 How. [42 U. S.] 28, 35, as governing in all cases of marine torts. See, also, *The Lively*, [Case No. 8,403.]

The case of *The Vaughan and The Telegraph*, in this court, [Case No. 9,217,] in 1867, was a case of the loss of a cargo of barley, on the Hudson river, between Newburgh and Cold Spring, by a collision, the barley being in transit on a canal-boat from Canada to New York. The commissioner, in computing the damages for the loss of the barley, took, as its value, the price at which other barley, on another boat in the same tow, was sold at New York, a few days after the collision, deducting therefrom the commission for the sale, and the freight on the barley, and adding interest on the remainder at seven per cent. per annum. The claimants excepted to the report, on the grounds that the commissioner should not have taken the value at New York, or at the place of collision, but should have taken it at the place of shipment, and that the proper rate of interest was six per cent. per annum, and not seven. In disposing of the case, I referred to the authorities above cited, and said: "The law is well settled, that, in case a contract to deliver goods is broken, the party is entitled to recover the full value of the goods at the place of delivery. * * * But in cases of loss of cargo by collision, or other tort, the rule is equally well settled, that the value of the lost property at the time and place of its shipment is the measure of damages." I held the commissioner to have erred in not adopting, as the measure of damages, the value of the barley at the port of shipment, and in allowing interest at seven per cent. and not at six. The circuit court, on appeal, (Nelson, J.,) concurred in the view, that the proper rule of damages, in respect to the cargo, was its value at the port of shipment. The supreme court, in its opinion in the case, on appeal, (14 Wall. [81 U. S.] 258, 267,) says: "In the district court, it was held, that the proper rule of damages where a cargo is lost in transitu by a collision, or other tort, is the value of the goods at the time and place of shipment. It was conceded, that, upon the breach of a contract for the delivery of goods at a particular place, the measure of damages is the full value of the goods at such place. Both propositions are correct and are well settled in our jurisprudence."

The libellants, in supporting their exception, contend that the proper measure of damages is the market value of the wool in Boston, on the day of its loss, less duties, freight and charges for landing, and less, also (an item not referred to in their ex-

ception, or before the commissioner) the reasonable cost of insuring the cargo from the place of loss to Boston. They insist that this would give the value of the cargo at the time and place of its destination, and would be in accordance with the rule laid down in *Smith v. Condry*, [supra.] But this construction of the rule would fritter it away altogether. The value at Liverpool, of a cargo lost by collision in the port of Liverpool, bound to Boston, would be ascertained by taking its market value at Boston, and deducting duties, freight, expenses of landing and insurance. This might give the very profits which were refused in *Smith v. Condry*.

It is urged for the libellants, that this cargo was lost but a few miles from Boston. But it was lost at a point where, as the facts show, there was greater peril than in the whole voyage. If the barque had not been run down by the Aleppo, she might have been run down during the same fog by some other vessel, nearer to Boston. If she had collided one mile further from Boston with some other vessel, in a fog, and her cargo had been lost thereby, its owners might, with equal force, have contended for the rule they now contend for. Yet it is shown that equal peril exists one mile nearer Boston, in a fog. The contingency of a safe arrival at Boston, in a case like the present, is purely a matter of conjecture.

It is contended, by the libellants, that *Smith v. Condry*, [supra.] is overruled by *Williamson v. Barrett*, [supra.] if the former case is to be considered as laying down the rule, that increased values or expected profits or earnings can never be allowed as damages in collision cases. It is sufficient to say, that the supreme court and the judges who concurred in the opinion of the court in the latter case, have never regarded the latter case as overruling the former. Mr. Justice Nelson, who delivered the opinion of the court in the latter case, cites the former case, in *The Ocean Queen*, [supra.] as settling the rule which is to govern on like questions in all cases of marine torts. In the case of *The Vaughan and The Telegraph*, [supra.] the supreme court sanction the rule which, in the same case, I had, on the authority of *Smith v. Condry*, [supra.] adopted; and, in the very next case in the same volume, (*The Cayuga*, 14 Wall. [81 U. S.] 270,) the same court maintain the doctrine of *Williamson v. Barrett*, [supra.] that reasonable demurrage, for unavoidable detention while repairing an injured vessel, is a proper charge in all suits for damages by collision.

It seems to me impossible, either on principle or on authority, to admit the rule of damages contended for by the libellants. That rule was not departed from in the case of *The Russia*. [Case No. 12,169.] where the value at New York, of a cargo which had arrived from a foreign port, and was damaged by a collision on board of a vessel

at her anchorage in the harbor of New York, less freight and duties, was allowed; or in the case of *The Alabama*, [nowhere reported,] in this court, where the value at New York, of a vessel which had arrived from a foreign port, and was owned there, and was damaged by a collision in the harbor of New York, off Staten Island, was allowed. The principle of these allowances was, that the property was not in transitu, but was, substantially, at New York, as a market.

It is equally impossible to sustain the rule of damages adopted by the commissioner. The general increase in market value, between the time of shipment and the time of the collision, was claimed and disallowed by the circuit court for this district, in the case of *The Ocean Queen*, [supra.] I should feel bound by that decision, so long as it was not overruled, even if I did not concur in its propriety. But it seems to me a correct decision. No principle of restitution in integrum, or of putting the suffering party as nearly as possible in the same situation in which he would have been if no collision had taken place, or of giving him the actual damage sustained by him at the time and place of the injury, or of giving him indemnity to the extent of the loss sustained—as the general rule is thus variously expressed—requires or admits an allowance made on the principle adopted by the commissioner in this case. It is true, that the place of the loss was not Montevideo, and that, at the time of the loss, like wool with that composing this cargo may have been worth more in the market at Montevideo than it cost the libellants to buy this wool. In a strict sense, there was no market, at the place of the loss, for the sale of the wool, but it had for the libellants the value of the money which they had expended upon it, in procuring it and lading it and transporting it to the place where it was lost, with interest. It had, however, no further value to them, at that place, and their actual loss was nothing more than such money, with interest. Restoring to them that money, with interest, restores all they actually lost. All beyond that was expected profits. The wool was not in Montevideo, so as to have applied to it any increase in market value, after it left there, which might have applied to it if it had remained there and been sold. The increase in value after it left there, and while it was on the voyage, based on an increase in the value there of like wool, is as much contingent as an increase in its value based on a price of like wool in Boston, at the time of the loss, higher than the price paid in Montevideo. The value of the wool to these libellants at the time and place of the loss, was only what it cost them to buy it and convey it to the place of loss, with interest. So, too, they cannot be allowed for any increase in market value at Montevideo or other place of purchase or shipment, be-

tween the time of purchase and the time of shipment. The rule is one which must operate uniformly in all cases. If there had been, between the time of purchase and the time of shipment a fall in the market value of the wool at the foreign place, it would be unjust to deprive the libellants, for that reason, of a part of the money they had actually expended on the wool. The risk of a bad market, whether at Montevideo or Boston, is one which the law will not throw on the libellants, so as to make them suffer by it; and, on the same principle, the owners of a vessel whose master, by an act of negligence, makes such vessel or her owners responsible for a marine tort, ought not to be compelled to pay the profits or increase which a good market might have afforded, if the tort had not been committed. It was the force of these principles, which led the supreme court, at an early day, to adopt the rule of prime cost of cargo, and expenses, and charges, and insurance, and interest, in cases like the present, and has induced it to adhere to such rule.

The item of insurance paid on the cargo is a proper item to be allowed, if properly proved. It is a part of the cost of the cargo, on board of the vessel, at the place and time of the loss. On wool, where the contract price included the expenses of putting the wool alongside of the vessel, charges for brokerage and commissions and consul's certificates, in purchasing and shipping, if paid, and if usual and necessary expenses, are proper, as part of the cost of the wool on board. On wool bought loose, the above charges are proper, and also charges for receiving and shipping, baling, cartage and lighterage, labor, custom house duties and charges, stamps, and classification, if paid, and if usual and necessary expenses. Charges for placing money at the purchase place to pay for the wool are not proper—such as commission for drawing bills of exchange, and London banker's commission, and brokerage on sale of exchange, and premium of exchange. Nor is the item of interest on the cost of the wool between the time of paying for it and the time of reimbursement by exchange, allowable, in that shape. Interest, however, on the purchase price paid, from the time it was paid, is allowable. So, also, interest is allowable on all other allowable items proved and paid. But such rate of interest on all the items in regard to the cargo must be six per cent., and not seven.

The claimants except because the commissioner has allowed interest on all the items in his report, as well as on those relating to the cargo, and also, because, in allowing it, he has taken seven per cent., and not six. I do not see why interest should not be allowed from the time of the loss on the value of the vessel, and of her net freight, and of provisions, and of the

chronometer, and of the clothes, money and effects of the officers and seamen, and, from May 16th, 1871, on the amounts allowed in the nature of wages to the officers and seamen. But the rate of interest must be six per cent., and not seven.

As to interest on money paid out by the libellants, there can be no proper objection to its allowance. As to interest on the other items above referred to, interest is not allowable as a matter of law, except in cases of contract, or the unlawful detention of money. In cases of tort, its allowance as damages is a matter of discretion. *Lincoln v. Claffin*, 7 Wall. [74 U. S.] 132, 139. It seems to me a proper allowance in this case on the items referred to. *Allen v. Mackay* [Case No. 228;] *Egbert v. Baltimore & O R. Co.*, [Id. 4,305.]

In admiralty, in cases of collision, where interest is allowed, it ought to be a uniform rate, and not one varying with the laws of the states. *Hemmenway v. Fisher*, 20 How. [61 U. S.] 255, 259. Such rate of interest, in collision cases tried in this court, has been and is six per cent., except, that, on money paid out here, for repairs made here, interest according to the law of this state has, in some cases, been allowed. This rate of six per cent. was fixed at an early day, in analogy, perhaps, to the rate fixed by act of congress as the rate on bonds for duties to the United States. Act March 2, 1799, § 65, 1 Stat. 677. It is the rate which the supreme court has allowed in cases of this kind.

The third exception of the claimants is technically correct and must be allowed. The other exceptions of both parties are disposed of in accordance with the views hereinbefore expressed, and the case must be referred back to the commissioner to be adjusted accordingly.

Case No. 159.

In re ALEXANDER.

[8 Ben. 99.]

District Court, S. D. New York. May, 1875.

BANKRUPTCY—COMPOSITION—POWER OF ATTORNEY.

Creditors of a bankrupt, who offered terms of composition, gave a power of attorney to T., which stated that the composition was not to be accepted if made for less than 20 per cent., 10 per cent. to be paid in six months, and 10 per cent. in twelve months, from February 16th, 1875. T. signed a composition which provided for the payment of 20 per cent. in six and twelve months from March 16th, 1875: *Held*, that this difference in time was fatal to the proceedings.

In bankruptcy.

BLATCHFORD, District Judge. There seems to me to be a fatal difficulty about

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the proceedings in the composition in this matter. The composition provides for the payment of 20 per cent. in two equal payments at six and twelve months from March 10th, 1875. It is signed by nearly all the creditors [of Joseph Alexander, the bankrupt,] through Mr. Tappen as attorney, under a power of attorney which states that the composition is not to be accepted by the signers of the power of attorney, or either of them, if made for less than 20 per cent., 10 per cent. thereof to be paid in six months, and 10 per cent. in twelve months, from February 16th, 1875. This is not a clerical error, because the paper in confirmation shows that the word "March" was written in after the word "February" had been written in and erased.

Independently of this excess of authority by the attorney, it is more than questionable whether, on the developments in the evidence, the composition is one which ought to be sanctioned, or one which the creditors themselves would approve, if called upon now to sign it in person.

Case No. 160.

In re ALEXANDER.

[Chase, 295; 3 N. B. R. 29, (Quarto, 6); 8 Amer. Law Reg. (N. S.) 423; 2 Amer. Law T. Rep. Bankr. 81; 16 Pittsb. Leg. J. 91; 2 Balt. Law Trans. 759.]

Circuit Court, D. Virginia. May Term, 1869.

CIRCUIT COURTS — APPELLATE JURISDICTION IN BANKRUPTCY CASES—DISCRETION OF COURT.

1. The jurisdiction of superintendence conferred upon the circuit court by the second section of the bankrupt act, must be exercised over proceedings in bankruptcy already pending in the district court, and it seems to be a reasonable interpretation that it does not extend to decisions of the district court from which appeals may be taken.

2. By the eighth section of the bankrupt act appellate jurisdiction is given to the circuit court in four classes of cases: 1. By appeals in cases in equity decided in the district court, under the jurisdiction created by the act; 2. By writ of error in cases at law decided in the exercise of that jurisdiction; 3. By appeal from decisions rejecting wholly or in part the claims of supposed creditors; and 4. By appeal from decisions allowing such claims.

[Cited in Knight v. Cheney, Case No. 7,883.]

3. The suits belonging to the first two classes of cases seem to be those of which concurrent jurisdiction is given to the circuit and district courts by the eighth section; for no jurisdiction of cases at law or in equity relating to the estate, rights, or liabilities of the bankrupt is expressly given to the district court elsewhere than in the third clause of the second section; though this jurisdiction may be well enough held to be included in the general grant of the first section.

[Cited in Re Norris, Case No. 10,304; In re Brinkman, Id. 1,884; Goodall v. Tuttle, Id. 5,533; Johnson v. Price, Id. 7,407.]

4. The appellate jurisdiction, strictly so called, conferred upon the circuit courts, is limited to controversies between assignees and the claimants of adverse interests, and to controversies between assignees and creditor-claimants, touching the allowance of claims.

[Cited in Norton v. Barker, Case No. 10,349. Followed in York's Case, Id. 18,139.]

5. The right of appeal, as given by the statute, can neither be enlarged nor restricted by the district or the circuit court. The regulation of appeals is a regulation of jurisdiction. The circuit court has no jurisdiction of any appeal, in any case, under the bankrupt act, from the district court, unless it is claimed, and the bond is filed at the time it is claimed, and notice of it is given, as required by the eighth section of the act, within ten days after the entry of the decree or decision appealed from; or unless it is entered at the term of the circuit court first held within and for the proper district next after the expiration of the ten days from the time it was claimed.

[Cited in Benjamin v. Hart, Case No. 1,302; Judson v. Courier Co., 25 Fed. Rep. 709. Limited in Baldwin v. Rapplee, Case No. 802.]

6. The only construction which gives due effect to all parts of the act relating to revisory jurisdiction seems to be that which on the one hand excludes from the category of general superintendence and jurisdiction of the circuit court the appellate jurisdiction defined by the eighth section; and, on the other, brings within that category all decisions of the district court or the district judge at chambers, which can not be reviewed upon appeal or writ of error under the provisions of that section.

[Cited in Gilbert v. Quimby, 1 Fed. Rep. 111; Sweatt v. Boston, etc., R. Co., Case No. 13,684; In re York & Hoover, Id. 18,139; Barstow v. Peckham, Id. 1,064. Distinguished in Gilbert v. Quimby, 1 Fed. Rep. 114.]

7. The exercise of this jurisdiction is left to the sound discretion of the circuit courts.

[8. Cited in The Norris' Case, Case No. 10,304, to the point that under section 2 a party may elect to proceed in bankruptcy or otherwise.]

[9. Cited in Sutherland v. Kellogg, Case No. 13,641, to the point that before the circuit court can take jurisdiction, the petition must show wherein the error of the ruling, complained of, consists.]

In bankruptcy. John D. Alexander was duly adjudicated a bankrupt on his own petition, and filed the usual schedules of his debts and assets. Among the debts was a judgment due Bagley, which judgment had been duly docketed under the law of Virginia in the counties where the real estate of the bankrupt lay, and thereby became a lien on such real estate. With a large number of other debts, was one due Miller, by three bonds, each for seventeen thousand dollars, dated December 24, 1864, and payable from five to six years after date. These bonds were endorsed by John Alexander, the son of the bankrupt, and were secured by a deed of trust on a plantation sold by Miller to Alexander, which deed was of even date with the bonds, and was given simultaneously with the sale, and of course were the first

¹[Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

lien on the property. John Alexander had a lease of this plantation from his father, which would expire, if proper notice was given, on the first day of January, 1870, six months' notice being necessary to oust this tenant. The assignee of the bankrupt filed a petition to sell the real estate, free and discharged from all encumbrances. On this petition Bagley showed cause against granting it until the bonds held by Miller were scaled down to their alleged proper value in legal money, they having been executed December 24, 1864, at a time when one gold dollar was worth sixty dollars of Confederate currency, and when the bonds would fall due, that currency would be utterly worthless. He claimed that the bonds must be either reduced to their gold value as of the date of their execution, or else must be considered as payable in a worthless currency, and therefore be now adjudicated as having no value, and therefore constituting no lien on the plantation covered by the deed of trust. If this was established, of course Bagley's judgment would become valuable as a valid lien on valuable property. John Alexander also showed cause, and claimed that the bonds held by Miller, and endorsed by him, should be scaled according to Bagley's contention—whereby he either would be relieved from all responsibility on them, or that by the great reduction they would undergo by the scaling process, the property would produce more than enough to pay them, and thus relieve him. It was shown that at the present or any past value of the plantation it would not bring more than twelve thousand dollars, never having brought or been valued at more than that in gold times. Alexander also claimed that any order of sale ought expressly to reserve his rights under the tenancy, or that he ought to be compensated for ousting him therefrom, out of the first proceeds of the real estate, before Miller's deed of trust.

Miller, on the other hand, appeared and consented to the sale, but claimed to have the first lien under his deed of trust for fifty-one thousand dollars, and interest from December 24, 1864, in lawful money of the United States. It was admitted that the value of the plantation before or during the war never exceeded twelve thousand dollars on a gold standard; but he contended that the purchase of the plantation at that price, payable at rates so far in the future, was a contract of hazard, in which he took the chance that the currency in existence when the bonds became payable would be more valuable than it was when they were made, and that the Alexanders, father and son, assumed the hazard that it would be less so. He claimed that the bonds were payable in the currency in existence when they fell due.

The district judge refused to scale the bonds, and on March 16, 1869, passed an

order directing a sale of the estate, allowing Miller to bid and pay his bonds at their full value on account of the purchase money, in case he purchased it, as it was almost certain he would do. From this order the assignee appealed, on the solicitation of Bagley and Alexander, who gave him security against costs of the appeal, and agreed to furnish also the appeal bond required by law. Not having been able to do so within the ten days required by the statute, these proceedings having taken place at Alexandria, in chambers, while they were all required to be entered in the clerk's office in Richmond, while the estate and the parties were in and near Lynchburgh, the district judge extended the time for filing the bond, and it was duly approved and filed within the time thus extended. Bagley and Alexander were thus satisfied that their rights were perfectly protected by the supersedeas of the bond and by the appeal which would ensue on adjudication by the circuit court, then about to meet.

After that court had been in session several days, the parties always considering themselves as the parties prosecuting the appeal, and substantially interested in it, after the court had adjourned one day, and the appeal was to be heard the next, the assignee informed them that he had authorized the counsel for Miller to move in his (the assignee's) name for the dismissal of the appeal. Thereupon they prepared a petition, setting forth the facts that the time for appeal had expired, and they were helpless unless the circuit court would supervise these proceedings under the power given in the second section of the bankrupt act.

For the petitioners, Bagley and Alexander, Bradley T. Johnson moved for leave to file this petition, and for an order restraining the district court from proceeding further in the matter until this court had heard and determined the cause. He urged that the petitioners had been taken by surprise, and if they were obliged to wait until this court issued an order commanding the assignee and Miller to appear and answer the charges in the petition—the assignees would in the meantime act in concert with Miller, as they had done before; would sell and convey the property to Miller, under the unrescinded or unsuperseaded order of the district court—and the supervision of this court be thus rendered nugatory.

L. H. Chandler and Charles Dabney, for Miller, showed cause why the petition should not be filed.

CHASE, Circuit Justice. A petition has been presented to the court by P. C. Bagley and John Alexander, for the revision of an order of the district court. It appears that among the assets of the bankrupt was a tract of land, encumbered by a deed of trust,

executed by him on December 24, 1864, in favor of William D. Miller, to secure the payment of three bonds, each for seventeen thousand dollars, payable in four, eight, and twelve years from date, respectively; that the petitioner, Alexander, is tenant of the tract, under the assignee, claiming a term which will not expire until January 1, 1870; and that the petitioner, Bagley, holds a judgment, which is a lien on the real estate of the bankrupt, and is claimed to be the next lien after the deed of trust. On March 16, 1869, the district court made two orders, one directing the assignee to sell the land, and the other directing that Miller might become the purchaser, and that the assignee should receive the amount of his bid in the trust bonds at par. The petitioners as soon as these orders came to their knowledge prayed an appeal in the name, and with the approval of the assignee, and immediately notified Miller and the clerk of the district court of their appeal. The time for filing the bond on appeal was extended by the order of the district judge until April 13, and on the 14th an order was passed showing that the assignee had filed his bond in the penalty of ten thousand dollars. On May 6, the assignee informed the counsel for the petitioners that he would not allow the use of his name in the prosecution of this appeal. The petitioners, therefore, ask in consideration of the surprise occasioned to them by this information, and also upon the ground that an appeal from the order of the district judge in such a case as that before him is not allowed by the act, that the court will give them leave to file their petition now presented and grant them appropriate relief. The petition invokes the exercise of the jurisdiction of superintendence, conferred upon the circuit courts by the second section of the bankrupt act, which provides that "the several circuit courts within and for the district where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as a court of equity."

In the consideration of this petition it becomes necessary to ascertain, if possible, the nature and extent of the jurisdiction thus conferred. It is clear that it must be exercised over proceedings in bankruptcy already pending in the district court, and it seems to be a reasonable interpretation that it does not extend to decisions of the district court from which appeals may be taken. By the eighth section, appellate jurisdiction of such decisions was conferred upon the circuit court in four classes of cases: 1. By appeal in cases in equity decided in the district court, under the juris-

isdiction created by the act; 2. By writs of error in cases at law, decided in the exercise of that jurisdiction; 3. By appeal from decisions rejecting wholly or in part the claims of supposed creditors; and, 4. By appeal from decisions allowing such claim. In the first two classes of cases, the appeal or writ of error is given to the unsuccessful party to the suit, whether in equity or at law; in the third class it is given to the dissatisfied creditor; in the fourth to the dissatisfied assignee. The suits belonging to the first two classes of cases seem to be those of which concurrent jurisdiction is given to the circuit and district courts by the eighth section; for no jurisdiction of cases at law or in equity relating to the estate, rights, or liabilities of the bankrupt is expressly given to the district court elsewhere than in the third clause of the second section; though this jurisdiction may be well enough held to be included in the general grant of the first section.

If this view is correct and the jurisdiction of the district court under the act spoken of in the eighth section is the jurisdiction defined by the third clause of the second section, the appellate jurisdiction by appeal and writ of error, from decisions in the exercise of that jurisdiction, must be regarded as limited to suits at law, or in equity, by assignees against persons claiming adverse interest, or by such persons against assignees. From these premises the necessary deduction is that the appellate jurisdiction, strictly so called, conferred upon the circuit courts, is limited to the controversies between assignees and the claimants of adverse interests and to controversies between assignees and creditor-claimants touching the allowance of claims. But there must be, obviously, numerous decisions by the district courts and district judges sitting at chambers, which are not included in either of these categories.

The order complained of in the petition is an example: It is not a decree in equity; nor a judgment at law; nor a rejection of claim in whole or part; nor an allowance of a claim. From this order, then, it is clear no appeal could be taken. On this point there seems to have been a misapprehension both of counsel and of the district judge; for an appeal was allowed, though not in time; and afterwards the time for filing the appeal bond was extended. Of this nothing more need be said now than that the right of appeal as given by the statute can neither be enlarged nor restricted by the district or the circuit court. The regulation of appeal is a regulation of jurisdiction. The circuit court has no jurisdiction of any appeal in any case, under the bankrupt act, from the district court, unless it is claimed and bond is filed at the time it is claimed, and notice of it is given, as required by the eighth section of the act,

within ten days after the entry of the decree or decision appealed from; or unless it is entered at the term of the circuit court first held within and for the proper district next after the expiration of the ten days from the time it was claimed. This is mentioned here only to correct the misapprehension which seems to prevail, concerning the jurisdiction of this court upon appeals. Returning, then, to the order mentioned in the petition, and finding it as already stated to be one from which no appeal can be taken, the conclusion is inevitable that it is one which may be reviewed in the exercise of the power of general superintendence, or that it cannot be reviewed at all.

It may be said that the superintending jurisdiction does not extend to decisions of the district court, or of the district judge at chambers; and, certainly, if it does not extend to both, it extends to neither; for the first section of the act gives the same jurisdiction to the district judge at chambers as to the district court. This construction would limit the revisory jurisdiction of the circuit court to that given in the eighth section. But it is plain that this construction is not the correct one. It would, indeed, nullify the operation of the most important clause of the second section; for it would limit the superintending jurisdiction to the proceedings of assignees and registers; and these seem to be already placed by the first clause under the supervision of the district court. The better, and indeed as it seems to me the only construction which gives due effect to all parts of the act relating to revisory jurisdiction, seems to be that which on the one hand excludes from the category of general superintendence and jurisdiction of the circuit court the appellate jurisdiction defined by the eighth section; and on the other, brings within that category all decisions of the district court or the district judge at chambers, which cannot be reviewed upon appeal or writ of error under the provisions of that section. The exercise of this general jurisdiction is not placed by the act under specific regulations and restrictions like the proceeding by appeal on writ of error. It was doubtless thought most advisable to leave its regulations to the discretion of the court and to the rules to be prescribed by the supreme court. As yet, the supreme court has prescribed no rule concerning it; nor has this court. In the case before us, its exercise must depend on the sound discretion of this tribunal. Unreasonable delay in invoking the superintending jurisdiction should certainly not be allowed. Nor, on the other hand, should such excessive rigor be exercised that the ends of justice will probably be defeated. Leave is given to file the petition, and other questions are reserved until the coming in of affidavits; and in the meantime let further proceedings under the order of the district court be suspended.

Case No. 161.

In re ALEXANDER.

[1 Lowell, 470; 4 N. B. R. 178, (Quarto, 145); 18 Pittsb. Leg. J. 81; 3 Amer. Law T. 280; 1 Amer. Law T. Rep. Bankr. 238.]

District Court, D. Massachusetts. Sept., 1870.

BANKRUPTCY—SECURED CREDITOR—GIFT TO WIFE
—LAND IN DEBTOR'S NAME—PAROL EVIDENCE.

1. One who holds the note of the bankrupt not yet due, has a good petitioning creditor's debt.

2. A creditor who holds security from the supposed bankrupt may petition for adjudication against him, if the security falls short of the debt by two hundred and fifty dollars or more.

[Cited in Re Stansell, Case No. 13,293; In re Jaycox, Id. 7,240; In re Crossette, Id. 3,435; In re California Pac. R. Co., Id. 2,315.]

3. It is no defense to a petition in invitum that the petitioning creditor is the only creditor of the supposed bankrupt.

4. A gift of all a debtor's property to his wife is an act of bankruptcy.

5. If land stands in the name of the debtor and is conveyed by him for the apparent purpose of avoiding attachments, it is doubtful whether parol evidence ought to be received that the land was held only in trust.

6. It seems, that a creditor of a bankrupt holding security on the property of a third person, may prove for his whole debt without renouncing such security.

In bankruptcy. These petitions for involuntary bankruptcy against the several defendants were tried together by consent of the parties. The defendant, James F. Alexander, bought out the stock in trade of the petitioner, O'Connell, in February, 1869, for about twenty-four hundred dollars; of which five hundred dollars was paid down, and for the remainder the two defendants gave their joint and several promissory notes on one, two, three, and four years, with interest at eight per cent. a year, payable semiannually, secured by a mortgage on the stock in trade. William B. Alexander, the father of the other defendant, had no interest in the purchase, but joined in the notes for the greater security of the petitioner, and, as between the two defendants, was a surety only, [and is so alleged in that petition.]¹

In February, 1870, the first note became due and was paid, together with the interest on the whole debt. The next note will be payable in February, 1871. On the thirteenth of February, 1870, the father conveyed his dwelling-house and land at East Boston to his wife. He was not and never had been a trader, and he had no other estate or effects liable to seizure on execution, and owed no debts excepting to this petitioner. In March the son conveyed to his wife a dwelling-house and land which had stood in his name for about two years. Evidence was admit-

¹[Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

²[From 4 N. B. R. 178, (Quarto, 45).]

ted, de bene, to show that he held the house by gift from his father-in-law, upon an oral trust or understanding that it should be used, enjoyed, and conveyed for the benefit of the grantor's family, including the defendant's wife. The conveyance to the wife was made without the consent or knowledge of the father-in-law, who heard of it but lately, not long before this petition was filed, and testified that he acquiesced in the arrangement. This defendant owed no debts of any consequence, excepting the mortgage debt, and one to his aunt, of whom he borrowed the five hundred dollars paid out in the first instance towards the purchase of this stock. The evidence tended to show that this debt would not be pressed against him.

J. D. Ball, for petitioning creditor.

J. H. Bradley, for respondents.

LOWELL, District Judge. Several points of law have been ably discussed before me, and I will consider them in their order.

1. The fact that the petitioner's debt is not yet payable is not a valid answer to this proceeding. By section 39 all creditors whose debts are provable under the act may petition; and by section 19 debts existing, but not payable until a future day, are provable. [This is decisive. But I may add, that such has been the decision of the only court whose opinion I have seen.]³ It was so under the act of 1841. *Barton v. Tower*, [Case No. 1,085.] And the practice has always been so under the insolvent law of this commonwealth. It would be a sad defect in a bankrupt law if the rights of creditors depended on the time at which their debts matured.

2. The next objection is that a creditor who holds security cannot petition. Here an important distinction is to be noted. This creditor has no security upon the property of W. B. Alexander, and the language of section 20 is that a creditor who holds security upon the property of the bankrupt, shall be admitted to prove only for the balance, &c. This would seem to show that the petitioner has a provable debt for the full amount against the estate of the father, because his only security is on the estate of the son. Such has always been the practice in England, and I am much inclined to think it the true practice. If the surety pays the debt, he may be entitled to the benefit of the collateral security. But in bankruptcy it seems more just and equitable that the creditor should have the benefit of all his remedies, so that he may obtain his whole debt, if possible. If he is obliged to realize his security, and prove only for a balance, he will be losing the advantage for which he has stipulated, of the full credit of the surety. A contrary doctrine appears to have prevailed in Massachusetts. *Lanckton v. Wolcott*, 6 Metc. 305. But I am not prepared to say that I could follow that precedent, nor

that the statutes are precisely alike on this point. Judge Fox has ably vindicated what I believe to be the true doctrine under the bankrupt law. It is not necessary to decide the question in this case, for reasons which will presently appear.

3. The next question is whether a creditor who holds a mortgage upon the property of his debtor, can proceed against that debtor himself by petition in bankruptcy. By section 20 such a petitioner can be a creditor only for the balance, after deducting the value of the property, which value is to be ascertained by agreement with the assignee, or by a sale under direction of the court. The argument is that until an assignee is appointed it cannot be legally ascertained whether such a mortgagee is really a creditor or not. This appears to me too strict and literal a construction. Take the case of an admitted act of bankruptcy, and of creditors whose security is plainly inadequate. Are they to be without remedy? No better illustration than this case affords could be desired. If this creditor cannot petition there is no other person who is interested to do so, and after the six months have passed he is without remedy. I have known a case in which all the creditors were secured, and none of them adequately. The true intent and equity of the statute will be met by holding that when the security falls short of a full indemnity, by two hundred and fifty dollars, or more, thus leaving the amount of a petitioning creditor's debt practically unsecured, the debt is sufficient. This will be a question of fact like any other, and no more difficult to decide than such as often arise on a disputed account or other debt sufficient in kind. This is the law of England by the express words of 24 & 25 Vict. c. 134, § 97. I do not wish to be understood that a creditor holding collateral security may not petition, if he offers to surrender and cancel his security, nor that any security by attachment or other lien created by law would usually be a bar; but my opinion is that full and adequate security created by contract, must be abandoned, and that if inadequate it must be so to the extent above mentioned. [Nor is it to be understood that it is any defense in bankruptcy that the petitioner is the only creditor, or that he has an adequate remedy at law or in equity in the state or federal courts. The bankrupt law protects all creditors, and is additional to other remedies in all cases to which it applies.]⁴

4. It is no defence in bankruptcy that the petitioner is the only creditor, nor that he has an adequate remedy at law or in equity in the state or federal courts. The bankrupt law protects all creditors, and is additional to other remedies in all the cases to which it applies. This creditor alleges in his petition, and has proved to my satisfac-

³[From 4 N. B. R. 178, (Quarto, 145.)]

⁴[From 3 Amer. Law T. 281.]

tion that his security falls short by more than two hundred and fifty dollars, and I must hold him entitled to proceed.

5. Have the acts of bankruptcy been established in evidence? It appears that W. B. Alexander has conveyed a homestead of some considerable value, and which was his whole property, to his wife. The effect necessarily is to delay creditors, and the intent ought to be presumed. The defendant testifies that his only purpose was to give his wife a home, and that the petitioner's debt was not in his mind at the time. But he was not in trade; there was no one but this creditor against whom the homestead needed protection, and the intent to give his wife a clear homestead necessarily involves the intent that this creditor should not reach it. I have often decided that the conveyance of the whole property of a trader to a pre-existing creditor affords a very violent presumption of a fraudulent intent. And a gift of the whole estate of any debtor is per se fraudulent. In the case of the son the evidence is not so clear that he had anything to convey. But considering that by the statute of frauds of the commonwealth parol evidence could not be admitted to prove such a trust as is here relied on, so that in case of attachment before the conveyance was made, the beneficial interest would be conclusively held to be in the defendant, I doubt if he ought to be admitted to show these alleged facts, even on the question of intent. But if the evidence is received, still the peculiar circumstances of the case seem to show that the defendant may have had some beneficial interest which he intended to withdraw from the grasp of his creditors; such seems to be a fair inference from the time and mode of the conveyance. The father and son made their deeds near about the same time, which was soon after the payment of one of the annual notes, and it must then have been evident to them that the stock in trade had been reduced in value below the amount of the mortgage debt; there were no other creditors and no apparent adequate motive for the acts, excepting the wish to confine the mortgagee to the property secured to him, and I cannot but think it a fair inference of fact, independently of legal presumptions, that the real intent was to delay and hinder the petitioner.

6. It was shown that the petitioner had acted in a harsh and even oppressive manner towards the defendant James, in respect to the foreclosure of the mortgage. This evidence was admitted only for its bearing upon the credibility of the petitioner, who was a witness in the case. It cannot affect the merits of this petition. I may, however, be permitted to observe that this seems to be a case in which the parties would do well to compromise the matter, by giving the petitioner adequate security for his debt. It is unfortunately true that the expenses in bankruptcy bear a large proportion to that part

of the petitioner's debt which remains unsecured. Still it is not a matter of discretion but of strict right that he should be permitted to proceed here if he chooses to do so. Adjudication ordered.

Case No. 162.

In re ALEXANDER.

[1 Low. 530.]¹

District Court, D. Massachusetts. Jan., 1871.

CRIMINAL LAW—VENUE—WARRANT FOR REMOVAL
—INDICTMENT AS EVIDENCE.

1. When a person is arrested here on a complaint charging him with a crime committed against the laws of the United States within another judicial district, the magistrate may lawfully receive in evidence a certified copy of an indictment found against him in that district.

[Cited in U. S. v. Haskins, Case No. 15,322; U. S. v. Brawner, 7 Fed. Rep. 88; U. S. v. Rogers, 23 Fed. Rep. 661.]

2. Such evidence, if uncontrolled, is sufficient to authorize a warrant for his transfer for trial to the district in which the indictment was found.

[Cited in U. S. v. Haskins. Case No. 15,322.]

Habeas corpus. The district attorney applied for a warrant to send the defendant [J. H. Alexander] to the district of Louisiana for trial on a criminal charge. The defendant was brought before a commissioner on a complaint, and the only evidence of probable cause was the certified copy of an indictment returned to the circuit court of the United States for the district of Louisiana. No evidence was offered by the defendant. By consent of both parties, the facts were brought before the judge, and spread upon the records of the court, in order to a decision whether the course pursued by the government in the case was the true one, and whether the defendant ought to be held for trial in the district of Louisiana. [Warrant allowed.]

LOWELL, District Judge. When an indictment has been found in one judicial district of the United States against a defendant not then within the jurisdiction, it has been much doubted whether the court in that district can issue its warrant to arrest the defendant wherever he may be found within the United States. The late Chief-Justice Taney, when attorney-general, gave it as his opinion that the power was possessed by the courts. 2 Op. Attys. Gen. 564. And this appears to be still the opinion of the office. 11 Op. Attys. Gen. 127. I am not aware of any decision of a court or judge upon the point, and it is not necessary to decide it now. That course not having been pursued, the next question is whether a copy of the indictment is sufficient evidence to authorize a committing magistrate out of the district to cause the accused

¹[Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

person to be bailed for trial in the district in which the indictment was found. The point taken by the defendant is, that he ought to be confronted with his witnesses before the magistrate, as well as at the final trial. The law of Massachusetts seems to require this, (Gen. St. c. 170, §§ 10, &c.) and it is copied from Rev. St. c. 135. I have been unable to trace it further back than the Revised Statutes, and I am informed that the practice both here and in Maine is, and so far as is known, always has been, to receive affidavits and other written evidence in proper cases on these preliminary hearings before commissioners. Such a course was sanctioned by the supreme court of the United States in *Bollman's Case*, 4 Cranch, [8 U. S.] 128; and this decision was acted on and explained by Chief-Justice Marshall in *Burr's Trial*, pp. 11, 15, 97, [Case No. 14,602.] Judge Conkling, in his *Treatise*, p. 631, represents this to be the true practice, and it has been usually followed, I believe, in the several circuits, as appears by the following cases. In *re Clark*, [Case No. 2,797;] U. S. v. *Shepard*, [Id. 16,273.] So, too, in extradition between the several states under the constitution and act of congress, such evidence is admitted. The precise question undoubtedly is, what evidence was admitted in such cases in Massachusetts in 1789. U. S. v. *Reid*, 12 How. [53 U. S.] 361. But the law of Massachusetts may be presumed, in the absence of evidence to the contrary, to have been the same with that of New York and Virginia, and with the common law of England, of which the cases cited are evidence; and the practice conforms to this view. Although it has been usual both in England and America to examine witnesses before the committing magistrate in the presence of the accused, yet this has never been an essential prerequisite to holding an accused person for trial. He might always be arrested on the warrant of a coroner or of a court upon an ex parte examination before a coroner's jury or a grand jury. The indictment in the district in which it is found is an ex parte proceeding, but since it is found upon oath, and after the examination of witnesses, it has a presumption of validity. Before the commissioner it is only a piece of evidence, to be sure, and may be met and controlled, but when it stands by itself, and uncontradicted, it seems to be enough according to our practice to authorize the warrant. Warrant to issue.

Case No. 163.

In re ALEXANDER.

[3 N. B. R. (1869), 20, (Quarto); 2 Amer. Law T. 137.]

District Court, W. D. Texas.

BANKRUPTCY—DEED OF ASSIGNMENT—RECORDATION—CLERK'S FEES—REGISTER'S FEES—MARSHAL'S FEES.

[1. Bankrupt Act 1867, § 14, provides that a copy of the deed of assignment to the assignee,

"duly certified by the clerk of the court, under the seal thereof, * * * shall be conclusive evidence for such assignee to take, hold, sue for, and recover the property of the bankrupt." *Held*, that it is the duty of the clerk to record the original deed of assignment.]

[2. The clerk has no authority to make out or charge for a certified copy of the deed of assignment unless such copy is demanded by the assignee.]

[3. For all necessary services performed by the clerk in bankruptcy proceedings, the fees for which are not provided for by the act or general orders, but which are embraced in the fee bill of 1853, fees may be taxed under the latter; and since a "warrant," within the meaning of general order No. 2, is a process, the clerk is entitled to charge for attesting the same as for issuing a warrant under the fee bill of 1853.]

[4. A register in bankruptcy is entitled to fees for certifying the date of the receipt of papers which come to his office, although he is not required, technically speaking, to file such papers in his office.]

[5. A certificate of the correctness of petition and schedules in bankruptcy may be regarded as a question certified to the court under Bankrupt Act 1867, § 4; and as such the register has a right to charge a fee (one dollar) therefor, as provided for by rule 30. Such rule, however, does not allow separate fees for issuing order of adjudication and certifying same, but one fee (one dollar) for both; and under the same section and rule he is entitled to a fee for a certified copy of the petition and schedules which he is required to furnish the assignee.]

[6. Although rule 14 requires the register to keep a docket of his proceedings in each case, yet there is no authority for his charging anything therefor, but he is entitled to fees for certifying copies of such proceedings to the clerk.]

[7. Where, under an order of court not properly a "special order," although so regarded when made, services are performed by the register not specifically required by the law and general orders, and for which no compensation is provided, he will be allowed compensation therefor, under Bankrupt Act 1867, § 47, allowing him not exceeding five dollars for each day's service under special order of the court. But such order will not justify an increase of the fee for services at a creditors' meeting, fixed by section 47.]

[8. The register is entitled to a fee for taking the marshal's affidavit on returning the warrant in bankruptcy, as for a deposition; and so as to an affidavit to an order calling a meeting of creditors, and an affidavit to the assignee's report.]

[9. When it appears from the bankrupt's schedules that there is a certain amount of assets, sufficient to justify a creditors' meeting, and the application for such meeting is made more than a month before the assignee's report, a fee of three dollars should be allowed to the register for the meeting.]

[10. The marshal is not entitled to charge for constructive mileage in serving a warrant in bankruptcy. Actual personal service, under order of court, is necessary.]

[11. The register and messenger cannot resort to the fee bill of 1853 for services rendered by them, respectively, which are not directly provided for by the bankrupt act and general orders.]

[In bankruptcy. Certificate to district judge by register of questions arising in the taxation of fees of clerk, register, and mar-

shal in the bankruptcy of Alexander Alexander, upon exceptions by the bankrupt's counsel to certain items of fees charged.]

DUVAL, District Judge. Upon motion of the bankrupt's counsel, the officers of the court were required to tax their costs in this case, and this having been done the following items were objected to, and the opinion of the court sought thereon, viz.:

Of the Clerk's Costs.

- 1st.—Filing, certificate and entry of order to record assignment.... 40c.
- 2d.—Filing, certifying and entry of assignment \$1.05

The objection made to these two items, if I understand it correctly, is predicated upon the idea that the register has no authority to order the clerk to record the deed of assignment required to be made by the 14th section of the bankrupt act, and that in fact it is not intended by the law to be recorded. Thus, as it seems to me, is a mistake. The section above referred to, according to my understanding, contemplates that the original deed of assignment, after being recorded by the clerk, shall be given to the assignee, who is required to have the same recorded in the different counties, &c., wherein the bankrupt may own real estate. It provides that "a copy duly certified by the clerk of the court, under the seal thereof of the assignment, made by the judge or register, as the case may be, to him as assignee, shall be conclusive evidence for such assignee to take, hold, sue for, and recover the property of the bankrupt." If the original deed is to be delivered to the assignee, and not recorded by the clerk, I am at a loss to know how he could, if called upon, comply with this provision of the law. Moreover, if the original deed is not to be entered of record by the clerk, and the same should be lost or destroyed before the assignee could have it recorded in the proper registry offices, then no copy of it could be had. In such case, the only mode for supplying its loss would be for the judge to order the register to make another deed nunc pro tunc, and this the law does not seem to contemplate. From a careful examination of section 14, my construction is that it not only intended, but that substantial reason requires, that the clerk should record the original deed of assignment. This being so determined, the two charges above made by the clerk are unobjectionable, unless it be as to their amount, and to this I do not understand the bankrupt as excepting.

- 3d.—Certified copy of deed of assignment \$1.00

It results from the views expressed by me in regard to the two foregoing items that the clerk has no authority to make out and charge for a certified copy of the deed of assignment unless it is demanded by the assignee. Until it was otherwise ordered by

the court the practice here was to file the original deed of assignment in the clerk's office, and deliver a certified copy to the assignee. I presume this was done in the present case, and hence the charge was made. Believing that such a mode of proceeding is incorrect, I sustain the exception taken to this item, unless it should appear that the certified copy was made at the request of the assignee.

The next charge objected to is:

- 4th.—To issue warrant in bankruptcy \$1.50

This charge, as I am informed by the clerk, is composed of the following items, viz.: Warrant, \$1; certificate of the clerk of the date of its issuance endorsed, 15 cents; entering on docket, 15 cents, and certificate of filing same when returned, being 10 cents for filing and 15 cents for certificate, making an aggregate of \$1.55, 5 cents more than the amount charged. This item is taxed under the fee bill of 1853. The objection taken to it is that it is the duty of the register to issue the warrant, and that he having charged a fee therefor in this case, the clerk can make no charge for the same act. It is true that section 11 of the bankrupt act, provides that the "judge or register shall issue a warrant to be signed by such judge or register directed to the marshal, &c. But this is qualified by rule 2, of the general orders, which requires that all process, summons, and subpoenas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks with the signature of the clerk and seal of the court, may, upon application, be furnished to the registers." Section 10 of the bankrupt act makes it the duty of the justices of the supreme court of the United States to frame general orders for the following purposes, among others, viz.: "For regulating the fees payable, and the charges and costs to be allowed, except such as are established by this act, or by law," &c. So I take it that for all necessary services performed by the clerk of the court in proceedings in bankruptcy, the fees for which are not provided for by the act or general orders, but are provided for by the fee bill of 1853, that they may rightfully be taxed and allowed under the latter. That this is so is rendered still more obvious by the 47th section, which enacts, "that in each case there shall be allowed and paid in addition to the fees of the clerk of the court, as now established by law or as may be established by general orders, &c., the following fees, &c." Thus clearly recognizing the right of the clerk to charge according to the fee bill of 1853, for services required by the bankrupt act, and not otherwise provided for. My opinion is that the warrant is a process within the meaning of general order No. 2, and that in being tested by the clerk under seal of the court he is entitled to charge therefor as for issuing a warrant un-

der the fee bill of 1853. In one respect the warrant may be regarded as being issued by the register, for after it has been tested by the clerk under the seal of the court it is countersigned by the register, who inserts therein the names of creditors, the time appointed for their meeting, &c. My conclusion is that the clerk is entitled to the fees as charged, and that the exception taken thereto should be overruled.

Next, as to the register's bill of costs. The items excepted to are:

1st.—To filing three papers, (petition, order assignment, order reference) 75c.

I can find no warrant for this charge, inasmuch as the register is not required nor does the law seem to contemplate that he shall, technically speaking, file any papers in his office. But I think it is right that he should endorse upon each paper that comes to his office the time at which it was received. The charge made is therefore allowed, as for a certificate of this character. This, as it seems to me, is authorized by a just construction of the 30th rule. The charge made is therefore allowed to the extent of 45 cents.

2d.—Certifying correctness of petition and schedules..... 55c.

Rule 7 makes it the duty of the register to examine the bankrupt's petition and schedules, and to certify whether the same are correct in form. This is a duty of some trouble and importance. Rule 30 allows him for every certificate of question to be certified to the district judge, under the 4th and 5th sections of the act, one dollar, while the certificate of the register as to the correctness of the petition and schedules is a certificate of a question which ought to be made to the court. I do not believe it is that character of certificate contemplated by the fifth section. But it seems to me it may be properly regarded as a certificate of a question arising under the fourth section, while the register is sitting in chambers, and despatching there the administrative business of the court. If this be not so, I am at a loss to conceive under what other part of the 4th section any question could be certified. Regarding it, then, as a question properly certified under the 4th section, I suppose the register would be entitled to charge \$1 therefor. But if incorrect in this, I think he might certify to the correctness of the petition and each schedule separately, and as these would ordinarily constitute several papers, the charge would usually exceed that now made in this case. The exception to his item is overruled.

3d.—Issuing order of adjudication.. \$1.00

4th.—Certifying same to clerk..... 1.00

For performing both the services mentioned in these two items the register is authorized under rule 30 to charge one dollar. The above charge, therefore, is double what it should be, and the exception taken thereto is sustained.

5th.—Entering case and proceedings in docket \$1.00

6th.—Certifying abstract of same to clerk 25c.

By section 14 the register is required to keep a docket in which to make short memorandums of his proceedings in each case, and by rule 11 he is to furnish the same to the clerk to be entered on the minutes book of the court. While the law imposes on the register the duty of keeping this docket, and it is obvious he ought to be paid for it, I can find no authority for his charging any fee therefor. But he is entitled to charge for certifying copy of these proceedings to the clerk. The exception to the 5th item is therefore sustained but overruled as to the 6th.

7th.—Certified copy of petition and schedules for assignee..... \$6.50

According to my understanding, a copy of these papers is required to be furnished to the assignee by the register, under section 4, and he has the right to charge for it under rule 30. Whether the charge is too much or not I am unable to say, as this would depend upon the number of folios.

8th.—One hour's employment, calculating interest 40c.

This is a service necessary in many instances to be performed, in order to determine the amount of indebtedness due from or to the bankrupt. Still, it is one not specifically required by the law, nor is any provision made to pay for it. On the 15th of October last an order was entered by the court, which, though not properly a special one, was regarded as such at the time, and may, I think, be so considered in so far as it authorized and provided for the performance of any service by the register not specifically required by the law and general orders, and for which no compensation was provided. By section 47, the register is entitled to not exceeding \$5 for each day's service under special order of the court. This, taken in connection with the order of the court above referred to, seems to me to authorize this charge. If so, and one hour's service in calculating interest be regarded as one-sixth part of a day's service, the same charge ought to be made, and that of 40 cents is little enough. The exception to this item is overruled.

9th.—One day's actual service, first meeting of creditors..... \$5.00

10th.—Oath upon return of warrant 50c.

11th.—One day's actual service, meeting of creditors..... \$5.00

By the 47th section of the act a fee of \$3 is allowed to the register for each day on which a meeting is held. It was supposed by the register, that the order of this court of 15th of October last, before referred to, justified the above charges of \$5, but upon mature reflection and careful examination I am satisfied such is not the case. The fee for service rendered by a register at a meeting

of creditors is fixed by the 47th section. It cannot be increased by means of an order designed to be special. Such seems to be the opinion of both Judges Ballard and Blatchford, and in this I concur with them. The exception, therefore, to the 9th and 11th items, is sustained. The charge in each case should be \$3. The exception taken to the fee of 50 cents, is overruled. This item has reference to the marshal's oath on return of the warrant. It is in effect a deposition, and under section 47 the register has a right to charge for it as such. Whether the amount is correct or not, I have not the means of determining.

12th.—Issuing order appointing assignee \$1.00

13th.—Certifying same to clerk.... 1.00

For reasons stated in regard to the 3d and 4th items a charge of but one dollar should have been made for both these services. The exception is therefore sustained.

14th.—Entering proceedings on docket 10c.

15th.—Certifying same to clerk.... 25c.

For reasons already given the exception is sustained as to the first of these two charges, and overruled as to the latter.

16th.—Application for general meeting of creditors..... \$1.00

17th.—Issuing order and calling same 1.00

18th.—Certifying same to the clerk.. 1.00

The exception to the 16th item is overruled. The charge is expressly authorized by the 47th section. The exception to the two remaining items is sustained; the fee for both should be \$1.

19th.—Entering proceedings on docket 50c.

To this item the exception is sustained.

20th.—General meeting of creditors \$3.00

The ground of objection to this item, in connection with the 16th, seems to be that under the 27th and 28th sections of the act a meeting of creditors ought not to be held in cases where there were no assets. This is probably the correct practice, but then I do not think these meetings can be dispensed with except by an order of court, predicated upon a report of the assignee, showing that there are no assets. In this case it appears from the bankrupt's schedules that he showed about \$2,500 of assets, and the application for meeting of creditors was made more than a month before the assignee's report. I think this charge is correctly made, and the exception to it is overruled.

21st.—Affidavit to order calling said meeting 50c.

22d.—Affidavit to assignee's report.. 50c.

I regard both these as depositions. The exception to them is overruled.

23d.—Entering proceedings in docket 25c.

The exception to this is sustained.

24th.—Certifying proceedings to clerk 25c.

To this charge the exception is overruled.

25th.—Filing order calling general meeting 25c.
The objection to this is sustained.

Marshal's Costs.

Exception is taken to the 2d item thereof, being mileage on 200 miles, for service of warrant of bankruptcy, \$20. The 11th section of the act provides the mode by which the warrant shall be served, and I do not think it authorizes any charge for constructive mileage. There must be actual personal service under order of the court to authorize it. The exception to this charge is sustained.

As an act of justice to the officers of the court I will here say that until my attention was called specially to the matter of costs by the exceptions taken in this case, my impression was that for any service rendered by them respectively, not directly provided for by the bankrupt act or general orders, they could resort to the fee bill of 1853, and this they understood from me in conversation. That such is the case, so far as the clerk is concerned, there can be no doubt, but, upon mature investigation I am inclined to the opinion that the register and messenger are not embraced in this rule. It is proper, also, that I should say in justification of the register that in making the charge of \$5 for each of two days' service, he supposed that he was authorized to do so by the order of this court of 15th October last. He was further misled in making the charge, embraced in items 3d and 4th, 12th and 13th, 17th and 18th, by the fee bill of the register, as published in Rice's Manual, page 231. The clerk will certify this opinion to the register, W. D. Price, Esq.

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ALEXANDER, The.

[See Brown v. The Alexander McNeil, Case No. 1,988; Southern Bank v. Same, Id. 13,186; Coyne v. Same, Id. 3,312a.]

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Case No. 164.

The ALEXANDER.

[1 Gall. 532.]¹

Circuit Court, D. Massachusetts. Oct. Term, 1813.²

PRIZE — TRADING WITH ENEMY AFTER DECLARATION OF WAR — CONFISCATION OF VESSEL — EVIDENCE OF CAPTURE.

1. If, after a knowledge of the war, an American vessel go to an enemy port, and take in a cargo there, the vessel and cargo are liable to confiscation for a trading with the enemy. See The Mercurius, 1 C. Rob. [Adm.] 80; The Columbia, Id. 154; The Neptunus, 3 C. Rob. [Adm.] 173; The Alexander, 4 C. Rob. [Adm.] 93; The Exchange, 1 Edw. [Adm.] 39.

[See Caldwell v. Southern Exp. Co., Case No. 2,303.]

¹[Reported by John Gallison, Esq.]

²[Affirmed by the supreme court in The Alexander, 8 Cranch, (12 U. S.) 169.]

2. What constitutes a capture. If there be an animus capiendi, and a submission on one side, and a possession on the other, it constitutes a capture, although no prize crew be put on board.

3. A prize crew not necessary to navigate a captured ship, so as to preserve the possession of the captors, if the captured crew agree to navigate her.

4. But the captured crew are not by law compelled to navigate her.

5. Where, on the original preparatory evidence, the fact of capture is admitted, further proof ought not to be admitted, to create doubts, as to the fact of capture.

6. Further proof is never allowed to a party, who shows himself in delicto.

[Cited in *The Ouba*, Case No. 3,457; *The Lilla*, Id. 8,348.]

7. The president's instruction of the 28th of August, 1812, did not protect from capture vessels coming from British ports with cargoes put on board long after a full knowledge of the war.

[8. Cited in *The Revere*, Case No. 11,716, as authority for dismissing a claim, and even for condemnation, where a ship sailed with false papers, as to her destination, and put in a false claim, supported by false testimony.]

[See *The Joseph*, 8 Cranch, (12 U. S.) 451; *The Rapid*, Id. 155; *Jecker v. Montgomery*, 18 How. (59 U. S.) 114; *The Diana*, Case No. 3,876; *Caldwell v. Southern Exp. Co.*, Id. 2,303.]

[In admiralty. Libel, as prize, of the brig *Alexander* and cargo, (William S. Picket, master, John Welles and Samuel Welles, claimants.) The United States also interposed a claim to the vessel and cargo as forfeited under the nonimportation act. The district court condemned the property as forfeited to the United States. From its decree the captors and the claimants appeal. Decree of condemnation to captors, affirmed by supreme court. *The Alexander*, 8 Cranch, (12 U. S.) 169.]

Cummings & Sprague, for captors.

F. Blake and R. G. Amory, for claimants.
George Blake, for the United States.

Before STORY, Circuit Justice, and DAVIS, District Judge.

STORY, Circuit Justice. The brig *Alexander* and cargo, owned by Messrs. John and Samuel Welles, (who are American citizens,) was captured by the privateer *America*, John Kehew, commander, on the 2d of June, 1813, on the high seas, for an alleged illegal traffic with the enemy. From the preparatory evidence and papers, and the affidavit of the claimants, (which as to these facts does not seem controverted,) it appears, that the brig sailed from Boston, in December, 1811, on a voyage to Naples, where she safely arrived and took on board a cargo of brandy, wine, and cream of tartar, with which she sailed from Naples, on the 22d of June, 1812, having on board a British license to protect the same on a voyage to England. The claimants assert, that when the brig

sailed from Naples, it was the intention of the master to land his deck load of brandy at Gibraltar, and to proceed with the residue of the cargo directly to Boston, and that the British license was intended as a protection of the brig and cargo until they had passed the Straits of Gibraltar. The brig accordingly stopped at Gibraltar, discharged her deck load, and sailed for Boston with the remaining cargo. In the course of the voyage, about the 3d of August, the master received information of the war, and immediately, and with a view to avoid British capture, changed his course for England, and on the voyage thither, the vessel was captured by two British cruisers, carried into Cork, and, after a detention of seven months, was, on trial, finally restored. The cargo was unlivered and sold at Cork, and the vessel then proceeded in ballast to Liverpool, where an attempt was made to sell her, but without success. Mr. Samuel Welles (one of the claimants) being then in England, thereupon purchased, with the funds of the partnership, the present cargo, consisting wholly of British manufactures, with a view to withdraw these funds from Great Britain, and on the 9th of May, 1813, the brig with the said cargo on board, sailed from Liverpool, on a voyage to Boston, for which place she was steering at the time of the capture. The brig arrived in Boston harbor on the 5th of July, 1813. The master immediately went on shore, and delivered all the invoices and letters respecting the cargo to the claimants, and they have never been since produced in the cause. At the time of the capture by the privateer *America*, a prize-master only was put on board; and a question having been made at the first hearing, as to the fact of capture, the district court directed further proof to be made on that point. Upon the further proof, a variety of affidavits were produced by each party, and also a paper signed by the master on the day of the capture, of which duplicates were made, one for the prize-master, and another for the privateer. The paper is as follows: "June 2d, 1813. I hereby certify, that I have this day been captured by the private armed ship *America*, of Salem, John Kehew, master, and that John Hooper, the 5th, has been put on board as prize master." It further appeared, and indeed was admitted by all parties, that the prize-master took possession of the ship's papers, at the time of the capture, and held them until the 13th of June, when a vessel, supposed to be a British cruiser, was descried, and the papers were handed to Captain Picket, in order to prevent any suspicion of the vessel's being a prize. The vessel turned out not to be a British cruiser, the prize-master demanded back the papers, which Captain Picket peremptorily refused. Subducted from the ship's letter bag a letter addressed to his owners, and held the same and the ship's papers in his own possession, until he delivered them to his owners, as I

have before stated. The supplementary proofs, introduced on the part of the claimants, are intended to show, that the brig and cargo never were intended to be captured as prize; but that a prize-master was put on board merely to secure to the captors the property of British subjects, if any, which should be found on board. On the other hand, the proofs of the captors are intended to show an absolute and unqualified capture of the whole property, as prize, and an agreement with Captain Picket, that a prize-master only should be put on board, in order to elude, for the common benefit, the vigilance of the British cruisers. And among the proofs of the captors, the privateer's instructions are introduced, which authorize a capture of American vessels coming from Great Britain.

I do not think it necessary to discuss the statements contained in the affidavits on each side in these supplementary proofs. There are many discrepancies, which it is difficult, if not impossible, to reconcile; and as my judgment is not influenced by a balance of their comparative credibility, I shall not attempt to conciliate their apparent discords. Upon the general complexion of the cause, there can be no doubt, that this vessel was engaged in an illegal traffic with the public enemy. She proceeded to England with a full knowledge of the war, and almost a year after the declaration of war, received a cargo of British manufactures of a very recent purchase, and was captured on her return to the United States. After the solemn decisions in the admiralty, and the courts of common law in England, (*The Hoop*, 1 C. Rob. [Adm.] 196; *Potts v. Bell*, 8 Term R. 548,) which have been repeatedly recognized and enforced in this court, I did not think the general doctrine open to discussion, and so at the argument I stated to the counsel of the claimants. Until I shall be taught a different rule by the supreme court, I shall continue to hold, that trading with the enemy is an offence against the laws of war, and subjects the property engaged in the traffic to confiscation. Admitting this doctrine, the defence at the trial turned upon two points. First, that there was no actual capture; and second, that if there was an actual capture, it was illegal, and in express contravention of the instructions of the president of the 28th of August, 1812.

As to the fact of capture, upon the preparatory examinations and papers no possible doubt could arise. In answer to the usual interrogatory, the master and mate explicitly admit the capture, without any qualification or exception. The doubt, if any, must be sought aliunde, in the further proof admitted on behalf of the claimants, after the real pressure of the cause was fully known. The captors contend, that such further proof was, in point of law, inadmissible because no ground of doubt was laid in the original evidence, and because the claimants stand in the

character of parties affected with the imputation of illegal traffic; and I think that both objections are of great weight. In general the prize court is solicitous to preserve the simplicity of its proceedings, and will not engage itself in inquiries, which do not spring from difficulties or suspicions attached to the original evidence. It applies this rule to the captors; why also should it not apply to the claimants? I do not say that the court will, in no case, go into collateral inquiries, to satisfy doubts arising from extrinsic sources. We all know, that the invocation of papers from other prize causes is an admitted exception. But if the evidence of facts, which the parties could not but know with precision, be clear and indisputable upon the preparatory examinations, the court will not encourage ingenious subterfuges and new pretensions, not dreamed of in the first instance, to be ushered into the cause. Any other course would be destructive of all simplicity, and lead to endless litigation. It would be setting up false lights, to allure and delude the court into inextricable quicksands. The rule, therefore, is in the highest degree salutary, not to admit, in general, collateral evidence to create doubts, but only to admit it to remove them. And, in a more enlarged view, it is of the utmost consequence to discountenance attempts to foist into a cause supplementary affidavits of the parties examined in preparatory, to explain away or contradict their former solemn statements: Let the parties learn that truth has but one face, and that at their peril they must declare it, in its full extent, in the first instance, and that if they then conceal, they must take the consequences of their own misconduct. So much I have thought it proper to say in vindication of the general rule. In the present case I cast no imputation upon the parties.

The second objection is still more decisive against the admission of further proof. The claimants were avowedly engaged in a trade with the enemy, under circumstances, which, in the prize court, not only prohibit them from the benefit of further proof, but which stamp them and their property with the hostile character, and induce the penalty of confiscation. I speak now of the character of the transaction, not of the character of the parties. The Messrs. Welles are known to me to be very respectable gentlemen, but I am bound to consider this cause, in point of fact and law, exactly as if they were utter strangers, and without excuse or apology for their conduct. In a case then of clear illegality, I would beg to know what right they can have to the benefit of further proof? Their claim must be rejected in limine. Further proof is an indulgence granted to legal innocence and unavoidable error, but never to illicit or hostile conduct. Under such circumstances, as Sir W. Scott has observed in *The Walsingham Packet*, 2 C. Rob. [Adm.] 77, the claimants can have no right to moot

difficulties in this court, as to the final disposition of the property, or to throw doubts in its path, where none before existed.

There is yet another fact, which is in general so material that I cannot pass it over. It is, that all the letters and papers respecting the cargo have been excluded from the view of the court. The master delivered them to his owners, and the latter have not yielded the custody of them to the court.³ I advert to this fact, as deserving great consideration in ordinary cases, where further proof is asked for, and I think it will be difficult to show, that it ought to be allowed where there is a voluntary suppression. In the present case the fact becomes altogether unimportant.

With this weight of objections, I have been pressed to overrule or reject the further proof admitted in the district court. I am free to confess, that I cannot surmount the difficulties presented by the objections. My entire deference for the learned judge, who ordered the proof, is a strong inducement not to shut my eyes against evidence, which he deemed material; and as I can satisfactorily to myself dispose of the cause, without rejecting the further proof, I shall not disturb the place, which it occupies in the papers. And I am entirely convinced, that there was an actual capture of the vessel and cargo, whether the original or the supplementary proofs are examined. The written acknowledgment of the master would, of itself, seem decisive. It was written at the time of the capture, when there was no motive to disguise or suppress the real character of the transaction. This acknowledgment and the ship's papers were delivered into the custody of the prize-master. If a capture was not really intended, I should be glad to learn why this was done; and if a capture was intended, I should be glad to find the evidence that limits its extent. Even if the ship's papers had not been put into the possession of the prize-master, it would not have materially affected the case: it is sufficient if they remain on board. It is said that no prize crew was put on board, that the navigation was left to the ordinary crew of the vessel. This objection proceeds upon the supposition, that to constitute a capture as prize, the vessel must be navigated by a prize crew. The supposition is not founded in law. It is true, that the master and crew of a prize ship are not compellable to navigate her, but if they voluntarily engage so to do, it is a legal waiver of the prize crew; and the parties are bound by their engagement, and the capture stands

³Since delivering this opinion, it has been stated, though the fact did not appear in the evidence, that at the trial in the district court, the Messrs. Welles offered to produce the letters and papers delivered to them by the master, but the district court, on an objection of the captors, was of opinion, that to entitle the papers to be read at the hearing, they ought to have been produced upon the preparatory examination.

absolute. Such was the express decision of Sir William Scott in *The Resolution*, 6 C. Rob. [Adm.] 13, a case which, as to the fact of capture, strongly resembles that before the court. This doctrine has also been fully recognized in the courts of common law, and does not seem to admit of any reasonable doubt. *Wilcocks v. Union Ins. Co.*, 2 Binn. 574. Now, upon the further proof, it is quite impossible not to believe, that the master of the *Alexander* entered into such an engagement. His whole conduct evinces it, and he must be now estopped in reason and equity from asserting an objection, which he must be held to have waived.

What indeed is necessary to constitute a capture? In ordinary cases the fact admits no doubt, and in point of law, nothing more is necessary, than an intention of capture, followed up by an actual or constructive possession of the property. Force and violence, or physical superiority are not required. It is sufficient, if there be a *deditio* or submission on the one side, and an asserted possession on the other. In the present case, the *animus capiendi* must be inferred from the instructions of the privateer, the detention of the vessel, and the subsequent prize proceedings. That there was an actual possession combined with this intention of capture, as conclusively follows from the possession of the ship's papers, the putting on board of a prize-master, and the acknowledgment of the master of the vessel. It is not required, that superior force should be exerted during the whole voyage, to maintain that possession; the acquiescence of the master and crew in the terms of the captors is a full equivalent. In my judgment, the case scarcely furnishes the slightest pretext for a denial of the fact of the capture. Was then the capture legal? This depends on the construction of the executive instruction of the 28th of August, which is as follows: "The public and private armed vessels of the United States are not to interrupt any vessels belonging to citizens of the United States, coming from British ports to the United States, laden with British merchandise, in consequence of the alleged repeal of the British orders in council; but are, on the contrary, to give aid and assistance to the same, in order that such vessels and their cargoes may be dealt with on their arrival, as may be decided by the competent authorities." The captors have argued, that this instruction is illegal and void; in the first place, because congress, to whom the exclusive power of declaring war is confided, have declared it in the most general terms, and it is not competent for the President, by a mere instruction, independent of law, to limit the rights of our citizens under the act of congress. (Act June 18, 1812, c. 102.) In the next place, they contend that no such authority has been delegated by congress. The act of the 18th of June, 1812, c. 102, authorizes the

president of the United States to issue letters of marque and reprisal, in such form as he may think fit, against the "vessels, goods, and effects" of the British government and its subjects. The authority, as to the form, does not authorize the president to vary the substance of the commission; and if it did, he has not done it, for the present commission is as broad in this respect, as the act itself. The act of 26th of June, 1812, c. 107, § 9, is the only other act which can be relied on. That authorizes the president "to establish and order suitable instructions for the better governing and directing the conduct" of privateers; which can only mean instructions for the internal discipline and management of privateers, but not for the abridgment of the rights of captors under the general act. Much less could it be admitted, that he might, under the act, suspend, by an instruction, the war, as to hostile property, or property which by the laws of war is deemed hostile, and confiscable as such, and is necessarily included in the general provisions of the act declaring war. The *Elsebe*, 5 C. Rob. [Adm.] 173. This argument, as to the powers of the executive, is certainly entitled to great consideration, and in a proper case would deserve the grave examination of the court. But I shall waive all discussion of it in this place, as this cause may be well decided without touching the legality of the instruction. Admitting its legality in the broadest extent, the instruction cannot, by any reasonable intendment, protect the present case.

It will be recollected, that by the act of the 2d of March, 1811, c. 96, the president was authorized to suspend the operation of the revived sections of the act of the 1st of March, 1809, c. 91, upon the revocation of the edicts of Great Britain, which violated our neutral rights. The celebrated orders in council which were supposed to violate those rights were, by a declaration of the British government made on the 23d of June, 1812, revoked after the first day of the ensuing August. The knowledge of this fact reached the United States in August, although not officially communicated to our government until the 30th of September. As the declaration of war was not known in Great Britain at the time of the revocation of the orders in council, it was immediately foreseen, that American merchants in that country, and British factors having American orders, would act upon the presumption, that the president would exercise the authority of suspension, which had been confided to him. Shipments of goods to an immense amount would therefore be made on the faith of that repeal, before a knowledge of the war could be had, and countermanding instructions given. To prevent merchants from suffering ruin, by a confidence which they reposed in the government of the United States, (a confidence, which congress

have amply and liberally redeemed; see act of the 27th of February, 1813, c. 175.) the precautionary instruction of August was issued by the executive. It carries in its language the most clear and satisfactory evidence of being a temporary measure. Its object was to protect American ships laden with British merchandize and coming from British ports, on the faith that the repeal of the orders in council had extinguished the great controversy between the two nations. But it could avail only, while both countries were in ignorance of the existence of the war. The instruction directs the public and private armed vessels of the United States not to interrupt any American vessels coming (not which at any time afterwards during the war should be coming) from British ports to the United States, laden with British merchandize, (not, with property of British merchants or of public enemies,) in consequence of what? of the war? No; in consequence of the alleged repeal of the orders in council. It does not, therefore, purport to be an order or indefinite future operation, to license and protect a trade with the enemy, or cover the property of enemies, after a knowledge of the war. It extends, in terms and in spirit, to a protection of property shipped in consequence of the repeal of the orders in council, before any other impediment to the trade could be known to the shippers. Upon any other construction, what would be the unavoidable result? By the declaration of war, all future trade between the hostile countries became illegal, and tainted the property engaged therein with the polluting leaven of illegality and confiscation. Yet, upon the construction of the claimants, this instruction not only suspended these legal results of the war, but gave to the trade directly from British ports a perfect and yet unterminated license. War would exist every where, except as to the trade from this favored island, and there an immunity from capture would invite the enure intercourse of peace. British manufactures, even on British account, might be introduced into the United States, to an unlimited extent, in proud defiance of the non-importation act and the laws of war, and the fundamental policy of the government be uprooted. Yet to this extent must the doctrine reach, in order to support the defence of the claimants. If such a doctrine could be engrafted on the instruction, it would strike deep into the very vitals of the country. "*Haeret lateri lethalis arundo.*"

When, by the act of the 6th of July, 1812, c. 129, congress prohibited all trade with British ports under licenses, could it have been imagined, that the president had already a power to grant licenses for the trade, to an unlimited extent, by laws enacted by them almost in the same breath? When by the act of the 27th of February, 1813, c. 175, congress refused to restore the

property of British subjects, which since the war had been shipped to the United States, could they have imagined that a subsisting order of the executive exempted all such property from capture on the high seas, and gave an implied invitation to the trade? When by the act of the 2d of August, 1813, c. 56, congress declared as prize of war all vessels and cargoes covered by a British license, however in other respects the voyage might be legitimate, could they have once thought, that a power was lodged in the president, and then in full exercise, which exempted from capture all American vessels and cargoes coming from British ports? That it was a greater offence to accept a license, than to do the acts, which a license authorized? I admit that congress can only declare what the law shall be for the future, not what it was in times past; but it seems to me, that the whole current of legislation to which the president himself is a party, indicates a policy entirely the reverse of that imputed by the argument to the administration. I do not feel at liberty to strain language in support of such extraordinary pretensions. It has been argued, that the proviso to the first section of the act of the 13th of July, 1813, c. 10, recognizes the legality of this construction: if it does, I think it as clearly carries with it the implication, that the instruction has had its full effect, and is no longer operative. Upon what pretence then can the purchase and shipment of the present cargo be argued to have been made "in consequence of the alleged repeal of the orders in council?" That repeal was itself conditional, and to be void, unless the American government, after notification, revoke the non-intercourse. It refused so to do, and that refusal was known as well in Great Britain, as in the United States, several months before this shipment. In no sense, therefore, could this shipment be referred to that repeal. Besides, a new state of things, a state of absolute hostility, had intervened, and extinguished all peaceable relations, as to commerce as well as to the governments. How then could it be possible, that a shipment, which either party might seize, as prize of war, could be founded on a measure, which was exclusively adapted to peace? In my judgment, there is no ground for protecting the Alexander and cargo from confiscation, as prize of war, under the instruction of the 28th of August. The claim of the Messrs. Welles must therefore be rejected; and that of the United States, as I have repeatedly held, cannot be sustained. I therefore condemn the vessel and cargo, as good and lawful prize to the captors, on account of the illegal traffic with the enemy, and reverse the decree of the district court in all respects, wherein it differs from this decree.

[NOTE. This decree was affirmed by the supreme court. 8 Cranch, (12 U. S.) 169. The decree of the district court is not accessible.]

Case No. 165.

The ALEXANDER.

[3 Mason, 175.]¹

Circuit Court, D. Massachusetts. May Term, 1823.

SLAVE TRADE—FORFEITURE OF VESSEL

The first section of the slave trade act of 1800, c. 51, [2 Stat. 70, § 1,] prohibits not merely the transportation of slaves, but the being employed in the business of the slave trade; and therefore a vessel caught in such trade, though before she has taken slaves on board, is liable to forfeiture.

[Cited in The Porpoise, Case No. 11,284.]

[Appeal from the district court of the United States for the district of Massachusetts.]

In admiralty. Libel of seizure [against the brig Alexander, William Booth, claimant,] founded on the slave trade act of 20th of April 1813, c. 86; the act of 22d March 1794, c. 11; and the act of 10th May, 1800, c. 51.

At the trial the only count, which was sustained by the evidence, was founded on the first section of the act of 1800, c. 51.

Upon the evidence, Blair, for the claimant, contended, that there was no offence within the act of 1800, even supposing the vessel was engaged in the slave trade, because no slaves had been taken on board or were on board during the voyage, for transportation, which was necessary to bring the case within the act.

Blake, Dist. Atty., contended, that the employment in the slave trade was the thing prohibited by the act, and slaves were not necessary to be taken on board to complete the offence. He cited *The Plattsburg*,² before Judge Van Ness at New York, and *The Fortuna*, 1 Dod. 81.

Before STORY, Circuit Justice, and DAVIS, District Judge.

STORY, Circuit Justice. The first section of the act of 1800, c. 51, [2 Stat. 70, § 1,] on which alone this prosecution can be maintained, declares, "that it shall be unlawful for any citizen &c. directly or indirectly to hold or have any right or property in any vessel employed or made use of in the transportation or carrying of slaves from one foreign country to another, under the penalty of forfeiture." The question is, whether the penalty is affixed to the mere employment of the vessel for the business and for the purpose of transporting slaves, or whether actual transportation is necessary. My opinion is, that the former is the true construction of the act. We often speak of vessels "employed in the coasting trade and fisheries," and the acts of congress use the same lan-

¹[Reported by William P. Mason, Esq.]

²[Nowhere reported; opinion not now accessible.]

guage, when actual transportation and actual fishing are not intended; but the purpose and business of the voyage are the coasting trade and fisheries. And it has never been doubted, that a vessel licensed for the coasting trade and fisheries, and on a voyage for that purpose, was truly employed in such trade or fisheries, although no goods were in the course of actual transportation, and no fisheries had been yet attempted. Let us look then to the other clauses of the statute, and see whether they do not afford means to ascertain the true sense of the legislature. The second section declares it unlawful for any citizen, &c. "to serve on board any vessel of the United States employed, or made use of, in the transportation or carrying of slaves from one foreign port to another," on the penalty of fine, not exceeding 2000 dollars, and imprisonment, not exceeding two years. The language of this section is substantially like that of the first. The third section, however, is different. It declares, "that if any citizen, &c. shall voluntarily serve on board of any foreign ship or vessel, which shall hereafter be employed in the slave trade, he shall, on conviction, be liable to, and suffer the like forfeitures, fines," &c. Here the phrase used is, "employed in the slave trade," which shows, that it was the employment in the traffic or business, and not merely the actual transportation, which is the object of the prohibition; and yet it must be almost an irresistible inference, that the legislature had the same general intent in all these three sections. The fourth section still more strongly demonstrates the construction. It declares, "that it shall be lawful for any commissioned vessels of the United States to seize and take any vessel employed in carrying on trade, business or traffic, contrary to the true intent and meaning of this act, or of the said act, to which this is an addition." The words here clearly indicate a legislative intent to reach the case of vessels, whose business, employment, or traffic was slave voyages. Now it appears to me, that every vessel fitted out for the purpose of the slave trade may be truly and accurately said to be employed in that business, and carrying it on, as soon as she has sailed on the voyage. It matters not at what point of the voyage she is captured, her enterprise is the slave trade, and every act done on such a voyage is an act of carrying it on. In the case of *The Fortuna*, 1 Dod. 81, 86, Sir William Scott adopted a similar doctrine. "It matters not," says he, "in my opinion, in what stage of the employment, (i. e. the slave trade), whether in the inception, or the prosecution, or the consummation of it," the vessel is seized. I interpret the language of the first section of the act of 1800 by that of the third and fourth, and I think, that the legislature intended the same thing in all; and that is, that the employment in the business and for the purposes of the slave

trade, and not merely the actual transportation of the slaves, should be prohibited and punished. Decree of condemnation affirmed.

ALEXANDER, (ALLISON v.)

[See Allison v. Alexander, Case No. 251.]

ALEXANDER, (BENNET v.)

[See Bennet v. Alexander, Case No. 1,310.]

ALEXANDER, (BRYAN v.)

[See Bryan v. Alexander, Case No. 2,064.]

Case No. 166.

ALEXANDER v. CENTRAL R. R. OF IOWA.

[3 Dill. 487;¹ 1 Cent. Law J. 543.]

Circuit Court, D. Iowa. 1874.

RAILWAY MORTGAGE—FORECLOSURE—PARTIES.

1. A provision in a railway mortgage, authorizing the trustee, on default of the company to pay interest, to take possession of the road, operate it and receive its income, and upon notice, to sell it, is a cumulative remedy, and does not affect the right to foreclosure by bill in equity.

[Cited in Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs, etc., Co., 11 Sup. Ct. Rep. 514, 139 U. S. 137. Distinguished in *Stern v. Wisconsin Cent. R. Co.*, Case No. 13,378.]

2. The special provision of the deed of trust in question, held not to require a majority of the bondholders to unite in a suit to foreclose for interest, or request the trustee to bring such suit.

[Distinguished in *Stern v. Wisconsin Cent. R. Co.*, Case No. 13,378.]

3. If a trustee improperly refuses to bring such suit, an individual bondholder may bring it for himself and others, and make the trustee a party defendant.

4. On a dismissal, by the plaintiff, of the bill as to the trustee, the court has a discretion to allow the trustee to file a bill for the benefit of all the bondholders.

[In equity. Suit by Charles Alexander and others against the Central Railroad of Iowa and another for foreclosure of mortgage. On demurrer to bill. Demurrer overruled.]

This is a bill in equity to foreclose a mortgage made by the defendant on its railroad and property. The bill is filed by the plaintiffs as bondholders, who allege that they bring it for themselves and all other bondholders who are similarly situated. It charges default in the company to pay interest. It alleges that the plaintiffs have made a demand on the trustee in the mortgage, viz., the Farmers' Loan & Trust Com-

¹[Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

pany of New York, to bring the suit, and its refusal, and the said company is therefore made a defendant. There is no averment in the bill that a majority of the bondholders unite in bringing it, or united in the request to the trustee to bring it. The trustee appears and files an answer, setting up that a majority of the bondholders have never demanded action on the part of the trustee, and that it is willing to submit to the direction of the court as to its duty in the premises, and to become plaintiff if the court so orders. The railroad company demurred to the bill, on the ground that under the provisions of the deed of trust there could be no foreclosure by bondholders, or by the trustee, unless a majority of the bondholders so desired, and there was no such averment. The following are the provisions in the deed of trust relied on in support of the demurrer: "And the said party of the first part (the railroad company) doth hereby covenant, promise and agree, for itself, its successors or assigns, to and with the said trustee, its successor or successors, that the said company will well and truly pay each and every of said bonds issued by them, and secured by this mortgage, together with the semi-annual interest to become due thereon, at the rate of seven per cent. per annum, at the times, in the manner, and at the places specified therein, in United States gold coin. And that in case said company shall, for the space of six months, make default in the payment of said semi-annual interest to become due upon any, either, or the whole of said mortgage bonds, then, after the expiration of twelve months from the time it became due, and without demand or notice, at the election or option of a majority of the holders of said bonds, the whole principal sum mentioned in each and all of the said mortgage bonds then outstanding shall forthwith become due and payable, and the lien or incumbrance hereby created for the security and payment thereof may at once be enforced. And it is agreed, in case of the default of the payment of the semi-annual interest, as above provided, that said trustee, or its successors, is hereby expressly authorized and empowered, upon the request in writing of a majority of the owners or holders of said bonds, to enter into and upon, and to take actual possession of all the property, real and personal, and rights, franchises and privileges of the premises hereby conveyed, and each and every part thereof, and by their agents or attorneys, have, hold, use, and enjoy the same, and from time to time make all repairs and replacements, and all useful alterations, additions and improvements thereto, as fully as the parties of the first part might have done before such entry; and to collect and receive all tolls, freight, incomes, rents, issues, and profits of the same and of every part thereof, and the said trustee, and its successors, shall and may, and hereby is

expressly authorized and empowered to sell at public auction, to the highest bidder, the entire property, real and personal, rights, franchises, and privileges herein conveyed. Said sale shall be either in the city of Marshalltown, Iowa, or in the city of New York."

Platt Smith and J. F. Duncombe, for plaintiffs.

Boardman & Brown, for railroad company.
Grant & Smith, for trustee.

Before DILLON, Circuit Judge, and LOVE, District Judge.

DILLON, Circuit Judge. 1. The authority in the deed of trust to the trustee, on default of the payment of interest, and upon the written request of a majority of the bondholders to take possession of the road, to operate it and receive its income, and on three months' notice to sell the same, and divide the proceeds of the sale pro rata among the bondholders, is a cumulative remedy for the benefit of mortgage creditors, and does not exclude their right to resort to the judicial tribunals for a foreclosure. Especially is this so, as the laws of the state of Iowa forbid sales under powers of this character by proceedings out of court.

2. Provisions in an instrument of this character limiting the right of a mortgage creditor to resort to a court of chancery to foreclose his security, are not to be extended beyond the fair meaning of the language used; and it is our opinion that there is no restriction in the deed of trust before us, upon the right of the coupon-holder to foreclose for interest upon default, although a majority of the bondholders do not unite in the suit, or request the trustee to bring it. The provision in question gives a majority of the bondholders, on default of the payment of interest, the option or election, after the expiration of a year from the default, to have the whole principal sum become due at once, and the mortgage security enforced accordingly. This is not inconsistent with the unbridged right of any coupon-holder to foreclose for interest, in the manner sought in the present bill, and it was not necessary that a majority of the coupon-holders should unite in bringing the bill, or in a request to the trustee to bring it.

3. As the bill alleges that the trustee refused to bring suit, the bill was properly brought in the name of the plaintiffs, for themselves and the other coupon-holders, making the trustee a defendant.

4. If the plaintiffs elect to dismiss the bill as to the trustee, we will allow the trustee to become a party plaintiff, and to file a bill for the benefit of all the bondholders; but it would be anomalous to have the trustee on the record both as defendant and plaintiff in the same proceeding. The de-

murrer of the railroad company to the bill is overruled.

Ordered accordingly.

NOTE, [from original report.] See Galveston H. & H. R. Co. v. Cowdrey, 11 Wall. [78 U. S.] 459; Gillman v. Illinois, etc., Tel. Co., [91 U. S. 603.]

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ALEXANDER, (CONWAY v.)

[See Conway v. Alexander, Case No. 3,146.]

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ALEXANDER, (DUNLOP v.)

[See Dunlop v. Alexander, Case No. 4,166.]

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Case No. 167.

ALEXANDER v. GALLOWAY.

[Abb. Adm. 261.]¹

District Court, S. D. New York. April, 1848.

SEAMEN — FORFEITURE OF WAGES FOR THEFT OF CARGO—ACQUITTAL IN CRIMINAL PROCEEDINGS.

1. The theft of a portion of a cargo, by a mariner, works an absolute forfeiture of wages. [See Mariners v. The Kensington, Case No. 9,085.]

2. The fact that the seaman has been acquitted on a criminal trial for the larceny of a part of the cargo, is not conclusive to rebut the charge when set up as a defense against his suit for wages.

[In admiralty. Libel for wages. Dismissed.]

This was a libel in personam, by William Alexander against Joseph Galloway, master of the ship Columbia, to recover seamen's wages. On the hearing of this cause, the libellant having proved his employment on board of the Columbia by the respondent, and the earning of wages, as alleged in the libel, the respondent put in evidence tending very strongly to show that, on the arrival of the Columbia at this port, the libellant stole from the cargo, with connivance of the second mate, a bale of cotton, which he took on shore for sale. This act was relied upon by the defence as a forfeiture of wages. To rebut this defence, the libellant introduced the record of his trial and acquittal in the New York court of sessions on the charge of the alleged larceny.

J. Murroughs, for libellant.

Burr & Benedict, for respondent.

BETTS, District Judge. The defence establishes a case of unqualified plunder and purloining of a part of the cargo by the libellant on the arrival of the ship in this port; and the circumstances afford strong reason to believe that the theft was committed with deliberation, and in pursuance of a pre-considered arrangement. Such gross dereliction of duty to the ship completely annihilates all claim to wages, without regard to the value of the property stolen. Cons. del Mare, cc.

¹[Reported by Abbott Bros.]

167, 173. The mere embezzlement of cargo, or the improper use of it, or the doing an injury to it through fraud or negligence, is cause of forfeiture of wages, although it is ordinarily visited only by an abatement of wages to the amount of the ship's loss. Mason v. The Blaireau, 2 Cranch, [6 U. S.] 267; Abb. Shipp. 652. See, also, the case of Scott v. Russell, [Case No. 12,546.] But a case of premeditated thieving draws after it the forfeiture of all wages due the mariner upon the voyage. This penalty is no more severe than is appropriate to the offence. The wrong is one for which the master would be fully justified in discharging the seaman from the ship during the voyage; and offences of that class may always carry with them a forfeiture of wages. Abb. Shipp. 652. Libel dismissed with costs.

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ALEXANDER, (GOSHORN v.)

[See Goshorn v. Alexander, Case No. 5,630.]

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ALEXANDER, (GRAHAM v.)

[See Graham v. Alexander, Case No. 5,662.]

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ALEXANDER, (HABRICHT v.)

[See Habricht v. Alexander, Case No. 5,886.]

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ALEXANDER, (HARRIS v.)

[See Harris v. Alexander, Case No. 6,113.]

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Case No. 168.

ALEXANDER v. HARRIS.

[1 Cranch, C. C. 243.]¹

Circuit Court, District of Columbia. June Term, 1805.²

LANDLORD AND TENANT—ACTION FOR RENT—PLEADINGS—AVOWRY.

The avowry is prima facie evidence of the amount of rent distrained for. Judgment for double rent.

[At law.] Replevin of goods distrained for rent; avowry of rent arrear, concluding with a prayer for judgment for double rent, according to the act of assembly.

Mr. Taylor and Mr. Youngs, for the landlord, moved for judgment for double rent, under the statute of Virginia. Old Rev. Code, p. 165, § 15.

E. J. Lee and Swann & Jones, for the tenants, contended that no instance has occurred in which judgment has been given for double rent. The jury have not found that the whole amount of rent distrained for, namely, \$141.67, was due. The avowry is

¹[Reported by Hon. William Cranch, Chief Judge.]

²[Affirmed by supreme court. 4 Cranch, (8 U. S.) 299.]

for \$111.67, and the jury have found \$111.67. It was stated in the plaintiff's replevin-bond that the sum demanded was \$141.67.

But THE COURT thought the avowry was prima facie evidence of the amount for which the distress was made. The act is peremptory. The court is bound by the evidence given at the trial, and cannot now, after verdict, go into new evidence. It is not necessary that the avowry should pray judgment for double rent, but if it concludes, "prays judgment for a return, &c.," and for the damages and costs, according to law, it is sufficient to support the judgment for double rent.

Judgment for double rent.

FITZHUUGH, Circuit Judge, absent.

[NOTE. This judgment was affirmed by the supreme court. 4 Cranch, (18 U. S.) 299.]

Case No. 169.

ALEXANDER et al. v. HORNER et al.

[1 McCrary, 634; 9 Cent. Law J. 111.]

Circuit Court, E. D. Arkansas. April, 1879.

POWERS OF INSURANCE COMPANIES — PROMISSORY NOTE—PAYMENT—FRAUD—NON-JOINDER OF PARTIES—PRACTICE.

1. Insurance companies have the power to take and hold negotiable notes and other securities in the general conduct of their business, and this includes the power to negotiate them.

2. The maker of a note, who pays it to an indorsee and holder who obtained it by fraud, is discharged from liability thereon to the payee, unless the maker had notice of such fraud; and the discharge extends as well to the original consideration.

3. Where, in such a case, the payee files a bill in equity to avoid the assignment and compel the maker to pay the note a second time, upon the ground that he had notice of the fraud, the alleged fraudulent indorsee to whom the payment was made is an indispensable party.

[Cited in *Chadbourne v. Coe*, 51 Fed. Rep. 482, 2 C. C. A. 327.]

4. The objection of the non-joinder of necessary parties is not required to be raised by the pleadings; it may be made on the hearing, and it may, and in a clear case ought to, be raised and acted upon by the court on its own motion.

[Cited in *Chadbourne v. Coe*, 51 Fed. Rep. 481, 482, 2 C. C. A. 327.]

In equity. L. E. Alexander, as receiver of the Columbia Life Insurance Company, and the company, are named as plaintiffs [and Horner and Horner and A. M. Britton as defendants] in the bill, which alleges that the company is a Missouri corporation; that on the eighteenth of October, 1877, it was, by decree of the circuit court of St. Louis county, adjudged to be insolvent and enjoined from doing further business, and the plaintiff, Alexander, appointed receiver of its property and assets, with authority to sue for their recov-

[Reported by Hon. Geo. W. McCrary, Circuit Judge, and here reprinted by permission.]

ery, etc.; that pursuant to the terms of the decree, the company executed an assignment of all its property and assets to the receiver, and by the terms of the same decree the corporation was dissolved. The bill alleges further, that on the twenty-ninth of November, 1872, the defendants were "indebted" (it is not alleged this indebtedness was for a stock subscription or how it arose) to the Mound City Mutual Life Insurance Company in the sum of \$5,830, for which sum they made their notes, payable to the company, and secured the same by deed of trust on lands in Arkansas; that the name of the last-mentioned corporation was changed successively, to Mound City Life Insurance Company, to St. Louis Life Insurance Company, and lastly to Columbia Life Insurance Company, but the corporation continued the same; that the company was insolvent on the twenty-third of November, 1875, and for some time prior to that date, and so continued until it was judicially declared to be insolvent; that on the twenty-third of November, 1875, a combination was entered into between Alfred M. Britton and George J. Davis, both of whom were directors in the life insurance company (the former its vice-president and acting president and the latter an attorney for the company) and the Life Association of America, to get possession of the assets of the life insurance company by fraudulent means; that in execution of this fraudulent scheme, Britton, Davis, and the life association, in December, 1875, obtained possession of the notes of the defendants and the deed of trust given to secure the same, and cancelled and delivered them to the defendants; that the life insurance company received no consideration from Britton, Davis, or the life association for these notes, and that the defendants paid nothing for their surrender, but only gave in exchange therefor shares of stock in the company, which were worthless, because the same had never been paid for and because the company was insolvent; and that defendants had notice of these alleged facts. Horner and Horner, the makers of the notes, and who are citizens of Arkansas, and Britton, the trustee named in the deed of trust, and who is a citizen of Texas, are made defendants. Davis and the Life Association of America are not made defendants, because they are, as the bill alleges, beyond the jurisdiction of the court, and cannot be joined without ousting the jurisdiction, being citizens of the same state as the plaintiff. Prayer for decree for amount of notes and foreclosure of deed of trust.

The defendants, answering, say the notes were given by them in payment for \$5,000 subscription to the capital stock of the company; that the stock issued to them was full paid stock; they deny all knowledge of the insolvency of the company, or of any conspiracy or fraud on the part of Britton, Davis and the Life Association of America to ob-

tain possession of their notes; and allege that in the month of November, 1875, they were advised by another stockholder, residing in Helena, that Britton, upon whose representations they subscribed for the stock, and in whom they had confidence, was about to retire from the directory of the company; that they could then sell their stock for par, or possibly something more, to parties who were buying it up; that, after consultation, the Helena stockholders reluctantly agreed to sell their stock, because they believed it was actually worth much above par if the true condition of the company could be known, and they only consented to sell for the reason that they could not be on the ground personally to ascertain and look after their interests, and believed if they did not sell some means would be resorted to to crowd them out; that thereupon they sent their certificates of shares of stock in the company, indorsed in blank, to Herman & Rainey, their correspondents in St. Louis, and authorized them to sell the same, but in no event for a less sum than would be sufficient to pay off their notes then held by the company; that their correspondents afterwards advised them that they had sold their stock to George J. Davis, and taken in payment their notes due to the company and \$176.80 in money, and inclosed a check for that sum, and their notes duly assigned by the company to Davis, and by him cancelled, and also a deed of release of the deed of trust, executed by Britton, the trustee; that they never heard of George J. Davis until they saw he was the assignee of their notes, and were informed by their correspondents that he had purchased their stock; that they believed the company was solvent, and would not have sold their stock for less than par; that they acted in good faith, and had no suspicion of any fraud, or that fraud was charged upon any one in connection with the transaction, until the filing of the bill in February, 1878, more than three years afterwards; and these allegations of the answer are well supported by the evidence.

It is shown by the evidence that on the twenty-third of November, 1875, the Life Association of America entered into a contract with George J. Davis, by which the former agreed to purchase from the latter nine thousand four hundred shares of the capital stock of the St. Louis Life Insurance Company, and as much more, up to ten thousand shares (the whole capital stock of the company), as Davis might transfer and deliver within thirty days. Contemporaneously with the delivery of the stock of the insurance company, Davis was also to deliver to the life association certain other stocks and securities mentioned in the contract, then owned by the insurance company. Davis was to receive for the nine thousand four hundred shares and other securities \$1,215,000, and par value for all shares delivered in excess of that number. The mode

of paying Davis for this stock and securities was prescribed with some detail, the substance of which was, that about ninety per cent. of the sum was to be paid in the draft of Hough, president of the life association, on the life association, and accepted by it, payable at one day's sight, and the remainder in cash, on delivery of the stock and other securities mentioned in the contract. Having made this contract with the life association, Davis resigned as a director of the insurance company, and on the thirtieth of November, 1875, made a proposition to the life insurance company to purchase from it the securities mentioned in his contract with the life association at prices stated in his proposition, and at a meeting of the board of directors of the life insurance company on that day, the record shows the following proceedings were had:

"Mr. Davis then submitted a list of securities belonging to the company which he desired to purchase, the price being satisfactory, and for payment of which he would give the draft of H. W. Hough, president, on the life association to his (Davis') order at one day's sight, and accepted by said life association. After an examination of the list and full discussion thereof, the following resolution, offered by Mr. Bogy, was adopted:

"Resolved, that the vice president be authorized to sell and deliver to Mr. George J. Davis the following securities, or any one or all of said securities, at the price named in the list hereto appended, and that the vice president be authorized to receive in payment for the securities so sold and delivered, the draft of H. W. Hough, president, drawn at one day's sight, to the order of G. J. Davis, and by him indorsed, on the Life Association of America, and by said life association accepted." Then follows a list of the securities sold (which are the same mentioned in the contract between Davis and the life association), with prices annexed to each, amounting in the aggregate to \$1,111,898.34. Among the securities thus sold to Davis were the notes of the defendants, which were afterwards duly indorsed by the insurance company and delivered to him. Davis having delivered the stock and other securities to the life association under the contract of November 3, 1875, received in payment some cash and the draft of the life association for \$1,111,898.34. This draft Davis indorsed and delivered to the insurance company on the tenth of December, 1875.

In the proceedings of the board of directors on that day, it set forth that the president of the company stated to the board for its information, "that Mr. G. J. Davis had tendered him this day the draft as specified in the resolution of the board, passed November 30, in the sum of \$1,111,898.34, and that in accordance with the authorization of said resolution he had sold and delivered to Mr. Davis the securities named." At

the conclusion of this transaction the directory of the insurance company resigned, and the life association, now the holder of the stock of the former company, elected a directory composed mainly, if not altogether, of the same persons who constituted the directory of the life association. In 1876, by an amendment of its charter approved by the superintendent of the insurance department of the state, the name of the company was changed to the Columbia Life Insurance Company, and it was authorized by a two-thirds vote of its board of directors to reduce the capital stock of the company, then ten thousand shares of the par value of \$100 each, to any amount not less than \$100,000. To effect this reduction, the surplus assets of the company might be used to purchase in the stock of the company. Under this authority the directory resolved on a reduction of nine thousand shares of the capital stock, and to effect the reduction, set aside \$900,000, alleged surplus funds, and afterwards purchased that number of shares at par—\$900,000—from the life association, and paid therefor by cancelling that amount of the draft of the life association given by it to Davis, and by him indorsed to the life insurance company under its contract for the purchase of its securities. The balance of that draft, viz.: \$211,898.34, was liquidated by cash payments and other transactions between the companies. The life insurance company continued to be a going concern until it was adjudged to be insolvent. The evidence is conflicting as to whether it was, in fact, a solvent institution in December, 1875, but it was reputed solvent and to be doing a profitable business, and its stock was then worth par in the market. The life association is still a going concern. The superintendent of the insurance department, in the proceedings in which the company was adjudged insolvent, made no complaint against the reduction of the stock of the company nor the sale of its securities to Davis; nor has the company or any stockholder or creditor, or the receiver, had these transactions annulled by a direct proceeding for that purpose, or taken any steps to that end, so far as this record shows. The bill does not allege, nor do the proofs disclose the condition of the company, otherwise than generally that it is insolvent; nor are the equities of any of the creditors disclosed; nor does the bill offer to surrender up to defendants the shares of stock they sold to Davis, or make any suggestion in relation thereto, other than that it is worthless. [Bill dismissed.]

W. W. Smith and Smith & Collins, for plaintiff.

Tappan & Horner, for defendants.

CALDWELL, District Judge. The board of directors of the insurance company had an undoubted right to sell the defendants' notes

and other securities to Davis, and authorize its secretary to indorse them as was done. Banks, insurance companies, and other like corporations, have the power to take and hold negotiable notes and other securities in the general conduct of their business, and this includes the power to negotiate them. *Hardy v. Merriwether*, 14 Ind. 203; *McIntire v. Preston*, 5 Gil. [10 Ill.] 48; *Nicholas v. Oliver*, 36 N. H. 218; *Spear v. Ladd*, 11 Mass. 94; *Northampton Bank v. Pepon*, Id. 288; *Lester v. Webb*, 1 Allen, 34. The notes were negotiable, and their assignment and delivery invested Davis with the legal and equitable title to them and the right to receive payment and cancel them. He did receive payment from the makers—the defendants—in shares of stock in the company, then worth par in the market, and cancelled and surrendered up the notes to them.

The amended answer and the deposition of J. J. Horner make it certain that the defendants, in this case, had no knowledge or suspicion personally, or through their agents, that Davis had obtained their notes by fraud, or that there was any infirmity in his title; and, having paid the notes in good faith to Davis, the indorsee and holder, the plaintiff cannot compel the defendants to pay the notes a second time, even if Davis was a fraudulent holder. Payment to the thief or finder himself, of a negotiable note transferable by delivery, will discharge the maker, provided such payment was not made with knowledge or suspicion of the infirmity of the holder's title, or under circumstances which might reasonably awaken the suspicions of a prudent man. *Byles, Bills*, 213. Nothing short of fraud, not even gross negligence, if unattended with mala fides, will invalidate the payment so as to take away the rights founded thereon. *Story, Bills*, § 416; *Edw. Bills*, § 537. The bill counts upon the notes exclusively; it does not seek a recovery upon a stock subscription, nor does it even allege that the notes were stock notes. The answer discloses that the notes were given for a subscription to the capital stock of the company, but that fact did not render the notes any the less negotiable, or prevent the company from negotiating them, or excuse the defendants from paying them to the indorsee and holder; and when paid in good faith to the holder, the company can have no claim against the makers, either upon the notes or for the original consideration.

It is not true the defendants paid nothing of value for the notes. The shares of stock owned by the defendants were issued as full paid shares; the stock was then worth par in the market; the defendants refused to sell it for less, and Davis agreed to give par for it. The test is its then market value, and not what it was really worth in the light of subsequent events. The company having indorsed and transferred the notes to Davis, it is not open to it to object that he dis-

charged the debt for an inadequate consideration, if the defendants had no notice of the alleged fraud and acted in good faith. If Davis had been a bona fide holder of the notes, he could not successfully maintain that they had not been fully paid, and no more can the company.

The bill is fatally defective for want of proper parties. The gravamen of the plaintiff's bill is that Davis and the life association, acting in concert, fraudulently procured the assignment and transfer of the defendants' notes from the company to Davis. It is not alleged in the bill, nor was it claimed in argument, that defendants were parties to that fraud; it is claimed that their agent only had notice of it before paying the notes. Obviously the plaintiff has no case unless he can impeach and set aside the sale and transfer of these securities to Davis. Davis ought to be a party to any bill seeking to do this. He is entitled to an opportunity to repel the imputation of fraud and protect himself from liability if he can do so; the defendants are entitled to his aid in defending the action; and as he would be liable over to the defendants, in the event of the plaintiff's recovering, he must be made a party for the protection of the defendants, and to avoid multiplicity of suits. *Robertson v. Carson*, 19 Wall. [86 U. S.] 94. The defendants have a right to insist that Davis shall be brought in; and on the averments in the bill the life association also, because if they are compelled to pay their notes a second time they are entitled to an action over against these parties, to be reimbursed the amount paid them or Davis in satisfaction of their notes, which would be the par value of their stock, that being the market value as well as the agreed value between Davis and the defendants. But as Davis and the life association are not made parties, it would be open to them in any suit that the defendants might bring against them to be reimbursed the amount of plaintiff's recovery, to contest the question of fraud in the transfer of these securities to Davis, and it might result that the court or jury trying that issue would find the transfer was not fraudulent, and thus the defendants would be wronged in a mode that would leave them no redress. Equity will not permit a plaintiff to put a defendant in this predicament. The rule is well settled that where, in the event of the plaintiff's succeeding, the defendants will be subjected to undue inconvenience, or to danger of loss or to future litigation, or to a liability under the decree more extensive and direct than if the absent parties were before the court; or will thereby acquire a right to call upon the absent parties either to reimburse him the whole or a part of the plaintiff's demand; then such absent parties must be brought before the court in order that the rights and liberties of all may be settled by one proceeding and a multiplicity of suits

avoided, with a possible different determination of the same issue, to the irreparable injury of the defendant sued. *Story*, Eq. Pl. §§ 136, 138; 1 *Daniel*, Ch. Pl. & Pr. 281, 282; *Robertson v. Carson*, 19 Wall. [86 U. S.] 94; *Milroy v. Stockwell*, 1 Cart. (Ind.) 35.

Anticipating this objection, and with a view to avoid it, the plaintiff alleges in his bill that Davis and the life association are beyond the jurisdiction of the court and citizens of the same state as the plaintiffs, and cannot therefore be made parties without ousting the jurisdiction of the court. The learned counsel for the plaintiffs argued earnestly that these averments, under the act of congress of February 23, 1839, (section 737, Rev. St.) and the 47th equity rule, dispensed with the necessity of making these parties defendants. This argument has often been made before, and always unavailing in a case like this. The supreme court of the United States have divided parties to suits in equity into three classes: (1) formal; (2) necessary or proper; and (3) indispensable. The first two classes may be dispensed with; the third, never. The absent parties in this case are indispensable parties, as that term is defined and applied by the supreme court. The act of congress and the 47th rule effected no change of the law on this subject of parties to suits in equity. In the leading case upon this subject the supreme court say: "The act of congress does not affect any case where persons are not joined because their citizenship would defeat the jurisdiction; and so far as it touches suits in equity it is no more than a legislative affirmation of the rule previously established by the decisions" of that court. "And the 47th rule is only a declaration for the government of practitioners and courts, of the effect of this act of congress and of the previous decisions of the court on the subject of that rule. It remains true, notwithstanding the act of congress and the 47th rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to a suit without affecting these rights, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields v. Barrow*, 17 How. [53 U. S.] 130. And in a late case the court say: "The act of congress of 1839, and the rule of this court upon the subject, give no warrant for the idea that parties whose presence was before indispensable could thereafter be dispensed with." *Ribon v. Railroad Co.*, 16 Wall. [83 U. S.] 450; and the rule established in these cases has been affirmed, illustrated and applied in many other cases. *Kendig v. Dean*, 97 U. S. 423;

Florida v. Georgia, 17 How. [58 U. S.] 508; Coiron v. Millaudon, 19 How. [60 U. S.] 115; Barney v. Baltimore City, 6 Wall. [73 U. S.] 284; Florence Sewing-Mach. Co. v. Singer Manuf'g Co., [Case No. 4,884;] Tobin v. Walkenshaw, [Id. 14,068;] Litchfield v. Register, [Id. 8,388.] The ruling in Robertson v. Carson, 19 Wall. [86 U. S.] 94, is directly in point in this case, and concludes the question.

Counsel for plaintiff urge that the rules as to parties in equity are somewhat flexible; that the 47th rule in terms empowers the courts to dispense with "necessary or proper parties, in their discretion;" and attention is called to the case of Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 152, where it is said the objection for want of parties does not affect the jurisdiction, but addresses itself to the policy of the court, and is subject to its discretion. Neither the rule nor the case cited touch the question of indispensable parties; the term itself implies they can never be dispensed with. And the absent persons in this case belong to that class, and not only cannot be brought in on account of their common citizenship with the plaintiff, but they would not be permitted to come in; and in all such cases the court cannot act at all, but will leave the parties to terminate their dispute by other means. Florida v. Georgia, 17 How. [58 U. S.] 508; Florence Sewing-Mach. Co. v. Singer Manuf'g Co., [Case No. 4,884;] Kendig v. Dean, 97 U. S. 423. And if the absent persons were not indispensable parties but only "necessary or proper," and if the 47th rule invested the court with the discretion to proceed or not with the case in the absence of such parties, there is nothing in the case calling for an exercise of that discretion favorable to the plaintiff, but the reverse, as will be seen from a brief resume of the case.

The bill only seeks to set aside the contract between Davis and the company so far as it concerns the defendants' notes; it does not seek to set aside the contract as to the other securities embraced in it; nor does the plaintiff offer to repay what the company received in cash on this sale of its securities or any part of it; or to surrender back to defendants their stock; or to place any of the parties in statu quo, nor does it seek to annul the subsequent action of the company by which it blotted out of existence nine-tenths of its capital stock, including the shares formerly owned by the defendants, and which reduction was effected by using as cash the draft received from Davis on the life association. The validity of the company's action in reducing its stock \$900,000 by the purchase of nine thousand shares from the life association and its cancellation ought to be determined before any relief is granted; for if that action was valid, it amounted to a ratification of all that had gone before, and the company ought not to be heard to assert that Davis did not pay

value for securities transferred to him when it appropriated and used the draft received from him as money. But that transaction cannot be inquired into in this case, because the bill does not attack, or even refer to it; and if it did the indispensable parties to its determination are not before the court.

Passing by the originators, actors and participants in the alleged fraud, all of whom are citizens of the same state as the plaintiff, and solvent, so far as the record discloses anything on that subject; affirming the sale of the company's securities to Davis, so far as it profited by it; keeping all that was obtained by that transaction and the subsequent operations based on the fruits of that transaction; the plaintiff seeks a recovery against defendants, admittedly innocent of any participation in the alleged fraud, by proceeding in a mode that would deprive them of that sure recourse on the actual parties to the alleged fraud, to which they would be entitled, and in a mode that would probably result in exempting the actual perpetrators of the fraud from liability altogether.

A plaintiff occupying this attitude has no claims to the favorable exercise of an equitable discretion on the subject of parties, if such discretion exists, which is not decided. Objection for the non-joinder of necessary parties need not be taken by demurrer, plea or answer; it is open to the defendant to make it any time; and it may, and in a clear case ought to, be raised and acted upon by the court on its own motion. These conclusions render it unnecessary to decide whether the transactions between Davis and the life association and the life insurance company were or not fraudulent, or to rule upon the other questions presented at the hearing.

Decree dismissing bill without prejudice.

ALEXANDER, (JAMIESON v.)

[See Jamieson v. Alexander, Case No. 7,203.]

ALEXANDER, (JOICE v.)

[See Joice v. Alexander, Case No. 7,435.]

Case No. 170.

ALEXANDER v. KNOX.

[6 Sawy. 54.]¹

Circuit Court, D. Oregon. Sept. 3, 1879.

COUNTY-SCHOOL FUNDS-PLAINTIFF - JUDGMENT
-JUDGMENT ROLL-CLAIM-DONATION-WIFE'S
SHARE.

1. A county in Oregon is a body politic, and may, in the exercise of the powers given it by statute, take a note or bond and mortgage, and enforce the same by the ordinary legal proceedings in the courts.

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2. In 1858, the only fund which a county treasurer was authorized by law to loan was the common school fund in his custody arising from the sale of sections 16 and 36, and in doing this he was the agent of the territory,—the trustee of the fund,—and not the county, and a suit to enforce the obligation of such note and mortgage should have been brought in the name of such treasurer.

3. A suit brought in the name of a plaintiff, who is neither a natural nor an artificial person, is a nullity; and therefore a suit by the "board of county commissioners of Lane county," in 1863, to enforce a note and mortgage given to the treasurer of that county upon a loan of school funds, was a nullity, and could not support a decree for any relief.

4. The judgment of a court of general jurisdiction is presumed to have been rightly given, upon sufficient pleadings and process, until the contrary appears; and therefore, where it appears that a decree might have been given, either in a suit which was a nullity for want of a real plaintiff, or in another which was not, this presumption is sufficient to sustain the validity of the same.

5. The certificate of the clerk is not evidence of the character or legal effect of the paper to which it is appended,—as, for instance, that it is a copy of judgment roll,—but only that it is a true copy of the original, on file in his office; and as to what it is, it must speak for itself.

6. The boundaries of a claim, under the donation act, are a part of the public surveys of the country; and a description of a tract of land as a claim, number 70, in township 20 south, of range 3 west, is sufficiently certain in a decree, or elsewhere.

7. Where a claim was taken up by a married settler, under section 5 of the donation act, after January 20, 1852, and the wife died before January 30, 1854, and before the completion of the residence and cultivation required by the act, her share of the donation was, by virtue of the act of January 20, 1852, (Sess. Laws, 64.) her separate property, and upon her death descended to her heirs unaffected by any claim of the husband on account of the marriage, as directed by the common law.

At law. This action is brought by the plaintiff, [Robert Alexander,] a citizen of California, against the defendant, a citizen of Oregon, to recover the possession of a half section of land situate in Lane county, the same being the donation claim of Robert Alexander and Sarah, his wife, numbered 70, and lying in sections 35 and 36, in township 20 south, of range 3 west, of the Wallamet meridian. The action was commenced against the tenant, George T. Sears, when, on his application, the landlord, Samuel B. Knox, was made defendant in his place. In the pleadings, each party alleges that he is the owner of the premises, and the other is not. The case was heard by the court without a jury. [Judgment for defendant.]

Addison C. Gibbs and W. Scott Bebee, for plaintiff.

Rufus Mallory and Horace Knox, for defendant.

DEADY, District Judge. From the evidence it appears that the plaintiff went on the premises on September 1, 1852, as a

married settler, under section 5 of the donation act, and resided upon and cultivated the same for four years, as required by said act; and that his wife, Sarah, died thereon in 1853; that on September 27, 1867, the officers of the proper land office issued a patent certificate to said plaintiff and his wife for said premises,—the north half to the husband and the south one to the wife,—and that on June 14, 1877, a patent for the premises issued in pursuance of said certificate; that on November 17, 1858, said plaintiff made his promissory note to the treasurer of Lane county for the sum of eight hundred dollars, payable three years from date, with interest at the rate of ten per centum per annum, and to secure the payment of the same, together with his then wife Susannah, on the date last aforesaid, executed and delivered to said treasurer a mortgage of said premises; that on October 8, 1863, a suit was commenced against said plaintiff and wife in the circuit court for said county to enforce the lien of said mortgage by filing a complaint therein, in the name of the "board of county commissioners of Lane county," and on the same day a summons likewise entitled was placed in the hands of the proper officer who, on October 16, 1863, returned thereon that he had duly served the same on said plaintiff on October 9; that on October 30, 1863, for want of an answer, a decree was given in said court entitled "Lane County, Plaintiff, v. Robert Alexander, Defendant,"² directing the sale of said mortgaged premises, and that the proceeds be applied to the payment of the costs and expenses of the suit and one thousand seventy nine dollars and fifty cents paid to the complainant, with interest from date; that on September 1, 1866, in pursuance of said decree, said premises were duly sold to one J. W. Matlock for the sum of one thousand two hundred dollars, and on October 25, 1866, said sale was duly confirmed; that on July 27, 1867, in pursuance of said sale and confirmation, said premises were by the sheriff duly conveyed to said Matlock, who, afterwards, on June 22, 1867, in consideration of the sum of one thousand and fifty dollars, conveyed to the defendant, Samuel B. Knox, all the interest of the plaintiff therein on September 1, 1866; and that afterwards, on March 20, 1867, said defendant, Knox, by means of proper conveyances, acquired all the interest in the premises of the six children and heirs to plaintiff's deceased wife, Sarah. The plaintiff puts his right to recover upon the ground that the decree upon which the premises were sold to Matlock is void, because: 1. The county of Lane had no power or authority to loan money or to take or own a mortgage. 2. The decree was given in a suit in which "Lane county" was the plaintiff, while it appears from the records

²[Nowhere reported.]

that the only suit then pending upon said note and mortgage in said court for Lane county was one in which the "board of county commissioners of Lane county" was plaintiff. Before considering those questions, it may be well to state the right of the plaintiff in the premises at the date of this mortgage, a point upon which there was some conflict and uncertainty in the opinion of the counsel. The donation act made no provision for the descent or disposition of the wife's share of the donation in case of her death before the completion of the residence and cultivation required by the act. At the death of Sarah, 1853, she was seised of an estate of inheritance,—a conditional fee in her share of the donation,—the condition being, that her husband should complete the necessary residence and cultivation thereon. There being then no statute in force in Oregon regulating descent of real property, the subject was regulated by the rules of the common law. According to these, the property descended to her children, as her heirs, to the exclusion of her husband. Neither did the latter acquire a life estate in the premises as tenant thereof by the curtesy. For by the act of January 20, 1852, (Sess. Laws, p. 64,) it was provided that "all right and interest of the wife" in the donation "be and is hereby secured to the sole and separate use and control of the wife." The share of the wife, Sarah, in this donation, was acquired after the passage of this act, and by the necessary operation of it the husband was precluded from taking any interest in it by virtue of the marriage. And although this act was repealed on January 30, 1854, and section 30 of the act of January 16, 1854, in relation to estates, (Gen. Laws Or. p. 588,) gave the husband an estate for life in the inheritance of the wife, of which they were both seised in her right "as tenant thereof by the curtesy," whether they had "issue born alive or not," still in this case, the wife having died before such repeal and enactment, and her inheritance having in the mean time descended to her children without any interest therein on the part of the husband, their rights could not be affected thereby. *Fields v. Squires*. [Case No. 4,776;] *Wythe v. Smith*, [Id. 18,122.] It follows from these premises that the plaintiff never had any interest in the wife's donation, and is, therefore, not entitled to the possession of the same, and that the defendant, having acquired the interest of her heirs therein, is the owner of the same, independent of the sheriff's deed.

As to the remaining quarter section, the husband's share or the donation, the case will now be considered upon the plaintiff's objections to the validity of the decree. By the laws of this state each county therein "is a body politic and corporate," for the purpose, among other things, of purchasing and owning property, real and personal, for the use thereof, and of making "all necessary

contracts," and doing "all other necessary acts in relation to the property and concerns of the county." (Gen. Laws Or. p. 535;) and the county court, as the representative of the county, has the power to provide, among other things, for the erection and furnishing of all necessary public buildings, bridges, the maintenance and employment of the poor, the management of the county property, funds, and business, and to compromise for any debt or damages due the county, (Civil Code Or. § 870.) The county sues, and is sued, in its name under the direction of the county court, (Id. § 871,) and may maintain an action upon a cause of action accruing to it upon a contract made with it, (Id. § 346.) From this summary of the powers of a county, it is apparent that it must have the authority in many instances to take notes and mortgages, and enforce them by the usual and proper legal proceedings. To show this, it is only necessary to suggest a few cases. For instance, the county may let a contract to construct a building or bridge, and may therefore take a note or bond and mortgage as security for the due performance thereof; it may compound a debt due the county by the sureties of a defaulting officer, and may, of course, take a note and mortgage for the sum accepted in lieu of the whole debt; it may also accumulate a fund by a limited tax, during a period of years, wherewith to construct an expensive bridge or building, and may in the mean time loan the fund as it is collected upon the note and mortgage. These acts are necessarily incidental to the powers expressly granted to the county. Indeed, the last instance is probably included in the express power to manage and care for "the county property, funds, and business."

From the complaint in the case of *Board of Com'rs of Lane Co. v. Alexander*, it appears that the note and mortgage sued on were given to the county treasurer. By section 20 of the act of August 14, 1848, (9 Stat. 323,) it was provided that sections 16 and 36 of the public lands of the territory should be "reserved for the purpose of being applied to schools" therein. By the act of January 7, 1856, (Sess. Laws, p. 69,) it was provided that the school lands in the various counties should be disposed of by the county superintendents of schools, and the proceeds deposited with the territorial treasurer; and by the act of January 30, 1858, (Id. 43,) that said proceeds should be paid into the county treasury, and it was also thereby made the duty of the respective county treasurers to loan the same under certain regulations therein prescribed, upon note and mortgage, for a period not exceeding three years.

The only money which a county treasurer was authorized by law to loan at the date of this note and mortgage was this school fund, and the reasonable inference is that

such was the character of the money loaned to Alexander. These funds belonged to the territory in trust for the benefit of the common schools of the country, and in fact that the legislature employed the county superintendents to dispose of the lands, and the county treasurers to keep and loan the funds arising therefrom, did not make them the property of the county, or authorize it to bring suit upon a note and mortgage made to the county treasurer therefor. In the absence of any statute to the contrary, the suit upon this Alexander note and mortgage should have been brought in the name of the county treasurer. But the validity of this note and mortgage, and the right of Lane county to sue upon it, was necessarily involved in the decree of the circuit court, and is therefore conclusively determined by it, whenever the question arises collaterally. *Semple v. Bank of British Columbia*, [Case No. 12,659;] *Cromwell v. County of Sac*, 94 U. S. 352. In the former case the court said: "The court, even if there had been no defense interposed, must, in giving its decree, have determined that the bank had capacity to sue, and that the note and mortgage were valid. This much at least was necessarily included in the decree, and, without determining these two questions in this way, the court could not have pronounced it." During the territorial government, the county was represented and its business transacted by a board, called "the board of county commissioners;" but by the constitution of the state government this tribunal was superseded by the county court. At the date, then, of the commencement of the suit against Alexander in the Lane county circuit court, there was no such person, either natural or artificial, as the "board of county commissioners of Lane county," and therefore the suit commenced in its name was without a plaintiff, and a mere nullity. *Proprietors of Mexican Mill v. Yellow Jacket S. M. Co.*, 4 Nev. 42. Of course, if the decree enforcing the lien of the mortgage, although entitled Lane County v. Alexander, was actually given in the suit, entitled Board of County Com'rs of Lane Co. v. Alexander, then it is null and void also.

The only question, then, open to consideration in the case is, whether the decree was given in such suit or not. The decree and suit, being in favor of different plaintiffs, are not presumed to be a part of the same proceeding, although the subject-matter appears to be the same. For aught that appears, the suit by the board of commissioners may have been dismissed or abandoned as a mistake, and another one brought in the name of the county in which this decree was duly given. The circuit court of Lane county is a court of general jurisdiction, and therefore the presumption is in favor of the regularity of its proceedings. In such a court all things are presumed to have been rightly done. *Miller v. U. S.*, 11 Wall. [78 U. S.] 299. Therefore,

the presumption is that the decree in question was duly given in a sufficient proceeding; and if from the records it appears that such decree might have been given in either a suit by the Board of Com'rs of Lane Co. v. Alexander, the presumption is that it was given in the latter, rather than the former, because that would be legal, and the other not. But the plaintiff contends that it appears affirmatively from the record that this decree was given in the suit of the Board of Com'rs of Lane Co. v. Alexander. The ground of this claim is that the clerk of the circuit court of Lane county has appended to a copy of the complaint, summons, and return thereon in said case and the decree in Lane County v. Alexander an official certificate of the date of April 14, 1879, to the effect that he has carefully compared said copies "with the original judgment roll in the suit of Lane County v. Robert Alexander," then on file in this office, and that they are correct copies of the whole thereof; and, further, that, according to the records and files of his office, no other paper than these "was ever filed or made in said suit." In this certificate the clerk does impliedly assert that there is in his office a judgment roll constituted by the papers of which these are copies, and the argument from this fact is, that it is conclusive evidence that the decree entitled Lane County v. Alexander was really given in the suit of Board of Com'rs of Lane Co. v. Alexander, and is therefore void, such suit being a nullity for want of a plaintiff. But can the clerk certify that there is or is not a judgment roll on file in his office, or that any given number or kind of papers therein constitute such a roll? It is clear in my judgment that he cannot. The only fact of which his certificate is evidence, is that the paper to which it is appended is a true copy of the original then on the files or records of his office. Being the custodian of the original, he is authorized to make a copy thereof, and his certificate is proof of that fact. Civil Code Or. §§ 568, 720, 738. But with this his power ends; and whether the paper is a judgment roll or not, must be determined by itself. If a clerk certifies, that a paper is a true copy of an entry in the records of his office, and that the same is a judgment in a particular action, the latter part of such certificate is extra-official, and of no effect. For whether such an entry is in law a judgment in the particular action mentioned, or at all, is a question of law to be determined by the court when and where it may arise, and not the clerk.

What constitutes a judgment roll, and when and by whom it shall be made, is set forth with particularity in section 269, Civil Code Or. It provides that the "clerk shall prepare and file in his office the judgment roll" before the next term of the court after docketing the same. The power of the clerk to make this roll does not extend beyond the next term, unless perhaps upon an order of the court allowing the same to be done thereaft-

er. When the complaint is not answered the roll is made by attaching together the complaint, summons, proof of service, and a copy of the entry of judgment. But such papers do not constitute a judgment roll, unless they have been identified and attached together by the clerk as the complaint, summons, and judgment in a particular case. But this is not all. These papers, when so collated, must be marked as the judgment roll, by being inclosed in a blank sheet of paper, with "the name of the court, the term at which judgment was given, the names of the parties to the action, and the title thereof, for whom judgment was given, and the amount or nature thereof, and the date of its entry and docketing," indorsed thereon; and then the roll, being prepared, must be filed by the clerk as such. But the judgment existed before the judgment roll, and is valid without it. Tried by this statute there is no judgment roll, so far as appears, in either Board of Com'rs or Lane Co. v. Alexander. There are copies of some papers here from both cases, but there is no judgment roll in either of them. Neither is there any sufficient evidence that there never were any other papers on file in either case. The certificate of the clerk is not, and could not be, absolute on that point, but is only according to the present records and files of this office. Further than this the clerk could not certify. But the present absence of a complaint, summons, and proof of service in the suit of Lane County v. Alexander from the files of Lane county court is not sufficient evidence that they were never there, in the face of the presumption to the contrary, arising from the fact that there is a final decree in that suit of record. The presumption being that this decree was rightly given, until the contrary appears, it follows that it must have been given upon proper pleadings and process. And the mere fact that the clerk of the court, after the lapse of sixteen years, is unable to find such pleadings or process on file in his office, or any evidence, from the records and file thereof, that they ever were there, is not sufficient to neutralize or overcome such presumption.

Objection was also made to this decree for want of certainty in the description of the premises directed to be sold and the amount to be paid the plaintiff therein. The description of the premises is as follows: "Claim No. 70 in T. 20 S., R. 3 W., of the Wallamet meridian." The survey of a donation claim is a part of the public surveys of the country, and therefore a description of a tract of land, as claim No. 70 in a certain township and range, is just as certain as a description by reference to a certain section in said township and range. The word "claim" in the surveys under the donation act is used to designate a tract of land claimed by a settler under such act—a donation claim. The premises are so described in the patent certificate and patent; and it is equally as certain as one

by the section or subdivision thereof. The decree directs that the premises be sold, and that out of the proceeds the plaintiff therein be paid one thousand and seventy-nine dollars and fifty cents, with interest from date. There is no uncertainty in the decree in this particular. There must be a finding for the defendant, that he is the owner of the premises.

ALEXANDER, The, (LEA v.)
[See Lea v. The Alexander, Case No. 8,153.]

ALEXANDER, (LITTLE v.)
[See Little v. Alexander, Case No. 8,393.]

ALEXANDER, (MORRISON v.)
[See Morrison v. Alexander, Case No. 9,840.]

Case No. 171.

ALEXANDER v. PATTEN.

[1 Cranch, C. C. 338.]

Circuit Court, District of Columbia. July Term, 1806.

CONTINUANCE—DEATH OF PARTY.

The defendant is not, of course, entitled to a continuance, upon the death of the plaintiff.

[At law. Application for continuance. Denied.]

The plaintiff died since the last term, and the administrator appears at this term. The issue was made up at the last term.

Mr. Youngs, for defendant, contended that he was of right entitled to a continuance. By the act of assembly of Virginia, (P. P. [1 Rev. Code 1803,] p. 110, § 20,) all suits abate by the death of a party, unless there has been a verdict or interlocutory judgment. But the judiciary act of 1789 (1 Stat. 73) provides that the suit shall not abate, but that the defendant shall answer thereto.

THE COURT refused a continuance as a matter of right under the act of congress, which was admitted by all the bar to be in force in such a case, as it provides for a case different from that in the Virginia act. The court referred to the case of Codman v. Wilson, [Wilson v. Codman, 3 Cranch, (7 U. S.) 193,] in the supreme court, where the point was decided.

Case No. 172.

ALEXANDER v. RODRIGUEZ.

[Pamphlet Case.]

Circuit Court, D. California. June 1, 1869.*
MORTGAGES—DEED ABSOLUTE ON ITS FACE—PAROL EVIDENCE—TRUSTS.

[1. Where a deed, absolute upon its face, is given to secure a debt, equity will enforce

*Reported by Hon. William Cranch, Chief Judge.]

†[Not previously reported.]

‡[Reversed by supreme court in Villa v. Rodriguez, 12 Wall. (79 U. S.) 323.]

the debtor's right to redeem, irrespective of any agreement or of the intentions of the parties; and parol evidence is admissible to show whether the conveyance was in fact made as such security.]

[2. To establish the fact that a conveyance, absolute upon its face, was intended to secure debt, and should therefore be subject to redemption, parol evidence of an agreement to that effect is insufficient; facts and circumstances must be shown dehors the instrument such as to give rise to an equity paramount to the intention of the parties, or by exhibiting the real nature of the transaction to expose the attempted fraud, and for these purposes parol evidence as to the consideration, the conversation and correspondence between the parties, and every other circumstances, is admissible.]

[See note at end of case.]

[3. A conveyance made in satisfaction of a precedent debt, so that there is no personal remedy left to the creditor against the debtor, cannot take effect as a mortgage, although it contains a clause providing for redemption. *Conway v. Alexander*, 7 Cranch, (11 U. S.) 218, followed.]

[See note at end of case.]

[4. A widow and her children conveyed to her brother in fee simple a ranch as a satisfaction for and extinguishment of a precedent debt, but under the expectation founded on the brother's assurance that any surplus of the price at which it might thereafter be sold over and above the amount necessary to reimburse him would be appropriated by him to the benefit of the widow and her children. *Held*, that whatever trust was created referred to the proceeds of such subsequent sale, and did not attach itself to the land, nor in any way impair the brother's right to dispose of it.]

[In equity. Bill by George Alexander against Jacinto Rodriguez, Rensselaer E. Steele, Isaac C. Steele, Edgar W. Steele, and George Steele to redeem certain land which had been conveyed to Rodriguez. Bill dismissed.]

J. B. Harmon and Paterson, Wallace & Stow, for complainant.

Williams & Thornton and Wilson & Crittenden, for respondents.

HOFFMAN, District Judge. This was a bill in equity, filed to redeem a certain estate conveyed to the defendant Rodriguez, by a deed absolute on its face, but alleged to be a mortgage. The general and undisputed facts of the case are as follows:

On the 13th April, 1852, Jose Maria Villavicencia, the grantee of a rancho known as the "Corral de Piedra," conveyed to his children all his right and title in the rancho. His claim had not then been confirmed, but a final decree of a confirmation was subsequently obtained, the lands surveyed, and a patent issued in November, 1867. In 18—, Jose Maria died, leaving surviving him the grantees named in the deed, who were his heirs at law, and his widow, Rafaela Rodriguez de Villavicencia. On the 4th day of December, 1860, the widow and Jose Ramon, Fulgencio, and Ascencion Villavicencia executed to the defendant Jacinto Rodriguez, who is a brother of the widow, a mortgage of the lands, to secure the payment of the

sum of four thousand dollars, with interest thereon at the rate of two per cent. per month compounding semiannually, and for such other advances as might be made by the mortgagee for the payment of any taxes, assessments, or other charges which might be imposed on the land. On the 29th April, 1864, there was due to Jacinto, for principal and interest of the moneys loaned by him, the sum of \$8,610, and for moneys advanced to redeem the premises from a tax sale the sum of \$1,172.33. As the family was in needy circumstances, and no interest had been paid on the mortgage, Jacinto desired a settlement, which he was further induced to demand by the fact that, under the laws of California, taxes were assessed against the mortgagors upon the value of the land, and against the mortgagee upon the amount of the mortgage. The family therefore determined to convey in fee the premises to Jacinto, which conveyance was executed on the 29th April, 1864, by the widow Rafaela, Jose Ramon, Fulgencio, Ascencion, Jose and Ramona. On the 17th day of February, 1865, Antonio Villavicencia, who had then come of age, and who had full knowledge of the original transaction between the other heirs and Jacinto, executed to the latter a conveyance of all his right, title and interest in the rancho, for the nominal consideration of \$100. On the 20th day of May, 1865, Jose Ignacio Villavicencia, with like knowledge of the conveyance by his mother and the other heirs, executed to Jacinto a deed in fee simple for all his right, title and interest in and to the premises. On the 27th July, 1866, Jacinto Rodriguez executed to the defendants Edgar W. Steele, Isaac C. Steele, and Rensselaer S. Steele a lease of the premises, with certain covenants on the part of the lessees for the payment of rent and the erection of improvements, and on the part of the lessor for the conveyance of the title at the expiration of the term for a specified sum.

On the 16th December, 1867, the widow, Jose Ramon, Jose Antonio, Ascencion and Ramona executed to Fulgencio a conveyance of all their right, title and interest in the rancho. This conveyance was made without consideration, and in order that Fulgencio might enter into arrangements with other parties for the assertion of their rights. Fulgencio accordingly, on the 26th December, 1867, conveyed to the complainant all his right, title and interest. The consideration stated in the deed is the sum of thirty-five thousand dollars; the actual amount paid was one thousand dollars; but it was agreed that a further payment of \$35,000 was to be made, in case the complainant should succeed in the suit. By what writings this obligation is evidenced, or what security has been given for its fulfillment, does not appear. It is alleged in the bill that the conveyance to Jacinto was executed in order to avoid the double taxation referred to; that

it was intended as a mortgage to secure the payment of the moneys due the latter; and that it was understood that upon repayment of such moneys, with interest, Jacinto would reconvey to the grantors the premises. These allegations of the bill are positively denied in the answer of Jacinto Rodriguez.

The equitable rule which treats every conveyance of land which is in fact a security for an antecedent debt or contemporaneous loan, as a mortgage, which the debtor is entitled to redeem and demand a reconveyance of the estate on payment of the debt, is firmly established in the jurisprudence of both England and the United States. This doctrine is not confined merely to cases where the deed fails to express the real intention of the parties through fraud, accident, or mistake, but it is applied where the parties have attempted, by express agreement, to convert what is in fact a security for a debt into an irredeemable conveyance, or even to qualify in any manner the power of the mortgagor to exercise himself the right to redeem, or to transfer it to another. "The principle is well settled," says Savage, C. J., in *Clark v. Henry*, 2 Cow. 324, "that chancery will not suffer any agreement in a mortgage to prevail which shall change it into an absolute conveyance, upon any condition or event whatever." An estate cannot at one time be a mortgage, and at another time cease to be so, by one and the same deed. *Howard v. Harris*, 1 Vern. 190. "Once a mortgage, always a mortgage;" and the grantor may redeem at any time consistent with the general rules of equity, notwithstanding the most express stipulation that the instrument shall not operate, or be considered, as a mortgage; and that, if the money be not paid at a day certain, the estate of the grantee shall be forever absolute. *Rankin v. Mortimere*, 7 Watts, 372; 3 [White & T.] Lead. Cas. Eq. 624. The inquiry, therefore, whether a deed absolute on its face is to be regarded by equity as a mortgage does not depend so much upon the agreement of the parties as upon the circumstances of the case, and the real nature of the transaction; and whenever it is made to appear, by proof oral or written that the transaction was a loan and the deed given as security for a debt due by the grantor, the latter will, on payment, be entitled to redeem. *Morris v. Nixon*, 1 How. [42 U. S.] 118; *Taylor v. Luther*, [Case No. 13,796;] *Babcock v. Wyman*, 19 How. [60 U. S.] 289; *Russell v. Southard*, 12 How. [53 U. S.] 139, *Jenkins v. Eldridge*, [Case No. 7,266;] 3 [White & T.] Lead. Cas. Eq. 625, and cases cited.

The familiar expression that a deed absolute on its face will be treated in equity as a mortgage, if so intended by the parties, is defective as a statement of the doctrine, for the right to redeem is not only independent of the agreement or intention of the parties, but paramount to it, and may be enforced in opposition to the terms of the convey-

ance. "The policy of equity," says the learned author of the American notes to 3 Lead. Cas. Eq. 627, "forbids the creditor to speculate on the necessities of the debtor, by the creation of an unredeemable mortgage, as the policy of the law, though from different reasons, forbids the creation of inalienable estates, in fee or entail. The rule overrides the agreement and intention of the parties, and cannot be evaded by any contrivance which cupidity may employ or necessity submit to." Upon this principle, the whole system of equity, with regard to mortgages, rests.

In the case of the ordinary bond and mortgage, the writings themselves disclose the fact that the relation of debtor and creditor exists, and that the conveyance is a mere security for a loan. When the conveyance is on its face absolute, or in the form of a condition, the same facts may be established by parol; and they are allowed to be proved, not for the purpose of varying or contradicting the terms of the written contract, but to establish the existence of the paramount equity of the mortgagor, by which the operation of the deed is controlled. *Babcock v. Wyman*, 19 How. [60 U. S.] 289; *Russell v. Southard*, 12 How. [53 U. S.] 139. "Whether a particular deed, absolute on its face, should be regarded in equity as a mortgage, will depend upon all the circumstances of the case,—the relations between the parties, the object they had in view, the purpose for which the conveyance was executed, the means employed to obtain it, or any other fact or circumstance may be shown, of a nature to control the deed, and establish a right of redemption paramount to and independent of its terms." 3 [White & T.] Lead. Cas. Eq., ubi supra.

The principal evidence on the part of the complainant in this case, is the depositions of the widow and heirs who united in the conveyance. They all assert that the deed was made at the solicitation of Jacinto Rodriguez, and with the understanding that it was to be merely a security for the debts due him from the family. *Rafaela* states that a few days before the execution of the deed, her brother Jacinto had a conversation with her, in which it was agreed that she and her children should execute a conveyance to him, as a security for the debt due him; that he begged her not to distrust him, and assured her that all he wanted was to secure his money. This conversation she communicated to her children, and on this understanding the deed was signed by them, and also the separate deeds afterwards executed by Antonio, on coming of age, and by Jacinto, who was then absent. The testimony of the other grantors is substantially to the same effect. They all swear to assurances given by Jacinto, that he wanted nothing more than his money, and that the deed was given as a security. Mr. C. W. Dana, county clerk of

San Luis Obispo county, who took the acknowledgments of the execution of the deed by the widow and her children, states that, before the deed was translated and read over to them, the widow inquired of Jacinto if it was in strict accordance with the agreements and understanding between them. Jacinto replied that it was. It was then translated and read in the presence of all the family. The witness also states that in a conversation between himself and Jacinto, on their way back to San Luis, the latter said that his object in getting the Villavicencia family to execute the deed was to secure the money which he had loaned or advanced to them, and to save the property for the benefit of his sister and her family; while, if it remained in their hands, he might lose his money, and his sister and her children would lose the whole property. He said they had done wisely in trusting him, as he intended to deal justly by them. A similar conversation between Jacinto and William J. Graves is testified to by the latter. If its purport is accurately given, Jacinto would seem to have acquiesced in the opinion expressed by Mr. Graves, that the deed to him should be regarded as a mortgage. It is objected that parol testimony as to the motives and understanding with which the instrument was executed, as also evidence of the admission of Jacinto, cannot be received to vary or contradict the terms of the written instrument. In 4 Kent, Comm. 143, it is declared that "a deed absolute on its face, and though registered as a deed, will be valid and effectual as a mortgage between the parties, if it was intended by them to be merely a security for a debt. And this would be the case, though the defeasance was by an agreement resting in parol; for parol evidence is admissible to show that an absolute deed was intended as a mortgage, and that the defeasance was omitted by fraud or mistake." To this Story, Circuit Justice, in Taylor v. Luther, [Case No. 13,796,] adds: "It is the same if it be omitted by design upon mutual confidence between the parties, for the violation of such an agreement would be a fraud of the most flagrant kind, originating in an open breach of trust against conscience and justice." These passages are cited with approval by the supreme court in Babcock v. Wyman, 19 How. [60 U. S.] 299.

But to establish the fact that the conveyance was intended as a mere security for a debt, something more than parol evidence of an agreement to that effect will be required. Facts and circumstances must be shown dehors the instrument, such as will give rise to an equity paramount to the agreement of the parties, or by exhibiting the real nature of the transaction expose the attempted fraud. On such an inquiry, the whole range of parol proofs is open. The relations between the parties; the consideration actually paid; the means employed to obtain the conveyance; the object

in making it; the origin of the transaction; whether the parties originally met on the footing of borrower and lender; conversation and correspondence between the parties; and, in general, every fact or circumstance of a nature to disclose the real nature of the transaction. Conway v. Alexander, 7 Cranch, [11 U. S.] 218; Pierce v. Robinson, 13 Cal. 117; Morris v. Nixon, 1 How. [42 U. S.] 132; Russell v. Southard, 12 How. [53 U. S.] 154; Babcock v. Wyman, 19 How. [60 U. S.] 289; Taylor v. Luther, [Case No. 13,796,] 3 [White & T.] Lead. Cas. Eq. 630-633, and cases cited. But when these or similar circumstances are not shown to take the case out of the statute of frauds or the rules of evidence, parol evidence is as inadmissible to show that an absolute deed was made subject to an understanding that it should be redeemable, or that a conditional deed was intended to be susceptible of redemption without strict compliance with the condition, as if it were offered to contradict or vary the instrument in any other particular." 3 [White & T.] Lead. Cas. Eq., ubi supra; [Elliott v. Maxwell,] 7 Ired. Eq. 246; Webb v. Rice, 6 Hill, 219; Cook v. Eaton, 16 Barb. 439; Conway v. Alexander, 7 Cranch, [11 U. S.] 218. In the present case, the evidence under consideration, when taken in connection with the other testimony adduced, is addressed not merely to the contract of the parties. The real nature of the transaction is sought to be exposed by showing the relations between the parties; the ignorance and confidence on one side—acuteness and capacity for business on the other; alleged inadequacy of consideration, and the conversation which occurred, and the inducements held out at the time of the execution of the conveyance. It has been held that the facts out of which the alleged equity arises may be shown by the admissions of the grantee, though such evidence should be received with caution. 2 Black, fol. 101, 4-67. And the motives of the parties, the means employed to obtain the deed, and the purpose for which it was executed, may be shown by the conversation which preceded or accompanied the execution, and which form a part of the res gestae of the transaction. Morris v. Nixon, [1 How. (42 U. S.) 132.] I think, therefore, that the evidence offered is clearly admissible.

Much testimony was taken to show that the consideration given for the land was inadequate. I have attentively considered it, but have not been able to find any satisfactory proof of any such gross inadequacy of consideration as to justify the conclusion that the deed must have been intended as a mortgage, or that undue advantage was taken of the necessities and distress of the grantors. In view of the recent extraordinary rise in the value of lands in the southern portion of this state, it is, no doubt, difficult for witnesses to recall how greatly in 1864, the year of drought, its value was de-

pressed, and how difficult it was to find a purchaser for an extensive rancho. The arguments and representatives made by Mr. Van Ness to Jacinto Rodriguez, when two years later he was endeavoring to induce the latter to sell this very estate, are, unless they were entirely disingenuous and inconsistent with notorious facts, more reliable evidence of what was then, and for two years had been, the value of the land, than any opinion he may now express under the perhaps unconscious influence of the recent advance in values. The fact, too, that Jacinto, who, in any view of the facts of this case, must have desired to have obtained the largest possible price, was able in 1866 to obtain only \$20,000, payable at the expiration of five years, is inconsistent with the supposition the lands could have a much greater cash value than the consideration mentioned in the deed. The witness who attaches the highest and in fact the extravagant value to the land is Mr. McReilay, and yet in March, 1866, he communicates, as a friendly office to Jacinto, an offer of \$12,000 for the land, and reminds [the latter] that no less than nine ranchos, which he enumerates, are for sale, and that there are no purchasers. The letters of the widow show that she was by no means destitute of intelligence. But the family was illiterate and unfamiliar with business affairs. They were poor, and had no other resources than the rancho, and they felt confidence and affection for their uncle. But these facts, though under some circumstances they might have great weight, are, in my view of this case, of subordinate importance.

The account of the transaction given by Jacinto himself is as follows: He was the holder of a mortgage executed nearly four years previous by the widow and three of the children, for money furnished for their support, and advanced to redeem the land on a tax sale. No interest had been paid, and the indebtedness was rapidly accumulating. He therefore wrote to his sister that it was time to come to a settlement, as the mortgage could not last a lifetime. She told him to come to see her whenever convenient. He accordingly did so, and, finding the family assembled, was told by them that they had consulted together, and were determined to sell him the rancho on account of the money due on the mortgage. They said they had come to this determination, because, it was put up for sale, some other person would certainly buy it, and they would never get it again; and they preferred that he should finally be the owner because he was the one who saved them on a former occasion when they were about to lose the rancho on another mortgage. To this he replied, that if they were all agreed to sell the rancho, he would accept the proposition with pleasure, and would take no steps to foreclose the mortgage. After some further consultation, and after obtaining from Antonio

a promise to unite in the conveyance when he became of age, he informed them that he would cause the conveyance to be made out, and would bring it to the house for the recorder to take their acknowledgments. They again informed him that they would comply with their agreement. Whereupon he told them that he did not wish to speculate upon them, because they were his relations, and they had treated him well, and that, if he could sell the rancho for enough to reimburse him for his outlays, he would return the surplus, if any; and also, if he could sell a portion of the land for enough to reimburse himself, he would reconvey the unsold portion. But if he had bad luck and could not sell he would lose his money. At the time of the execution of the deed, he informed them that it had been prepared in accordance with what passed in the conversation, and with what they had promised; and he asked if they were willing to sign. They declared themselves ready, and the deed was executed. The witness adds that his offer to restore the surplus of the land, or the price he might obtain, after reimbursing himself, was purely spontaneous, and made after they had agreed to sell.

I have no doubt that this was the true nature of the transaction. It is consistent with the conversations reported by Mr. Dana and Mr. Graves, and it is not irreconcilable with the statements of Rafaela and the family. It is true that they testify that the conveyance was made as a security for the debt due Jacinto. But it is to be remembered that these witnesses testify under the pressure of poverty and interest. Except the insignificant sum of \$1,000 already received, their future hopes depend on the result of this suit. They are, therefore, under great temptation to shape their testimony so as to promote their interests,—see opinion of Mr. Justice Campbell in *Babcock v. Wyman*, [19 How. (60 U. S.) 289,]—and the adoption by all of them of the very phrase of the books, that the deed was given as security for a debt, suggests the suspicion that they have been thoroughly apprised what facts it would be necessary to establish. Both Rafaela and her daughter admit that Jacinto was to endeavor to sell the land, or find a purchaser. They assert, however, that the family were to be consulted, and, if satisfied with the price, to execute the conveyance. It will presently be shown that the family were fully advised of the negotiations with the Steeles, and offered no objection; but the statement that they were to unite in the deed to the purchaser is inconsistent with their own account of the transaction, for why should an absolute deed be made to Jacinto, in order that he might sell and reimburse himself, if the final deed to the purchaser was to be made by themselves?

But the most important corroboration of the testimony of Jacinto is found in the letters written by or at the dictation of

Rafaela. In her letter of March 4th, 1865, she says: "He (one Goldtree) also told me to ask you if you wished to exchange a piece of land of your rancho. He says he will give you, from the road," etc., etc. "I know that you will not like this, but he has pressed me so that I promised to write to you to see if you were willing to do so or no. About the amount I owe him, I said to him that, if he wished the interest I have in the rancho of San Ramon, I would give it to him for that which I owe him." In her letter of March 13th, 1865, she informs him that she, and all of her sons and daughters, had been sued, and the rancho attached, for a debt due to one Buzzolano, and adds: "I do not know if that gentleman will tell you of the attachment or not, but I think, from what some disinterested friends of ours have told us, that there is some trap well laid here, not against me, because I have nothing, but against the rancho, that is against you. * * * I would like to see Mr. Murray, that he may defend our part; but, of course, without your consent, nothing will be done. The fact is that their object, according to my sure and truthful information, is to nullify the sale of the rancho to you, upon the grounds that when that sale was executed the debt had already accrued, or at least that it was about accruing, and under some other requisite, of which we are ignorant, to the end that, in this manner, the debt shall fall upon the rancho. You will see from this that it is of the greatest importance you should come," etc. "I am very much cast down. They seek to collect not only the debt, but the interest." In her letter of July 23, 1866, she says: "I have received your esteemed letter of 22d inst., respecting matters in relation to the rancho,—that Mr. Van Ness has spoken to you of the sale of the rancho, and also of renting. You also tell me that another gentleman, who is a business agent, tells you that he can find a customer to buy the rancho or rent it, paying him his five per cent. commission, assuring you that he can sell the whole of the rancho for \$20,000, or rent it for \$1,000 per year, the lessee paying the taxes, and at the end of the term taking the whole of the rancho, if it be convenient for him to do so. You tell me that it is impossible to reserve a piece of land with the house; do not think that I did not know this. I have always said that it is impossible for you to find a customer for the sale of the rancho except for the whole. You should do what is most convenient for you. They tell me that there is in San Francisco a gentleman who wishes to buy the rancho, but I have not seen him. I do not know if he be not the same whose agent you say was in this place on Monday last. I wrote you a letter respecting the taxes on the rancho. Cappe sent word to me to write that you should come here to attend the Board of Supervisors. I think you have to pay \$500 taxes; and perhaps if you were here

it would not be so much. Don Thomas Pollard desires to rent the ranch to put sheep on it. He told me he would wait two weeks, but I think he went above. It may be that he will go to see you about the rent of the rancho. Answer me whether you will come or not, and what will be the result of all this. Rafaela Rodriguez." On August 8, 1866, she writes: "I have before me your esteemed letter of the 30th ultimo, in which you tell me that you have rented the rancho for five years, at the rent of \$1,000 annually, and that the said gentleman has the privilege, at the end of the five years, of buying the rancho at the price of \$20,000. If, as you tell me that you had rented the rancho, you had told me that you had sold it, it would have been better than renting it in this manner, because of what use is it for us to occupy the house and sowing grounds for one year, as you have contracted? We cannot plant next year, because when the 1st August comes they will say to us 'Away!' And as the harvest is from September to October, to be dependent upon whether the lessees will or will not allow me to remain longer, is, in fact, to be obliged to leave. Finally, it being already done, no matter how, it is well. I think you will remember that Ramona has a piece of ground on the rancho, which I and my children gave her some years since. I do not know what arrangement you will make with her. You tell me to write to you that you may see if we are angry. Why should we be angry? I think it would be nonsense, and at the same time unjust, to be angry about a thing which is past. I cannot be. Tell me when you will come with those gentlemen to deliver the rancho. I think you ought to come yourself to give the possession, for if they come alone I do not know one of them, and I do not know what they will do. * * * Your affectionate sister, Rafaela Rodriguez." In her letters of September 18th, 1866, December 19th, 1866, August 8th, 1867, and September 26th, 1867, Rafaela speaks of having been looking for a piece of land from the time the rancho was rented, and of Antonio's application to Mr. Branch for this purpose; of the refusal by the Steeles to allow them to occupy more than 12 acres of the planting ground; of her regret that Jacinto had not reserved the small piece of ground belonging to Raimunda, (Ramona); of her depression of spirits as the time for leaving approached; of her application to Mr. Steele to rent the house for another year, and of his willingness to do so at the rate of \$120 per annum. The testimony shows that this arrangement was, in fact, made. In none of these letters is there the slightest intimation of any interest in the land retained by the family, or of any violation by Jacinto of any understanding or trust by which he was bound.

It will be remembered that at the time the deed was signed by the other members of the

family, Ignacio was absent. On the 16th March, 1865, he writes as follows to Jacinto: "I have received your esteemed letter of the 14th of the present month, in which you say to me that you hope that I will transfer by sale to you my right in the rancho of 'Corral de Piedra,' as all the rest of the family had transferred by sale their rights to you. I assure you that I will do the same as the rest of the family so soon as I see you, which I think, at the latest, will be in April or May, at the place—since here nothing can be done for want of a notary public; but if there were a notary public here, I would with all my heart transfer by sale my right to you, like all the rest of the family. Do not think that I would sell to any one else, although the whole world were offered me. * * * Your affectionate nephew, Jose Ignacio Villa." Certainly no one would suspect that the writer of this letter intended to offer to execute merely a mortgage, or that he was driven by necessity and the exactions of a rapacious creditor to assent to an unconscionable bargain. These letters disclose the real nature of the transaction. They dispel all suspicion as to fraud, accident, or mistake, in the execution of the deed. It was intended to operate according to its terms, and from the moment of its execution Jacinto is treated as the owner of the land, with the absolute right to dispose of it. If, as Ramona testifies, it was understood that the family were to be consulted before the sale was concluded, that understanding was fulfilled, for Rafaela was apprised of the offer of the Steeles before the lease was made, and informed of its execution three days after the papers were signed. She makes no objection, either that the signatures of the family were necessary, or to the terms of the contract, except only to that part which provided for her residence on the place for one year. Had they both been aware that Jacinto was fraudulently violating the agreement upon which the deed was made, it is difficult to account for the entire absence of concealment on his part, or of complaints and reproaches on her's. But her conduct and that of the family was as significant as the language of the letters. The Steeles were suffered to take possession without a word of protest, or any intimation of the rights now set up. They were permitted to make the valuable improvements required by the lease, (amounting in value to about \$5,000 a year.) Several of the sons entered into their employ, and a lease was finally procured from them for the house and grounds the family were occupying. For more than a year the rights now set up were either concealed or unsuspected. When and by whom they were first suggested, and what was the origin of this litigation appears from Rafaela's letter of November 19, 1867: "I will now tell you what there is in relation to the rancho. Do not be alarmed; there is nothing done yet; and I will inform you of what they wish to

do." "The owner of the rancho of Guadalupe came yesterday to make me a proposition. He tells me that if I am willing to give him my signature and those of my children, selling all the rights we have in the rancho of Corral de Piedra to him for a much better price than that which Mr. Steele pays you, paying you all the money you have given for the rancho, and the interest of the money from the time you have loaned money on the rancho. They say I can do this. They have looked at the record of the deed which we gave you, and the lawyer, Van Ness, says that the deed which we made to you is only to secure your money, and not to pay my interest on the money which you had on the mortgage, and that I, having the money, can pay the same and the property remain in my hands. They also say that if this is done you will have no responsibility. They only desire to do so out of consideration for the family. This business is between Cappe, the owner of the Guadalupe, Van Ness and another lawyer. These gentlemen have made me this suggestion that the money which you have given on the rancho is \$10,000 or \$12,000, and that at the end of the five years of the contract with Messrs. Steele, it is very likely the interest of the money will amount to the \$20,000, and then that the family will be left to perish. Recently a gentleman offered Steele \$50,000 for the rancho, which he refused to accept, and as time passes these lands increase value on account of the immigration of the people who are to come. This is the reason why they say that for so small a sum Steele will remain with the rancho when you and we might enjoy \$40,000 or \$50,000, which is what he proposes to pay me,—the said gentleman who desires to buy the rights to the rancho. Mr. Van Ness also says that, according to the contract you have with Steele, the rancho will remain with him in any event. That it will matter little to him whether he fences the rancho or not within the time he has for buying it, and that you have no right to refuse to fulfill the contract, although Steele should refuse to comply with the terms of the same. But in all this they tell me, what can I do? I said that I believe we had no right, and if we had any, to do that which they wish, I have to advise with you in relation thereto; and according to your opinion, if you asked me to do it. Well, and if not, I did not wish to do anything without your approval. All this is under much secrecy, and according to what you think of the same you will answer me whatever it be. Do not think that we will do any unless you should wish it. * * * Your sister, Rafaela Rodriguez." This letter not only shows when and how the idea first entered the mind of Rafaela, that the deed to her brother could be made out to be a mortgage; it also contains the expression of her disbelief in the existence of the rights which were attributed to her. It cannot be said that she was ignorant and illiterate,

for her correspondence shows her to have possessed unusual intelligence for a person in her condition. The question was one of fact and not of law, and had she known that the deed was executed merely as a security for the debt due her brother, as she would now have us believe, some allusion to or recognition of that fact must have fallen from her. Certainly she did not then dream of charging her brother with having fraudulently, and contrary to his agreement, disposed of property as his own, which he held only as a security. The overture thus made to Jacinto to unite in a scheme to avoid the fulfillment of his contract with the Steeles, he seems to have declined. From all this testimony, the facts of the case clearly appear.

The deed was executed, not as a mortgage, but in payment of the debt due to Jacinto. It was executed voluntarily, and as the best, if not the only means, of preventing the property from being sold under the hammer, but with the expectation that, if more could be realized for it than was necessary to repay Jacinto, the surplus would be given to the family. But, if additional evidence were wanting to show that the deed was not intended as a mortgage, it will be found in the fact that the previous indebtedness was paid and extinguished.

In *Conway v. Alexander*, 7 Cranch [11 U. S.] 218, Mr. Chief Justice Marshall says: "But as a conditional sale, if really intended, is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the repayment of money, or an actual sale. In this, the form of the deed is not in itself conclusive either way. The want of a covenant to repay this money is not complete evidence that a conditional sale was intended, but it is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secure. It is, therefore, a necessary ingredient in a mortgage that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case. But it must exist in order to justify a construction which overrules the express words of the instrument." This decision has been followed in numerous other cases. *Glover v. Payn*, 19 Wend. 521; [*Holmes v. Grant*,] 8 Paige, 243. See cases collected in 3 [White & T.] Lead. Cas. Eq. 336 et seq. "It necessarily follows," says the learned editor, "that when a conveyance is in satisfaction of a precedent debt, it cannot take effect as a mortgage, although containing a clause for redemption, because the previous debt being extinguished, and no new one created, one of the essential attributes of a mortgage is wanting." And for this he cites numerous authorities.

In the case at bar, the deed, after reciting the note, and other indebtedness in con-

sideration of which it is made, further recites: "And in further consideration that the party of the second part cancel and discharge said note and mortgage herein before referred to, and the parties of the first part from any and all the liabilities, debts, and sums of money hereinbefore mentioned as having been paid or advanced by the party of the second part, the parties of the first part have granted, bargained, sold," etc., etc. The proof shows that the mortgage was cancelled of record on the following day. The note does not seem to have been demanded or surrendered, but all liability upon it was extinguished by the recitals in the deed and the cancellation of the mortgage. It was retained probably in order that, if Jacinto should be called on to fulfill his promise to give to the family any surplus over and above the debt due, he might have the means of establishing its amount. From the date of the deed the debt appears to have been treated by all parties as extinguished. No payment of principal or interest was made or demanded, and no reference to it is contained in the correspondence until the letter of November 19th, 1867, nearly four years afterwards. My conclusion from all the evidence in the case is, that the deed and the testimony of Jacinto disclose the true nature of the transaction, viz., that the land was conveyed not in security for, but in satisfaction and extinguishment of, the precedent debt, but under the expectation founded on Jacinto's assurances that any surplus of the price at which it might be sold, over and above the amount necessary to reimburse Jacinto, would be, by the latter, appropriated to the benefit of the family. Whatever trust, therefore, was created referred to the proceeds. It did not attach itself to the land or in any way impair the right of Jacinto to dispose of it.

In the view I take of the evidence it is not necessary to consider at length the title or right acquired by the Steeles. That they contracted without notice of the alleged equities in the grantors of the complainant, and on the faith of the recorded title, is beyond controversy. The attempt to fix on them a constructive notice, by evidence of loose rumors and conjectures, was wholly unsuccessful. "Vague reports and rumors from strangers," says Story, Circuit Justice, "are not a sufficient foundation on which to charge a purchaser with notice of a title in a third person." *Blagg v. Mann*, [Case No. 4,847.] In *Wilson v. Wall*, [6 Wall. (73 U. S.) 91.] says the supreme court: "The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence."

As the Steeles, by the contract to sell, merely acquired an equitable right, it was

conceded at the argument that they were not within the general rules which protect bona fide purchasers, without notice. It may deserve consideration, however, whether under the recording statutes of this state he who has acquired the right to demand the conveyance of the legal title on the payment of a sum of money, by a contract entered into with the apparent owner, is not entitled to the same protection as he who has actually obtained a deed. The effect of those statutes is not merely to affect all persons with notice of every recorded deed and to avoid as against subsequent incumbrances. They also operate as a designation of a place, to which all the world is invited by law to resort, for complete and reliable record evidence of the titles to estates. Whoever, therefore, voluntarily and with full knowledge of its purport executes a deed, knows that it will necessarily be placed on record, and he authorizes the grantee to proclaim himself, in the most emphatic manner, to the world as possessed of the estate which the deed purports to convey. If, in fact, the real title, or right of ownership, is in the grantor, the latter consents to the proclamation of a falsehood, and the making of a deceptive record; and, as between himself and any person who, on the faith of the recorded title and without notice, has dealt with the apparent owner, it seems most agreeable to justice and the analogies of the law to hold the former bound by the acts of the agent or trustee to whom he has furnished the means of deception. A contract for the sale of land is by the same statutes regarded not merely as a personal contract on the part of the contractor, but as a covenant attached to and running with the land; and, if recorded, it will bind the land, and may be enforced against any subsequent incumbrance. He who has entered upon land under a contract for the conveyance of the title, is popularly considered the real owner as much as if he had obtained a deed and paid the purchase money; and there would seem to be no good reason for refusing the protection which equity would unhesitatingly have afforded him had the transaction assumed the latter form. Nor are his rights fully secured by exacting from the owner of the latent equity a return of whatever of the purchase may have been paid or money expended in betterments. He may have fixed his home upon the land, and it may have acquired for him a pretium affectionis, or it may have risen greatly in value, as in the case at bar, and this increase is the fair and legitimate fruit of his sagacity or his good fortune, to which he is justly entitled. To allow the equitable owner to lie by, and at his will to enforce or avoid the contract, as his interest may dictate, is to give him an unjust advantage to which his own negligence or blind confidence, in suffering a person not the true owner to appear as such

upon the records, does not seem to entitle him. It is not necessary, however, to pass upon the point, as, for the reasons already stated, I think the bill must be dismissed.

[NOTE. This decree was reversed by the supreme court in *Villa v. Rodriguez*, 12 Wall. (79 U. S.) 323. Mr. Justice Swayne, in delivering the opinion, said: "The lessees and their assignees insist that they are bona fide purchasers without notice. This proposition cannot be maintained. * * * The doctrine invoked has no application where the rights of the vendee lie in an executory contract. It applies only where the legal title has been conveyed and the purchase money fully paid. * * * To give validity to such a sale by a mortgagor, it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. * * * The terms exacted for the loan by Rodriguez were harsh and oppressive. The condition of the widow and orphans might well have touched his kindred heart with sympathy. It seems only to have whetted his avarice. Two per cent. a month—and this, if not paid as stipulated, to be compounded—was a devouring rate of interest. It was stipulated that the further advances should bear interest at the same rate. He demanded an adjustment when, from the failure of the crops and other causes, the property was greatly depressed, and he knew the widow and her children had no means of payment. The alternatives presented were an absolute conveyance of the property or a foreclosure and sale under the mortgage. He was anxious to procure the deed, and exulted when he got it. The debt and advances, with the interest superadded, were much less than the value of the property. * * * The testimony of Rodriguez alone is sufficient to turn the scale against him. He cannot repudiate the assurances upon which his grantors were drawn in to convey. To permit him to do so would give triumph to iniquity. The facts indisputably established bring the case clearly within those principles by the light of which, in determining the rights of the parties, the judgment of this court must be made up. The complainant stands in the place of those from whom he derives title. He is clothed with their rights, and is entitled to redeem six-sevenths of the premises upon paying that proportion of the mortgage debt and interest. The former must be held to include the amount advanced, as well as that represented by the note, and the latter be settled by the terms of the contract and the law of California."]

ALEXANDER, (UNITED STATES v.)

[See *United States v. Alexander*, Case No. 14,428.]

ALEXANDER, (VOWELL v.)

[See *Vowell v. Alexander*, Case No. 17,017.]

Case No. 173.

ALEXANDER'S ADM'R v. SELDEN.

[4 Cranch, C. C. 96.]¹

Circuit Court, District of Columbia. Nov. Term, 1830.

DOWER—DEATH OF HUSBAND NOT SEIZED — DAMAGES FOR NONASSIGNMENT—EQUITY.

If the husband does not die seized, the widow is no more entitled to damages in equity for the nonassignment of her dower than she is at law.

In equity. Bill in equity by the administrator of the widow Frances Alexander, against [Wilson C. Selden et al.] the heirs at law of her husband, [Charles Alexander, Sr.,] for an account of the rents and profits of her dower, from the time of demand until her death. Her husband in his life time had conveyed the lands to his son, Charles Alexander. Mrs. Alexander died in 1823.

Mr. Hewitt, for the plaintiff, cited *Curtis v. Curtis*, 2 Brown, Ch. 620, and contended that the plaintiff might recover damages in equity, even if she could not at law.

Mr. Taylor, contra. By the statute of Merton, the widow is not entitled to damages unless her husband died seized; but here her husband had in his life time conveyed the estate to his son; so that the husband did not die seized. Co. Litt. 32b; [Anon.,] 3 Dyer, 284a; *Embree v. Ellis*, 2 Johns. 124; [*Humphrey v. Phinney*,] Id. 484; *Shaw v. White*, 13 Johns. 179; Act Va. Dec. 6, 1792; 1 Rev. Code, 1803, p. 170, § 4.

Mr. Hewitt, for complainant, cited *Herbert v. Wren*, 7 Cranch, [11 U. S.] 370; *Mundy v. Mundy*, 2 Ves. Jr. 122; 1 Co. Litt. 588, note; and contended, that courts of equity are not confined to the legal right of dower, but may give the same damages from the time of demand of dower where the husband did not die seized as the statute of Merton gives where the husband died seized.

THE COURT was of opinion that damages cannot be given in equity which could not be recovered at law.

THRUSTON, Circuit Judge, absent.

Case No. 174.

ALEXANDER v. THOMAS.

[1 Cranch, C. C. 92.]¹

Circuit Court, District of Columbia. April Term, 1802.

LANDLORD AND TENANT — DISTRESS FOR RENT — REPLEVIN BOND—MARSHAL'S COMMISSION.

The marshal's commission of five per cent. may be included in a replevin bond for [goods distrained for] rent.

¹Reported by Hon. William Cranch, Chief Judge.]

At law.

Motion for judgment given on a replevin bond for goods distrained for rent.

Mr. Taylor, for the defendant, objected that the bond included the marshal's commission of five per cent.

But THE COURT were of opinion that the commission ought to be so included. Act of Assembly, Rev. Code, 228, 338; Act 1800, p. 10.

Case No. 175.

ALEXANDER v. TODD et al.

[1 Bond, 175.]¹

Circuit Court, S. D. Ohio. April Term, 1858.

FRAUDULENT CONVEYANCES—WHAT CONSTITUTE—CONSIDERATION—POSSESSION.

1. A conveyance of real estate, by a debtor, is clearly fraudulent if, at the time of its execution, no consideration is paid and no security or evidence of indebtedness is taken.

2. Such a conveyance is also impeachable on the ground of the falsity of an admission contained in it, that the whole amount of the consideration had been paid.

3. The presumption of fraud, arising from the non-payment of the consideration and the failure of the vendor to take from the vendee any evidence of indebtedness for the property sold, may be rebutted, if subsequently, and in pursuance of the understanding of the parties at the time the deed was executed, the consideration is paid in good faith.

4. Proof that a full consideration for the property sold was paid, does not decisively negative the presumption of fraud, for the intention of parties, and not the fact of payment, is the test by which the transaction is to be judged.

5. A transfer of property, with an intent to defraud or defeat creditors, will be void, although there may be, in the strictest sense, a valuable and adequate consideration.

6. Where defendants are apprised, by a bill in equity, that a deed executed by them is to be impeached, it is incumbent on them to contradict and explain every fact tending to cast suspicion on it.

7. Possession of land, and receipt of the profits after an absolute conveyance, is evidence of fraud, unless such possession be consistent with the terms and objects of the deed, or the character of it be openly and explicitly understood.

8. It avails nothing that the parties to a sale insist or swear that it was made in good faith, if their declarations are outweighed by the facts and the necessary inference of law.

[In equity. Suit by Robert J. Alexander against Martin L. Todd and Alfred W. Woods to set aside a conveyance as fraudulent. Decree for plaintiff.]

D. Peck, for plaintiff.

G. E. Pugh, for defendants.

LEAVITT, District Judge. This is a bill in equity, prosecuted by the plaintiff as the assignee in bankruptcy of the defendant

¹Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

Woods, to set aside, as fraudulent and void, a conveyance of real estate by him to the defendant Todd. The allegations of the bill are substantially that in April, 1838, the defendant, Woods, having a title in fee to a tract of nearly forty acres of land, on the Ohio river, in Belmont county, in this state, opposite the lower part of the city of Wheeling, then valued by Woods at twenty-five thousand dollars, and having no other property of any considerable value, and being at the time indebted on his own account and as a surety to the amount of nearly twenty thousand dollars, conveyed the said real estate to the said Todd, his brother-in-law, with the intent to defraud his creditors and evade the payment of his debts. The bill charges that Todd was privy to the fraud, and received the deed really as a trustee for the benefit of Woods, and that no consideration was paid by Todd, and that the possession remained virtually in Woods after the conveyance. The prayer is, that the deed may be set aside as fraudulent, and that Todd shall account for any moneys received by him for any part of said property sold; and that such part as is unsold be now sold and the proceeds paid to the plaintiff, for the benefit of the creditors of Woods. The defendants were not required to answer under oath, but have filed answers, not sworn to, denying the fraudulent purpose alleged in the bill, and asserting that the sale and purchase of the property were in good faith, and that the consideration named in the deed was paid. As the answers are not evidence, it will not be necessary to refer specially to the facts stated in them. The deed, which is impeached as fraudulent, is among the exhibits in the case. It bears date April 28, 1838, and appears to have been executed and acknowledged according to the requirements of law; and was left for record in the office of the recorder of Belmont county, by the grantee, on the day of its execution. It purports, in consideration of twenty-five thousand dollars, paid by Todd, to convey to him in fee the tract described, together with all the ferry rights and privileges pertaining to it. It is not signed by Mrs. Woods, the wife of the grantor; but it appears that, some time after its date, she released her right of dower.

The only evidence which relates directly to the execution of the deed is before the court in the deposition of the defendant Woods, who, by his own consent and the consent of the counsel for the plaintiff, has been examined as a witness. He is therefore a competent witness, and entitled to credit, so far as his testimony is not contradicted or weakened and rebutted by the probabilities of the case. He states that the sale and purchase of the real estate had been a subject of conversation between him and Todd for some time prior to the execution of the deed, but no written agreement had been signed, and the terms of the sale do not appear to have been

specifically settled. He also states that he lived on the property at the date of the deed and had occupied it for many years before, and that Todd resided about a mile from it. On April 28, 1838, the parties went to the town of St. Clairsville, the county seat of Belmont county, distant about twelve miles from their homes, where they procured an attorney to write the deed, which was signed, acknowledged, and put on record as before noticed. No money was paid at that time, nor was any note or other writing given by Todd, evidencing his liability to pay the consideration named in the deed or any other sum. Woods says, in his deposition, that there was a verbal understanding that the purchase money was to be paid as he might require it in his business, except sixteen hundred dollars, the payment of which was to be deferred until it could be made from the sale of the property conveyed by the deed. He also testifies, and it is otherwise proved, that in the summer of 1838, some twenty acres of the tract was laid off in town lots and called West Wheeling, a plat of which was made and entered of record in Todd's name. No part of the money, according to the evidence of Woods, was paid to him until August 8, 1839, when he received from Todd twenty-three thousand four hundred dollars. As something will be said hereafter concerning this payment, it will not be noticed further in this place.

Before proceeding with this investigation, the inquiry is suggested, whether from the facts connected with the execution of this deed, apart from the alleged payment at a subsequent day, such indications of fraud are found as will invalidate it. Thus considered, it is clearly a mere voluntary conveyance, and void as impairing the rights of creditors. It is too clear to admit of doubt, that Woods was not in a position to make a legal transfer of this property for any other purpose than the benefit of his creditors. His debts at that time exceeded fifteen thousand dollars, and he possessed no property of any value except the real estate conveyed to Todd. If, therefore, the evidence fails to establish the fact of a bona fide payment of the consideration money, the deed is void as a fraudulent conveyance to the injury of creditors. But, without further remarks on this view of the case, I will notice some of the facts in relation to the transaction in question which justify a strong suspicion, if not the positive conclusion, that it is infected with fraud. There are circumstances in proof, relating to the conveyance in question, which are hardly accordant with an honest purpose in these parties. Without noticing all the facts inducing the suspicion of fraud, there is one, so marked in its character and so widely variant from the usage of the country in such cases, as to be significant, if not conclusive. It will be readily seen that the amount involved in this transaction, especially in reference to

these parties and the time it occurred, may well be regarded as large; and, on the supposition that the sale was a real one, and free from any taint of a fraudulent intent, would have induced great caution and vigilance in its consummation. But the remarkable fact appears, that although the sale had often been a subject of conversation prior to the execution of the deed, and the terms had been, to some extent, settled between the parties, nothing had been put in writing respecting it. It is, however, still more remarkable, and wholly without explanation, that Woods executed the deed containing an acknowledgment, in the most solemn form, that the entire sum of twenty-five thousand dollars had been paid by Todd, when in fact no part of it had been paid, or any promise or security given that it would be paid. It seems incredible, that any man of sane intellect, intending to make a bona fide sale of real estate of large value, should neglect to take even the written acknowledgment of the party, in the form of a promissory note or otherwise, as evidence of the indebtedness. It is usual, in such cases, for the purchaser either to give the vendor a note with undoubted personal security, or a mortgage, to assure the payment of the purchase money. In this case, on the theory that the payment was made, nearly sixteen months elapsed from the date of the deed, during which time Woods was in possession of no evidence of Todd's liability to pay. The payment, therefore, if made, was wholly voluntary on his part, and without any pretense that interest on the amount was either demanded or paid. In the case of *Hendricks v. Robinson*, 2 Johns. Ch. 283, the learned Chancellor Kent held that a conveyance was impeachable for fraud, where the consideration was large, on the ground that the vendor had taken the promissory notes of the vendee payable on time, without security. After stating that for the remainder of the consideration, amounting to \$221,793, notes were taken, payable in one, two, three, four, and five years, the chancellor remarks, "that the whole of this immense debt, created by the sale of the real estate at its fair value, was thus left to rest on the personal promise of H. F., without any other security, real or personal." It is true, in the case referred to, there were other indications of fraud, but great stress was laid by the chancellor on the fact above stated. He remarks: "It is contrary to the ordinary course of dealing, and repugnant to the maxims of common prudence to alienate such an immense real estate without payment or security."

The conveyance from Woods to Todd was clearly fraudulent at the time of its execution, for the reason that no consideration was paid, and no security—not even the promissory note of the purchaser—was taken. It is also impeachable on the ground of the falsity of the admission contained in it, that the whole amount of the consideration had

been paid. In the case of *Watt v. Grove*, 2 Schoales & L. 501, the lord chancellor says, that "solemn instruments, duly executed, are prima facie conclusive on the parties. Where they state truly the transactions on which they are founded, they are binding in equity as well as at law, if the consideration stated is sufficient for the purpose. But, if it appears that transactions are not truly stated, the instruments may lose all their binding quality in equity, even if conclusive at law." But it is insisted, by the counsel for the defendants, that the consideration stated in the deed, though not paid or secured at the time of its execution, was paid some fifteen months after; and that, conceding the instrument to have been void at its inception, the subsequent payment purged from all taint of fraud. It is a grave question, perhaps, whether a transaction clearly fraudulent in law, at the time it took place, can be relieved from the imputation by any subsequent act. It is not proposed to consider this question in its application to this case. It is, however, proper to remark that the presumption of fraud arising from the non-payment of the consideration, and the failure of the vendor to take from the vendee any evidence of indebtedness for the property sold, may be rebutted, if subsequently, and in pursuance of the understanding of the parties at the time the deed was executed, the consideration is paid in good faith. It is, therefore, a proper subject of inquiry, in this case, whether the payment was made, as asserted by the defendants. But, before considering this question, it is proper to remark, that proof that a full consideration for the property sold was paid does not decisively negative the presumption of fraud. The intention of the parties, and not the fact of payment, is the test by which the transaction is to be judged. Judge Story has clearly stated the law on this subject. He says, the consideration must be valuable, and must also be bona fide; and that if there is an "intent to defraud or defeat creditors, it will be void, although there may, in the strictest sense, be a valuable, nay, an adequate consideration." And he remarks further, that "cases have repeatedly been decided, in which persons have given a full and fair price for goods, and where the possession has been actually changed; yet, being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore set aside. Thus where a person, with knowledge of a decree against the defendant, bought the house and goods belonging to him, and gave a full price for them, the court said, that the purchase, being with the manifest view to defeat the creditor, was fraudulent, and, notwithstanding the valuable consideration, void." 1 Story, Eq. Jur. § 369.

But was the consideration stated in the deed paid by the defendant Todd? The evidence on this point is that contained in

the depositions of the defendant Woods, his brother Andrew Woods, and Richard Miller. A proposition, it would seem, was made by the plaintiff that the defendant Todd should be examined as to the payment, but it was declined, and his statement is not before the court, except as it is contained in his answer, not verified by oath. The defendant Woods swears positively that twenty-three thousand four hundred dollars was paid to him by Todd, in August, 1839, in bank-notes, in the presence of his brother Andrew. Andrew Woods testifies that he was present, and assisted in counting the notes; and that the amount was as above stated. The witness Miller says he was in the room, and saw a large pile of bank-notes on the table, but does not know the amount. If these witnesses are entitled to credit, the fact of the transfer of bank-notes by Todd to Woods, amounting to \$23,400, is proved. But, the question still remains, was this a bona fide payment of the consideration expressed in the deed? Without referring to the mass of evidence bearing on this point, I can only notice some of the more material facts sustaining the conclusion that this payment was not made in good faith, but was a device intended to give an appearance of fairness to the sale, when, in fact, it was the intention of the parties to place the property beyond the reach of the creditors of Woods.

1. There can be no question as to the fact that Andrew Woods was largely indebted in April, 1838, when the deed was executed. It does not change the legal aspect of the subject, that the larger part of his indebtedment was as surety for other persons. Nearly all these debts were due to banks, for which all the parties were held as principal debtors, with warrants of attorney to enter up judgments at their maturity. The defendant, therefore, was liable to judgment and to execution for these debts at the date of the execution of the deed. And it is not controverted that if the persons for whom he was surety were not then insolvent, they were known to be so shortly after.

2. It is a significant fact that, although the sum alleged to have been paid by Todd to Woods was large, no evidence is offered to prove from whom, or in what manner, Todd obtained it. The defendant Woods and his brother Andrew Woods say, in their depositions, they do not know where he procured this money. Nor does Todd, in his answer, give any information on this point. There is evidence that for many years prior to his removal to Ohio, in the year 1832, he had been a physician at Wheeling, and, in connection with his profession, was also interested in a drug store in that city. It is the opinion of the witnesses who have testified as to this point that his business was lucrative; and it appears that he was the owner of real estate in Wheeling of consid-

erable value. But, as negating the fact of his having in his possession nearly twenty-four thousand dollars in August, 1839, it is in evidence that he disposed of no real estate about that time, and that he had no deposits, to any considerable amount, in any of the banks at Wheeling, or that vicinity. And there is also evidence, in regard to some of his pecuniary transactions, showing that his cash means were quite limited. Now, as, upon the theory on which the defendants attempt to sustain the deed in question, it was obviously important to prove, not only the payment of the consideration, but that the purchase by Todd was free from all imputation of fraud, or covinous purpose, their failure to adduce any proof as to the source whence the large sum in question was obtained, may well excite suspicion as to the character of this transaction. And this suspicion is certainly in no degree weakened by the omission of the defendant Todd to state the facts, which were within his knowledge, relating to this point. The defendants were apprised by the bill that the deed was to be impeached; and it was incumbent on them to contradict or explain every fact tending to cast suspicion on it.

3. In addition to the facts that no note or other writing was given when the deed was executed, as evidence that the consideration money was due, and that for more than fifteen months the business remained in this uncertain and perilous position, the still more extraordinary fact is developed that when the money was paid no receipt or other written evidence of payment was required by Todd, or given by Woods. In a transaction of so much importance to these parties, it is almost incredible that they should be content to leave it resting in the knowledge or memory of a single witness.

4. In the next place, the conclusion is irresistible from the evidence before the court, that no satisfactory account is given of the application of the money alleged to have been paid by Todd to Woods. After a rigid examination, the statements of Woods in his depositions are, in some particulars, vague and unsatisfactory, and as to others, in direct conflict with the reliable evidence of other witnesses. I do not propose to notice the evidence at length on these points. It is remarkable, however, that Woods produces no book or voucher showing the payment of a dollar of the funds received from Todd in extinguishment of his debts. He states that he paid to different persons, to whom he was indebted, some thirteen thousand dollars, and that he lost largely by investments in steamboats. The accuracy of these statements is seriously impugned by the evidence of other witnesses, proving that at least two debts of considerable amounts were paid prior to August 8, 1839, and could not, therefore, have been paid out of the funds received from Todd.

5. There is still another view of this transaction which, in my judgment, exhibits its real character in a light that clears it of all doubt, and forces on the mind the conclusion that it is infected with legal, if not actual fraud. I refer to the fact established by the proofs that there was no real change of possession after the alleged sale to Todd. Chancellor Kent, in the case of *Hildreth v. Sands*, before referred to, says that "possession of land, and taking the profits after an absolute conveyance, is evidence of fraud within the statute of frauds, unless such possession is consistent with the terms and object of the deed, or the character of it be openly and explicitly understood." 2 Johns. Ch. 46. There is no pretense that the deed to Todd contains any reservation of the right of possession in Woods. Nor is there any evidence conducing to prove, in any legal sense, that Woods was the agent of Todd, and retained the possession and exercised acts of ownership in that character. Several of the persons who purchased lots after the town was laid out state that they were not aware of any conveyance to Todd, and supposed the title was in Woods until they received their deeds from Todd. It is true, that in some instances Woods professed to act as Todd's agent in the sale of lots, and after receiving payment procured the deeds to be made in his name. Woods received in cash and otherwise more than four thousand dollars for lots thus sold, and there is no evidence that he ever paid this sum, or in any way accounted for it to Todd. In one case it appears that as late as the year 1842, subsequent to the discharge of Woods under the bankrupt law, he received pay in part for a lot sold in work on a ferry-boat. And it is also proved that he offered to pay a debt due from him by the sale of a lot in the town, and with this view procured Todd to execute a deed to his creditor. There is one fact bearing on the question of Woods' possession after his conveyance to Todd that seems to be conclusive. It has been already noticed that some months after the date of this conveyance, some twenty acres of the land described in it were laid off in town lots, leaving about seventeen acres not included in the town plat. This part of the tract was mostly a hill-side, in which there was a valuable coal-bank that had been worked for many years before the conveyance to Todd. On this seventeen-acre tract was situated a dwelling house, in which Woods had long resided, and where, without any change and without any lease from Todd, he continued to reside, and perhaps yet resides. It also appears that the ferry, which was an appendage of the property, has been ever since carried on by Woods, the license therefor always being in his name. It is also in proof that he has continued to take coal from the coal-bank for the use of his ferry-boat, and that he has also sold large quantities of coal taken from

that bank. It is true the defendant Woods says in his deposition that he agreed to pay Todd three hundred dollars a year for the ferry and for the coal required for the use of the ferry-boat; and was also to account at a price agreed on for the coal sold by him. No written agreement to this effect is exhibited; nor is there any evidence of any agreement by parol or otherwise, except what is contained in the deposition of Woods. It is obvious from the position he occupies in reference to this case, that his testimony must be received with great caution. He testifies under the influence of a strong desire to sustain the fairness of this transaction, and thus vindicate his character from the imputation of fraud. In reference to facts of such materiality as those now under consideration, it is most reasonable to require that his testimony should in some way receive confirmation. If he was bona fide the tenant of Todd, and in that character retained the possession and use of the dwelling house, the ferry, and the coal-bank, it may be well asked why some proof of the fact beyond his own statement is not adduced? It is strange, indeed, that this arrangement should be allowed to continue for many years without some note or memorandum in writing of its existence. There is not only the absence of such proof, but the statements of Woods as to his being bona fide the tenant of Todd, are strongly impeached by facts drawn from him in the progress of his examination. Although he states that he settled with Todd for the rent of the ferry and the use of the coal-bank, he admits that he kept no account in any form of their dealings, and does not exhibit any book or voucher showing the payment of anything to Todd on account of rent. He also states that he does not know that Todd kept any book showing the state of their accounts. It would certainly require a great stretch of credulity to believe that if the relation of landlord and tenant existed between these parties in good faith, there would be such looseness and carelessness in the transaction of their business. And I can not resist the conclusion that in reference to the dwelling house, the ferry, and the coal-bank, the possession remained unchanged in Woods after the conveyance to Todd; and that he enjoyed all the benefits and advantages of that part of the tract not included in the town plat, on which was situated the dwelling house with its appendages, as also the coal-bank, as fully as before the alleged sale to Todd. This remark would seem also to apply to the ferry and the privileges connected with it. It is also worthy of notice, as an indication of the real character of this transaction, that while it is alleged in the answers of both the defendants that it was verbally agreed that Woods should act as the agent of Todd in the sale of lots, and while Woods stated in his deposition that such was the agreement, and that he sold

lots and received payment as an agent, there is no satisfactory evidence that any accounts were kept between them showing the existence of the relation of principal and agent. Woods states distinctly that he kept no account of sales made or moneys received, and that he does not know that Todd had any books or papers showing these facts. The omission to do this, and the vague and unsatisfactory statements as to the settlements between these parties, involving large amounts of money, are certainly indications of the real character of the conveyance to Todd. Men of ordinary intelligence and prudence do not conduct their business in this loose manner. The instincts of self-interest usually induce all men, in their business transactions, to make full and exact entries of moneys received or paid. And the mind is forced to the conclusion, in the absence of any proof that this was done, as between a principal and agent, that the parties did not recognize the existence of the relation. In this case, there is no book, voucher, or paper of any kind showing any receipts of moneys by Woods as the agent of Todd, or any payments to the latter in that capacity. This is not accounted for by the lapse of time since these alleged transactions took place. The deposition of Woods was taken within less than ten years from the date of their occurrence; and it is not reasonable to suppose that within that period the written evidence of what passed between the parties could have been lost or destroyed. There is no pretense in this case of such loss or destruction.

Without further remarks or comments, I am obliged to say, that looking to the conduct of these parties from the first to the last of their transactions, it seems irreconcilable with the supposition that the transfer of the property in question was made in good faith. I cannot doubt that it was a mere device to put the property of Woods beyond the reach of his creditors; and viewed in this light, it has the infection of legal fraud. That both the parties are implicated in it seems hardly to admit of doubt. It is indeed insisted that there is no proof that the defendant Todd had any knowledge of the embarrassment of Woods at the time of the execution of the deed. There is no such direct evidence; but can it be doubted, considering that the parties were brothers-in-law, living near to each other, and were on terms of intimacy and friendship, that he had such knowledge? Todd was then an aged man and in infirm health; and it is altogether improbable that he would have purchased this property under such circumstances at a price greatly beyond its real value, with the purpose of laying off a town and making profit by the sale of town lots. While it is quite conceivable that he may have been influenced by a benevolent desire to shield his brother-in-law from impending pecuniary ruin, and

for this object was willing to place himself in the position of a purchaser of the property, yet, in a legal aspect, he was a mere trustee for the creditors of Woods. And it avails nothing that these parties insist or swear that the sale was in good faith. In the case of *Hendricks v. Robinson*, before cited, Chancellor Kent remarks: "It is indeed true, that the purchaser and the vendors say that this was an honest and bona fide sale, but do not the facts, which they all admit, outweigh the declaration? And can a mere assertion be compared to the unequivocal language of facts and the necessary inference of law?" It results from these views that a decree must be entered for the plaintiff. It must declare the conveyance from Woods to Todd fraudulent and void; but as it is admitted by the plaintiff's counsel that those who have purchased lots in the town are purchasers for a valuable consideration and without notice of any fraud in the sale to Todd, their rights are not to be affected by the decree. The decree must also direct that the unsold portion of the tract be sold for the benefit of the creditors of Woods. And so far as Todd has received moneys for the sale of lots or the rent of the dwelling house, coal-bank, and ferry, he must be held to account for the same. This will involve the necessity of a reference to a master, who will be authorized to examine the defendant Todd on oath and report to this court.

Case No. 176.

ALEXANDER v. TURNER.

[1 Cranch, C. C. 86.]¹

Circuit Court, District of Columbia. April Term, 1802.

LANDLORD AND TENANT — DISTRESS FOR RENT — PAYMENT BY ACCEPTED BILL.

An acceptance by the tenant of a bill drawn by the landlord for the rent is no bar to a distress, if the bill be not paid.

At law. Replevin [by Alexander against Turner, as bailiff of Patten.] Cognizance, as bailiff, for rent arrear. Plea, "No rent arrear," and issue.

Mr. Taylor, for plaintiff, moved for leave to withdraw the plea of "No rent arrear," and file a new plea setting forth that Patten had drawn an order on the plaintiff, for three quarters' rent, which the plaintiff had accepted to pay; and that, as to the fourth quarter's rent, he tendered it before the distress was made.

THE COURT refused the motion. The cause was then tried on the issue joined, and the court instructed the jury that the acceptance did not destroy the debt due for the rent, and that it was no bar unless it had been paid.

¹[Reported by Hon. William Cranch, Chief Judge.]

Case No. 177.

ALEXANDER v. WEST'S EX'X.

[1 Cranch, C. C. 88.]¹

Circuit Court, District of Columbia. April Term, 1802.

JUDGMENTS—VACATING ON PLEA OF "NEVER EXECUTRIX."

An office judgment may be set aside on the plea of "Never executrix."

At law. The plea of "Never executrix" was admitted to set aside an office judgment.

MARSHALL, Circuit Judge, said he agreed, as this was a new case, but he should not agree again to admit such a plea to set aside an office judgment after the first term, but upon affidavit that it was not intended for delay.

ALEXANDER McNEIL, The.

[See: United Hydraulic Cotton-Press Co. v. The Alexander McNeil, Case No. 14,404; Brown v. Same, Id. 1,988; Coyne v. Same, Id. 3,312a; Southern Bank v. Same, Id. 13,186.]

Case No. 178.

The ALEXANDRIA.

[10 Ben. 101.]²

District Court, S. D. New York. Sept., 1878.

COLLISION—DAMAGES—INTEREST ON DEMURRAGE—CUSTODY OF CARGO.

1. In a collision case the owners of the injured vessel may recover interest on the sum allowed them for the demurrage of their vessel.

[Disapproved in *Johanssen v. The Eloina*, 4 Fed. Rep. 574, 575.]

[See note at end of case.]

2. A reasonable sum for the care and custody of cargo is also to be allowed, but not interest on the value of the cargo.

[In admiralty. Libel by William B. Byrnes and others, owners of the barkentine *C. L. Pearson*, against the steamship *Alexandria*, for damages sustained by collision. Decree for libellants. An appeal was taken to the circuit court, and there affirmed.]

Scudder & Carter, (G. A. Black,) for libellants.

H. Nicole, for claimants.

CHOATE, District Judge. Exceptions to the report of a commissioner on the amount of the damages sustained by the libellants in a case of collision. One of the items allowed is demurrage, or an allowance for the loss of the use of the libellants' vessel while being repaired. It was agreed between the parties that the fair rate of demurrage was sixty dollars per day, making this item \$1,-

¹[Reported by Hon. William Cranch, Chief Judge.]

²Reported by Robert D. Benedict, Esq., and Reni. L. Benedict, Esq., and here reprinted by permission.]

920. The libellants claimed interest on this item, which was refused by the commissioner, to which refusal the libellants except. It seems to me that the libellants are entitled to interest on this item from the date of the commencement of the suit. The item itself is allowed because it is a loss directly caused by the collision, and sustained by the libellants. That loss had been sustained prior to the commencement of the suit. They have been kept out of it since that time by the defense interposed in the suit. Their indemnity obviously will not be complete unless interest is allowed. The case comes within the principle of the case of *The America*, [Case No. 285.] In the case of *Mailler v. Express, etc.*, Line, 61 N. Y. 316,³ it was expressly ruled by the New York court of appeals that interest should be allowed on an item of damages of this character. It seems to have been once the rule of the common law that interest will not be allowed on an unliquidated claim for damages, even in cases sounding in the contract, but this rule has been greatly modified. In the case of *Foster v. Goddard*, [Case No. 4,969,] tried in the circuit court of the United States in this district, before Judge Blatchford and a jury, the case being assumpsit for services of a mercantile agent on a quantum meruit, the jury were instructed that having found the value of the service, they should add interest from the commencement of the suit. The case went to the supreme court, and the judgment was affirmed. This ruling seems not to have been questioned there. *Goddard v. Foster*, 17 Wall. [84 U. S.] 123. The disallowance of interest in the present case is said to be in accordance with the practice in this court; but I am referred to no case where the court has actually passed upon the question. Damages in collision cases in the courts of admiralty are, in general, to be estimated "in the same manner as in other suits of like nature for injuries to personal property." *The Baltimore*, 8 Wall. [75 U. S.] 385.⁴ It cannot be claimed, therefore, that the disallowance of this claim for interest can rest on any principle as to computing damages peculiar to this court as a court of admiralty. This exception is therefore allowed. The commissioner rightly held the claim for damages, by reason of the prolongation of the subsequent voyage, too remote and speculative to be allowed. He also correctly held upon the testimony that the sum allowed for the care and custody of the cargo was a reasonable compensation therefor. So, also, he properly disallowed the claim for interest on the cargo during its detention. Full damages were allowed for the injury to the cargo with interest. Libellants' 1st exception sustained,

³[See, contra, *White v. Miller*, 71 N. Y. 135, 78 N. Y. 393.]

⁴[See, also, *The Cayuga*, 14 Wall. (81 U. S.) 270.]

2d and 3d overruled. Claimants' exception overruled.

[NOTE. Demurrage for the detention of an injured boat while undergoing repairs was allowed without mention of interest in the following: *Williamson v. Barrett*, 13 How. (54 U. S.) 101; *The Cayuga v. Hoboken Land & Imp. Co.*, 14 Wall. (81 U. S.) 270; *The Favorite v. Union Ferry Co.*, 18 Wall. (85 U. S.) 598; *The Potomac v. Cannon*, 105 U. S. 630; *The M. M. Caleb*, Case No. 9,683. In *Johaussen v. The Eloina*, 4 Fed. Rep. 573, the district court for the eastern district of New York decided that it was not in accordance with the practice in that district to allow interest on demurrage, but after a review of the authorities, including *The Alexandria*, Case No. 178, held that at most the allowance of interest was within the discretion of the court. The allowance of interest was refused in *The Isaac Newton*, Id. 7,091.]

Case No. 179.

The ALEXANDRIA.

BYRNES v. The ALEXANDRIA.

[8 Reporter, 390.]

Circuit Court, S. D. New York. July 3, 1879.¹

COLLISION—BETWEEN STEAM AND SAIL—DUTY TO STOP OR CHANGE COURSE—INTEREST ON JUDGMENT.

[1. Where a steamer bound for the open sea observes a bark less than a mile distant apparently getting under way, but drifting across the steamer's bow from starboard to port, and the steamer puts her helm to starboard, and keeps on at full speed, she is liable for the resulting collision if it could have been avoided by porting her helm, or by reversing or slackening her speed after sighting the bark.]

[2. In affirming a decree of the district court awarding damages for a collision, which included interest to the date of its entry, interest should be allowed only upon the damages assessed, and not upon the amount of the decree itself.]

[See *Pinckney v. Singleton*, 2 Hill, (S. C.) 343; *In re Fuller*, Case No. 5,148; *Quivey v. Hall*, 19 Cal. 97; *Heidenheimer v. Johnston*, (Tex. Sup.) 13 S. W. Rep. 46; *Corcoran v. Doll*, 32 Cal. 82.]

[3. Questioned in *The Eloina*, 4 Fed. Rep. 574, as to the effect of this decree in affirming *The Alexandria*, Case No. 178, in respect to the allowance of interest on demurrage.]

[In admiralty. Libel by William B. Byrnes and others, owners of the barkentine C. L. Pearson, against the steamship Alexandria, for damages sustained by collision. Decree for libelants, reported in *The Alexandria*, Case No. 178. Claimants appeal. Decree affirmed.]

[Facts Found by the Court.*

[(1) At about five o'clock in the morning of the 19th of May, 1876, the barkentine C. L. Pearson, owned by the libelants, and laden with a full cargo, started on a voyage from New York to Japan. She was of 664 tons

burthen, and her length over all was 165 feet. Her draft was about sixteen feet. A tug took her below the Narrows. The pilot left her about 9:30 in the forenoon after she got out into the open sea. The wind was light from the westward, but so long as she had the ebb tide with her she made a little headway. About 1 P. M. the captain, observing that she was drifting with the flood tide, which had then made, and that the wind had all died out, let go his kedge anchor, and, paying out forty or fifty fathoms of lawser, lay at anchor waiting for wind. Some of the sails remained set, but hanging loose against the masts, and the yards were properly braced. She lay with her head out to sea, and against the tide, which was running to the northward and westward. Her position was a very little to the southward and eastward of the fairway buoy in Gedney's channel, which is a little to the southward of the middle of the channel, and in the deepest water. The channel is about 1,200 feet wide, and the water where the vessel lay was more than 21 feet deep at mean low tide. The day was clear, and the vessel was distinctly visible many miles away in every direction. The weight of the kedge was not far from four hundred pounds. It was sufficient to hold the vessel in position as the wind and tide then were.

[(2) A little before four o'clock in the afternoon, a light breeze sprang up from the southwest, and the captain set about getting under way again. For this purpose he properly trimmed the sails that were set, and began heaving on the anchor. The tide was the last quarter of the flood, and still setting pretty strong to the northward and westward. Soon after they commenced heaving on the anchor, and when they had got twelve or fifteen fathoms of the hawser inboard, the barkentine was struck by the steamship Alexandria in her stern, a little to the starboard of the stern port, and cut into about eleven feet, and down to the water's edge, a line but slightly angling across the keel to port.

[(3) The Alexandria was a steamship of 1,623 tons burthen, about three hundred feet long, and drawing 21 ft. 6 in. She left New York at ten minutes past two that afternoon, with a full cargo, bound for Glasgow. She had a pilot on board, who continued in charge of her navigation until after the collision. The captain and pilot were on the bridge, and the second mate near by, where he could pass the orders from the bridge to the wheel. There was no lookout specially assigned to duty, but the first mate was on the fore-castle, so situated that he could look out, though he was also engaged looking after his watch, who were at the time employed in cleaning up and getting the ship ready for sea. Just before the ship turned the tail of the Roemer, so as to pass from the Swash into Gedney's channel, the captain discovered the barkentine apparently at anchor. He

¹[Affirming *The Alexandria*, Case No. 178.]

*[The "Facts Found by the Court," the "Conclusions of Law," and the concluding paragraph of the opinion, included within the brackets, were obtained from the records at the clerk's office.]

gave her no special attention at the time, and did not speak to the pilot about her. The vessels were then about a mile apart, and the steamer going at her usual speed of about ten knots an hour. After getting out of the Swash channel, the ship was put on a course of east by north, and this brought the barkentine a little off her starboard bow, and about three quarters of a mile away. The captain and pilot then saw the barkentine, and judged she was a little to the southward of the buoy. It is usual in going out through Gedney's channel to pass as near as is consistent with safety to the buoy. The course taken was intended to carry the ship somewhat to the northward of the buoy and of the barkentine. When the vessels were about half a mile apart the captain observed the barkentine drawing a little ahead, and her bow falling off somewhat to the eastward. No attention was paid to this movement, but when the vessels were only a quarter of a mile or thereabouts apart, and when the barkentine appeared to be drifting to the northward and westward, the helm was starboarded, still with the intention of passing her to the north. A little later, when the barkentine seemed to be drifting further across the bow of the steamer, the wheel was put hard to starboard, and the engine stopped and backed. When this last movement was made the vessels were not more than five hundred feet apart, and the collision could not in that way be avoided. The steamer could not have been stopped in going less than nine hundred feet.

[(4) Had the wheel been ported, instead of starboarded, when the change in the position of the barkentine was first discovered, or had the engine been stopped until the actual movement of the barkentine was ascertained, the collision would not have occurred.]

[(5) The damages sustained by the libelants, as found by the district court, and not objected to on the appeal, amount to \$13,189.22, as of July 2, 1878.]

[Conclusions of Law.]

[(1) That the collision was caused solely by the fault of the Alexandria.]

[(2) That a decree should be given in favor of the libelants for the sum of \$13,189.22, and interest from July 2, 1878, at the rate of six per cent. per annum, or so much thereof as is not for interest allowed by the commissioner in stating his account or by the court.]

E. H. Nicoll, for libelants.

Scudder & Carter, for claimants.

WAITE, Circuit Justice.* I have no doubt whatever of the liability of the steamship

*[This cause was heard by Mr. Chief Justice Waite, holding the circuit court for the southern district of New York, pursuant to Rev. St. § 617, at the request of Mr. Justice Hunt, allotted to the second circuit.]

for this collision. It happened in broad daylight, when there was no wind, and nothing to prevent her keeping out of the way, as it was her duty to do, if those in charge of her navigation had acted with ordinary prudence and foresight. The fact that the barkentine was lying at anchor in such a place, with her sails set, was evidence to the mind of a skilful navigator that she was waiting for the wind, and would be likely to get under way as soon as she could. The tide was running to the northward and westward, so as to carry the drift in that direction. The wind also, which met the steamer just before she came out of the Swash channel, was from the southwest. Under these circumstances any one at all acquainted with navigation ought to have known that, when the barkentine did attempt to get under way, she would almost necessarily drift somewhat in the direction of the wind and tide before her sails could draw so as to take her ahead. When, therefore, the captain of the steamer, half a mile away, saw the barkentine first heaving ahead, then swinging her bow off to the northward, and finally drifting bodily somewhat in the same direction, he ought to have known she was getting under way, and governed himself accordingly. Had he, when he first discovered that the vessel was in motion, ported his wheel, stopped his engine, or even slackened his speed, there probably would have been no collision. Instead of that, he starboarded, and kept on at full speed, until it was impossible to keep the vessels from coming together. It needs no argument to show that this was the very worst thing that could have been done, if, as the captain of the steamer says, the barkentine was drifting rapidly to the northward and crossing his bows. In this, however, I think he is mistaken, and that the collision actually occurred by reason of an attempt on the part of the steamer, when she set her course originally, to pass too near. Undoubtedly the barkentine drifted somewhat to the northward, but it could not have been far. Between the time the captain first discovered her in motion and the collision was not to exceed three minutes. The steamer, going at ten knots an hour, only went half a mile. The drawing ahead which was first seen undoubtedly began with the heaving on the anchor. As soon as the hawser shortened, so as to weaken the hold of the anchor, the drift may have commenced under the combined action of the wind and tide, but the movement could not have been very great, for so long as the anchor was on the ground, while it might not keep the vessel in place, it would to a greater or less extent retard her progress. That it was on the ground is shown by the fact that the hawser was cut when the steamer took the barkentine in tow. Under such circumstances the drifting of the vessel ought not to have embarrassed the steamer, and it is clear to my mind that

the collision was caused alone by her unskillful and careless navigation. The kedge anchor, though light, was sufficient to hold the barkentine in place with the wind and tide as they were. It was, therefore, not a fault to put that out instead of a heavier one. It was only when they commenced heaving the anchor in, that the drift commenced, and that ought to have been allowed for by the steamer when she made her calculations for passing. There was plenty of room on both sides, and a prudent navigator would have gone far enough away to have avoided all chances of danger by any movement of the vessel while getting under way.

No objection is made here to the amount of the decree in the district court. That, therefore, may be taken as the basis of the decree here, adding interest from the date of that decree only on the amount of the damages, exclusive of the interest allowed below. A decree may be prepared for the libelants.]¹

Case No. 180.

ALEXANDRIA v. BOWNE.

[1 Cranch, C. C. 124.]²

Circuit Court, District of Columbia. June Term, 1803.

PLEADING—ISSUE—INFORMALITY.

If in an action of debt upon a bond with collateral condition, the entry of the pleadings be "covenants performed," "joined," the court will send the cause back to the rules as not being at issue.

At law. Debt on auctioneer's bond, for the penalty of \$10,000, with a profert. On the back of the declaration is an indorsement in these words: "The plaintiff assigns for breach of the condition of the said bond in the declaration mentioned, this, to wit, that the said M. F. Bowne," &c., "have failed to pay to a certain Thomas Patton, the administrator of S. Wallace, deceased, £15. 9s. 8d. due and owing from them as vendue masters to the said Thomas Patton, as administrator as aforesaid, for the sales at vendue, of certain goods, wares, &c., deposited with the said Bowne, &c., in the year 1795, by the said S. Wallace, deceased, and by them sold at vendue as aforesaid." "Declaration filed April, 1802—May, rule plea—June, oyer of the bond and covenants performed, joined." The plea is not filed, but only noted on the minutes. There was no replication.

THE COURT sent the cause back to the rules after striking out the entry of issue joined.

KILTY, Chief Judge, absent.

¹[From records of the court.]

²[Reported by Hon. William Cranch, Chief Judge.]

Case No. 181.

ALEXANDRIA v. BROCKETT.

[1 Cranch, C. C. 505.]¹

Circuit Court, District of Columbia. July Term, 1808.

EVIDENCE—WITNESS—COMPETENCY—PLEADING.

1. Citizens of Alexandria are not competent jurors in an action of debt for the penalty of a by-law of the corporation, but are competent witnesses.

[Followed in *Pomery v. Slacum*, Case No. 11,262.]

2. A by-law, approved on the 27th of March, will not support an averment of a by-law passed on the 26th.

At law. Debt for the penalty of a by-law of the corporation of Alexandria, against burning oyster-shells on a brickkiln, without a license.

Mr. E. J. Lee, for defendant, objected to the jurors, because they were citizens of Alexandria, and the penalty enured to the benefit of the corporation; and cited *Hanson v. Peircy*, 1 Morgan, Essays, 280; *Rex v. Carpenter*, 2 Show. 47; *City of London v. Unfree Merchants*, Id. 146; 3 Bac. Abr. 252, tit. "Jurors E;"; *Co. Litt.* 154, 156, 157, 158a; *Mellor v. Spateman*, 1 Saund. 344.

Mr. Swann, contra, observed that in the case from Morgan's Essays, the litigation was between the corporation and a stranger, but here it is between the town and one of its citizens.

THE COURT overruled the objection, and also an objection by the defendant to the admission of J. Mandeville, a citizen of Alexandria, as a witness for the plaintiffs. 1 *Lofft's Gilb. Ev.* 240; *Rex v. Mayor, etc., of London*, 2 Lev. 231; *Bull. N. P.* 290; *Trials per Pais*, 385.

The jury found a verdict for the plaintiffs, subject to the opinion of the court, upon the competency of George Deneale and Joseph Mandeville, two of the citizens of Alexandria, as witnesses for the plaintiffs.

THE COURT, upon consideration, granted a venire facias de novo, upon the ground of the incompetency of citizens of the town as jurors; but were of opinion that they were competent as witnesses.

THE COURT also (DUCKETT, Circuit Judge, absent) refused to suffer a by-law, approved by the mayor of Alexandria on the 27th of March, to go in evidence to support the averment of a by-law passed on the 26th, which was the day on which it was passed by the common council.

¹[Reported by Hon. William Cranch, Chief Judge.]

Case No. 182.

ALEXANDRIA v. BROCKETT.

[2 Cranch, C. C. 13.]¹Circuit Court, District of Columbia. Nov.
Term, 1810.

INSTRUCTIONS—MATTER IN ISSUE.

When the issue is joined upon a matter of law, the court will not, at the prayer of either party, instruct the jury upon the matter of law submitted to the jury by the pleadings.

At law. Debt for the penalty of two hundred dollars under a by-law against burning oyster-shells in Alexandria.

The defendant pleaded that the penalty of the by-law was not a reasonable penalty, upon which the plaintiff took issue.

Upon this issue the plaintiff moved the court to instruct the jury that if they should be satisfied that in the year 1803 (the year the by-law was passed) the yellow fever prevailed in the town, and was generally supposed to have been caused by burning oyster-shells, then the penalty was reasonable.

THE COURT (THRUSTON, Circuit Judge, absent) refused to give any instruction to the jury upon the subject, the parties having by their pleadings put the reasonableness of the penalty in issue to the jury. If the party offers an issue as to matter of law, the other party may demur; if he joins issue, he cannot afterwards submit the matter of law to the court.

Case No. 183.

ALEXANDRIA v. CORSE.

[2 Cranch, C. C. 363.]¹Circuit Court, District of Columbia. Nov.
Term, 1822.PRINCIPAL AND SURETY—LIABILITY OF SURETY—
WANT OF SKILL—GROSS NEGLIGENCE.

The surety in an official bond, conditioned that the principal shall faithfully execute the duties of his office, is not liable for the honest error, in judgment or want of skill, of the principal. But gross negligence is want of fidelity.

At law. Debt, against the surety of one Talbot, an inspector of fish, upon his official bond faithfully to execute the duties of the office.

Mr. Mason, for defendant, prayed the court to instruct the jury that the defendant was not liable upon this bond, for honest error in judgment, or want of skill; and cited [President, etc., of Union Bank v. Clossey,] 10 Johns. 271.

THE COURT, (THRUSTON, Circuit Judge, absent,) at the prayer of the defendant's

¹[Reported by Hon. William Cranch, Chief Judge.]

counsel, instructed the jury, that the defendant was only liable for the faithful discharge of Talbot's duty as inspector, and was not liable for his honest error in judgment, or want of skill.

But the court, at the prayer of the plaintiff's counsel, further instructed the jury, that if the inspector was guilty of gross negligence in examining the fish, he did not faithfully execute the duties of his office in that respect.

ALEXANDRIA, (FOWLE v.)

[See Fowle v. Alexandria, Case No. 4,993.]

ALEXANDRIA, (HOOE v.)

[See Hooe v. Alexandria, Case No. 6,666.]

ALEXANDRIA, (HOOE v.)

[See Hooe v. Alexandria, Case No. 6,667.]

ALEXANDRIA, (LYLES v.)

[See Lyles v. Alexandria, Case No. 8,623.]

ALEXANDRIA, (LYLES v.)

[See Lyles v. Alexandria, Case No. 8,624.]

Case No. 184.

ALEXANDRIA v. MANDEVILLE.

[2 Cranch, C. C. 224.]¹Circuit Court, District of Columbia. Nov.
Term, 1820.STREETS—PAVING—LOCAL ASSESSMENTS—EVI-
DENCE.

1. It is not necessary that an order of the common council for the pavement of any particular street should be passed as a by-law and submitted to the mayor for his approbation.

2. Upon a motion for judgment against a proprietor of lots, liable for the expense of paving the street opposite the lots, the court will not receive evidence that the pavement was badly done.

This was a motion by Mr. Taylor, attorney for the common council of Alexandria, for judgment against Joseph Mandeville, for his proportion of the expense of paving Pitt street, between Cameon and Queen streets, the recovery of which, by motion, is authorized by the amended charter of the 25th of February, 1804, § 11, (2 Stat. 255.)

By the by-law of the 7th of September, 1802, the proprietor of a lot is liable to a tax of \$1.32, on every front foot of his lot on a street sixty-six feet wide, which should

¹[Reported by Hon. William Cranch, Chief Judge.]

thereafter be ordered by the counsel to be paved. The street in question had been ordered to be paved, the tax had been demanded, and payment refused, and due notice given of the present motion.

Mr. Swann, for defendant, offered to prove that the order for the paving of Pitt street, between Cameron and Queen streets, was not passed as a by-law after three readings, agreeably to the rules adopted by the common council.

THE COURT (THRUSTON, Circuit Judge, absent) refused to permit such evidence to be given, deeming it irrelevant and immaterial.

He also offered evidence that the pavement was badly done. But the court rejected the evidence; and in the case of Common Council v. Swann, [Case No. 3,066,] at the same term, decided (THRUSTON, Circuit Judge, absent) that it was only competent for the defendant to show that the contract made by the common council for the pavement was not fairly made, or fraudulent, or not with good faith.

Judgment for the plaintiff.

Case No. 185.

ALEXANDRIA v. MOORE.

[1 Cranch, C. C. 440.]¹

Circuit Court, District of Columbia. July Term, 1807.

PLEADING.

Debt on an auctioneer's bond; plea, general performance. Replication, that the auctioneer did not pay over money to A and B. A rejoinder that it had not been established, by a judgment, that money was due to them by the auctioneer, is an issuable plea, to set aside an office judgment.

At law. Debt on an auctioneer's bond; plea, general performance; special replication, that Moore, the auctioneer, had not paid money to Archer and to Vowell, which he had received as auctioneer.

At the first term after office-judgment, and to set it aside, Mr. C. Simms, for defendant, Patten, (one of the sureties,) offered a rejoinder that Archer and Vowell respectively had not proved, by a suit and judgment, that the money was due from Moore to them.

Mr. E. J. Lee, for plaintiff, objected that it is not pleading to issue within the meaning of the act of Virginia, 12th December, 1792, § 28, p. 78, and that it will drive him to a special demurrer.

But THE COURT (nem. con.) admitted the replication, because it was an issuable plea, and if bad it is bad on general demurrer.

¹[Reported by Hon. William Cranch, Chief Judge.]

Case No. 186.

ALEXANDRIA v. PATTEN.

[1 Cranch, C. C. 294.]¹

Circuit Court, District of Columbia. March Term, 1806.

PLEADING—TENDER—PROCEDURE.

The plaintiff, upon a plea of tender, cannot take out the money and proceed for more.

[Cited in Ye Seng Co. v. Corbitt, 9 Fed. Rep. 431.]

At law. Plea of tender, &c. Before trial of the issue,

Mr. Swann, for plaintiff, moved the court for leave to take out the money and go on for the balance of his claim. Esp. N. P. 161.

THE COURT thought the plaintiff could not take the money out and then proceed for more.

[NOTE. This case seems to have proceeded to judgment, which was for defendants. Plaintiffs excepted to the instructions of the trial judge, and obtained a reversal by the supreme court on writ of error,—see Mayor, etc., of Alexandria v. Patten, 4 Cranch, (8 U. S.) 317; but the above ruling was not involved in the case before the supreme court.]

Case No. 187.

ALEXANDRIA v. WISE.

[2 Cranch, C. C. 27.]¹

Circuit Court, District of Columbia. July Term, 1811.

TAXES—LIABILITY OF LOTS IN ALEXANDRIA.

The lots lying west of West street, in Alexandria, are liable to be taxed like other lots in the town.

This was a motion for judgment for taxes on a range of lots lying on the west side of West street, in Alexandria. The question was whether the jurisdiction of the corporation extended over those lots.

The act of assembly of Virginia of the 10th of December, 1796, recites that, "Whereas several additions of lots, contiguous to the town of Alexandria, have been laid off by the proprietors of the land in lots of half an acre each, extending to the north, to a range of lots on the north side of a street called Montgomery; upon the south to the line of the District of Columbia; upon the west to a range of lots on the west side of West street, and on the east to the river Potomac; that many of the lots in these additions have already been built upon, and many more will soon be improved:—And whereas it has been represented to the general assembly that the inhabitants residing on the said lots are not subject to the regulations made and established for the orderly government of the town, and for the preservation of the health of the inhabitants

¹[Reported by Hon. William Cranch, Chief Judge.]

by the prevention and removal of nuisances, upon which their prosperity and well-being does very much depend;—Section 1. Be it therefore enacted, that each and every lot and part of a lot within the aforesaid limits on which at this time is built a dwelling-house of at least sixteen feet square, or equal thereto in size, with a brick or stone chimney, and that each and every lot within said limits which shall hereafter be built upon, shall be incorporated with the said town of Alexandria, and be considered as part thereof." The 2d section provides for the removal of nuisances from any lots, within those limits, which were not incorporated within the town; and by a subsequent act the unimproved lots within the same limits are "incorporated with," and to be "considered as a part of, the said town of Alexandria, and subject to the same regulations as the other parts thereof."

E. J. Lee, for defendant, contended, that the lots were to be considered as contiguous to the town, not in the town; and that they were subject only to the regulations respecting nuisances, and not liable to taxes.

THE COURT, however, (FITZHUGH, Circuit Judge, absent,) was of opinion that the jurisdiction extended over the range of lots west of West street; and that, by the acts of Virginia, those lots were incorporated with, "and to be considered as part of, the town, and subject to the same regulations as the other parts thereof." See Act Va. 1785, 1786, 1796.

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ALEXANDRIA CANAL CO., (SWANN v.)

[See Swann v. Alexandria Canal Co., Case No. 13,671.]

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ALEXANDRIA, ETC., R. CO., (HAY v.)

[See Hay v. Alexandria, etc., R. Co., Case No. 6,254.]

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ALEXANDRIA WATER CO., (AVIL v.)

[See Avil v. Alexandria Water Co., Case No. 679.]

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Case No. 188.

ALFONSO v. UNITED STATES.

[2 Story, 421.]¹

Circuit Court, D. Massachusetts. Oct. Term, 1843.

EVIDENCE — EXPERT TESTIMONY — COMPETENCY — ESTOPPEL — CUSTOMS DUTIES.

1. Where, in a writ of error, exception was taken to the admission by the judge of the testimony of merchants and appraisers in Boston, in respect to the market value of sugars in Cuba, it was *held*, that the market value being a question of opinion, as well as of fact, such testimony was admissible, as being in the

nature of evidence by experts, and of the same degree as the evidence of merchants in Cuba.

[Cited in Chaffee v. U. S., 18 Wall. (85 U. S.) 542; U. S. v. 146,650 Clapboards, Case No. 15,935.]

2. Exception being, also, taken to the admission of certain evidence, as to prior fraudulent shipments to other parties, made by B., the shipper of the sugar for the claimants, the judge refused to affirm, that the evidence was improperly admitted.

[Cited in U. S. v. 146,650 Clapboards, Case No. 15,935.]

3. Exception being, also, taken to the admission of other invoices of shipments in July and August, (this shipment being made in May,) to show the market value of sugar, it was *held* that they were properly admitted.

[Cited in U. S. v. 146,650 Clapboards, Case No. 15,935.]

4. The phrase "actual cost" in the revenue act of 1799, c. 128, [1 Stat. 677,] means the actual price paid in a bona fide purchase, and not the market value.

[Cited in U. S. v. Twenty-Six Cases Rubber Boots, Case No. 16,571; U. S. v. 150 Bales of Unwashed Wool, Case No. 15,932b.]

5. Where a bill alleged that certain sugars were fraudulently invoiced at a sum less than "their actual cost and fair market value," which question was directly put in issue by the pleadings, and the judge charged the jury, "that if the goods were found to be invoiced below their fair market value, with intent to defraud, &c., they should find a verdict for the government," to which instruction exception was taken by the plaintiff, it was *held* that the instruction was proper.

6. *Held*, also, that the agent of the claimants, having assumed, in his oath to the invoice or entry of the shipment, the position of a purchaser, he could not avail himself of the defence that he was not a purchaser, but a producer or manufacturer.

[Cited in Locke v. U. S., Case No. 8,442.]

7. It seems, that the revenue act of 1799, c. 28, only applies to cases where an actual purchase has been made.

[Cited in U. S. v. Twenty-Six Cases Rubber Boots, Case No. 16,571; U. S. v. Auffmordt, 7 Sup. Ct. Rep. 1184, 122 U. S. 204; 19 Fed. Rep. 894.]

[8. Cited in Greely v. Thompson, 10 How. (51 U. S.) 237, in support of the proposition that the appraisement should be as of the time of the exportation of the goods to this country.]

[Error to the district court of the United States for the district of Massachusetts.]

[At law. Libel of seizure for forfeiture of certain sugar, (Gonzalo Alfonso, claimant.) Judgment of forfeiture to United States. Claimant appeals.]

Writ of error to a judgment rendered in the district court. The original suit was a libel of seizure of 100 boxes of sugar for an alleged forfeiture under the 66th section of the revenue act of 1799, c. 128, [3 Bloren & D. Laws, 198, 1 Stat. 677,] because "the actual cost of the said sugars at the place of export was not, nor was the fair market value thereof the said sum of three reals for each arroba, (at which they were invoiced,) but that the said sugars were so invoiced falsely and fraudulently, and with a design to evade a part of the duties, payable thereon to the United States, and that the actual cost, or fair market value, of the said sugars at the place of export was a

¹[Reported by William W. Story, Esq.]

much larger sum, to wit, the sum of four reals and a half for each arroba;" contrary to the statute, &c. The claimant, in his plea and answer, averred, that "the said merchandise was not imported contrary to law, and because," he says, "that the actual cost and fair market value of the same at the place of export, was the sum of three reals for each arroba, and no more, and that the said merchandise was not invoiced at that rate falsely and fraudulently, and with design to evade the payment of a part of the duties payable thereon to the United States, as in the said libel is alleged." The replication puts the matter of the plea and answer in issue, denying their truth. The cause was heard by a jury, who found a verdict for the United States. At the trial, a bill of exceptions was taken by the claimant, which was as follows: "The libellants offered to prove by the testimony of appraisers of the custom house and merchants resident in Boston, engaged in the importation and sale of sugars, and who derived their knowledge on the subject from letters and invoices received by themselves in the usual course of their business, and from inspection of the sugars in question, or samples of them, and from their general knowledge of the business, what was the market value of these sugars in Matanzas at the time of exportation. The claimant objected to the competency of this evidence, there being in the case the deposition of witnesses, taken by the claimants, resident in Matanzas at the time of exportation, as to the market value of these sugars; but the objection was over-ruled and the evidence admitted. The government, in order to show a design to defraud in the present case, offered to prove by the appraisers, that, on one former occasion, they thought an invoice of sugars shipped by one Burnham, by whom this lot was also shipped in behalf of the claimant, and by whom it was invoiced, to be rated below the market value: though no information of such opinion was given to the importer or exporter; and that, on one other occasion, said appraisers had put up an invoice, sent by the same person, believing the same to be rated too low, and the consignee had paid the advance, without making any objection; it not appearing, in either case, that the claimant was interested therein, or had any knowledge thereof. The claimant objected to this evidence as incompetent, but the objection was over-ruled and the evidence admitted. The government, in order to show that these sugars were invoiced below the market value at the time of exportation, which was in April, offered invoices of sugar, some of which were shipped in July and August, it being in evidence that the market fluctuated, and what was the extent of such fluctuation according to the demand and supply. The claimant objected to this evidence, but the objection was over-ruled and the evidence admitted. On the whole evidence, it appeared that these sug-

ars were the produce of a plantation belonging to the claimant, in the island of Cuba, and sent by him to this country for sale: no evidence was offered to show what was the actual cost, and thereupon the claimant prayed the court to instruct the jury that the statute on which this information was founded did not apply to articles belonging to the producer or manufacturer, so as to render them liable to forfeiture if invoiced below the market value; or, at least, not unless it was also proved that the actual cost to the producer or manufacturer was higher than the valuation of the invoice. But the learned judge refused so to instruct the jury, and instructed them that if they believed the goods to be invoiced below their fair market value, with intent to defraud, &c., they should find a verdict for the government." Judgment having been rendered for the United States, a writ of error was brought by the claimant, and was argued at the present term.

Francis C. Loring, for claimant.

Franklin Dexter, Dist. Atty., for the United States.

Before STORY, Circuit Justice, and SPRAGUE, District Judge.

STORY, Circuit Justice. I cannot but regret that the revenue laws have not undergone a thorough revision and consolidation since the act of 1799, c. 128, [3 Bioren & D. Laws, 198; 1 Stat. 677,] so as to cure the numerous defects, and supply the obvious omissions (not to speak of the repugnances of the later legislation), which experience has demonstrated to exist in that act. Instead of a plain and uniform statute to regulate this whole matter, we are now driven to an examination of numerous laws, which have been since passed upon the same subject, the provisions of which are not always easily reconcilable with each other, and which present almost endless embarrassments and questions, in their actual application. It is a matter of surprise, that congress should have left this whole system in such an imperfect state, after the experience of nearly a half century has shown its inadequacy, and have rested satisfied with occasional amendatory laws, which have covered a few blots only, and introduced many new controversies as to their true interpretation and extent. The court, however, must act upon the system as it is, with a consciousness, however, that, in many cases, it is obliged to rely upon a measuring cast of opinion, without being able to resolve many difficulties to its own entire satisfaction.

I shall consider the objections, in the order in which they stand in the bill of exceptions, as at once natural and convenient, premising, however, that upon the state of the pleadings, the true issue before the jury was, whether the sugars in question were in-

voiced at the port of export, according to their "actual cost and fair market value," to wit, three reals and no more, without any design falsely and fraudulently to evade the payment of the proper duties. The issue was not, whether they were invoiced according to their "actual cost" alone, but according to their "actual cost and true market value," coupling them together, and using them apparently as equivalent expressions. This is a most important consideration to be borne in mind in examining the argument, which has been addressed to the court, upon the charge of the district judge, and to which I shall have occasion hereafter to refer. The first exception is to the admission of the evidence of the appraisers, and of merchants in Boston engaged in the importation and sale of sugars, as to the market price thereof at the port of export. The objection seems to be founded upon this, that it is, (1) not the best evidence that the nature of the case admits of; (2) that it is mere hearsay. But it appears to me, that the objection is not supportable, upon either ground. In the first place, the market value is necessarily a matter of opinion, as well as of fact, or rather of opinion gathered from facts. How are we to arrive at it? Certainly not by the mere purchase made by a single person, or by purchases made by a few persons; for in either case, they may have purchased above or below the market price, or the market price may be fluctuating, and the sales too few to justify any general conclusion. Buyers may refuse to buy at a particular price; sellers may refuse to sell at a lower price. In this state of things, we must necessarily resort to opinions of merchants and others, conversant in trade, for their opinions, what, under all the circumstances, is the fair market price or value of the goods. The market price or value, therefore, must in most cases, if not in all, be a matter of fact mixed up with opinion, for it must necessarily include a general price or value in the market, deducible from various averages, and approximations, and the different qualities of the same class of goods. In the next place, the knowledge of the market price being thus, at least in part, a matter of skill, judgment, and opinion, it is in no just sense mere hearsay; but it is in the nature of the evidence of experts. If the evidence of merchants at the port of export might be taken in the case, because of their actual experience and information, that of merchants and appraisers having equal means of knowledge or information from their actual trade and business, would be equally evidence. Each is evidence in the same degree, and not the one secondary to the other, even if each were not intrinsically of equal value under all circumstances. Indeed, I can conceive of cases where the evidence of Boston appraisers, or Boston merchants, might be of higher value in the estimate of a jury,

than that of any foreign merchants at the port of export, from the nature or importance of the case, or different interests of the witnesses. This objection, therefore, is not sustainable. And the same answer may be given to the second objection, which supposes that the testimony of witnesses at Matanzas as to the market value was of a higher degree than that of witnesses in Boston. It might weigh more or less with a jury, according to circumstances, than the testimony of the Boston witnesses. But the evidence would not be higher in its nature, character, or degree, in a technical sense. It might have more or less weight; but that would not degrade it to an inferior class of evidence.

The next objection is to the admission of the evidence of the appraisers, as to prior shipments by Burnham (the shipper of these sugars for the claimant), and of invoices accompanying the same, being, in their judgment, invoiced below the market value, the other shipments not belonging to the claimant, nor he being shown to have any knowledge thereof. I confess, that I have felt some difficulty upon this point; and I should have been glad that the original bill of lading of the present shipment, and the invoice thereof, and the entry thereof at the custom house, had been put into the case, so that it might have been shown, in what precise manner the bill of lading and invoice were made out; whether Burnham appeared thereon solely as the shipper, or whether it was added, that the shipment was on account and risk of the claimant, and also what the entry and oath administered on the occasion purported to state. As I understand the case, however, Burnham made out the invoice as the agent of the claimant in the shipment; and, therefore, the invoice value of the sugars must be understood as the value put upon the same, with the full assent of the claimant, as the actual cost to him. We must then, as it seems to me, treat Burnham as the general agent of the claimant in this matter. And the question comes shortly to this, whether an agent employed in other transactions of a similar nature for other persons, whose conduct is open to suspicion, as to his readiness to cooperate in a fraudulent evasion of duties in those cases, may not, in the claimant's case, be equally open to the like suspicion, so as to let in his conduct as in some degree affecting the bona fides of his invoice for the claimant. I confess that the fact, per se, would not alone have much weight; but, combined with other circumstances, inflaming the suspicion of fraud, I am not entirely satisfied that it was not admissible in evidence, although the claimant is not shown to be directly privy to it. Suppose the argument at the bar to be urged, that the agent ought to be deemed as acting bona fide, for as a mere agent, he could have no motive to deceive or aid in a fraud, would not the ar-

gument be met and overturned by showing, that no scruple of this sort had been seen in his prior shipments? Without, therefore, saying that I feel free from all doubt on this point, I cannot affirm that there was error in the learned judge in admitting the evidence, *valere quantum valere possit*.

The next objection is to the admission of the evidence of other invoices of shipments in July and August, 1842, (the present shipment having been made in the preceding May,) in order (as I understand it) to show the market value, at those times, of like sugars at the port of export. I see no reason to exclude this evidence; although it would not and ought not ordinarily to be decisive as to the market value in May. There may be fluctuations in the market during the intervening period between May and August; and, indeed, there was evidence (it seems) in this case to show, that such fluctuations actually existed. Still, however, upon a question of market value—a subject, in its nature, somewhat indeterminate, and of opinion—it appears to me, that evidence of this sort is admissible, as affording the means of approximation to the true market value at the time. Its weight would depend upon other circumstances, which might enhance or diminish it.

Having disposed of these minor questions, we come, in the last place, to the main question in the case, which is as to the ruling of the learned judge in refusing the instruction prayed for on behalf of the claimant, and the actual instruction given by him to the jury, "that if they found the goods to be invoiced below their fair market value, with intent to defraud, &c. they should find a verdict for the government." Now, upon the actual issue before the jury, the real question was, whether the sugars were invoiced at their actual cost and fair market value; and I do not, therefore, well see how the learned judge could otherwise have instructed the jury on that point. The main objection that exists is to the instruction prayed and refused by the court. And this involves several important considerations. In the first place, as to the construction of the 66th section of the revenue act of 1799, c. 128. I adhere to the doctrine laid down in the cases cited at the bar, *U. S. v. Sixteen Packages of Goods*, [Case No. 16,303,] and *Tappan v. U. S.*, [Id. 13,749,] that "actual cost" in that section means the actual price paid for the goods by the party in the case of a real bona fide purchase, and not merely the market value of the goods. But then the market value may be and often is justly resorted to as a means of ascertaining the actual cost in doubtful and suspicious cases, for it may be fairly presumed, in ordinary cases, that the market value, and no more, and no less, is generally given for the commodity. The terms, however, are not identical in their meaning, nor is the one necessarily the true interpretation of the other.

It is observable in the present case, that, in the pleadings and issue, the parties have used the words as exact equivalents, and treated the fair market value as the actual cost, and the actual cost as the fair market value.

In the next place it must be taken also, upon the pleadings and evidence, as a clear concession, that the goods were invoiced at their actual cost and fair market value by the shipper, the agent of the claimant, with the consent of his principal; and thus he has placed himself in the invoice and entry, in the predicament of a purchaser, and not in that of a producer or manufacturer of the article. If the invoice and entry purport to state the actual cost, or the market value of the sugars, as a purchase, is it competent in point of law for the claimant now to set up a different case, and to avail himself of the defence, that he was not a purchaser, but a producer or manufacturer? Now, in this view, it is most important to consider that the act of the 1st of March, 1823, c. 149, has in the 4th section prescribed the different oaths to be taken in the entry by the consignee or importer, or agent, and by the owner of the goods, and also by the manufacturer or owner, who has not purchased the goods,² when he enters the same. Where the goods are entered by the consignee or importer, or agent, he is required to swear that the invoice exhibits the actual cost, if purchased, or the fair market value if otherwise obtained. Where the owner enters the goods, he is to swear to their actual cost, including all charges; and where the manufacturer or owner, who has not purchased the goods, enters the same, he is to swear that the invoice contains a just and faithful valuation thereof, at the fair market value. Now, as the invoice and entry, in the present case, are not before me, I cannot say which of these oaths was taken by the consignee. But, regularly, it ought to have been, and, therefore, I presume it was, that the invoice exhibited the actual cost, if purchased, or the fair market value, if otherwise obtained. If the consignee made the entry, referring to the invoice of the sugars, as exhibiting their actual cost, then it seems to me, that he cannot now be permitted to make a different case for the claimant, and insist, that it was no purchase, but a manufacture by the claimant. In the next place, the instruction asked and denied, requires the court to ascertain and decide, that the sugars in controversy were the produce of a plantation belonging to the claimant in the island of Cuba, and sent by him to this country for sale. Now, the court had no right to assume this, unless it was admitted on the part of the United States; and although stated in the exception, there is no admission, and no evidence of the fact on the record.

²See, also, act of 14th July, 1832, c. 224, § 15, [chapter 227, 4 Stat. 593.]

In the next place, it may be true, that the 66th section of the act of 1799, c. 128, in that part which declares, that if goods are not invoiced according to the actual cost, with design to evade the duties, then only they shall be forfeited, does not apply to cases, where the goods belong to the producer or manufacturer, and are invoiced below the market value, if that market value be not below the actual cost; and yet upon an issue like the present, the court might not be bound to give that instruction, as not being relevant to that issue. Indeed, with reference to such an issue, the point might be purely an abstract point. But what could seem to be decisive is, that it is plain, that such an instruction could not be asked of the court, unless the claimant could show, that by his invoice and entry, he put his case upon the allegation, that the valuation was the fair market value of the goods, and did not put it upon the ground that the valuation was the actual cost of the goods. I very much incline to hold the opinion, that the 66th section of the act of 1799, c. 128, so far as it inflicts a forfeiture, does not apply, except to cases where an actual purchase has been made, and of course where the invoice ought to be of the actual cost upon such purchase. Still, however, I do not decide the point, because in my view of the present case, it is not fairly presented upon the pleadings and evidence, in such a manner as to call upon the court to decide it. In this view of the whole matter, my opinion is, that the learned judge was right in refusing the instruction in the terms and under the circumstances in which it was prayed. The judgment of the district court is, therefore, affirmed, with costs.

Case No. 189.

The ALFRED.

[1 Adm. Rec. 461.]

Superior Court, S. D. Florida. March 6, 1837.

SALVAGE—AMOUNT OF AWARD.

[This was a libel for salvage by Benjamin F. Wiltse and others against the cargo and materials saved from the ship Alfred, (Peter Flaivery, claimant.)]

[Cited in Baker v. The Slobodna, 35 Fed. Rep. 542. No opinion accessible. 1 Adm. Rec. 461, only contains the decree of the court.]

Case No. 190.

The ALFRED AND EDWIN.

[7 Ben. 137.]

District Court, E. D. New York. Jan., 1874.²

TUG AND TOW—NEGLIGENCE—NOTICE OF DANGER.

Where a canal-boat, while being towed through a channel before the ice was all out of it, struck the shore ice and sank, the mas-

ter of the boat having known in advance of the danger, and the tug having refused to take pay or be responsible for damage, held, that there was, under the agreement, no negligence on the part of the tug in undertaking the service at a time when it was necessarily hazardous; and that on the evidence there was no negligence in the performance of the service sufficient to make the tug liable.

[Distinguished in The E. A. Packer, 22 Fed. Rep. 670.]

In admiralty. In March, 1873, the canal-boat Mohawk was towed from Passaic, N. J., to Port Johnson, the master of the canal-boat knowing that the ice in the channel was strong and the passage dangerous. The owners of the tug were unwilling to have her undertake the work, because of the danger, and because they did not tow for hire; and had refused to take any pay for the service, or to be responsible for damage. The trip was made safely, and the boat got a load of coal. The charterers of the canal-boat went several times to get them to tow the boat back loaded; and, finally, the owners of the tug agreed to do so on the same conditions; and the Mohawk came out from Port Johnson to intercept the tug on her way to Passaic, and was taken in tow. When near the mouth of Passaic river, the Mohawk struck the shore ice, was cut open and sank. Her owner libelled the tug, claiming that the injury was caused by negligence on the part of the tug. This the claimants denied, and they set up as defenses, their refusal to incur responsibility, the bad condition of the Mohawk, and the inefficient handling of her while in the tow.

Wilcox & Hobbs, for libellant.

R. T. Wild, for claimants.

BENEDICT, District Judge. Upon examination of the pleadings and proofs in this cause, I am of the opinion that the loss of the libellant's boat was not caused by any negligence on the part of the tug in her management of the tow, but arose from perils necessarily incident to an attempt to tow the boat in a channel made narrow and dangerous by ice. The nature of the service to be performed, and the character of the risks attendant upon its performance, were known at the time when the tug was employed. Under such an employment as the evidence discloses, the tug cannot be chargeable for negligence in undertaking the service at a time when it was necessarily hazardous to the tow; and, upon the proofs, the service, when undertaken, was performed with all the regard for the safety of the tow that circumstances would permit. The libel must, accordingly, be dismissed, with costs.

Case No. 191.

The ALFRED AND EDWIN.

Circuit Court, E. D. New York.

[Affirming The Alfred and Edwin, Case No. 190. Nowhere reported; opinion not now accessible.]

¹[Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

²[Affirmed by circuit court in The Alfred and Edwin, opinion not now accessible. See Case No. 191.]

A. L. GRIFFIN, The, (COUNCER v.)
[See Councer v. The A. L. Griffin, Case No.
3,279.]

Case No. 192.

The ALHAMBRA.

[2 Ben. 153; 7 Int. Rev. Rec. 75.]¹

District Court, S. D. New York. Feb. 1368.

COLLISION AT SEA — STEAMER AND SCHOONER
MEETING—CHANGE OF COURSE BY SCHOONER.

1. A steamer, steering south half west, off Cape Hatteras, in the night, made a schooner's green light one and a half or two points on her starboard bow, and changed her course to south-southeast, which she kept for ten or twelve minutes, the position of the light remaining about the same, and then changed her course to south, and ran on that course for fifteen minutes, the light remaining in about the same position, and the green light then went out of sight, and a red light came in view, whereupon the steamer's helm was at once ported, and her engine stopped and reversed, but too late to avoid the collision. The schooner, sailing north by east, with the wind south by east, made the steamer's light directly ahead, and being uncertain whether she was a steamer or a sailing vessel, ported her helm, and changed her course to northeast by north, and kept that course till she saw that the vessel was a steamer approaching on a course which would run her down, when she put her helm hard a-port, and changed her course to east by north. The speed of both vessels was about six or eight miles an hour, that of the schooner being a little the greater. Each vessel had her lights properly set and burning. The schooner was struck amidships on the port side, and sunk instantly. *Held*, that, on this state of facts, the 15th and 18th articles of the act of April 29th, 1864, prescribed the rules for the navigation of the vessels.

2. That it was a fault in the schooner to port her helm when she did so first, especially when she was uncertain whether the approaching light was that of a steamer or sailing vessel.

3. That that fault did not contribute to the collision.

4. That the fact that the position of the light ahead did not change after the steamer had changed her course to the eastward, ought to have been a clear indication to her that the schooner was proceeding in such a direction as to involve a risk of collision, and, under those circumstances, it was her duty to keep out of the schooner's way.

5. That the steamer ought to have ported before she did, and ought to have stopped and backed before she did.

6. That the last change of the schooner's helm to port, being made in the heat of danger, did not cause the collision, nor was it faulty.

In admiralty. This was a libel filed to recover damages for a collision, which took place between two and three o'clock A. M. on the 26th of June, 1865, about fifty miles to the northward of Cape Hatteras, between the steamship Alhambra and the schooner Wonder, by which the schooner was sunk and totally lost. The schooner was owned

by Kinney and Smith. Smith was her master. He lost his life in the collision. The schooner was on a voyage from Nuevitas, in Cuba, to Philadelphia, and had a crew of seven men, namely, her master and Kinney who was on board as supercargo, and a mate, a cook, and three men before the mast. She also had two passengers. They were lost in the collision. The mate was so injured that he afterward died. The mate and McLean, one of the seamen, were the only persons on deck on the schooner at the time of the collision, and for some time before, except two men, who were asleep in the boat. The schooner had her proper green and red lights burning. The wind was fresh, and about south by east. The schooner had eight sails set. The steamer was bound from New York to Charleston. The libel averred, that the course of the schooner was north by east; that the mate, who was on the lookout on the schooner, saw the lights of a vessel several miles distant, and directly ahead; that, until the vessels approached each other, it was uncertain to the schooner whether the vessel approaching her was a sailing vessel or a steamer; that, when the steamer's lights were discovered ahead, the course of the schooner was changed, by porting her helm, from north by east to northeast by north; and that she steadily kept on that course until after it was discovered that the approaching vessel was a steamer, and until she had approached so near as to make a collision imminent, and until it was found that the steamer was steering a course which would carry her against the schooner, when the wheel of the schooner was put hard to port, and she swung around to east by north, when the steamer, at full speed, and without slowing, stopping, or backing, struck the schooner on her port side, about amidships, and cut her in two and sunk her. The libel also averred, that the lights of the schooner were made by the steamer nearly or quite ahead, when the vessels were several miles apart, the course of the steamer being at the time south half west; that, upon discovering the lights of the schooner, the course of the steamer was changed to south-southeast, which brought the schooner more upon the starboard bow of the steamer; that the mate of the steamer supposed the schooner to be a steamer; that the steamer ran for several minutes on a south-southeast course, the schooner retaining her relative position to the steamer, which was an indication that their lines were crossing; that the course of the steamer was then changed to the south, which brought the lights of the schooner dead ahead; that the steamer continued that course for a short time, when she found herself rapidly nearing the schooner, and her wheel was put hard to starboard, which brought her directly across the schooner; that the order was immediately given to port the steamer's helm, but, before her wheel had reached amidships, she struck the schooner, the speed of the steamer

¹[Reported by Robert D. Benedict, Esq., and here reprinted by permission. Partial report only given in 7 Int. Rev. Rec. 75.]

not being diminished, nor any signal given by her until after she had struck; that the collision was the fault of the steamer, in not having a proper lookout, in not porting instead of starboarding her wheel when she made the schooner's lights ahead, in not keeping still farther away after she had changed her course back to south and had made the schooner's lights ahead, in putting her wheel hard to starboard when she found herself approaching the schooner, in not blowing her whistle, in not slowing, stopping, and backing, and in not avoiding the schooner; that the schooner had a good lookout, and good and sufficient lights; and that her course was proper in changing to the right when she made the steamer's lights ahead, and in keeping to the right until the collision. The answer averred, that the steamer had the proper lights set, and had a proper lookout; that, at about ten minutes past two o'clock, the lights of the schooner were seen from the steamer, in proper time, about from one-half of a point to two points on the starboard bow of the steamer, showing a green light; that the helm of the steamer was starboarded, and she was kept on a south-southeast course for ten or fifteen minutes, which brought the schooner about two and a half points on the starboard bow of the steamer, a green light only being in sight to the steamer all the time; that, if the schooner had kept her course, as she should have done, the steamer would have cleared her by from 300 to 500 yards, but that the schooner wrongfully suddenly changed her course to cross the bows of the steamer, her green light passed out of sight, and her red light came in view, so near as to show the schooner, when the steamer's helm was immediately put hard to port, and her engine was at once stopped and backed, but it was not then possible to avoid the schooner on the course she had thus suddenly taken; that the schooner had no proper lookout, and did not have the proper lights set, and did not pursue the course prescribed by the rules of navigation, in altering her course instead of holding her course and passing on the starboard side of the steamer; and that the collision was wholly caused by the violation, by the schooner, of such rules and law, and by her altering her course and crossing the bows of the steamer.

Beebe, Dean & Donohue, for libellant.
Benedict & Benedict, for claimant.

BLATCHFORD, District Judge. It is clear, on the testimony, that each of the vessels had the proper lights set and burning, from the time the lights of each were discerned on board of the other, until the time of the collision, and that there was nothing but negligence or willful inattention that could prevent either of the vessels from reading correctly the language spoken by the lights of the other. The schooner knew,

or was bound to know, that the other vessel was a steamer. The steamer knew, or was bound to know, that the other vessel was a sailing vessel. On this state of facts, the rules of navigation are clearly prescribed by statute. Article 15 of the act of April 29, 1864, (13 Stat. 60.) provides as follows: "If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship." Article 18 provides, that where, by article 15, the steamship is to keep out of the way, the sailing ship shall keep her course. The libel avers, that the course of the schooner was north by east when she made the lights of the steamer, the wind being south by east; that the schooner made the lights of the steamer directly ahead; that, for some time after the discovery by the schooner of the lights, and until the vessels had approached one another, it was uncertain whether the vessel approaching the schooner was a sailing vessel or a steamer; and that, when the lights were discovered ahead, by the schooner, that is, when the vessels were several miles apart, and while those on the schooner were uncertain as to whether the vessel approaching from directly ahead was a sailing vessel or a steamer, the schooner changed her course, by porting her helm, from north by east to northeast by north, a change of two points, and kept steadily on the latter course until after she discovered that the approaching vessel was a steamer and was on a course that would run down the schooner, when the schooner's helm was put hard to port till she headed east by north, in which position she was struck on her port side. The only person now living who was on the deck of the schooner at the time, and saw anything of the collision, was McLean, who had the wheel, the mate being on the lookout. McLean has been examined as a witness for the libellant. He says, that he was standing on the starboard side of the wheel when he first saw the approaching lights; that they were on the starboard bow, right ahead, his attention having been called to them by the mate; that the lights bore north by east from him; that, about a minute after seeing the lights, he, on an order from the mate, ported his wheel, and brought the schooner up to the northeast point; that, when that change had been made, it caused the lights to bear a point and a half or two points on the port bow of the schooner; that he ran on the northeast course a minute or a minute and a half and then changed to a course northeast by north; that, just at the moment of being struck, he put his wheel hard to port; and that it was from twenty-five to thirty minutes from the time he first saw the lights until the time of the collision. The testimony of McLean is explicit that, for full twenty minutes, he kept the northeast by north course. Now, by law, it was

clearly the duty of the schooner to keep her course, as against the approaching steamer, and it was the duty of the steamer to keep out of the way of the schooner. It was, therefore, bad navigation in the schooner to port her helm, when she saw the lights right ahead, and change her course first to northeast and then to northeast by north, the approaching lights being those of a steamer. Especially was it wrong in the schooner to make this change of course when, as appears from the libel, she was uncertain whether the lights were those of a steamer or of a sailing vessel. I am not satisfied, however, that this fault in the navigation of the schooner makes her chargeable with the collision.

The steamer made the schooner one and a half to two points on her starboard bow, and, acting on the indications that the approaching vessel was a sailing vessel, did not port her helm, but starboarded it, in order to keep out of the way of the schooner. The change by the steamer was from a course south half west to south-southeast, a change of two and a half points towards the east. The change made in the course of the schooner on sighting the steamer, was a change of from two to three points towards the east. The speed of each vessel was about the same—say six to eight knots an hour, that of the schooner being, perhaps, a little the greater. Now, on this state of facts, each vessel making the other nearly ahead, but a little on the starboard bow, one heading south half west and the other north by east, and each then changing to and running on a course about two and a half points further to the eastward, we should expect it to follow that, from the former vessel, the lights of the other vessel would, after the last change, take a bearing which would be preserved substantially unaltered during the running of the vessels on their several new courses. This result did follow. The testimony of Newbegin, the mate of the steamer, taken on the part of the claimants, shows that, while the steamer was running on her south-southeast course, which course she continued for ten or twelve minutes, the schooner continued all the time to bear about two and a half points on his starboard bow; that he then changed to a south course, and ran on that for fifteen minutes, and that the schooner still continued to bear not more than from two and a half to two and three-quarters points on his starboard bow; that the united speed of the two vessels was from sixteen to eighteen knots an hour; and that he first made the schooner's lights when she was about seven miles off. In twenty-five minutes, the vessels, at a united speed of sixteen knots an hour, would approach six miles and two-thirds of a mile nearer to each other. This approach of the schooner, without the bearing of her lights being substantially altered, while the course of the steamer was first south-south-

east for ten minutes, and then south for fifteen minutes, ought to have been a clear indication to the steamer that the schooner was proceeding in such a direction as to involve a risk of collision. Under these circumstances, it was the duty of the steamer to keep out of the way of the schooner. The schooner, after she took a northeast by north course, kept it up to the very jaws of the instant peril. Her change to a northeast by north course from a course north by east did not contribute to the collision. It was wrong in the steamer to persist in starboarding her helm, and running on a course which, from the bearing of the schooner's lights, and the freshness of the wind, it ought to have been evident, would soon bring the two vessels into peril of collision. The steamer ought to have ported her helm before she did. If she had done so, she would have cleared the schooner, as the movement which the schooner made in the heat of danger in putting her helm hard to port, favored the chance that the steamer would, by porting, clear the schooner. Such movement of the schooner did not, on the evidence, cause the collision, nor was it faulty. The steamer ought to have kept out of the way. The schooner kept her course, and there was no special circumstance making it necessary for the steamer to take and keep the course she did. Moreover, the steamer did not soon enough slacken her speed, or soon enough stop and reverse. If she had done so at an earlier moment, she would have gone under the stern of the schooner, and so she would if she had ported at an earlier moment. There must be a decree holding the steamer liable for the collision, and for the damages caused by it, with a reference to ascertain and report the damages.

ALICE, The.

[See The A. G. Brooks, Case No. 98.]

ALICE v. MORTE.

[See Case No. 193.]

Case No. 193.

The ALICE GETTY.

[2 Flip. 18; 9 Chi. Leg. News, 315; 4 N. Y. Wkly. Dig. 471; 23 Int. Rev. Rec. 203.]

District Court, W. D. Michigan. April 9, 1877.

PRIORITY OF LIENS—MARITIME OR STATE LIENS TO BE PAID BEFORE MORTGAGE LIENS, WHERE BY GENERAL MARITIME OR LOCAL LAW A LIEN IS GIVEN.

A mortgage lien upon a vessel has no priority over maritime claims of any class for which either the state or maritime law gives a lien, but is postponed to those liens.

[Cited in The Theodora Perry, Case No. 13, 879; The Bradich Johnson, Id. 1,770; The

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General Burnside, 3 Fed. Rep. 230; The City of Tawas, Id. 174. Followed in The Illinois, Case No. 7,005; The J. E. Rumbell, 13 Sup. Ct. Rep. 502, 148 U. S. 1.]

In admiralty.

F. W. Cook, for Miller.

WITHEY, District Judge. Exceptions to the clerk's report as to the order in which creditors of the "Getty" are entitled to be paid out of the proceeds have been filed, and present questions which, in part at least, were passed upon by this court in The St. Joseph Case, [Case No. 12,229.] The tug belongs at Muskegon, in this state, and most of the libels are for supplies, repairs, etc., furnished in Michigan. She was accustomed to take tows across the lake, and there is one libel for supplies furnished in Chicago, besides several for seamen's wages. The original libellant's claim is for necessaries furnished the tug in Michigan. For this claim a decree was obtained and the tug sold. A number of intervening libels were filed before sale, and a number of creditors asserted their liens after sale upon the proceeds. Besides these, Rogers petitioned to have the proceeds applied upon two mortgage liens. The filing of his mortgages in the custom house antedated nearly all the other lien claims. The clerk's report gives priority to the strictly maritime liens, viz.: seamen's wages and the claims for supplies furnished out of the state. After satisfying these and the costs there is a surplus. Then preference is given to liens under the state law asserted before sale of the tug. There is still a surplus, and this is given to the mortgage claims to the exclusion of domestic liens after sale against the proceeds. These latter creditors except to the report because they are postponed to the mortgage creditor, and the mortgage creditor excepts to the report because his lien is postponed to those domestic liens which were asserted by intervening libels before sale. Rogers, the mortgagee, insists that he is entitled to rank next to those liens established for seamen's wages and the foreign creditors.

The court held in the St. Joseph case that the mortgage liens do not have priority over maritime claims of any class for which either the maritime law or the state law gives a lien. We have repeatedly affirmed that view, and so far as we are advised neither the circuit court of this circuit nor the supreme court has held a contrary rule to govern as to priorities. In the northern district of Illinois it was decided that a mortgage lien outranked domestic liens. 2 Biss. 131, [The Grace Greenwood, Case No. 5,652;] 6 Biss. 367, [The Kate Hinchman, Case No. 7,620.] In the last named case, (6 Biss., [Case No. 7,620,]) it seems to have been the opinion of the learned district judge that The Lottawanna, 21 Wall. [8 U. S.] 558, had settled this question in favor of the priority of a mortgage lien over those liens created

by state laws, but this we think is a misapprehension as to what was there decided. We do not know what bearing the Illinois statute may have had in determining the priorities in the cases in the district court of Illinois, if any. The Michigan statute giving the lien on domestic vessels, fixed their priorities over mortgage liens, sections 6678, 6679. If the state may give the lien, we do not see why it may not fix the rank as between the several domestic and mortgage lien creditors. But we are of opinion that if the statute be silent on the subject, the principles of the maritime law would postpone mortgage liens to all maritime claims where by the general maritime law or by the local law a lien is given. It would not be claimed that a purchaser of a vessel could successfully assert a claim to proceeds against either class of maritime claims. Viewed in the proper light, a mortgagee is a purchaser subject to a condition, the performance of which condition by the mortgagee will defeat the mortgagee's title. Now, nothing is better settled than that a mortgage on a vessel creates no maritime claim; on the contrary, the mortgage represents an ordinary debt to which we attach no maritime rights whatever, and can no more be enforced in admiralty courts than can a judgment or execution lien in favor of a creditor, who has, through proceedings in a state court, levied on the vessel. The mortgage gives a lien and so does the levy, but neither can operate to deprive maritime claims, for which the local or maritime law gives a lien, of superior rank and claim to priority, and this rests upon that measure of public policy in favor of those who supply vessels with necessary things to enable them to proceed on their voyage, without which marine commerce could hardly be sustained, and because the supplies are supposed to be to the advantage of both owners and creditors of the vessel.

The only standing a mortgagee can obtain in a proceeding in admiralty is against the remnant in the registry, and this only by petition under the 43d admiralty rule. We understand the Lottawanna Case to have settled nothing on the question whether a mortgage lien outranks a lien for supplies given by the local law. In that case it was held that liens asserted under the law of Louisiana had never been perfected and therefore had no standing before the court; this left the mortgagees at liberty under the 43d admiralty rule to come forward and claim what was left of the remnant in the registry of the court as against the owner of the boat. We regard that case as supporting in very many points what we have said. If a mortgagee wishes to avoid claims arising against the mortgaged vessel, he should take possession and avoid debts, but if he lets her sail, he understands the necessity which may arise for supplies and repairs on the credit of the ship, and he can no more defeat those debts

by asserting his mortgage than could a purchaser. He is benefited by any repairs and may be by ordinary supplies, which enable the ship to proceed on her voyage and thus save her freight. We entertain no doubt upon the subject, and sustain the exceptions by those having liens under the state law, whose libels were filed subsequent to the sale of the vessel, and direct that the decree be entered so as to give them priority over the mortgaged liens. We overrule the exceptions filed by Rogers, the mortgagee.

Case No. 194.

The ALICE TAINTER.

[5 Ben. 391; 15 Int. Rev. Rec. 40.]

District Court, S. D. New York. Nov. 1871.*

MARITIME LIENS—SUPPLIES—HOME PORT.

A bark owned by American citizens, resident in New York, was put into the name of a British subject and under a British register, after which she was sold by the American owners to a firm, also resident in New York, one member of which was an Austrian subject, but neither of the members was a British subject, the title, however, being put into the name of another British subject. This firm kept possession of the vessel for some time, and finally sold her. During this period C. furnished supplies to the vessel, on the order of her master, in New York, whom C. had known a long time. C. did not know who owned the vessel, and made no inquiries. He afterwards filed a libel against the vessel, to recover for the supplies. *Held*, that the vessel was really in her home port when the supplies were furnished, and was not really a foreign vessel, as regarded the rights of the libellant, and that he had no lien on the vessel for the supplies.

[In admiralty. Libel in rem by James E. Chase against the bark Alice Tainter for supplies. Libel dismissed with costs. Affirmed by the circuit court in *The Alice Tainter*, Case No. 195.]

Scudder & Carter, for libellant.
Beebe, Donohue & Cooke, for claimant.

BLATCHFORD, District Judge. The libel in this case alleges, that, between the 24th of October, 1867, and the 26th of December, 1867, while the bark Alice Tainter was lying at the port of New York, she was in want of certain supplies and provisions, to enable her to proceed upon any voyage and earn freight; that her master applied to the libellant, and requested him to furnish to the bark such supplies and materials as she stood in need of; that thereupon, and between the dates before named, at the city of New York, the libellant furnished to the bark materials and supplies of the value of \$1,938.50, all of which were necessary for the bark; that bills therefor were rendered to the master and approved by him, but no part of the sum has been paid; and that

the libellant has a maritime lien on the vessel therefor. The libel does not allege that the vessel was a foreign vessel, or a vessel in a foreign port, at the time the materials and supplies were furnished, or that they were furnished on the credit of the vessel. It alleges that the vessel is a foreign vessel, speaking as of the date the libel was sworn to and filed, which was the 11th of December, 1869.

The answer admits, that, during the times mentioned in the libel, the libellant furnished certain supplies and provisions, and that the same were necessary for the bark. It sets up, that the bark is an American built bark, and has been, at all times, in truth, owned by American citizens; that, at the times mentioned in the libel, Slocovich & Smith, residents of the state of New York, and merchants doing business in the city of New York, were the real owners of the bark; that that fact was well known to the libellant, and the supplies and provisions were furnished upon their credit; that the bark was sailing under a British register; that, to give her nationality, she was nominally placed in the name of the claimant, one Armstrong, a British subject, then and ever since residing and doing business in the city of New York; that, since the furnishing of the supplies and provisions, and before the commencement of this suit, the bark had performed a voyage to Europe, Japan, back to Europe, and thence back to the United States; and that this court has no jurisdiction of this suit.

The history of the bark, as shown on the trial, was this: She was built in New York for the firm of Smith & Dunning, a firm doing business in New York, and whose members resided there or in Brooklyn. They owned the bark, the title to her being in the name of Mr. Smith, of that firm. That firm continued in possession of her until they actually sold her, October 22d, 1867. Meantime, and on the 21st of April, 1863, Mr. Smith, of that firm, conveyed her, by bill of sale, to one Duck, a British subject, residing in New York, and she was put under the British flag, and furnished with a British register. Smith & Dunning sold her, on the 22d of October, 1867, to the firm of Slocovich & Smith, a firm composed of two members, both of whom resided in New York. That firm carried on business in New York. They negotiated for her purchase with Smith & Dunning, and accounted to them for her purchase money. None of the members of the firms of Smith & Dunning and Slocovich & Smith were British subjects. Slocovich was an Austrian subject. On the purchase by Slocovich & Smith, Duck, on the 22d of October, 1867, by a bill of sale, executed by Smith, of the firm of Smith & Dunning, as his attorney, the power of attorney from Duck to Smith being dated September 21st, 1864, conveyed the vessel to the claimant, Armstrong, who was a British

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*[Affirmed by the circuit court in *The Alice Tainter*, Case No. 195.]

subject, residing and doing business in New York. At all times after such conveyance, until February 11th, 1870, when Slocovich & Smith sold the vessel, she continued in their possession, employed by them in trade. They sent her on a voyage to Rotterdam, thence to China, Japan, Cork, Amsterdam, and New York. On the 11th of February, 1870, they sold her, and Armstrong conveyed her, by bill of sale, to one Adey, a British subject.

The only testimony as to the furnishing of the supplies to the vessel is that given by the libellant himself. He says that he was not on board of her, and did not know by whom she was owned; that he supplied the goods to her by the order of her master, with whom he had been a long time acquainted; that the master happened in at his, the libellant's, store, and told him, the libellant, that he, the master, was appointed to the command of the vessel, and thought he could give him, the libellant, the order for fitting her out; and that subsequently the master gave him, the libellant, the order, and he filled it.

It is impossible, on the facts in this case, to hold that the libellant has any lien on this vessel, which can be enforced in a suit in admiralty against her, in rem. She was, in fact, in her home port, when the supplies were furnished, and not in a foreign port, nor was she then really a foreign vessel, as regards the rights of the libellant in reference to her in respect of these supplies, however it might be necessary to regard her as a British vessel in respect of any rights claimed by her as against the United States, as a sovereign power. Nor is this a case where she was held out by her real owners as a foreign vessel, or a vessel in a foreign port, in such wise as to deceive or mislead the libellant to his prejudice. He does not testify that he supposed she was a foreign vessel or a vessel in a foreign port, or that he furnished the supplies on the credit of the vessel, or gave credit for them to the vessel. On the contrary, he says that he did not know by whom she was owned. He does not show that he inquired of the master, or of any other person, where or by whom the vessel was owned, or whether she was in her home port or in a foreign port. The master did not come to him as a stranger or a foreigner, in command of a foreign vessel. On the contrary, he had been acquainted with the master for a long time. Moreover, the fact that the master, happening in at the libellant's store, told him that he was appointed to command the vessel, and thought he could give him the order for fitting her out, must be regarded as a sufficient indication that he had been appointed master then recently by parties at hand, to put the libellant to inquiring, at least, from the master, where the vessel really belonged and who were her real owners.

There is not in this case the slightest indication that the libellant had any idea that he was furnishing the supplies to a foreign vessel, or to a vessel in a foreign port, or on the credit of the vessel, or that he was obtaining a security on the vessel by furnishing them. I must, therefore, dismiss the libel, with costs.

Case No. 195.

The ALICE TAINTER.

[14 Blatchf. 41.]¹

Circuit Court, S. D. New York. Nov. 11, 1876.²
SHIPPING—LIEN FOR SUPPLIES—HOME PORT—FOREIGN REGISTRY.

An American built vessel, really owned by residents of New York, was put under the British flag by a formal transfer to a British subject, and was registered in a British port. Afterwards, supplies were furnished to her in New York, by a person who was not misled as to her character: *Held*, that there was no maritime lien on the vessel for the supplies.

[Appeal from the district court of the United States for the southern district of New York.]

[In admiralty. Libel in rem by James E. Chase against the bark Alice Tainter for supplies. Decree for claimant dismissing the libel in the Alice Tainter, Case No. 194. Libellant appeals. Affirmed.]

Scudder & Carter, for libellant.

Welcome R. Beebe, for claimant.

JOHNSON, Circuit Judge. The controlling question in this case is, whether the fact that this vessel was put under the British flag by a formal transfer to a British subject, recorded at the British consulate in New York, and by being registered at Hamilton, in the island of Bermuda, although she was really owned by Smith & Dunning, her original owners, and continued to be controlled by them until they sold her to Slocovich & Smith, just before the supplies in question were furnished, converted her into a foreign vessel, so as to subject her to a maritime lien for supplies. That the vessel lost her right to the protection of the government of the United States, by the transaction stated, and that, so far as the revenue laws are concerned, she had no longer any claim to be considered an American vessel, is quite clear. But all this may be without her being subjected, as a foreign vessel, to a maritime lien for supplies. In respect to that question, the residence of the owners, and not the place of registry or enrolment, controls. The Plymouth Rock, [Case No. 11,237.] I do not find, upon the evidence, that the libellant was misled in any way in respect to the character of the vessel. He seems to have known her history very well, except that he did not know

¹[Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

²[Affirming The Alice Tainter, Case No. 194.]

her owners at the time, nor did he make any inquiry about them. He knew Captain Nichols, who used to come into his office, and who, when he got charge of this vessel, told the libellant that he thought he could give him the order for her supplies, and subsequently did so. The libellant testifies that he knew she was under the British flag when he furnished the supplies, and that he furnished them on the credit of the vessel. But this neither makes out that the vessel was not in her home port, nor that he was misled about her in any respect, unless it was in the idea that this change of her colors had caused New York to cease to be her home port. I do not find that the cases to which I am referred support the libellant's view of the law. In most, if not in all, the question presented assumed the vessel to be in a foreign port, and then the inquiry was whether the other circumstances would support a maritime lien. This was clearly so in *The Patapsco*, 13 Wall. [80 U. S.] 329, in *The Grapeshot*, 9 Wall. [76 U. S.] 129, in *The Guy*, Id. 758, in *The Lulu*, 10 Wall. [77 U. S.] 192, and also in *The Walkyrien*, [Case No. 17,092; Id. 17,091.] In the latter case, the attempt was, though the vessel was foreign, to defeat the maritime lien on the ground that the foreign owner was a resident of New York, and this the court refused to do; while, on the other hand, in the early case of *The St. Jago De Cuba*, 9 Wheat. [22 U. S.] 409, it was held, that, even in a home port, a vessel may be subjected to the liabilities of a vessel in a strange port, by being falsely held up as foreign by her owners, but that, in such a case, the question is, whether there was an imposition practised, under circumstances calculated to deceive and mislead men of ordinary vigilance.

Entertaining these views of the law, I think the decree of the district court in 5 Ben. 391, [*The Alice Tainter*, Case No. 194,] was correct, and that the further testimony presented in this court has not altered the position of the case in any material and controlling respect. The decree must be affirmed and the libel dismissed.

Case No. 196.

The ALICE TAINTER.

[14 Blatchf. 225.]¹

Circuit Court, S. D. New York. May 18, 1877.

ADMIRALTY—COSTS—FEES OF CLERK.

1. Where a note of issue, on an appeal in admiralty, is delivered to the clerk, under rule 55 of this court, with a view to his putting the cause on the calendar of causes to be tried, for a particular term, a fee of \$1 to the clerk for the service is a lawful and proper fee, and, if paid by a successful party, can be taxed against his adversary, as costs in the cause.

[Cited in *The Siren*, Case No. 12,910; *The F. Merwin*, Id. 4,893.]

2. It is proper for the clerk to charge for including the evidence, in a suit in admiralty, in the final record, on final decree, notwithstanding the provision of section 1 of the act of February 16th, 1875, (18 Stat. 315,) in regard to appeals in admiralty to the supreme court.

In admiralty.

Beebe, Wilcox & Hobbs, for libellant.
Scudder & Carter, for claimant.

BLATCHFORD, District Judge. Rule 55 of this court provides as follows: "When a cause is noticed for trial or argument for the first day of the term, a notice thereof, with a note of the issue, and of the pleadings, and of the attorneys' names shall be delivered to the clerk at least eight days next preceding the term, and the clerk shall, as early as the following Thursday, have the calendar of causes to be tried, made up, arranging them according to the dates of their issues; and no cause shall be put upon the calendar, without the special order of the court, unless the note of issue shall be furnished as is hereby required." A rule like this, in substance, has been in force since 1838. Such rule was made under the authority contained in section 7 of the act of March 2, 1793, (1 Stat. 335,) which provides, that "it shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts, directing the returning of writs * * * and otherwise, in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings." This enactment is embodied in section 918 of the Revised Statutes, which provides, that "the several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the supreme court" under section 917, "make rules and orders directing the returning of writs * * * and otherwise regulate their own practice, as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." The practice of making up, for the use of the court, a calendar of causes, from time to time, sometimes every term, sometimes not so often, such calendar to be composed only of causes specified in notes of issue delivered to the clerk of the court by one or the other or both of the parties to the cause, and of confining the action of the court, in trying and hearing causes, to the causes which are upon such calendar, is a practice which has always existed in the state courts of New York, of all grades; while, in some of the states, such practice is unknown, but the clerk of the court makes up a trial list from his own scrutiny of the papers on file. In the courts of New York, and in the federal courts in New York, the payment of a fee

¹[Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

to the clerk, on the delivery to him of the note of issue, has always been required.

In the present case, on an appeal in admiralty from the district court, the libel was dismissed, with costs, by this court. In taxing the costs the clerk allowed and taxed the following item: "8 notes of issue, \$8.00." The cause was upon the calendar each one of eight terms, and, on each one of the eight occasions, the claimant delivered to the clerk a note of the issue and paid him the sum of \$1. It is contended, for the libellant, that this charge of \$1 on each occasion is unlawful, unless it is found to be specifically provided for in section 828 of the Revised Statutes; that the only provision on the subject in section 828 is this one: "for making dockets and taxing costs, in cases removed by writ of error or appeal, one dollar;" and that, under this provision, there can be but one charge of one dollar.

It is to be noted, that the rule does not require that the note of issue shall be filed in the court or with the clerk, or shall become part of the files of the court. It is only to be delivered to the clerk for his use in making up the calendar. The clerk makes the calendar for the convenience of the court, and a copy of it is always made for the use of the bar. The service is not one which it is contemplated by section 828 that the clerk shall perform, and it is not covered by any item in that section, nor does any fee prescribed in that section apply to it. In the rule, it might as well have been provided that the marshal or a commissioner should perform the service, as the clerk. It is not reasonable that the service should be performed without compensation. As it is for the benefit of suitors, it is reasonable that suitors should pay for it. It is as reasonable that they should pay for it as it is that they should pay the expense of printing papers which the court requires to be printed. It is for the court to say who shall ultimately pay such expenses; and the court has the power to say that the losing party shall ultimately pay them, by refunding them to the party who pays them in the first instance. Whether they are paid in the first instance to a printer or to any other person who is designated by the court to perform the particular service, is immaterial. In *Neff v. Pennoyer*, [Case No. 10,084,] the circuit court for the district of Oregon held, that, under section 918 of the Revised Statutes, that court had the right, either by general rule or by special order in a particular case, to require parties to a cause submitted to it for decision to file printed briefs, and to tax the reasonable expense of printing the brief of the prevailing party against the losing party, as a necessary disbursement. Under the same authority, this court made a rule, on the 1st of July, 1876, requiring the cases and points and all other papers in certain

calendar causes to be printed, and providing that a party recovering costs should be allowed his disbursements for the printing required of him by such rule. A like practice and rule as to printing papers exists in the circuit court for the district of Massachusetts. See *Jordan v. Agawam Woolen Co.*, [Case No. 7,516.]

The remaining question is, as to whether the charge of \$1 for the service is a reasonable one. It has for many years been the standard charge for the service in both of the federal courts for this district. It has not, it is believed, until now, been ever questioned. In the years 1852 and 1853, as appears from the records of this court, the usual charge for the same service, paid without question, was \$4.75. The charge of \$1 seems reasonable, in view of the nature of the service, and of the fees allowed in section 828. Long acquiescence by the court and the bar go far to establish that the fee is a reasonable one.

As to the clerk's costs on final decree, no objection is made to any specific item, although the items are stated in detail by the clerk, except to the charge for making the final record, which, it is contended, ought not to include the evidence in the cause, because, by section 1 of the act of February 16th, 1875, (18 Stat. 315,) the review, by the supreme court, on an appeal in admiralty, is limited to a determination of the questions of law arising on the record, and the circuit court is required to make a finding of facts, as part of the record. But, rule 52 in admiralty, prescribed by the supreme court, requires that the record transmitted to the circuit court, on an appeal by the clerk of the district court, shall contain, among other things, the testimony on both sides. The record so transmitted to the circuit court becomes part of the record of the cause in that court, and, if there be an appeal to the supreme court, such record must, as a whole, be transmitted to that court. There is nothing in the act of 1875 which varies this practice.

The question as to the copy of the apostles has been heretofore disposed of. The taxation is affirmed.

Case No. 197.

The ALICE VIVIAN.

[Nowhere reported; opinion not accessible.]

[8 Adm. Rec. 403.1]

District Court, S. D. Florida. Jan. 20, 1864.

[Cited in *The R. E. Lee*, Case No. 11,691.]

[This was a libel by the United States against the steamer *Alice Vivian* and cargo, captured in attempting to run the blockade.]

¹[8 Adm. Rec. 403, only contains the decree of the court.]

Case No. 198.

ALICE v. MORTE.

[2 Cranch, C. C. 485.]¹

Circuit Court, D. Columbia. May Term, 1824.

SLAVERY — LOST MANUMISSION — EQUITABLE RELIEF.

A slave who has been manumitted, and lost her deed of manumission, may have relief in equity.

In equity. The complainant, Alice, was a mulatto woman, who was claimed by the defendant Peter Morte, as his slave, and who was about to be carried away into the southern states, when she claimed her freedom, and complained to Mr. Hoffman, a justice of the peace, who, under a statute of Virginia, in force in the county of Alexandria, detained her, and committed her to the marshal for safe keeping, until her complaint could be heard by the court; the defendant, Morte, having refused to give security for her forthcoming to prosecute her claim at court. Having been brought before the court by habeas corpus, and having filed her petition to be permitted to sue in forma pauperis, Mr. Mason was assigned by the court as her counsel, who reported in favor of her claim in equity; whereupon she filed her bill in equity, in which she stated that she was formerly held as a slave in Maryland, by one Samuel Edelin, in whose family she continued till she was sixteen years of age, and where she was kindly treated. That Edelin was an unmarried man, and about five years ago gave her what she supposed was a deed of emancipation, and was suffered by him to go at large, as a free person, which she did for some time, in his immediate neighborhood, with his knowledge and approbation. That, with his knowledge, she then went and resided in Washington, D. C., where she continued unmolested until the year 1819. That she lost her paper which was given to her by Edelin, when she was discharged from his service, and which she is informed and believes was a full and sufficient deed of emancipation. That she was lately seized, thrown into jail, and sold to the defendant, Peter Morte, who was informed of her claim to freedom, and who is about to remove her to some part of the southern or western country. This bill was sworn to by the complainant. The defendants demurred "as to so much of the complainant's bill as seeks to charge them with a knowledge of her right to freedom, or as seeks to compel the defendants or either of them to make any discovery touching the same, or any of the matters relating thereto, in the bill suggested or alleged;" "and for cause of demurrer show, that they ought not to be compelled to discover any matters whereby they may impeach or accuse themselves of an offence or crime for which they

¹[Reported by Hon. William Cranch, Chief Judge.]

may suffer corporal punishment, or be grievously fined."

THE COURT, at May term, 1824, after argument, overruled the demurrer, and ordered the defendants to answer on or before the first day of the next term. Not having done so, and the complainant having filed the deposition of John B. Edelin, fully confirming the facts stated in the bill, it was taken for confessed, and the court decreed that the complainant should be emancipated and set free, and that the defendant Edelin should make, execute, and deliver to her a proper and full deed of emancipation, duly prepared for record; and that the defendant Morte should be perpetually enjoined from exercising, or in any manner setting up, any claim to the complainant.

Case No. 199.

The ALIDA.

[Abb. Adm. 165.]¹

District Court, S. D. New York. Feb. 1848.

MARITIME LIENS — STATE LAW — DISCHARGE OF LIEN—CONTRACTS.

1. The libellant, a blacksmith, solicited the engineer of a domestic steamboat running daily between New York and Albany, to employ him in making such repairs as should be required during the season by the boat, in the line of his trade. The engineer promised this, and the libellant was called upon to make, and did make repairs upon the boat at various distinct times, sending in his bills monthly. *Held*—1. That these facts did not constitute an employment for the season, but that the libellant had a right of action for each distinct job when it was completed. 2. That libellant's lien upon the boat, if any, under the provisions of 2 Revised Statutes, p. 405, § 2, for each item of service rendered by him, was discharged on the lapse of twelve days after the departure of the boat from Albany for New York next following the rendering of such service.

[See note at end of case.]

2. The court affords a remedy against domestic vessels for labor, supplies, &c., furnished, only where the vessel is subject by the local law to a lien therefor; and the privilege is enforced subject to every qualification or limitation attached to it by that law.

[Cited in *Thomas v. The Kosciusko*, Case No. 13,901; *The City of Salem*, 31 Fed. Rep. 616.]

[3. Cited in *The Albany*, Case No. 131, to the proposition that a lien attaches to a foreign ship by the general maritime law, and that the different states of the federal union are, in regard to this question, regarded as foreign states to each other.]

[In admiralty.] This was libel in rem, by James O. Haight against the steamboat *Alida*, to recover for repairs made upon that boat. [Libel dismissed.]

The facts out of which this action arose were as follows: During the navigation season of 1847, the steamboat *Alida*, being then wholly owned in this state, was employed in running between New York and

¹[Reported by Abbott Bros.]

Albany, making regular passenger trips daily, Sundays excepted. The libellant was a blacksmith, residing at Albany, and he solicited the engineer of the boat to employ him in doing such jobs of work as should be required in the line of libellant's trade during the season. The engineer promised to do so; and at various times when the boat was at Albany, from August 4 to September 24, the libellant was called upon to make repairs upon the engine and other parts of the boat, and he supplied, during that time, all labor and materials within the scope of his trade which the boat required. These services were rendered by the libellant on the 4th, 6th, 13th, 18th, 20th, 22d, and 27th days of August, and on the 1st, 8th, 13th, 15th, 17th, 20th, 22d, and 24th days of September. The Alida changed owners in New York, September 21st; her down trip from Albany was on the 25th, and no work was performed on her by libellant subsequently. She was attached, on her arrival in New York, on other demands, but afterwards continued her trips as before. The engineer who employed the libellant left the boat on the 27th. There had accrued during the month of August, upon the libellant's account for services, charges amounting to \$80.95, and the bill therefor was presented on the 1st of September. On the 20th of September, \$50 was paid the libellant, and was credited on the August account. Early in October, the bill for the September work, including the arrears on the August bill, was presented to the owners in New York. The book-keeper of the libellant testified that it was his course of business to present the libellant's shop bills for payment on the first of each month. The libel was filed on the 7th of October.

John Cochrane and S. P. Staples, for libellant.

Smith & Woodward, for claimant.

BETTS, District Judge. The present action was commenced within twelve days after the libellant ceased working on the boat; but if each job created a debt by itself due and payable when such job was completed, all the items, excepting the last one, \$13.43, had been due more than twelve days when the vessel was arrested, and more than that period would have elapsed after the work was finished, and after a departure of the vessel from the port of Albany to the port of New York. To sustain the action upon the facts shown, the libellant must maintain one or two propositions: that his employment was for the season, and that accordingly he had no right to arrest the boat until his contract was terminated by the expiration of the running season, or by the act of the owner of the boat; or that, in order to bar his remedy in rem, the boat must have left Albany and have remained absent for more than twelve days

continuously, after each particular indebtedness accrued.

In my opinion, the evidence in no way authorizes the assumption that the hiring of the libellant was for the entire season. The nature of the employment clearly indicates that it was merely for piece or job work, and that, in each instance, the libellant had a right to demand payment when the particular job was completed. It was the usage of his shop, indeed, to render bills to customers monthly; but that usage in no way affected the legal right of libellant to withhold the indulgence and exact ready pay, nor did it put him under obligation to proceed, and supply material and labor on credit throughout the season. Such usage could only tend to raise a presumption in favor of such credit; but this presumption, if unsupported by other proofs, would be of too slight a character to postpone his right to collect his charges, because it would be balanced if not indeed countervalled by another implication, that each piece of work or article of manufacture furnished by a mechanic, completes his obligation to his employer as far as that item of employment is concerned, and has no connection with or dependence upon other services, similar in character, rendered between the parties. This is the well-understood relation of employer and employed, in all cases of mechanical services; and there is no stronger inference in favor of a continuing credit where the employment is for a series of independent repairs to a single steam-engine, than where it is for the original construction of several different engines. In the absence of stipulations between the parties, the law assumes that a mechanic is entitled to compensation for his job when finished, (Story, Bailm. §§ 425, 426,) and the job must, in ordinary acceptance, be regarded as finished when all the material or labor demanded has been fully supplied. This is as true in relation to small items of mechanical labor and supplies, as it is in respect to those of the greatest magnitude and expense. The job of the block-maker is to all legal intents completed when he has finished the particular tackle ordered, as clearly as is that of the shipwright when the ship is launched and fully sparred; and either is then entitled at law to demand compensation for his labor and materials. If, then, the employment proved in this case were to be regarded as a contract for hire and materials, I should think it amounted to nothing more than an engagement by the libellant to answer such calls or orders as should be made upon him in his line of business, leaving his right to recover compensation therefor to stand upon the ordinary legal footing. In my judgment, however, the understanding between the libellant and the engineer constituted no agreement obligatory on either party. It was no more than the customary good-will solicited by tradesmen and mechanics, and

promised by those to whom application is made. These friendly assurances secure no right to either party which can be enforced against the other, as arising upon an agreement of legal obligation.

The question then arises, under the second point, whether the lien, if originally existing in favor of the libellant, was discharged by the departure of the boat from Albany, twelve days or more before the suit was brought. Where services or supplies are rendered to a foreign ship, a lien attaches by the general maritime law; and the different states of our Federal Union are, in regard to this question, regarded as foreign states to each other. The nature, extent and character of the lien, in such case, are to be determined, not by the local law of the particular state, but by the general principles of the maritime law applicable to the case. *Zane v. The President*, [Case No. 18,201.] *The Nestor*, [Id. 10,126;] *The Chusan*, [Id. 2,717.] But against domestic vessels the court affords a remedy only where they are subject by the local law to a lien for work done, or for articles or materials furnished in building or repairing the vessel, or for provisions or stores furnished within the state, and fit and proper for the use of the vessel when furnished; and accordingly the privilege is enforced, subject to every qualification or limitation attached to it by the state law. The case is governed altogether by the municipal law of the state, and no lien is implied, unless it is recognized by that law. *The General Smith*, 4 *Wheat*. [17 U. S.] 438; *The Robert Fulton*, [Case No. 11,890;] *The Jerusalem*, [Id. 7,294;] *The Hull of a New Brig*, [Id. 11,609;] *The Bark Chusan*, [Id. 2,717;] *Peyroux v. Howard*, 7 *Pet.* [32 U. S.] 324; *Harper v. The New Brig*, [Case No. 6,090;] [*Buddington v. Stewart*.] 14 *Conn.* 404; *Davis v. The New Brig*, [Case No. 3,643.]

The statute of the state of New York under which this lien must be supported, if at all, contains a provision that when the ship or vessel shall depart from the port at which she was when the debt was contracted, to some other port within the state, every such debt shall cease to be a lien, at the expiration of twelve days after the day of such departure; and in all cases the lien shall cease immediately after the vessel shall have left this state. 2 *Rev. St.* p. 405, § 2. The act preceding this, (*Laws 1830*, c. 320, § 50,) and the antecedent one, (*Laws 1817*, c. 60, § 1,) have always been held in this court to bar the arrest of a vessel after twelve days subsequent to her leaving (provided her departure is not clandestine or fraudulent) the port in which the lien was incurred, and going to another port in this state, without regard to the time during which she might remain away from the port where the debt was contracted. *Jenkins v. The Congress*, [Case No. 7,264;] *The Joseph E. Coffee*, [Id. 7,536.] I am satisfied that the state act demands that exposition, and should now only refer to the former

decisions in this court upon the subject, had it not been earnestly contended in this case that the meaning of the provision was clearly different from that of the former acts upon the same subject, and that it requires, in order to discharge the lien, a continuous absence of the vessel for more than twelve days from the port where the debt was contracted, and that she remain for that length of time in some other port or ports within the state. It was urged that any other construction would render the lien fallacious and worthless, for the reason that the creditor could never know when it was intercepted or destroyed. Stress was also laid upon the decision of the supreme court of the state of New York, in *Denison v. The Appellonia*, 20 *Johns.* 194, as determining that the vessel must remain more than twelve days in the port to which she is removed, in order to divest the lien. And in view of this construction of the statute, it was further contended that the boat, having returned to the port of Albany on every day succeeding the one on which she left it, had never departed from that port within the intent of the statute. I think there is but slight call for construction in this case, as the words of the statute (2 *Rev. St.* 405, § 2) fix the meaning of the legislation with a clearness not to be strengthened by explanatory comments. The day of departure is the point from which the limitation commences running, and it becomes final at the expiration of twelve days after that day.

The reasons upon which the legislation on this subject rest also demand this construction of the law, in so far as it applies to cases not constituting maritime liens to be enforced by admiralty courts under their general jurisdiction. Those courts take no cognizance of such claims against domestic vessels in their home ports, excepting in execution of the local law. It is accordingly the lien of the artisan or furnisher, as recognized at common law, that the legislature had in contemplation and sought to extend. *The Marion*, [Case No. 9,087;] *Moore v. Hitchcock*, 4 *Wend.* 292. See, also, *Harper v. The New Brig*, [Case No. 6,090.] The common-law lien was dependent upon the actual holding in possession of the thing to which it attached, and any surrender, however brief, of such possession, divested or discharged the lien. So, when actual possession of the thing was not acquired, the lien never attached. *Story*, *Bailm.* §§ 440, 588; *Ex parte Foster*, [Case No. 4,960;] *Meary [Meany] v. Head*, [Id. 9,379.] This rule of law manifestly left mechanics, material-men, and others who furnished stores to vessels while anchored in port or moored at the dock, yet remaining in possession of their owners, masters, and crew, without other security for their claims than the personal responsibility of their agents or owners. This mischief is remedied by a statutory liability, having all the virtue of a common law and maritime

lien, not only while the vessel is under the hands of her creditors, but for twelve days after she departs from the port where the debts were contracted, to any other port within the state.

While there is an impressive equity in affording to creditors some means of protection against the sudden removal of vessels from under their hands, thus cutting off their security, it is plain that the legislature meant also to guard the public against prejudice from these tacit and secret claims. They are permitted, accordingly, to continue in existence for a short period after the vessel has gone from their quasi occupancy and possession. It is proper that sufficient time be allowed to enable the creditor to enforce his right; but no reason demands that these liens should be allowed to float with the vessel, going out of the port and coming back with her to it, so long as she may continue to revisit it, without her absence exceeding twelve days. On the contrary, this would tend to mislead and prejudice subsequent purchasers and creditors, as such prior lien, if sustained, would hold its preference against all subsequent claims, (*Rankin v. Scott*, 12 Wheat. [25 U. S.] 177,) and thus would be withdrawn all the protection which the limitation of time prescribed by the statute was designed to secure.

The supreme court of this state have evidently so understood the provisions of this act in *Hancox v. Dunning*, 6 Hill, 494. They preserved the lien in that case only because the vessel had not left the port or state within the meaning of the act. She had only gone out on an experimental trip to try her boilers, and it was held that the touching at a New Jersey port, while on such an excursion, did not divert the lien. The language of the court suggests that the present case would be regarded as coming within the limitation. The court say: "The reasonable construction is, that the lien ceases when the vessel departs from the port where the repairs were made, or leaves the state, upon a voyage or trip in the pursuit of some kind of trade or business." The boat in this case was running in steady employment as a passenger vessel, loading and unloading daily at the port of departure and destination, and completing her voyage on her arrival at the latter.

The case of *Denison v. The Appellonia*, 20 Johns. 194, relied upon on the argument, turned upon the language of the state act of 1817. Laws 1817, p. 49, c. 60, § 1. This provision is not incorporated in the Revised Statutes, and it is exceedingly difficult to comprehend what is intended by it. There is probably a misprint in the proviso; but as the decision of the court was upon a point of pleading, the only inquiry was whether the pleading had stated the case provided for by the act, and no attention seems to have been paid to the import and effect of the clause itself upon the rights and reme-

dies of privileged creditors. The proviso was, "that the said lien shall in no case endure beyond twelve days after such ship or vessel shall leave the port in which the same may have been arrested." The plea in bar to the proceedings was, that the vessel left, and for more than twelve days continued absent from the port where the supplies, &c., were furnished before her arrest. The court held the plea bad, because it did not state the cause which exonerated the vessel from the lien;—that is, her arrest, before her removal, and then her continuing absent more than twelve days after the arrest. No principle is settled by that case which is applicable to this.

I am, accordingly, of opinion, that any indebtedness to the libellant, which was a lien upon the boat, ceased to be so after the expiration of twelve days from her leaving Albany, and subsequent to the time the debt was due.

The last charge made against the boat by the libellant, September 24, being for less than \$50, no lien arises in his favor for it, and upon the considerations stated, he cannot maintain the suit for the antecedent credit. Libel dismissed with costs.

NOTE, [from original report.] On the subject of liens upon domestic steamboats, see, also, the decision in another suit against *The Alida*, [Case No. 200.]

Case No. 200.

The ALIDA.

[Abb. Adm. 173.]

District Court, S. D. New York. Feb., 1848.

MARITIME LIENS—SUPPLIES—CONTRACTS.

1. Where a writing, although embodying an agreement, is manifestly incomplete, and not intended by the parties to exhibit the whole agreement, but only to define some of its terms, the writing is conclusive as far as it goes; but such parts of the actual contract as are not embraced within its scope, may be established by parol evidence.

[Cited in *Lafitte v. Shawcross*, 12 Fed. Rep. 521.]

[See *Page v. Sheffield*, Case No. 10,667; affirming *Sheffield v. Page*, Id. 12,743.]

2. The owner of a steamboat, and a corporation engaged in the business of supplying coal to steamboats, had for some months been accustomed to deal with each other for the supply of coal required by the boat; the requisite supply for her wants upon each trip being furnished her on each arrival. Under these circumstances the owner executed a written memorandum, acknowledging that he had purchased 1500 tons of coal at a specified price per ton; which was, however, silent as to time and mode of delivery and payment. *Held*.—1. That the previous course of dealing between the parties might be shown, to establish their intention in regard to these points. 2. That upon this evidence the contract must be construed as intending a delivery of the coal from time to time as it might be ordered to meet the wants of the boat, and as creating an obligation to pay for each parcel of coal as delivered

[Reported by Abbott Bros.]

3. A steamboat is subject to a lien under 2 Rev. St. p. 493, [1st Ed., pt. 3, c. 8, tit. 3,] for fuel furnished her for the purposes of her navigation.

4. The lien for labor, supplies, &c., furnished to vessels, given by 2 Rev. St. p. 493, takes effect from the time when the benefit is actually conferred, not from the date when it is engaged or contracted for.

[Cited in *The James H. Prentice*, 36 Fed. Rep. 781.]

In admiralty. This was a libel in rem, by the president, managers, and company of the Delaware and Hudson Canal Company, against the steamboat *Alida*, to recover for supplies of coal furnished that boat. [Decree for libellants.]

The action arose out of the following facts:—The libellants' corporation were the owners of the Lackawanna coal beds, and were engaged in supplying coal extensively to steamboats. Their course of business was, to deliver the coal in carts from the yards of the company as it was required for use, and to render bills therefor regularly about once a month, to those receiving the supplies, and to collect the amounts within a few days afterwards, allowing a reasonable time for the examination of the bills. The *Alida* was built during the winter and spring of 1847, and was employed during the navigation season of that year, in running between New York and Albany as a passenger boat. She was accustomed to leave New York on Mondays, Wednesdays, and Fridays of each week, returning the alternate days; and she usually, on her arrival down, received coal sufficient to supply her run up the next day. The libellants were accustomed to supply her with coal; and it was proved by the books of the libellants, which were put in evidence by the claimants, that the libellants supplied the boat, in this city, on March 19, 1847, with four tons of lump coal, at \$5.50 per ton; on April 10th, with ten tons at the same price; and on alternate days during the residue of the same month, with 141 tons, generally furnishing a little more than twenty tons per day, at \$5 per ton. In like manner the boat received in May, 245 tons in New York; eight tons at Kingston, at \$4.50, and at Rondout 349 tons, at \$4; the latter quantity being delivered together. In the same manner she received, in New York, during the month of June, 303 tons, at \$4.50 per ton; and in July, up to and including the 10th, 123 tons, at the same price. The total price of these supplies was \$4,537.70. Payments were made on June 23d, of \$782, and June 30th, of \$2,858.70, leaving a balance which remained due up to July 12th, of \$917. On the last-mentioned day, William R. McCullough, of New York city, then the owner of the boat, made an engagement with the libellants' corporation for further supplies of coal. The only direct agreement proved was a memorandum in the following words, written by McCullough, in the books of the libellants:—Steamboat *Alida*. I have purchased

this day of the Delaware and Hudson Canal Company, five hundred tons of lump coal, to be delivered at Rondout, at \$4.62½ per gross ton, less 12½ cents per ton for cash, to August 1st. Also, one thousand tons of lump coal, to be delivered from yards in New York, at \$5 per net ton, to be delivered by carts. Wm. R. McCullough. New York, July 12, 1847."

From this time the delivery of the coal continued in the manner practised theretofore. On each arrival of the boat in New York she received almost uniformly twenty-four tons at a time; the smallest quantity being once twenty tons, and the largest twenty-five tons three times. On August 2d, the sum of \$1,363.50 was collected by the libellants, and on August 31st, \$2,145. The collecting agent of the libellants was accustomed to present the bills to McCullough, throughout the season, for each month's delivery of coal, and he also used to call a few days after the presentation of the bills, when he received the payments as credited. When he presented the bill for September, McCullough promised to pay the amount due in a day or two. On Monday, September 20th, McCullough transferred the boat to another person in trust; but the custom-house officers refusing to register that conveyance, a regular bill of sale to E. Stevenson, was executed on the 21st, and on the 27th, Stevenson conveyed her to Orvin Thompson. The failure of Stevenson was publicly known in the city on the 21st of September. It was on that day, also, that the vessel was attached on the libel filed in this cause. The action was now before the court for hearing on the pleadings and proofs, and was heard at the same time with the action by James O. Haight against the same boat, a report of which case immediately precedes this. [Case No. 199.]

William H. De Forest and S. P. Staples, for libellants.

Smith & Woodward and Mr. Crist, for claimants.

BETTS, District Judge. I am of opinion that the evidence offered of the course of dealing between the parties during the early part of the season is proper and relevant, to show the relation in which the parties stood to each other, and the character of their mutual dealing, and that it affords a safe guide to the intention and meaning of the written memorandum of July 12th. That agreement, as reduced to writing, most manifestly does not represent the entire bargain and understanding between the parties. It is not to be supposed that either of them contemplated an instant sale of fifteen hundred tons of coal, which the libellants could at once deliver and compel payment, or require payment in advance, or which McCullough had a right to demand. In toto, on the signature of the paper, or on any day he might designate. The obvious purpose of the par-

ties was to arrange the prices which should be paid for the coal, and to fix the quantity which should be supplied at those prices, and accordingly a mere note or memorandum was made of those particulars, leaving the mode of supply, in respect to time, amount, &c., to continue as theretofore. A stipulation between vendor and vendee, circumstanced as these parties were, if intended to contain the whole contract, would naturally, if not necessarily, define with precision the rights and obligations of each under it, specifying the periods and quantities of delivery, and the terms of payment. The parties to this agreement had been, at its date, engaged in dealing together for more than three months, in the very matter to which the agreement related, and they both perfectly understood the general usage of that branch of trade, and their own respective means and wants. The libellants knew that McCullough was running a day boat on the river, which consumed more than twenty tons of coal on each trip; and McCullough well knew that they had command of the fuel usually required and obtained for the use of steamboats, and there was an established usage between them to furnish and receive a daily supply at the current market prices, payable on delivery. Both were willing to make an arrangement which should relieve this trade between them from the uncertainty of price to which coal is subject in the general market, and which the proofs show had occurred within the previous three months, to the advantage and disadvantage of each, compared with the standard adopted in the agreement. Thus the circumstances under which the agreement was made have a most important bearing in determining the actual intention of the parties, if the court is not required, in determining that construction, to lay out of view every thing extraneous to the writing itself.

It is very clear, upon the authorities, that this agreement, being manifestly incomplete and intended to define not the entire contract but only one or two of its terms, the circumstances of the case, and especially the previous course of dealing between the parties may be resorted to, in order to supply those parts of the contract which are not within the scope of the memorandum, as well as in determining the sense of uncertain or ambiguous words. Had this writing been a formal obligation under seal, the circumstances in proof might rightfully be noticed in ascertaining the meaning of the parties; and a mere parol memorandum, not amounting to a complete agreement, can incontestably be construed with reference to extraneous facts which tend to determine the motives and intentions governing its adoption. Thus it is said that the rule which forbids the admission of parol evidence to contradict or vary the terms of a written instrument, is directed only against the admission of any other evidence of the language em-

ployed by the parties making the contract than that which is furnished by the writing itself. But the writing may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties. 1 Greenl. Ev. §§ 274, 277, 287, 288; Chitty, Cont. 24, 25; [Hodges v. King,] 7 Metc. [Mass.] 583.

The supreme court of this state, in 1815, in *McMillan v. Vanderlip*, 12 Johns. 165, held that the rule governing the construction of contracts ought to be discharged of all subtlety, and that they should be expounded according to the real intention of the parties. So, in South Carolina, it is distinctly held that loose memoranda, not containing a complete agreement, are open to explanation by parol proof. *Stone v. Wilson*, 3 Brev. 228. So, in Missouri, the court holds the rule to be that parol evidence is admissible to show the time, place, and manner of performing a written contract which is silent upon those subjects. *Benson v. Peebles*, 5 Mo. 132. So, also, the supreme court of New York, in *Farmers' & Manufacturers' Bank v. Whinfield*, 24 Wend. 419, admitted parol evidence where the agreement was in writing, to show the nature of the transaction, and the object and purpose of the parties. The case of *Potter v. Hopkins*, 25 Wend. 417, decided in the New York supreme court in 1841, is a clear authority upon this point. In that case, the contract between the parties was originally in parol, but was in part expressed in a receipt given for the first payment made under the agreement. The receipt being put in evidence on the trial, an objection was taken, that the party could not be allowed to prove the previous parol agreement, because such proof amounted to the contradiction of the writing; but the court held that the instrument in question did not purport, on its face, to be a complete arrangement between the parties, but was obviously given as an acknowledgment of part execution of a contract, referring to some of its terms. It was held that the instrument was binding as far as it went, but that, as to such parts of the contract as were not embraced within the writing, parol evidence was admissible. There are many other cases which sustain this doctrine. See *Hunt v. Adams*, 6 Mass. 519; *Barker v. Prentiss*, Id. 434; *McCullough v. Girard*, [Case No. 8,737;] *Mead v. Steger*, 5 Port. (Ala.) 505; *Commissioners v. McCalmont*, 3 Penn. R. 492, [Pen. & W. 122;] *Sharp v. Lipsey*, 2 Bailey, 113; *Knapp v. Harden*, 1 Gale, 47; *Reay v. Richardson*, 2 Crompt. M. & R. 427; *Ingram v. Lea*, 2 Camp. 521; *Hall v. Mott*, Brayt. 81; *Tisdale v. Harris*, 20 Pick. 12.

The case of *Jeffery v. Walton*, 1 Starkie, 267, is perhaps more analogous to that now before the court than either of those yet mentioned. That case was assumpsit for damages received by a horse hired by the defendant from the plaintiff. At the time of the hiring the plaintiff told the defendant's

agent, who applied for the horse, that if he took him on hire he must be liable for all accidents. The agent engaged the horse on this condition, and the following memorandum of the terms was made in writing:—"Six weeks, at two guineas. William Walton, Jun." The counsel for the defendant contended on the trial, that this memorandum was to be considered as the real contract between the parties, having been made according to the evidence immediately upon the close of the agreement, and that it was not competent to the plaintiff to engraft upon it a further term by means of parol evidence. And, consequently, that this was nothing more than an ordinary case of hiring, in which accidents of this nature were to be borne by the person who let the horse. But Lord Ellenborough said: "The written agreement merely regulates the time of hiring and the rate of payment, and I shall not allow any evidence to be given by the plaintiff in contradiction of these terms; but I am of opinion that it is competent to the plaintiff to give in evidence suppletory matter as a part of the agreement."

In my judgment, therefore, this memorandum, if read in view of the proofs in the case, did not in any way vary the relation of the parties in their dealings in the matter, excepting in respect to the prices chargeable for the coal. The libellants were bound under it to deliver the coal as before, from time to time when it might be demanded, and only in the quantities required at each time; and McCullough was bound to pay for each parcel of coal on delivery. Each delivery created a debt to the value of the coal delivered, and that debt was payable immediately. The acts of the parties after the agreement are, moreover, fully in accordance with this exposition of their meaning, derived from their previous usage. Coal was supplied to the boat at each trip, and only enough to meet her consumption on the run. The bills were rendered as they previously had been, and collections were made upon them as being then due and payable. It is plain that McCullough so understood the rights of libellants and his own obligations, because he promised their collector, in September, to make immediate payment of the balance in arrear.

It appears to me, also, that the words themselves of the memorandum may reasonably be considered to coincide with this interpretation, collected from the course of dealing between the parties, and that they by no means import a contract of sale of fifteen hundred tons of coal as an entirety. Five hundred tons are deliverable at Rondout, at \$4.62½ per ton, less 12½ cents per ton for cash, to the 1st of August. This latter provision fairly implies an understanding that a part only of the stipulated quantity might probably be called for before August. It seems to me the meaning to be attached to the clause, construing the memorandum by

itself alone, is that whatever part of the five hundred tons McCullough chose to take from Rondout, between July 12th and August 1st, he should receive at \$4.50 per ton, paying cash on delivery, while that taken afterward should be at \$4.62½ per ton; and that, consequently, it was at his option to order the whole or none on the lower terms. There is no indication in the memorandum that it was the duty of the libellants to make immediate delivery, or that they had a right to deliver the whole five hundred tons at their election immediately after the signature of the agreement. The one thousand tons contracted for in New York were to be delivered from the yards and in carts. This manifestly contemplates a delivery in parcels, and at distinct times. If lump coal from yards is an article different from and superior to coal brought to market in barges and in bulk, and the contract can only be satisfied by supplying coal of that description, there could still be no reason for defining the method for transportation other than this, that the understanding between the parties contemplated the furnishing the coal in small lots when called for, according to the known usage of the trade, and the particular wants of the libellants. I should have no difficulty, accordingly, in holding the agreement, even as evidenced by the memorandum itself, to be that the libellants should furnish the stipulated quantity of coal as it might be ordered by McCullough, and that they were entitled to payment upon each order as it was fulfilled.

The cases cited to show that this contract must be construed as an entire one, under which the libellants had no right to demand any payment from McCullough, without showing either full performance on their part or a legal excuse for non-performance, do not, in my opinion, exclude the construction which I have placed upon the memorandum. In *McMillan v. Vanderlip*, already cited, (12 Johns. 165,) the plaintiff had hired for ten and a half months, under an agreement to receive wages upon a certain mode of computation, based upon the amount of work done by him; and he left his employer before the completion of the term agreed for. The court held that the engagement of the plaintiff to work out the whole period was a condition precedent, necessary to be performed before the defendant could be held liable for his wages. The principle of that decision does not, however, reach this case, for here is no agreement to deliver the whole fifteen hundred tons of coal before the price is payable. The analogy would have been a strong one had the stipulation been to deliver the fifteen hundred tons at or within a certain time, and for a specified amount of money, in gross or per ton. The case of *Champlin v. Rowley*, 18 Wend. 187, was an analogous case to *McMillan v. Vanderlip*, and the decision there was only that an agreement to deliver a

particular amount of hay, at a given time, must be performed entirely, or that no liability upon it accrued to the vendor against the purchaser.

The case of *Waddington v. Oliver*, 2 Bos. & P. (N. R.) 61, was a case of like description. The agreement there was to deliver a hundred bags of hops before the first of January. A part were delivered in December, and immediate payment for them was demanded, and on refusal to pay, suit was brought for their value forthwith. It was held that the action would not lie for two reasons: first, because the plaintiff had not performed the whole of his contract; and second, because the time in which the contract was to be completed on both sides, had not arrived when the suit was commenced. The supreme court of this state held, in *McMillan v. Vanderlip*, that the first reason is a legal and satisfactory one. It is manifest, however, that the agreement in that case stipulated for a complete execution upon the part of the plaintiff by a given day, and accordingly gave an element of entirety to the contract which is not found in the one now before the court.² The contract in the present case is destitute of that ingredient. There is no time stipulated at or within which the coal must be delivered, either at the beginning or close of the season, or within one or several seasons. That circumstance, it seems to me, is significant to show that the parties never contemplated a purchase or sale of fifteen hundred tons of coal as an entirety. That would have placed the purchaser who required a daily supply of fuel sufficient for his boat, quite at the discretion of the vendors, who would be in no way bound to furnish it with reference to the wants of the boat, but might follow their own convenience. And, accordingly, to uphold and carry into effect the plain meaning of both parties, the memorandum must be regarded as fixing only that term of the contract which was loose and indefinite before, namely, the price to be paid; and all else must be regarded as intended to be left upon its former footing. If the memorandum imports an entire agreement, then the libellants could rightfully perform the whole at once, (except, perhaps, delivering the five hundred tons at Rondout,) and as no time was fixed for the delivery, they might have elected to make it after the navigation of the river had closed for the season, and indeed without any reference to the wants of the boat during the season. No court would close its eyes to the manifest purpose of the parties in the agreement, and to all the concomitant facts tending to establish that purpose, so as to sustain a mode of execu-

tion which might wholly subvert its object, and the motives of the parties making it. If, then, under the general phraseology of the memorandum, there is to be implied, in behalf of McCullough, a right only to the delivery of coal when ordered, because that construction only is consonant with the relations of the parties and the plain object of the bargain, though not expressed upon its face, the like reason exacts in behalf of the libellants that the implication should be raised to protect them, in parting with so large an amount of property, from being compelled to rely solely on the personal credit of the purchaser—an obligation not assumed by them in the agreement, and which had never attended similar transactions between the parties. These views in relation to the memorandum rest upon the assumption that it is to be regarded a contract on the part of McCullough, and as thus creating, by implication, corresponding engagements on the part of the libellants, so as to have the same effect as if it expressed a stipulation by them to deliver to him five hundred tons of coal at Rondout, and one thousand tons at their yards in New York.

But the circumstance should not be overlooked, that the memorandum may reasonably be understood as no more than an admission on the part of McCullough, that he had purchased such a quantity of coal at the prices stipulated; and as not meant to fix the terms of his contract beyond that, much less to regulate the manner of performance on the part of the vendors. He takes no assurance or engagement from them. There is not the mutuality essential to a contract to render it obligatory to both parties. *Chitty*, Cont. 3, 108. And this admission of purchase by him, not asserting any condition of credit or entire fulfillment of the sale by the vendors, would place him on the footing of an ordinary purchaser, who is bound to pay for the article bought on its delivery. *Com. Cont.* 182. So he understood his own obligation, and both parties having throughout acted upon that, as the true meaning and design of their arrangement, and it being no way inconsistent with what is stated in the memorandum, I hold that the libellants were entitled to demand payment on each delivery of the several lots or quantities of coal ordered by McCullough.

A steamboat is subject to a lien under the state statute for fuel furnished her for the purposes of her navigation. 2 Rev. St. p. 493, § 1. In the case of *Johnson v. The Sandusky*, 5 Wend. 510, which was decided in the New York supreme court, in October, 1830, it was held that a party who had furnished wood to a steamboat, to be used as fuel for the purpose of propelling her, was not entitled to a lien therefor. The supplies contemplated by the act, it was said, "must be such as to enter into the construction or equipment of the vessel and become part of

²The cases upon the general subject of the dependence or independence of contracts, may be found examined in the note of *Sergeant Williams v. Peeters v. Opie*, 3 Wms. Saund. 352, note 3, and in the note of *Mr. Wendell* in the case of *Champlin v. Rowley*, 18 Wend. 194.

her, and not such articles as are daily consumed and constantly replaced. They must be such as go towards the building, repairing, fitting, furnishing and equipping a vessel." That case was decided under the act of 1817. In the case of *Crooke v. Slack*, 20 Wend. 177, the same court held that the word "stores," introduced into the Revised Statutes on the subject, embraced fuel furnished to a steamboat as a particular now entitled to a lien. This court, in the case of *The Fanny*, [Case No. 4,637,] followed the construction of the statute given by the state court in the case of the *Sandusky*, although not satisfied with that exposition. I now readily conform to the later interpretation of the statute by the local court, without inquiring whether there is any essential difference in the provisions of the two statutes. The lien, however, upon the principles laid down in the case of *Haight v. The Alida*, [Id. 199,] heard at the same term with this cause, is available to the libellants to the extent of such amount of coal only as was delivered to McCullough within twelve days before this suit was brought and after the departure of the boat on her regular trip to New York. This would include the coal delivered from September 9th to the commencement of the action, being one hundred and twenty tons, at five dollars per ton, amounting to \$600. For the residue of the quantity delivered the libellants have lost their remedy against the boat.

It is contended for the claimants, that any lien which might have existed for the balance of \$600 is discharged; because, by the act, it arises at the time the debt is contracted, and within the purport of the statute the debt was contracted on the 12th of July, after which day the boat continued to depart from New York for the port of Albany every alternate day, until September 21st, following, and a period exceeding twelve days after every such departure had elapsed before the institution of this suit. It is manifest that the provision of the statute has relation to subsisting debts due and payable for supplies, materials, and labor furnished vessels, and not to initiatory and executory bargains out of which a debt may arise. A different construction of the statute would subvert the whole purpose and policy of the privilege, which is intended to give security for labor and materials actually furnished to vessels, and not for the mere contract or stipulation to supply them. These contracts are, probably, in most instances, entered into in anticipation of the time when the vessel is to receive the repairs or supplies, and she often continues her business, leaving the port where the contract is made and returning again, until the period arrives for its fulfillment. The anchors, spars, rigging, cables, sails, &c., which she requires, must often be in course of preparation by the furnishers, under their contracts, for considerable periods of time, during which she awaits their

completion or pursues her employment. After she has received supplies, under such circumstances, to hold her discharged from liability on the ground that more than twelve days had elapsed after her departure from the port since the contract was entered into, would render the assurance held out by the act to creditors a sheer delusion. I cannot perceive the slightest color for such interpretation of its enactments.³

The cases cited upon the argument in support of that construction—*Moss v. Oakley*, 2 Hill, 265; *Moss v. McCullough*, 5 Hill, 131—relate to subjects widely different and distinct in principle from this class of liens or charges, and have very slight, if any, analogy to the point in controversy here. They apply to the obligation of a stockholder in an incorporated company to pay the debts of the company, contracted whilst he is a corporator, and only touch this case in so far as the inquiry when a contract is considered in law to be made and obligatory. The act of incorporation in those cases made every stockholder liable for debts incurred by the corporate body while he was a stockholder. Those cases were claimed to fall within the purview of the statute; and in each the court decided that the debts sued for had been contracted by the corporation within the period the defendants were stockholders. The first case turned upon a question of pleading,—whether it was necessary to aver that suit had been brought while the defendant remained a stockholder, and the other upon the effect of a judgment obtained against the company, as evidence to charge an individual stockholder with the debt. The principle involved in that statute, as expounded by the court, was, that the stockholder was surety for all debts of the company, and that of course his liability would attach concurrently with that of the company at the time the debt was contracted. But neither case turns upon the point, or even adverts to it, whether conditional contracts, before fulfilment of the condition on the part of the creditor, come within the privilege. That question could hardly become a practical one under that statute.

It has already been sufficiently shown that no debt subsisted against McCullough on his undertaking until the libellants had delivered coal to him; the liability of the boat is incident and consequent only to the debt when it has been thus created and perfected. This was so in this case, on September 21, 1847, for the value of the quantity delivered that day. Decree for the libellants for \$600, and interest from that day, and costs to be taxed.

³The same view was taken by the New York court of appeals in *Veltman v. Thompson*, 3 Comst. [3 N. Y.] 438. It was held, on the authority of the decision in our text, (which was cited in MSS.) that "the statute has relation to a subsisting debt for supplies, materials or labor furnished vessels, and not to the initiatory bargain out of which the debt may arise."

Case No. 201.

The ALIDA.

[3 Ben. 580.]¹

District Court, E. D. New York. Dec., 1869.
COLLISION IN NEW YORK HARBOR—TOW-BOAT—
VESSEL AT ANCHOR—SUDDEN GALE.

A tow-boat, with thirty canal-boats, four barges, and a sloop in tow, was bound down the North river, with an ebb tide. In passing a large steamer, which lay at anchor, the hawser struck the steamer, and two of the canal-boats were sunk. The defence set up was, that a sudden squall of wind struck the steamer, as the tow was passing at a proper distance, and drove her into the tow: *Held*, That the defence had not been made out, but that the collision was occasioned by lack of precaution on the part of the pilot of the tow-boat.

[In admiralty. Libels for collision. Decrees for libellants.]

T. E. Stillman, for libellants.

O. Van Santvoord, for claimants.

BENEDICT, District Judge. These two actions, which have been tried together, were brought to recover the amount of the injury caused to the cargoes of two canal-boats, the Emma Davis, and the William Burr, by a collision, which occurred in the North river, on the 16th of September, 1869, between the steamship Borussia, and the steamboat Alida and her tow, of which the canal-boats named formed a part. It is not contended by either party, that the collision was caused by any fault on the part of the canal-boats. The sole question is, whether it was caused by negligence on the part of the Alida, which was, at the time, towing the boats. The tow of the Alida consisted of two barges on each side, and a hawser tow of thirty canal-boats, arranged in six tiers of five boats each—astern of which, were a sloop and two barges, on a stern hawser some 220 fathoms long. The tow was bound down the North river, upon an ebb tide, and the Borussia, a large sea-going propeller, was lying at anchor, near the middle of the river, off the dock of the Hamburgh steamers.

As the Alida and her tow came down to the Borussia, she determined to pass to the eastward of the steamer—that is, between the steamer and the New York shore—and she did, herself, so pass in safety; but, in passing, her hawser tow came in contact with the bows of the steamer, and the canal-boats Emma Davis and William Burr brought up heavily upon the Borussia, and her chain, and were so injured that their cargoes were totally destroyed. The defence of the Alida, as now made, is that the collision was occasioned by an event purely fortuitous, namely, a sudden squall of wind, which struck the Borussia, as the Alida was passing at a proper distance, and drove her to the eastward and into the tow.

In support of, and in opposition to, this de-

¹[Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

fence, a mass of testimony has been taken, which is noticeable for its bold and inexplicable contradictions. It has all received my best attention, aided by the careful briefs of the respective advocates, and it has failed to satisfy my mind that the disaster was caused as claimed by the defence. On the contrary, I can entertain no doubt, after weighing the evidence with care, that, if that precaution had been exercised by the pilot of the Alida, which the circumstances required, and which the law imposed upon him, he would have avoided the vessel at anchor, and the collision would not have occurred. I must, accordingly, hold, that the collision was occasioned by the fault of the Alida, in not avoiding the Borussia, as she was bound to do.

I content myself with this announcement of the result of my examination and comparison of the testimony, not deeming it necessary to spread out, in a lengthy opinion, the various portions of this mass of evidence, which have led me to the conclusion arrived at, as all of it, I am glad to believe, will be placed before the appellate court, and my error, if I have fallen into one, then corrected.

The decrees will, therefore, be in favor of the libellants, with orders of reference to ascertain the amount of damage.

ALIDA, The, (BROWN v.)

[See Brown v. The Alida, Case No. 1,939.]

ALIDA, The, (EARLE v.)

[See Earle v. The Alida, Case No. 4,245.]

ALIDA, The, (ELMORE v.)

[See Elmore v. The Alida, Case No. 4,419.]

ALIDA, The, (SPENCER v.)

[See Spencer v. The Alida, Case No. 13,231.]

Case No. 201a.

In re An ALIEN.

[Betts' Scrap Bk. 101.]

District Court, S. D. New York.¹

NATURALIZATION—RESIDENCE—ACTS OF 1802, 1813,
AND 1824—MINORS.

[1. The naturalization act of April 14, 1802, § 1, (2 Stat. 153, c. 28.) required five years' residence in the United States. Act March 3, 1813, § 12, (2 Stat. 809, c. 42.) provided that an alien must have a residence of five years, without being for any part of that time out of the territory of the United States, in order to become entitled to naturalization. *Held* that, under the act of 1802, "residence" meant domicile, and that said act did not require that the alien remain constantly in this country for five years.]

¹[Probably decided about 1842.]

[2. Act May 26, 1824, (4 Stat. 69, c. 186,) provided that any free white alien, under 21 years of age, who shall have resided in the United States three years next preceding his arriving at the age of 21 years, and who shall have continued to reside therein until the time of making application to be admitted as a citizen, may be naturalized after arriving at the age of 21 years, and after he shall have resided in the United States five years, including the three years of his minority. *Held* that, so far as concerns minors, this repealed the act of 1813, and required merely a domicile in the United States under the prescribed conditions.]

[3. A person who serves an apprenticeship in the United States, and thereafter is in constant service as a sailor, and spends the short intervals between his voyages with his mother, who resides in the United States, is himself a resident of the United States, within the meaning of the act of May 26, 1824, (4 Stat. 69, c. 186,) and is entitled to naturalization.]

[In the matter of an application by an alien for a certificate of naturalization. Certificate granted.]

BETTS, District Judge. The applicant came to the United States in the year 1832, being then a minor. His surviving parent, his mother, still resides in this state, where he served his time as an apprentice, and he now makes his home with her, when not engaged in his present pursuit. For several years past he has been a sailor, being constantly engaged in that employment, except the short intervals between ending one voyage and going out upon another. These periods are passed at the house of his mother, he having no family of his own.

Two questions are presented by these facts: First, whether the act of 1813, March 3, § 12, [entitled "An act for the regulation of seamen," (2 Stat. 809, c. 42,)] applies to this case, and, if it does not, whether the residence of the applicant has been such as to satisfy the existing laws on the subject. The act of [April 14.] 1802, § 1, [2 Stat. 153, c. 23,] required a residence within the United States of five years. Residence, in its legal acceptation, is the place of a party's home or domicile, and not merely the spot occupied by him for the time being. This may be constantly varying; but every change of abode is not regarded as constituting a new residence, without the accompaniment of an intention to abandon the former for the purpose of taking up another. The act of 1802 therefore could not prevent an alien who had come into the United States, and acquired a domicile there, with intent to make it his permanent home, from obtaining his naturalization, although he had not stayed uninterruptedly in the country the full period of five years.

The act of March 3, 1813, § 12, confirms this construction of the previous laws, by declaring that, after the war, aliens coming to this country shall reside therein five years without being at any time during that period out of the territory of the United States, in order to be entitled to the privilege of naturalization. Congress very distinctly signifies that such uninterrupted continuance was not

required to constitute the residence demanded by the laws before in force.

On the 26th of May, [1824,] it was enacted [4 Stat. 69, c. 186] that any alien, being a free white person and a minor under the age of 21 years, who shall have resided in the United States three years next preceding his arriving at the age of twenty-one years, and who shall have continued to reside therein to the time he may make application to be admitted as a citizen thereof, may, after he arrives at the age of 21 years, and after he shall have resided five years within the United States, including the three years of his minority, be admitted a citizen, &c. Section 1. Congress in this act reverts again to the use of the term of residence in its general sense, without the specification of a restriction as to the mode of its exercise or enjoyment. It is to be a residence of a continuous character; but absence from a domicile in the regular prosecution of a man's vocation or business does not divest his residence, and is entirely compatible with the demand of this section, because a residence, when obtained, in judgment of law continues to the party until a new one is acquired by him. The act of 1824, therefore, by re-enacting in respect to minors the provisions of the act of 1802 regarding residence, by implication of law dispenses with and supercedes the restrictions of the act of 1813 in that behalf. This case is, therefore, to be considered as if the act of 1813, in its application to minors, had been expressly repealed by the posterior act of 1824, and the applicant is accordingly entitled to his certificate of naturalization upon these proofs, under the act of 1802.

ALINE, The.

[See I— v. The I. M. Lewis and The Aline, Case No. 6,991.]

Case No. 202.

ALKAN et al. v. BEAN et al.
[8 Biss. 83; 23 Int. Rev. Rec. 351; 10 Chi. Leg. News, 25.]

Circuit Court, E. D. Wisconsin. Oct., 1877.

ENJOINING COLLECTION OF ASSESSMENT—LIEN OF GOVERNMENT—FORFEITURE.

1. Allegations in a bill, that an assessment made by the commissioner of internal revenue, is irregular, and in violation of law, and void, do not constitute ground for an injunction to restrain the collection of the assessment.

[Cited in *Kensett v. Stivers*, 10 Fed. Rep. 526; *Snyder v. Marks*, 3 Sup. Ct. Rep. 160, 109 U. S. 193.]

2. Statements by a collector of internal revenue, to the effect that the government has no claim upon distillery property for unpaid taxes, do not affect the right of the government to assert an existing lien for taxes upon such property.

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3. The remedy by bill in equity to collect assessments, conferred by section 3207, Rev. St., is cumulative.

4. Section 3224, Rev. St., is not limited in its application to the party taxed. A purchaser of distillery property upon which there is an existing lien for taxes due to the government, cannot acquire the same freed from such lien, though he purchase in good faith, for value, and without notice of the lien.

5. In a case where proceedings were instituted, for forfeiture of a distillery, followed by seizure and subsequent release of the property on bond under section 3331, Rev. St., but which were afterwards discontinued by the government without any judicial declaration of forfeiture, a lien for unpaid taxes is not lost or affected by such bonding and release of the property in the forfeiture proceeding, and a subsequent purchaser from the former owner takes the property incumbered by the lien.

In equity.

[Heard on motion to dissolve a temporary injunction that had been granted at the time of the filing of complainants' bill. Injunction dissolved.]

The bill charged, that the defendant, Bean, was collector, and that the defendant, Buckley, was deputy collector of internal revenue for the first collection district of Wisconsin; that the complainant, Alkan, was the owner of certain premises described in the bill, upon which was situated a distillery with all the distilling apparatus appertaining thereto. That these premises were conveyed to Alkan, October 12, 1875, by Lewis Rindskopf and wife; that on the 13th of October, 1875, he leased the property to the complainant Swenger, for the term of two years, at the annual rent of \$2,500; that Swenger thereupon took possession of the premises and then began and thereafter carried on the business of distilling spirits thereon; that he executed the proper bond as a distiller, which was accepted by the officers of the United States; that he had paid all taxes upon all distilled spirits made by him, and complied with the laws relating to the distillation of spirits; that previous to the purchase of the property by Alkan, the business of distilling had been carried on by Rindskopf upon said premises; that on the 7th day of October, 1875, the premises, distillery and apparatus were seized by the collector for alleged infractions of the laws of the United States relating to internal revenue; that Rindskopf, as claimant, intervened, applied for the appointment of appraisers and release of the property, pursuant to section 3331, of the Revised Statutes; that appraisers were appointed, an appraisal made, and a bond given; that the distillery premises were released from seizure, and that the bond is still outstanding and in force; that afterwards an information was filed against said property, which recited the seizure, and prayed condemnation, but the prosecution thereof was afterwards abandoned by the United States, and was regularly dismissed. The bill further alleged that prior to the purchase of the premises

and property by Alkan, he informed the collector and deputy collector of his contemplated purchase, and desired to know whether the United States had any claim against the property, and whether there were any unpaid taxes thereon due to the United States; that he was informed by the collector and his deputy that there were no such unpaid taxes, and that the United States had no claim against the property; that relying upon such statements and information he purchased the premises in good faith, and paid \$15,000 therefor. That about Nov. 1, 1875, the commissioner of internal revenue assessed a tax upon or against said Rindskopf for \$49,427.45, as being due for spirits distilled upon said premises, by Rindskopf, in the months of December, 1874, and January, February, March, April, May and June, 1875. The bill charged that this assessment was made irregularly, and in violation of law, and was void; and alleged further, that this assessment was certified by the commissioner to the defendant collector about Nov. 6, 1875; that the collector issued a warrant under which the premises in question were advertised for sale, to satisfy such assessment, which sale was thereafter abandoned; that on the 19th of May, 1876, the United States filed a bill in equity in this court against Rindskopf, the complainants in the present bill, and others, to subject said property, with other property, to sale, to satisfy said assessment, which bill in equity was still pending; that the property sought to be subjected to sale by that bill, aside from the premises owned by complainant, Alkan, consisted of three distinct parcels, of more value than the whole amount of the alleged assessment. The bill further alleged, that on the 10th of January, 1877, the defendant, Bean, as collector, issued a warrant to the defendant Buckley as deputy collector, for the collection of said assessment, under which warrant a seizure and levy were made upon the premises and distillery in question, and the same were advertised for sale; and the bill charged that such sale would be inequitable and unjust, and would create a cloud upon the title, and destroy the business carried on at the distillery. The prayer of the bill was for a perpetual injunction restraining the proposed sale, and any interference by the defendants with the property and business there carried on.

On filing this bill, a temporary restraining order was granted. The bill was demurred to, and on hearing, the demurrer was overruled. It was at the same time considered by the court that the temporary injunction previously granted should stand until the filing of an answer, when the defendants would be at liberty to move to dissolve that injunction. Subsequently an answer was filed and this motion was made.

The answer admitted the conveyance of the premises by Rindskopf to the complainant, Alkan, and the leasing of the same by

the latter to the complainant, Swenger, but denied that these transactions were in good faith. It alleged that the premises, with the distillery thereon, had been for a long time in the occupancy of, and owned by, Rindskopf, and had been operated by him as a distillery, and various allegations were made in the answer, impeaching the good faith of the alleged purchase and ownership of the premises by Alkan, and the occupancy and possession of the same by Swenger. The answer admitted that the distillery premises were seized, October 7, 1875, by the collector; that the same were appraised and a bond given therefor, and that they were released from such seizure. But it was denied that the bond was outstanding, and it was alleged that the United States took no steps in said proceedings after such release, beyond the filing of an information, and that thereafter and before the issuance of the warrant for distraint and sale of the property, the proceedings were abandoned and notice of discontinuance was filed, and the same were regularly discontinued. It was also admitted that about October 12, 1875, the complainant, Alkan, inquired of the collector if the United States had any assessment against the distillery premises, and stated that he was talking about buying the property; that the deputy collector stated that the collector had no notice of any assessment against the premises, but that he could not tell when or how soon they might have such notice, and that they could give no guaranty against any assessment which might be made. The answer further admitted that the commissioner of internal revenue assessed the tax for \$49,427.45, mentioned in the bill, alleged that such assessment was duly and regularly made, and what were claimed to be the facts and circumstances of the assessment were set forth, that the defendant, Bean, on the 10th of January, 1877, issued a warrant for the collection of said assessment, by virtue of which a seizure of the premises was made, and the same were advertised for sale. It was also admitted that on the 6th day of November, 1875, a warrant was issued for the collection of the assessment, and the premises were under that warrant advertised for sale, but that subsequently those proceedings were abandoned. The filing of the bill in equity, May 19, 1876, by the United States against Rindskopf and others, as alleged in the present bill was further admitted, but it was denied that the property sought to be subjected to sale by that bill, aside from the distillery premises, was of sufficient value to pay and satisfy said assessment. The answer also alleged that the present suit was brought to restrain the collection of a tax, within the meaning of section 3224 of the Revised Statutes.

J. P. C. Cottrill and J. C. McKenney, for complainants.

G. W. Hazelton, for defendants.

DYER, District Judge. By section 3251 of the Revised Statutes, the tax imposed by law on distilled spirits produced from any distillery, is a first lien on such spirits; the distillery used for distilling the same, the stills, vessels, fixtures and tools therein, the lot or tract of land whereon the distillery is situated, and any building thereon, from the time the spirits are in existence as such until the tax is paid. Section 3224 provides that "no suit for the purpose of restraining the assessment or collection of any tax, shall be maintained in any court."

The distillery premises in question, as appears by the bill, were conveyed to complainant, Alkan, October 12, 1875. The assessment by the commissioner was made in November, 1875, but it was for and on account of spirits distilled in December, 1874, and in January, February, March, April, May and June, 1875. So that the tax thus assessed, if legal and valid, was a lien on the property when the spirits came into existence, and unless this lien was subsequently lost, it continued and was in force at the time Alkan took his conveyance from the former owner.

The allegations in the bill that this assessment was made irregularly and in violation of law, and is therefore void, do not furnish ground for the intervention of the court by injunction to restrain the collection of the alleged tax. Upon this point I adopt without hesitation the language of the court in *Howland v. Soule*, [Case No. 6,800.] "The object of the statute is to prevent the assessment and collection of the public revenue from being hindered or delayed by judicial proceedings, at the instigation and upon the representation of parties interested, to avoid or resist the payment of taxes. The statute would be wholly inadequate to that object if such parties were allowed to maintain suits to enjoin the collection of a tax because, as they say, the proceedings in the revenue department were erroneous or illegal.

"The statute prohibits all suits to enjoin the collection of a tax, and leaves the person who considers himself aggrieved by the collection thereof to the ordinary and usual remedy—an action at law to recover back the amount paid.

"This is a tax within the meaning of the statute. It has the form and color of a tax. It was assessed upon manufactured articles liable to a duty, by a person in office and clothed with authority over the subject matter. The tax has come to the defendant for collection in due course of office, and from the proper authority. The defendant is the person authorized to collect such taxes and by the means proposed—the seizure and sale of the complainant's property."

The lien in favor of the United States could not be waived or affected by any statements made by the collector or his deputy to the complainant, Alkan, to the effect that the government had no claim against the

property, and that there were no unpaid taxes thereon. No such statements or representations could estop the government from asserting any claim [it actually had,]² or any lien existing in its favor for unpaid taxes. And the complainant could not acquire the property divested of any such claim or lien because he may have relied upon such statements as are alleged in the bill to have been made by the collector prior to his purchase. If such representations or statements were made, they could not bind the government nor affect its rights.

Nor does the fact that at the time the proceedings against this property now sought to be restrained were instituted, there was pending a bill in equity previously filed by the United States under section 3207, to subject this distillery and other property to sale to satisfy the assessment, preclude the government from enforcing its alleged lien or claim by the statutory methods now pursued. The remedies given by the statute are concurrent. No one of them is exclusive. Section 3207, which authorizes the filing of a bill in chancery, does not declare that remedy exclusive, while section 3253 evidently contemplates concurrent remedies.

But it is contended upon other grounds that section 3224 ought not to be enforced against complainants' alleged equities. It is said that the complainant Alkan was a purchaser in good faith without notice of any claim by the government for unpaid taxes upon the distillery premises, and that the statute was not intended to forbid a suit by such a party to restrain the collection of a tax. This position is untenable unless the court can by construction properly add to this section what does not appear by its express terms. The language of the section is plain and comprehensive. "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." No exception is here stated. The scope of this section is not limited in terms to the party taxed. The evident purpose of the section is, as was held in Delaware R. Co. v. Prettyman, [Case No. 3,767,] "to prevent any interference with the prompt and regular collection of the revenue;" and where the commissioner of internal revenue, in making an assessment, acts within the limits of his jurisdiction, so that his acts cannot be treated as nullities. I am of the opinion, as was held in the case just cited, "that the purpose of the law was to prevent any person disputing by injunction process the validity of a tax assessed under the authority of an act of congress."

The lien of the government attaches under section 3251, as we have seen, from the time the spirits came into existence. This being so, how can a person subsequently purchase the property upon which the lien is by law imposed, and which is then existing, freed

from the lien and its consequences, though his purchase may be innocent and without actual notice? In the case of U. S. v. Turners, [Case No. 16,548,] Mr. Justice Swayne held that the provisions of the statute then in force, that the tax shall be a lien on the interest of the distiller in the tract of land whereon the distillery is situated, from the time the spirits are distilled until the tax shall be paid, is absolute and unconditional, and secures to the government a lien upon the distillery premises as against innocent purchasers without notice.

In that case the tax accrued while the Turners were owning and operating the distillery. Subsequently they sold the distillery, and ultimately Stoltz became the innocent owner for value, and as such claimed to be protected. But the court granted a decree in favor of the government for sale of the property upon bill filed to subject the distillery to payment of the tax.

In connection with section 3224, the provisions of section 3226 may be noticed as bearing upon the evident object of the legislation on this subject. That section provides that no suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected until appeal shall have been made to the commissioner of internal revenue, and his decision shall have been had thereon. The purpose of the legislation on this subject plainly is to prevent any interference by suit against the officers of the government with the collection of the tax. As Judge Shipman says, in U. S. v. Black, [Case No. 14,600,] "by the provision that no suit can be maintained for the purpose of restraining either the assessment or the collection of the tax, the statute has in fact provided that payment must be made at all events whether the tax was justly or unjustly levied, and that redress for an unjust exaction must be sought subsequently. The distiller is thus obliged to pay his taxes as they are assessed, and when they mature. If he neglects to pay, payment can be enforced by distraint, in which event his remedy is to pay the tax and appeal to the commissioner. If the appeal is denied, he can then resort to the courts to obtain repayment."

In conclusion, upon this question my view is, that where the assessing officer has jurisdiction to make the assessment, and a tax is assessed, inasmuch as the lien exists from the time the taxable articles come into existence, there cannot be incorporated into section 3224 an exception in favor of a subsequent purchaser of the property to which the lien is affixed, though such purchaser may have acquired the same innocently and without notice. To hold otherwise would, I think, be to disregard the plain and explicit inhibition contained in that section.

The case of Clinkenbeard v. U. S., 21 Wall. [88 U. S.] 65, was cited on the argument by

²[From 23 Int. Rev. Rec. 351.]

the learned counsel for complainants. The scope of the decision in that case is not to be enlarged beyond what is actually decided. The ruling there is not [and I conceive it cannot be construed to mean]³ that the distiller could have maintained a suit to restrain the collection of the tax, notwithstanding the prohibition of section 3224. Certainly this is not its effect, unless it be determined that the assessing officer in that case was wholly without jurisdiction to make the assessment for the period in question, and so that his act was a nullity. In that case the government attempted the collection of the alleged tax, not by distraint, but by action of debt upon the distiller's bond. The court held that the illegality of the tax could be set up as a defense to the action. Against this position were invoked the provisions of the statute, which declared that no suit shall be maintained for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been made to the commissioner, and his decision had. And the court, in construing that section, held it inapplicable, because "the suit thus prohibited is a suit brought by the person taxed to recover back a tax illegally assessed and collected." Mr. Justice Bradley says further: "This is different from the case now under consideration, which is a suit brought by the government for collecting the tax, and the person taxed (together with his sureties) is defendant instead of plaintiff. No statute is cited to show that he cannot, when thus sued, set up the defense that the tax was illegally assessed, although he may not have appealed to the commissioner." From this language [in the opinion which expresses the reason for the conclusion reached]³ it seems clear that if the suit had been one brought by the distiller to restrain the collection of the tax, the court would not have hesitated to say that it was within the prohibition of the statute, and could not be maintained. The closing remarks of the court in the opinion clearly indicate this. "When the government elects to resort to the aid of the courts, it must abide by the legality of the tax. When it follows the statute, its officers have the protection of the statute, and the parties must comply with the requirements thereof before they can prosecute as plaintiffs."

But it is alleged in the bill that on the 7th day of October, 1875, proceedings were instituted by the United States, for the forfeiture of this distillery, on the ground of alleged infractions of the law, and that a seizure of the same was made; that Rinds-kopf, then the owner, intervened, and procured the appointment of appraisers, and a release of the property on bond, pursuant to section 3331, of the Revised Statutes, which authorizes such proceeding where there is

live stock depending on the products of the distillery for feed, and which would suffer injury if the business of the distillery should be stopped. Further facts [in that case appear by the bill and answer to have been]³ that subsequent to the seizure, an information was filed, and thereafter the proceedings were abandoned and discontinued, and notice of discontinuance was given. It is contended, on the part of complainants, that the release of the distillery on bond, in the forfeiture proceeding, operated as a release of the property from any lien for unpaid taxes; and that the government is now estopped to assert such lien, and must pursue its remedy on the bond. In support of this position, the case of *U. S. v. Mackoy*, [Case No. 15,696,] has been confidently submitted as a conclusive authority. It is important, therefore, that the case cited be particularly and closely examined.

Mackoy purchased a distillery, and subsequently Mackoy & Co. began the business of distilling and continued the business [for a few months and]³ and until the distillery was seized by the collector for violation of the revenue laws. An information was filed and the property was released to Mackoy & Co., upon bond given as required by law, which bond was conditioned to the effect, that if the property should be condemned as forfeited, the obligors would thereupon pay into court the appraised value thereof. Pending the proceedings to have the property declared forfeited, Mackoy & Co. were adjudicated bankrupts. Subsequent to the commencement of bankruptcy proceedings, a trial was had in the forfeiture case, and a judgment of forfeiture and condemnation was entered, which was followed by judgment against the sureties on the bond which had been given for the release of the property. The sureties then moved that the property be ordered to be sold under the judgment of condemnation, and that the proceeds be applied to the satisfaction of the judgment rendered against them. The assignee in bankruptcy also filed a petition for an order authorizing him to sell the property under section 25 of the bankrupt act. The motion made on behalf of the sureties was overruled, and the court directed the marshal to sell the property and return the proceeds into court for future order. Accordingly the property was sold by the marshal to one Mageath, which sale was confirmed, and a deed was executed to the purchaser. Subsequently an action was commenced by the government on the distillery bond to recover taxes assessed against the distillers and unpaid. A bill in chancery was also filed on the part of the United States, reciting the proceedings in the district court, making the assignee in bankruptcy, various lien creditors of Mackoy & Co., the sureties on the bond given on release of the property from seizure, and the purchaser of

³[From 23 Int. Rev. Rec. 351.]

³[From 23 Int. Rev. Rec. 351.]

the distillery, defendants, and asserting a lien on the property for unpaid taxes, and asking to have the property subjected to the payment thereof. The question was, whether upon the facts so appearing, the bill could be sustained; and it was held that all of the interest of the United States in the property sold, passed to the purchaser, that the United States was estopped to set up as against the purchaser any lien thereon for taxes in existence, and known to it at the time the order for sale was made, and the bill was dismissed.

Now, in this case, there were certain distinguishing features, which clearly controlled the disposition made of it, and which are not to be overlooked.

First—The forfeiture proceedings were prosecuted to judgment of condemnation, and there was a full judicial declaration of forfeiture to the government. By the judgment it was necessarily determined and decreed, that the alleged causes of forfeiture existed, and that the acts had been committed which produced a forfeiture, and in consequence vested the ownership of the property in the United States, at the time of the violations of law.

Second—The liability of the sureties on the bond for release became fixed, and judgment was rendered against them for the amount of the appraised value of the property.

Third—The purchaser acquired his title, not from the original owner, but under a judicial sale, which was confirmed by the court, and which was followed by a marshal's deed to such purchaser, who at once made large improvements upon the property.

Fourth—The United States consented to the sale ordered by the court, and at that time, its bill asking to have the taxes declared a lien upon the distillery property, was pending. In his opinion, Judge Dillon expressly says, that the sale was made with the consent and for the benefit of the United States, and that it was plain upon the evidence: "That it was the intention to sell, to whomsoever should purchase, a clear and perfect title, and that the parties interested should litigate thereafter over the proceeds of such sale." Further, the court says: "There is no evidence to show that the United States intended to keep alive a tax lien upon the property. On the contrary, there is evidence that it abandoned the proceedings by which the property had been seized to secure the taxes now sought to be enforced, and the district attorney was instructed to commence suit on the bond."

Under the circumstances, the judgment of Judge Dillon was, [and he expressly rested his judgment on the circumstances] that the marshal's deed passed and conveyed to the purchaser all of the interest of the United States in the property, and that the United States was estopped to set up as against

the purchaser any lien thereon for the taxes claimed to be due.

The case, then, was such as has been stated. Does it rule the case at bar? In my opinion it does not. The cases are dissimilar in essential particulars. Here, although forfeiture proceedings were begun, they were never prosecuted to judgment. There was no judicial declaration of forfeiture. There was no judicial ascertainment of the facts necessary to exist as the basis of a forfeiture and the existence of which was essential in order to vest the title of the property in the United States at the time of any violation of law. The proceedings were discontinued. Necessarily the bond fell with the proceedings, because necessarily the terms of the bond and the obligations of the sureties must have been, that the principal should answer and perform the ultimate decree of the court; and if no decree should be rendered because of a discontinuance of the cause, the bond would cease to have any effect and its life would then terminate. Here, too, the sale was by the original owner. The United States was not a party to it; it did not consent to it. It was not a sale for its benefit as in *U. S. v. Mackoy*, [supra.] The United States did not act evidencing an abandonment of any lien for taxes upon the property.

It is true that in the opinion of the court in the case referred to, it is stated that "the effect of a release of the property on bond is that it may be sold bona fide, and give the purchaser a good title, or liens or rights may be acquired after such release, which will be protected." But this enunciation should be considered in connection with the facts of the case then before the court, and with which the court was dealing. And the scope of the decision is not to be enlarged beyond what is necessary to decide upon the case presented. In that case the proceeding being prosecuted to judgment of condemnation, and the liability of the sureties being fixed by the adjudication of the court, undoubtedly the effect of the release on bond was such as the court pronounced.

Further, the court, in its opinion, speaks of the property as owned by the United States at the time of the violations of law for which it was seized. It must be borne in mind that there was a judgment of forfeiture and condemnation, and, therefore, it was judicially ascertained that the facts existed, that the violations of law had transpired which, *eo instanti*, divested the title of the original owner.

In the case at bar there was no such ascertainment of facts, but a discontinuance of the forfeiture proceedings, the bond, in consequence, then and thereafter, ceasing to have any force or effect.

In the case of *U. S. v. Turners*, supra, the spirits upon which the tax was unpaid were removed upon transportation bonds and sold in the market. It was claimed not only that

[From 23 Int. Rev. Rec. 351.]

Stoltz was an innocent purchaser for value without notice, but that the lien of the United States upon the distillery was discharged by taking the transportation bond. But Mr. Justice Swayne, as we have seen, held the lien upon the distillery premises valid [notwithstanding] as against an innocent purchaser, without notice, for value. And in that case as in this, the title of the purchaser had its source in the former owner.

Considering this case upon all the points presented by the bill and on the argument, I have been unable to reach any other conclusion than, that to continue the preliminary injunction granted in this cause, would be to disregard a statute which forbids any such restraint upon the collection of a tax in favor of the government.

Motion to dissolve injunction granted.

ALKNOMAC, The, (CAMPBELL v.)

[See Campbell v. The Alknomac, Case No. 2-350.]

ALL.

[NOTE. Cases cited under this title will be found arranged in alphabetical order under the names of the articles; e. g. "All the Distilled Spirits," etc.]

[See Distilled Spirits, Case No. 3,923.]

Case No. 203.

ALLAIR v. The FRANCIS A. PALMER.

[3 Wkly. Law Gaz. No. 25.]

District Court, D. New York. 1859.

ADMIRALTY JURISDICTION—MARITIME LIENS.

[A contract by a plumber and coppersmith for materials and labor expended upon the construction of a ship is not a maritime one, and a lien therefor given by local law is not enforceable in admiralty. *Ferry Co. v. Beers*, 20 How. (61 U. S.) 393, 402, followed.]

[Cited in *The Norway*, Case No. 10,359.]

[See *Roach v. Chapman*, 22 How. (63 U. S.) 129; *Edwards v. Elliott*, 21 Wall. (88 U. S.) 532; *The Lottawanna*, Id. 558; *The Belfast*, 7 Wall. (74 U. S.) 624; *The Edith*, Case No. 4,283.]

In admiralty.

Owen & Vose, for libellants.

Mr. Van Vleck, for claimants.

NELSON, Circuit Judge. The libel in this case was filed to recover for materials furnished and labor done as plumber and coppersmith, upon, and in the construction of, the ship Francis A. Palmer. The materials were furnished and the work done at the request of William Perrine, the builder of the vessel, and who had charge of her at the time. The F. A. Palmer is described in the libel as a domestic vessel, and owned by per-

sons resident in the city of New York. The libellant claims \$782.79.

The principal question argued in the case was, whether or not Perrine, the builder, and at whose request the materials were furnished and the work done, was owner at the time; so as to bring the case within the statute of New York giving a lien to material men and laborers in the construction and equipment of vessels. It was insisted, on the part of the claimant, that he was not the owner, but that the title and the ownership were in Post, the person for whom the vessel was built, under the peculiar wording of the contract. This question has become immaterial since the decision of the case of the *People's Ferry Co. of Boston v. Beers*, 20 How. [61 U. S.] 393, 402. It was held that the admiralty jurisdiction did not extend to cases of liens claimed for work done, or materials furnished in the construction of ships; that the contract for building was not a maritime contract; nor did it involve rights and duties appertaining to commerce and navigation, in the sense of the law giving jurisdiction to the admiralty. This case was decided after full argument and a careful consideration of the question; and we must regard it as settling the point of jurisdiction in the case before us. For, if the court had no jurisdiction of the principal contract, for building the vessel, and this, on account of its nature and character, not being a maritime contract, it had not of the collateral or incidental contracts arising out of the construction. They must be regarded as partaking of the nature of the principal one; certainly, of no higher character in this respect. It may be said, however, that the statute of New York gives a lien to the material man and workman in this case, which distinguishes it from the case referred to. It is true that there was no statute in the state of New Jersey, where that vessel was built, giving a lien to the builder, but that circumstance in no way influenced the judgment of the court. The result would have been the same if a local lien had been given by the state law. The local lien attaches in no case within the admiralty law as heretofore expounded by the courts of the country, except where the contract is maritime in its nature and character. This was so decided soon after the courts recognized the local liens, and enforced them to the admiralty. It was so decided in the case of a libel by the master of a ship for his wages. [*The Orleans v. Phoebus*, 11 Pet. (36 U. S.) 175.] The lien was denied, though given by the local law. This question, as to the effect of local lien, will not be material hereafter, as the supreme court have decided not to recognize or adopt it in any cases arising or suits commenced, after the first of the present month. The rule of the court recognizing it was repealed, to take effect on that day. The decree of the court below is reversed, and the libel dismissed, for want of jurisdiction.

¹[From 23 Int. Rev. Rec. 351.]

ALLAIRE WORKS, (HUBBARD v.)

[See Hubbard v. Allaire Works, Case No. 6, 814.]

ALLDERDICE, (BOUTWELL v.)

[See Boutwell v. Allderdice, Case No. 1,708.]

Case No. 204.

The ALLEGHANY.

[1 Biss. 497.]¹

District Court, D. Wisconsin. Sept. Term, 1865.²

DUTY OF PROPELLER ENTERING HARBOR—DUTY OF TUG MEETING.

1. A steam vessel entering a harbor is bound to observe the utmost vigilance to avoid collision with other vessels, and a propeller is negligent in entering the harbor of Milwaukee at the rate of eight miles an hour.

2. Having exchanged signals with a tug towing out a schooner, she is bound to keep the side of the channel agreed upon. If she sheers or refuses to obey the helm it becomes her duty to stop.

3. The tug is entitled to half the river, and is not bound to keep close to the pier.

4. The tug with her tow had the character of a steamer going out on her own course, agreed upon with the propeller, which course she was bound to keep, and had the right to, exclusive of the propeller.

5. If she had attempted to cross the channel on seeing that the propeller sheered, and did not obey the helm, she would have done so at her own risk, and there is no obligation upon her to maneuver in reference to the course of the propeller.

[See The Daniel Drew, Case No. 3,565; The Syracuse, 9 Wall. (76 U. S.) 672; The Leo, Case No. 8,250.]

[See note to The Alleghany, Case No. 205.]

[In admiralty. Libel for collision. Decree for libellant, affirmed by circuit court in The Alleghany, Case No. 205, and that decree affirmed by supreme court, 9 Wall. (76 U. S.) 522.]

The libellant, Bernard Goldsmith, shipped on board the schooner Henry C. Winslow a cargo of oats, at Milwaukee, to be carried to the port of Buffalo. On the 7th of May, 1864, the schooner left her dock in the Milwaukee river, in tow of the steam tug W. K. Muir. It was broad daylight and clear, wind from the southwest. Shortly after leaving the dock, the captain of the tug, seeing the propeller Alleghany coming inside the piers, signaled her by one whistle to keep the starboard or right side, the usual signal, in like cases; the propeller replied by a like signal: the tug signaled a second time, when the propeller was about ten rods distant, which was replied to as before; the propeller struck the schooner on her port cat-head, cutting

her nearly to her keel, so that she sunk within fifteen minutes. The answer admits the signals, from the tug by one whistle, to keep to the starboard side, the tug then being above the piers, which was answered by a like signal; the second signal, when the propeller was about ten rods off, is also admitted. It is also admitted that the propeller and schooner collided between the harbor piers, and that the propeller struck the schooner, and cut into her, so that she sunk as charged in the libel. It is also admitted in the answer, "that the propeller proceeded up about the center line between the piers; that in proceeding so far to the starboard side of such channel, the propeller, drawing eleven feet two inches of water, dragged the bottom, so that she would not mind her helm; that the propeller proceeded up about the center line between the piers, gradually losing her speed." The proof was that, on account of her speed and draught of water, the propeller steered wildly, sheering from side to side, and not answering her helm. The propeller Alleghany came up to the piers from the south, having run from Chicago at the rate of about ten or eleven miles an hour; and on a strife with the propeller Maine coming in from the north, she entered the piers ahead. The rate of speed of the Alleghany entering the piers was eight miles an hour. The piers are eleven hundred and fifty feet in length, extending east and west, and about two hundred and sixty feet apart. The length of the schooner was about one hundred and thirty-seven feet. The collision occurred about two lengths of the schooner from the mouth of the river, between the piers.

Emmons & Van Dyke, for libellant, cited: Union Steamship Co. v. New York, etc., Steamship Co., 24 How. [65 U. S.] 307; Sturgis v. Boyer, Id. 110; Waring v. Clarke, 5 How. [46 U. S.] 441; Wheeler v. The Eastern State, [Case No. 17,494;] The Anita v. The Anglo-Norman, [Id. 9,174;] Clapp v. Young, [Id. 2,786;] Ward v. The M. Dousman, [Id. 17,153;] Culbertson v. Shaw, 18 How. [59 U. S.] 584; 3 Kent, Comm. 231; The Neptune, 1 Dods. 467.

E. Mariner and Wm. P. Lynde, for respondent.

MILLER, District Judge. There is the usual conflicting testimony in collision cases. Several persons who were on board the propeller as passengers and otherwise, in a set of stereotyped answers, testify that at the time of the collision she was nearer the north pier than the south. This is in contradiction of the answer and the other evidence. The answer states that the propeller kept in the center between the piers; and the proof is that at the time of the collision her bow was fifty feet south of the center, heading southwestward. It is satisfactorily shown that immediately before the collision the engines

¹[Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

²[Decree of district court affirmed by circuit court in The Alleghany, Case No. 205, and decree of circuit court affirmed by the supreme court, 9 Wall. (76 U. S.) 522.]

of the propeller were reversed. It is not necessary to a correct decision of the question of fault, on the part of the propeller, to examine at length the volume of evidence submitted. The facts above stated from the pleadings show satisfactorily that the propeller was in fault. The well-established rule, that a steam vessel entering a harbor is bound to observe the utmost vigilance to avoid collision with other vessels, was not observed by the propeller in the following particulars:

1. The propeller entered the harbor from the lake at too great speed. The rate of eight miles an hour is not allowable. A steam vessel entering between the piers from the lake, even on slackening her speed by shutting off steam when inside, may not be in condition to stop or reverse in time to avoid collision with vessels under way out. "There being no usage as to an open way, the vigilance is thrown upon the entering vessel. Ordinary care under such circumstances will not excuse a steamer for a wrong done." The length of the piers is too short and the space between them too narrow to admit the ordinary maneuver of vessels in the open sea to avoid collisions. The collision occurred about nine hundred and thirty feet from the outer end of the piers. At the rate of eight miles an hour, the propeller would reach that point in less than one minute. If checked in speed one-half on her way up, she would reach that point in one minute and one-half. By running in at that rate, and a tug with a schooner in tow in full view of meeting her, the propeller must take the responsibility.

2. The signal was given the propeller in due time to keep to the right side, which was answered in like manner. It then became the duty of the propeller to keep the right or north side of the center between the piers, which she did not; and at the moment of the collision her bow was about fifty feet south of the center, heading into the schooner.

3. When the propeller sheered, and did not answer her helm to the starboard, steered wildly and was unmanageable, it was the duty of the master to stop her until the tug and schooner had passed. The propeller had full power to stop at any time, and to reverse. She did not stop in time to avoid the collision.

It is alleged that the tug was in fault for not keeping close to the south pier, and out of the way of the propeller. The tug was entitled to one-half the channel or space between the piers. The signals settled that matter between the propeller and the tug. The captain of the tug even on seeing that the propeller sheered, and did not answer her helm a-starboard, would have risked collision at his expense by running the tug in reference to the course of the propeller, or to have steered towards the north pier. There was no obligation upon the tug so to maneuver at its own risk of condemnation in case of collision. The tug was on its own

course, and had the right of it, exclusive of the propeller. It is true that the tug was not in the range of a sailing vessel, requiring steamboats to keep out of the way. The tug had the character of a steam vessel, going out of port, on its own course, agreed upon with the propeller, which it was bound to keep. The wind being from the southwest, although not very strong, yet striking the schooner on her starboard, it is not probable that she would be a-starboard of the tug. It would require a quick movement on the part of the tug to bring the schooner into line at the point of entrance into the piers. The tug at the time of the collision was heading south-eastward, and could not have advanced much further on that course without running on the south pier. In this movement the tug was making way for the propeller.

In the answer it is stated, "that the master of the propeller saw the schooner descending the river in tow of a tug. He immediately caused the steam to be shut off entirely from the engine of the propeller, in order that the schooner might get between the harbor piers before he met her. And that when the schooner had got within five hundred feet of the propeller, the master of the propeller saw that the vessels, if they proceeded at the speed at which they were going, and upon the same courses, must meet in the bend of the river where it turns out of the old channel to come into the straight cut between the piers, gave the order to the engineer to reverse the engines of the propeller, and that thereupon the engines were immediately reversed." The tug and schooner being in the bend of the river where it empties into the straight cut between the piers, and the captain of the propeller, knowing that to be a difficult point of navigation, particularly for a tug with a vessel in tow, and requiring an effort at that point on the part of the tug to keep its tow in line, preferred meeting them inside the piers, where there was less danger of collision. Whatever fault there was, consisted in the propeller running up too far. The tug was running at a rate of between three and four miles an hour, and if the propeller was then running at four miles an hour, it is evident that a collision must occur before the propeller could assume a backward movement. It was also argued, that the tug was in fault for allowing the men on board the schooner to be setting sails coming down the river. It was a matter of duty and of necessity to prepare the vessel for navigation and protection, before passing out into the open lake. In less than two minutes, if the collision had not occurred, the schooner would have been cast loose from the tug in the lake. It was alleged that the master of the tug, seeing the unmanageable condition of the propeller, in not answering her helm, should have stopped. If the tug could have stopped, what would have become of the schooner?

She could not be stopped short of being turned completely around in the way of the propeller, and with greater certainty of collision. From examination of the pleadings and evidence, my opinion is, that the propeller is in sole fault of the collision, and a decree is ordered accordingly.

NOTE, [from original report.] As to duty of steamer in crowded harbor, see *The Corsica*, 9 Wall. [76 U. S.] 630; *The Johnson*, Id. 146; *The City of Paris*, Id. 634; *The Syracuse*, [Case No. 13,718;] *Brunswick v. The Sea Gull*, Case No. 12,578. As to duty of tug, *Horn v. The Anthracite*, Case No. 6,412; *Smith v. The Creole*, Case No. 13,033; *Sproul v. Hemmingway*, 14 Pick. 1; *The Express*, [Case No. 4,596;] *Snow v. Hill*, 20 How. [61 U. S.] 543; *New York, etc., Transp. Co. v. Philadelphia, etc., Nav. Co.*, 22 How. [63 U. S.] 461. Boats in tow and exclusively under the control of the tug, are, as respects other vessels, to be considered vessels under steam. *The Pennsylvania*, [Case No. 10,946.] A tug with a tow lashed alongside is considered as one vessel and that a steam vessel, and must follow the rules of steam vessels. *Railroad Co. v. The Manton*, [Case No. 7,319.]

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Case No. 205.
The ALLEGHANY.

[2 Biss. 29.]

Circuit Court, E. D. Wisconsin. Sept., 1868.*

PROPELLER ENTERING HARBOR.

1. A propeller, entering a harbor, having accepted the signal of an approaching tug and tow to keep to starboard, should, if for any reason it cannot do so, slacken speed.

2. It is not the duty of the tug to stop, as her tow would then become unmanageable.

3. Six miles an hour is too high a rate of speed in Milwaukee harbor, when the vessel does not mind her helm.

4. Testimony of passengers commented upon. [See *The Daniel Drew*, Case No. 3,565; *The Syracuse*, 9 Wall. (76 U. S.) 672; *The Leo*, Case No. 8,250.]

[See note at end of case.]

[Appeal from the District Court of the United States for the District of Wisconsin.]

[In admiralty. Libel for collision. Decree in district court for libellants. Respondent appeals. Decree affirmed, and decree of circuit court affirmed by supreme court.]

This was an appeal from a decree of the district court against the propeller *Alleghany* for the loss of a cargo of oats shipped by the libellant, *Bernard Goldsmith*, on board the schooner *Henry C. Winslow*, which was sunk by collision with the *Alleghany*. The facts are fully stated in the case in the district court. 1 Biss. 497, [The *Alleghany*, Case No. 204.]

Emmons & Van Dyke for libellant, cited *The Marcellus*, 1 Black, [66 U. S.] 414; *The Wa-*

ter Witch, Id. 494; *The Potomac*, 2 Black, [67 U. S.] 581; *Newell v. Norton*, 3 Wall. [70 U. S.] 258; *The Grace Girdler*, 7 Wall. [74 U. S.] 196.

E. Mariner, for respondent.

DAVIS, Circuit Justice. This case was at the last term argued with great ability and earnestness, but for want of time to consider it, was not decided. I have recently read the evidence and briefs with care and examined the authorities referred to, and am prepared to announce the conclusion at which I have arrived. The testimony is, in a large degree, conflicting, and in many respects irreconcilable, but there are certain leading facts established, as I think, clearly by the evidence, on which, in my opinion, the case turns. The tug *Muir* left her dock in the harbor of Milwaukee about 7 o'clock on the morning of the 4th of May, 1864, with the schooner *Winslow* in tow for the purpose of towing her out into the lake. The propeller *Alleghany* was near the mouth of the straight cut, making for the harbor, and being seen by the tug, was signalled to keep to the right, which signal was accepted. It is uncertain at what point in the river the tug sounded her first whistle, but it is not material, as the notice which the signal gave to the propeller, was in proper time. The tug and tow proceeded down towards the lake, and the propeller up the straight cut, until she struck the schooner in her port side, cutting down several feet below her water line so that she sunk within fifteen minutes. There can be no dispute that this collision was inexcusable, for it occurred on a bright clear day, with nothing to obstruct the view of the approaching vessels, the peculiarities of the navigation well known, and the wind not unfavorable. The important subject of inquiry is to ascertain who is to blame for it. In order to do this, it is not only necessary to consider the conduct and condition of the boats, but also whether the passage up and down the river and cut was beset with difficulties which all mariners accustomed to the port were presumed to know. The evidence shows where the Milwaukee river empties into the straight cut is a difficult point of navigation, difficult for even ascending boats to get the right turn into the river, and requiring a tug towing a vessel out into the lake to use care and skill to get the vessel properly straightened up between the piers. There is also near the inner end of the north pier shoal water, which causes heavily loaded vessels with large draught to sheer off if they go too near it. In the view I take of this case, it is not necessary to determine the exact place where the collision took place. The evidence leaves it uncertain—it is strange that it is so, with so many persons witnessing it—but if not at the entrance of the piers, it was not far inside of them, and at all events the tow was not fairly

*[Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

†[Affirming decree of district court in *The Alleghany*, Case No. 204. Decree of circuit court affirmed by supreme court. 9 Wall. (76 U. S.) 522.]

straightened up in the cut when it happened. Did the captain of the propeller do all he could under the circumstances to avoid this collision? I think not—he knew he had to take the starboard side of the channel, and yet the answer says he kept only as far over to the starboard as he was able and not go aground, and that in proceeding as far as he did to starboard, his boat dragged the bottom, so that she would not mind her helm, and the evidence sustains the allegation of the answer that she would not mind her helm. Did not these considerations point out to the captain his clear line of duty? Having accepted the signal of the tug to go to the right of the channel, if, for any cause, he found himself unable to do so, he should have waited until the tug and tow passed. Pursuing the center of the channel was certainly not taking the starboard side of it, and going ahead at all after these warnings was experimenting in the face of danger. Besides, the tug had the right to full half the channel. The necessity for haste is not apparent, and it will be conceded that a good seaman would always act as if apprehensive of danger when meeting a tug and tow in a place no wider than the straight cut of the Milwaukee river, and with similar difficulties of navigation.

It is said, it was as much the duty of the tug to have stopped as it was of the propeller. I do not think so. The propeller could stop at any time and reverse, while the tug could not without throwing the schooner around. If the critical point of navigation and the shoal water were equally known to both, yet the master of the propeller knew, better than the master of the tug, the unmanageable condition of his boat and the reasons for it. The tug could not know why the propeller was not under control, and had a right to presume that no boat liable to sheer because of too great draught of water would venture the ascent of the cut with a tug and tow approaching, when a detention of two minutes at the farthest would relieve her of all trouble. The tug having signalled that she would keep to the south, it was her duty to do so, and if she had altered her course for any reason, she would have been properly chargeable in case of collision. As she could not stop without turning the schooner around, it was her duty to go ahead. The dangers of collision are greater in narrow rivers than in the open lake because vessels, in times of peril, cannot be so readily manoeuvred in the river, and the interests of commerce imperatively require that all boats propelled by steam, in entering a harbor, should check down their speed so as to be under easy control. The Alleghany was in fault in not doing this. Some of the witnesses testify that four miles an hour is the usual rate of speed with which steam vessels enter the Milwaukee harbor, and that they can steer

better while running at that rate than if the speed is less or greater. It is certain the Alleghany entered the cut running much faster—how fast it is not easy to tell, but the speed was not less than six miles an hour, and probably higher. Whatever the exact rate of speed, it was too fast, as is proved by her bad steering and inability to mind her helm. It would seem that the master, in his hurry to reach her dock, did not appreciate the responsibility of his position, nor apprehend danger until it was too late. If he misapprehended the speed of his boat or its effect before he entered the cut, as soon as he entered and saw she sheered badly, it was his duty to have checked down to a point that would have enabled him to have readily stopped her when he found difficulty in going to the starboard of the center of the channel. It is true, the engines of the propeller were reversed before the collision, but it was then too late, for the movement did not succeed in stopping, in time, the headway of the boat. That the propeller was in considerable motion at the moment of collision is demonstrated by the character of the injury which the Winslow suffered. The fault was in not doing sooner what was left undone until the peril was imminent. I do not interpret the evidence so as to charge the tug or tow with fault. It is said they did not keep to the south of the channel, but the evidence which has weight with me, proves the contrary.

It is proper to state that I place slender reliance upon the testimony of the passengers on board the Alleghany who swear she was nearer the north than the south pier when the vessels collided. They mean to tell the truth, but I distrust very much their ability to judge of courses and distances on an element to which they are not accustomed, and this distrust is increased when I find they are contradicted by the weight of the remaining evidence in the case. Besides there are too many of them who swear too nearly alike. It is insisted the tug and tow could with safety to themselves have gone further south. This may or may not be true, but if true, it was not a fault, for they left plenty of room to the north for any vessel that would mind her helm and would not sheer, and they were not required to go further south to accommodate a vessel in the predicament of the Alleghany. The decree of the court below is affirmed.

[NOTE. This decree was affirmed by the supreme court. Mr. Justice Strong, in delivering the opinion, reviewed the facts involved, and remarked that, as the master of the propeller knew the difficulties of the channel, it was "his duty to avoid the meeting in that part of the cut where the propeller could not go to the north side, and to make no attempt to pass until the tug could straighten out her tow. He had it in his power to select the place for passing. If it be, as is now contended, that the propeller could not at that part of the cut go

nearer the north pier, in consequence of the bar, she was not the less in fault. She ought not to have been there. She ought to have foreseen the difficulty, and guarded against it; and this fault is closely connected with another. The propeller entered the cut at too great a rate of speed. This increased the danger. It brought her to the place of greatest difficulty at the most unfavorable time for passing it, besides making her unmanageable. * * * It is thus manifest that the collision was caused by the misconduct of those in charge of the propeller." *The Alleghany*, 9 Wall. (76 U. S.) 522. See, also, *The Daniel Drew*, Case No. 3,565.]

Case No. 206.

ALLEGHANY FERTILIZER CO v. WOODSIDE.

[1 Hughes, 115; Cox, Manual Trade-Mark Cas. 206.]

Circuit Court, D. Maryland. 1871.

TRADE-MARKS — WHAT WILL BE PROTECTED — "EUREKA" AS A NAME.

The word "Eureka," first used by complainants in a compounded fertilizer which they call the "Eureka Ammoniated Bone Superphosphate of Lime," and have used for several years, is a trade-mark, in the exclusive use of which they have the right to be protected by the courts.

[See note at end of case.]

In equity. The complainants, a Boston company, are the manufacturers of a fertilizer to which they have given the name of "Eureka Ammoniated Bone Superphosphate of Lime." The defendants manufacture a fertilizer which they call the "Baltimore 'Eureka' Ammoniated Bone Superphosphate of Lime." At a former hearing the court had refused the complainants' application for a preliminary injunction, because the defendants, in their answer, denied that the appropriation of the name as a trade-mark was original with the complainants. The testimony, however, proved conclusively that the name originated with the complainants in 1865, and that its use by them had been continuous and exclusive to the present time, and under that name the fertilizer manufactured by them had become widely known. [Injunction granted.]

S. T. Wallis and T. W. Hall, for complainants.

J. H. B. Latrobe and J. A. Preston, for defendants.

GILES, District Judge. The natural or proper designation of an article can never become a trade-mark, because anybody making the article has a right to call it by its proper name. Upon this ground, in a previous case, the court had refused protection to the name "Balm of a Thousand Flowers" as a trade-mark, because it had been proved that it was a common designation among per-

fumers, having its correlative in various European languages, e. g., the French "mille fleurs," Italian "mille fiori," etc. But a purely arbitrary or fanciful appellation, for the first time used to distinguish an article to which it has no natural or necessary relation, does, by virtue of that very appropriation, and subsequent use, become a trade-mark. Such was the Greek word "Eureka," applied to a fertilizer. The same might be said of a symbol or sign, such as a cross, a star, or lion, which, when stamped upon a particular article, may become its distinctive mark, and will be upheld as such so soon as the article becomes known and distinguishable by that mark. But the words "ammoniated bone superphosphate of lime" being the proper name of an article which anybody may make or sell, by themselves could never constitute a trade-mark. "Eureka" was, therefore, for the purpose, and in the connection in which it was used, the complainants' trade-mark. By it the fertilizer manufactured by them became known, was bought and sold, and acquired its reputation. Persons at a distance desiring to order it wrote to their merchants, "Send me ten, twenty, or thirty tons of 'Eureka.'" Even in the trade it was far better known by this name, as the testimony showed, than by the name of the manufacturer or place of manufacture. The name was, therefore, valuable to the complainants, and they were entitled to be protected in the enjoyment of it as their trade-mark. To deny this protection would be a reproach to the law or to a court of equity. If it was not valuable, why did the defendants seek to appropriate it, when all the languages of the earth were open to them from which to make their selection? If it had no value in their eyes, why did they take the advice of counsel as to their right to use it? This very conduct of the defendants proved that, in their estimation, it was a thing of value to the complainants. But it was argued the name adopted by the complainants did not sufficiently indicate "origin and ownership" to be regarded as a trade-mark. This was a mistake. It served to distinguish the complainants' manufacture quite as effectually as names ever serve to distinguish things. The doctrine contended for would invalidate ninety-nine in a hundred of the trade-marks which had been upheld by the courts. It was also said that no violation of the complainants' rights had been attempted by the defendants, inasmuch as they did not profess to sell their fertilizer as the manufacture of the complainants, but the contrary, and their advertisements in the newspapers had been read in proof of this fact. This was also illusory. They had attempted, by the appropriation of the complainants' trade-mark, to profit by the reputation their fertilizer enjoyed in the market, with the value of which they were well acquainted, having been for several years the complainants' agents in this city. Besides, the fertilizer-

[Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. Only partially reported in Cox, Manual Trade-Mark Cas. 206.]

was widely sold in different portions of the south, where the defendants' advertisements might never be seen. It was in evidence that persons had been deceived, that a farmer in Virginia, wishing to buy the article he had used and tested for several years, which was the complainants', had bought the defendants' instead, misled by the name. This was all wrong, and whatever the intentions of the defendants might be, it was a fraud in law, which it is the duty of this court to prevent. Nor was it necessary that the defendants should have copied the entire trade-mark of the complainants, or that the verbal or physical resemblance of the two marks, placed side by side, should be complete. They had taken the essential part of the complainants' mark when they took the word "Eureka."

[The following statement by the reporter, Hon. Robert W. Hughes, was appended to the opinion:]

Judge Giles referred to various authorities in support of the views he had expressed. He read with particular approbation the opinion of Lord Cranworth in the case of *Seixo v. Provezende*, reported in [L. R.] 1 Ch. App. [192], as containing the clearest exposition of the law of trade-marks he had found; also a recent decision of the supreme court of Missouri, reported in the July number of the American Law Register for 1869, [*Filley v. Fassett*, 44 Mo. 169, 100 Amer. Dec. 275.] in which the name "Charter Oak," as applied to a stove, had been upheld as a trade-mark, and which, the learned judge said, fully covered the ground of the present case. The conclusion of the whole matter, in his opinion, was that, when the right of a manufacturer or dealer to a particular trade-mark had, by priority of appropriation, been once established, no rival manufacturer was at liberty to use the same mark for the same purpose, even in connection with his own name and place of manufacture. He would, therefore, sign a decree in the present case perpetually enjoining the defendants from any use of the complainants' mark.

[NOTE. Arbitrary words used for the first time to distinguish the productions of one person from those of another may become a valid trade-mark, and will be protected by injunction; such, for instance, as the "Star Shirt," (*Morrison v. Case*, Case No. 9,845;) "Anti Washboard" soaps, (*O'Rourke v. Central City Soap Co.*, 26 Fed. Rep. 576;) "Chatterbox," as applied to a series of juvenile publications, (*Estes v. Williams*, 21 Fed. Rep. 189;) "Good-year," as applied to manufactures of rubber, (*Goodyear Rubber Co. v. Goodyear's Rubber Manuf'g Co.*, 21 Fed. Rep. 276.) To the same effect, see *Roberts v. Sheldon*, Case No. 11,916; *Shaw Stocking Co. v. Mack*, 12 Fed. Rep. 707; *Kinney v. Allen*, Case No. 7,826. The limitations upon the use of devices as trade-marks are well defined. The object of the trade-mark is to indicate, either by its own meaning or by association, the origin or ownership of the article to which it is applied. *Manufacturing Co. v. Trainer*, 101 U. S. 51. This object of the trade-mark and the consequent limitations upon its use are well stated in *Canal Co. v. Clark*, 13 Wall. (80 U. S.) 311.

by Mr. Justice Strong,—that "no one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured, rather than protected, for competition would be destroyed. Nor can a generic name, or name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection." Consequently the use of a geographical name as a trade-mark will not be protected if naturally applicable to the article to which it is applied, such as "Pennsylvania Wheat," "Kentucky Hemp," "Virginia Tobacco," "Sea Island Cotton," (*Canal Co. v. Clark*, supra;) but where the geographical name is used in a manner calculated to deceive, as "St. Louis Lager Beer," applied by a New York brewer to his own production, such illegitimate use will be enjoined in favor of a brewer in St. Louis who had established a trade and reputation as a manufacturer of "St. Louis Lager Beer," (*Anheuser-Busch Brewing Ass'n v. Piza*, 24 Fed. Rep. 149.) So, also, it was held that the use of words calculated to deceive will not be protected, such as "straight cut" arbitrarily applied to tobacco to which it is not applicable, (*Ginter v. Kinney Tobacco Co.*, 12 Fed. Rep. 782,) or "Mason's Patent, Nov. 30, 1858," or "Mason Jar of 1858," when in fact the jar was not patented, (*Consolidated Fruit-Jar Co. v. Darfinger*, Case No. 3,129.) See, also, *Seabury v. Grosvenor*, Id. 12,576, and *Manhattan Medicine Co. v. Wood*, 2 Sup. Ct. Rep. 436, 108 U. S. 218. The word "Centennial" is an example of a word which has by general use become common property. *Hartwell v. Viney*, Case No. 6,173a. For a summary of the law of trade-marks, see *Columbia Mill Co. v. Alcorn*, 150 U. S. —, 14 Sup. Ct. Rep. 151.]

ALLEGHENY, The, (UNITED STATES v.)
[See *United States v. The Allegheny*, Case No. 14,429.]

ALLEGHENY, The, (WOLVERTON v.)
[See *Wolverton v. The Allegheny*, Case No. 17,931.]

ALLEGHENY CITY, (McCORMICK v.)
[See *McCormick v. Allegheny City*, Case No. 8,717.]

ALLEGHENY COUNTY, (DOBBIN v.)
[See *Dobbin v. Allegheny County*, Case No. 3,941.]

ALLEGHENY COUNTY, (LOUTE v.)
[See *Loute v. Allegheny County*, Case No. 8,544.]

ALLEGHENY COUNTY, (WOOD v.)
[See *Wood v. Allegheny County*, Case No. 17,939.]

ALLEGHENY INS. CO., (CONSTANT v.)
[See *Constant v. Allegheny Ins. Co.*, Case No. 3,136.]

Case No. 207.
The ALLEGIANCE.

[6 Sawy. 68.]

District Court, D. Oregon. Oct. 29, 1879.

SALVOR, UNDERTAKING OF—DUTY OF TOW—SALVAGE BY STEAM TUG—COMPENSATION.

1. A salvor does not undertake to succeed in saving the property in peril, but only that he will exercise ordinary skill and diligence in the use of the means or machinery with which he undertakes the salvage service.

2. It is the duty of the vessel in tow to keep in proper trim and tack, to follow the tug, and steer accordingly; and, if injury results to the tow from negligence or mistake in these respects, the tug is not responsible.

3. Owing to its comparative independence of the winds and currents, a steam tug may perform a salvage service with comparative safety to herself, and therefore the matter of risk to herself and crew is to be estimated accordingly, in fixing the value of such service.

4. A steam tug of three hundred and four horse-power left Baker's bay, and overtook an iron ship of one thousand two hundred and thirty-five tons, worth forty-seven thousand dollars, drawing twelve feet of water, in ballast, drifting onto the west end of Chinook spit in seventeen feet of water at flood tide, near two hours before high water, with the wind blowing about eight from the south-east, and took her hawser and towed her under the lee of the east of Sand island, where, owing to the strength of the wind, which had increased to ten and veered to south-east by south, she was compelled to let her go in comparatively safe anchorage in twenty-three feet of water; but the ship, only letting go one anchor, dragged on to the spit, where she lay until next morning in about four or five feet of water at low tide, when the tug, and three others of near the same power, and working under the same management, returned to her, and pulled her off about two hours before high water, with a light breeze from the east by south, and the ship heading south and west, without any serious risk to the tugs or actual injury thereto. *Held*, that the service was a salvage service, and the compensation therefor fixed at five thousand dollars.

[In admiralty. Libel by J. A. D. Wass and George C. Flavel for salvage against the Allegiance, (David Morgan, claimant.) Decree for libelants.]

John W. Whalley and M. W. Fehheimer, for libelants.

Ellis G. Hughes and William H. Effinger, for claimant.

DEADY, District Judge. A. D. Wass and George C. Flavel bring this suit against the British ship Allegiance upon a cause of salvage, civil and maritime, for salvage service rendered by them to said ship with the aid of the steam tugs Brenham, Astoria, and Columbia, and their officers and crews, on January 10 and 11, 1879, in and near the north channel of the Columbia river, between black buoy No. 5 and the east end of Sand island. Upon due process and proceedings the vessel was seized and appraised at forty-seven thousand dollars, and delivered

¹[Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

to the owner, David Morgan, of Anglesea, Wales, upon a stipulation in the sum of thirty thousand dollars. The answer of the claimant denies that the service rendered to the Allegiance was a salvage service, and avers that it was only a towage service, worth not to exceed two hundred dollars. Afterwards, upon the stipulation of the libelants and claimant, A. M. Simpson, George Flavel, and A. D. Wass, as owners of the tugs, and E. Johnson, A. Malcolm, and D. M. McVicker, as part of the crew of the Brenham, were admitted to intervene herein as joint salvors with the libelants, and to become parties to the libel. The testimony is somewhat voluminous, and upon some material points conflicting. The master, mate, and two pilots of the Brenham, the master of the Astoria, the master of the light-house tender, the Shubrick, and of a merchant vessel, the McNear, were examined as witnesses by the libelants; and the master and two mates of the Allegiance, the master and two lieutenants and the boatswain and carpenter of the revenue cutter, the Corwin, for the claimant. After an extended examination of the testimony, and a careful comparison of the disputed points with the known circumstance of the channel, spits and tides of the locality, and after weighing well the intelligence, means of knowledge, candor, and credibility of the witnesses, I find the material facts of the case to be as follows: On the evening of January 9, 1879, the Allegiance, an iron ship of one thousand two hundred and thirty-five tons burden, two hundred and twelve feet in length, and drawing twelve feet of water, made the mouth of the Columbia river in ballast, on her way to this port. She stood off and on until morning, when getting pretty close to the breakers, and no pilot coming to her aid, she crossed the bar at a quarter past ten o'clock, with a fair wind from the southwest, under her topsails, foresail, foretopmast staysail, and jib, and passed red buoy No. 2 on the starboard tack, about eleven o'clock, nearly one hundred and fifty yards to the eastward of the channel, with a whole-sail breeze from the south by east, her course being about north-east by east. The master of the Allegiance had never been in the Columbia river before, but the mate had once, and told the master, as an inducement to come in without a pilot, that they would certainly find the steam tug and pilot in Baker's bay. At this time the tug Brenham was lying at anchor near the wharf at Fort Canby in Baker's bay, well around the point of the cape, and the revenue cutter Corwin was at anchor in the same bay, about two hundred yards to the north-north-east of her. The officers of the tug had known from early morning that the Allegiance was outside the bar, but had not gone out to give her a pilot or a tow because of the roughness of the bar. When the Allegiance passed the red buoy No. 2 the

weather was getting thick, and she had not yet made out the entrance to Baker's bay, and the master probably thought it was ahead of him in the direction in which he was sailing. Soon after the Allegiance passed the red buoy No. 2 she was sighted by the cutter, and it appearing to the master of the latter that the former was out of the channel, he gave the alarm by blowing his whistle. This attracted the attention of the Allegiance, and she at once commenced to shorten sail, luffed up to the wind, and checked her way, but drifted on before the wind and tide in a north-east direction. The tide was flood and lacked about two hours of high water. The current was running in at the rate of three or four miles an hour, while the wind had a velocity of about eight, and was increasing.

As soon as the Allegiance passed the cape, the tug called her pilot from off shore, got up her anchor, set her flag, and started after the Allegiance, to save her from being lost or going ashore, and overtook her about one and a half miles from the cape, beyond the black buoy No. 5, in seventeen feet of water, with her foretopsail and staysails and fore and main lower topsails set, her yards braced sharp up, on the starboard tack, drifting, without headway, and within two hundred yards of the breakers on the west end of Chinook spit. Here the Allegiance signified that she wanted the services of the tug, when the latter passed her a line, and took the ship's hawser, of about forty fathoms, on board, and commenced towing her out into the channel. By this time the wind had veered to about southeast by south. The tug put her helm hard a-port, and tried to haul the ship around against the wind, to take her back into Baker's bay; but owing to the strength of the wind upon her starboard bow, and the fact that her sails had not all been taken in and were aback, the tug was unable to do so, and then she commenced towing the ship in the channel towards Astoria. After towing her in this direction from three fourths of an hour to an hour under the pressure of seventy-eight pounds of steam, and making from three-fourths of a mile to a mile, the wind increased to ten, and the tug was unable to tow the ship any further, and both were drifting by the force of the wind and tide in the direction of the breakers on Chinook spit, whereupon the tug blew her whistle and signaled the ship to let go her anchor. The port anchor only was let go, and it was let go foul, the chain being around the stock, and when thirty fathoms of chain had run out and the anchor had bit or taken hold, the tug cut the hawser—it being unsafe to attempt to back and cast it off—and proceeded to Astoria for assistance. At this time the ship was on the lee side of the channel in three and one half fathoms of water, with some of her sails not yet wholly furled. She

paid out forty fathoms of chain on her port anchor, but it was not sufficient to hold her, and she dragged to the northward on the sands about two hundred yards. The starboard anchor, being on the rail, was not let go at the signal from the tug, but was let go about the time the ship got on the sands, and lay near her forefoot until night, when it was hove up for fear the vessel might float upon it on the next high water. Between three and four o'clock in the afternoon the tug Brenham returned from Astoria, accompanied by the tugs Astoria and Columbia, and found the Allegiance on the sands, and two or three feet out of the water, and, being unable to render her any assistance at the time, proceeded with the Columbia to Baker's bay, while the Astoria remained in the vicinity for an hour and a half, and then joined her companions at the cape. On the morning of the eleventh the three tugs went up to the relief of the Allegiance about nine o'clock, going within about one hundred and seventy-five yards of her. The weather was fair, with a light breeze from the east by south, and a considerable swell from the incoming tide. The pilot of the tug Brenham, E. Johnson, boarded the ship, and attempted to negotiate with the master for a tow. The latter said he wanted a pilot and a tow, but declined to make any specific terms for compensation, and the result was that the Brenham and Astoria put their hawsers on board the ship, while the Columbia was ahead with her hawser fast to the Brenham. The pilot, Johnson, remained on board the Allegiance, and with the assistance of a portion of the cutter's crew, who had been put on board for the purpose, got in the anchor, which had then about fifteen fathoms of chain out. The ship was lying in a bed which she had made for herself in the sand, in about four or five feet of water, and as the tide rose and her sails more or less filled, she rolled in her bed, but did not move forward. The anchor came in through the sand without materially affecting the position of the ship. The tugs commenced pulling on her at about half past ten, and she came off at nearly twelve o'clock, and about two hours before high water; when she was towed to Astoria by the tug Brenham, assisted by the Columbia as a matter of convenience, and not because such assistance was absolutely necessary.

At the time the Brenham first took hold of the Allegiance, the latter was in great danger of grounding in the breakers just to the northward of her, and must have done so, unless she had let go her anchors, only one of which was ready to let go, and probably then, as she was exposed to the whole force of the wind and tide setting her in that direction; and if the ship had been properly handled at the time the Brenham took hold of her, it is probable that she could have been then turned around and

taken in safety to Baker's bay. When the tug left the Allegiance inside of Sand Island, she left her in comparatively a good anchorage, by reason of the protection from the wind and tide by said island; and being unable to tow her any further or to turn her round and take her to Baker's bay, she did the best that could be done under the circumstances, by letting her go when and as she did; and it is very probable that if both her anchors had been let go at once she would have not dragged as she did on the sands. The Allegiance sustained no appreciable injury between the bar and Astoria; the tug Brenham incurred no extraordinary risk or danger in going to the Allegiance on the tenth, and towing her as she did; but both she and the Astoria did incur such risk and danger in pulling her off the sands on the eleventh, by touching the bottom on account of the swell and depth of water; but neither of said tugs sustained any appreciable injury therefrom. On the morning of the eleventh, when the tugs came up to the Allegiance, she was lying hard aground, heading about south by east, thus showing satisfactorily that she did not ground simply by the ebbing of the tide, but that she dragged on to the sands in high water. She was in no immediate danger; but as the tide rose and she commenced to float in her bed, and pound the bottom with the rise and fall of the sea, she would be in danger of springing a leak, and at high tide, if the wind had increased, as was probable, she would have gone farther up on the spit and beyond the reach of assistance, and ultimately been lost. Nor is it at all probable that the vessel could have been sailed off at high water. The tide, while it might lift her out of her bed so that she could float, would tend to set her higher on the spit, while the wind, being about southeast by south, would have the same effect, until she had steerage way, which it is almost certain she could not obtain, under the circumstances, in time to get off.

As to the value of the tugs there is no direct evidence. They are probably worth over one hundred thousand dollars. At the date of this occurrence there were four men employed on the tug Brenham, at the aggregate monthly wages of three hundred and fifty dollars, and found; besides which she carried two Washington territory pilots, E. Johnson and A. Malcolm, who were in the employ of the owners of the tug, and turned over their pilot fees to the manager of the same, Captain George Flavel, and received from him monthly wages for their services. George C. Flavel was master of the Brenham, and D. M. McVicker, the mate. A. D. Wass was master of the Astoria. The three tugs employed an aggregate of twenty-six men, including six pilots, whose monthly pay amounted to two thousand two hundred dollars, and found. The Brenham is of three hundred and four horse-power, the Columbia

two hundred and thirty-eight, and the Astoria three hundred and ninety-two but practically the Brenham is the most powerful. The tug Astoria was owned by the libelants, A. M. Simpson, George Flavel, and A. D. Wass, and the Brenham by said Simpson and Flavel, and the Columbia by said Simpson. The ordinary charge for towing a vessel from outside the bar to Astoria is from one hundred and fifty to two hundred dollars, and the time usually occupied in such service is from four to eight hours.

The principal point made by the claimant to the contrary of these conclusions is, that the tug was in the wrong in not taking the Allegiance back into Baker's bay, when she first took hold of her on the ninth. But assuming that this could have been done under the circumstances, it was certainly the fault of the ship that it was not done. When the tug put her helm hard a-port, and turned her head to the south-west, with the intention of making Baker's bay, the Allegiance would not come around, and the only alternative was to proceed up the channel for Astoria, and at least make an anchorage under the lee of Sand Island. The reason the Allegiance did not come around was, that a portion of her sails had not been taken in, and, as soon as her head came up to the wind, were aback; and that she was without steerage way. The tug is not responsible for the steering or sailing of the tow. It was the duty of the latter to keep in proper trim and upon the right track, to follow the former, and to steer accordingly. If there was any negligence or mistake in any of these particulars the tug is not responsible for the consequences. The Merrimac, [Case No. 9,478.] Neither did the tug undertake that it was capable of towing the Allegiance under the circumstances, but only that it would try, and that it would exercise ordinary skill and diligence in so doing. The tug took hold of the vessel in an extraordinary emergency, with a view to save her from what appeared to be an impending peril, and therefore did not engage to do anything more than she could do with the aid of ordinary skill and diligence on the part of her master and crew. A salvor's compensation depends upon the success of the undertaking, but there is no implied obligation that he will succeed or that he is capable of so doing, and therefore he is only responsible for the exercise of ordinary skill and diligence in the use of the means or machinery with which he undertakes the salvage service.

The case is not like a mere contract for towage, where a tug meets or finds a vessel in a place of ordinary safety, and offers and agrees to tow her to a certain other point or place, as a mere business transaction. In such a case, undoubtedly, the master of the tug undertakes that his boat is properly equipped, and of sufficient capacity and power to do the service in question at the time

and under the circumstances proposed. The Merrimac, supra.

Upon this state of facts the libelants are entitled to recover as and for a salvage service, and the only question is as to the amount. There is no standard by which the compensation for such service can be absolutely measured. In each case the amount to be allowed must depend largely upon its own circumstances, varying from one half the value of the property saved to something more than a mere compensation for towage. Where the service is rendered by a steamer to a sailer, it often happens that a material service is rendered to the latter by which it is rescued from a serious and impending danger with very little risk or trouble to the former or to its crew. A vessel propelled by steam has a command over its motion and direction comparatively independent of the winds and currents, and may therefore approach a vessel in danger, and take her off with comparative safety to itself. In such cases, an important element in the value of the services, namely, the risk to the vessel and lives of the salvors, is more or less wanting, and they must be estimated accordingly. The services rendered the Allegiance, both on the tenth and eleventh, by the tugs, were, in my judgment, timely and material. She was rescued on each occasion from an impending peril, and probably saved from becoming a total loss. But at the same time this service was accomplished with little more than the ordinary risk attendant upon a towage service to the tugs and their crews. Under those circumstances it is my judgment that five thousand dollars is a fair compensation for the services rendered, including a counsel fee in this suit to collect the same.

Case No. 207a.

ALLEGRO v. The NIAGARA.

[21 Betts D. C. MS. 89.]

District Court, S. D. New York. April Term, 1843.

COLLISION—VESSEL LYING IN TRACK OF NAVIGATION—IGNORANCE OF THE LANGUAGE.

[1. A vessel taking an anchorage so near a pier as to hinder the movement of other vessels cannot recover for damages received in a collision when she has failed to sheer on her anchor out of the way of the other vessel, that being the measure usual and proper under such circumstances to avoid danger.]

[2. It is no excuse that the vessel at anchor is foreign, and has no one aboard who understands the directions given by the approaching vessel.]

[In admiralty. Libel in rem by Vicenzo Allegro against the steamboat Niagara (Thomas C. Durant and others, claimants) for collision. Decree for respondents.]

BETTS, District Judge. The brig Time was anchored in the East river, opposite pier

8, not exceeding a distance of 200 feet from the piers, on a strong ebb tide. The steamboat was taking a tow of barges and boats from about pier 8 in the daytime, and gave notice to the brig to go into her berth or anchor further off to enable the steamboat and tows to get out. This is the usual course for vessels anchored near the slips to take to aid towing vessels, etc. The brig not being moored, she was requested to port her helm and sheer off to starboard, and she did so sufficiently to enable the steamer and her tows to pass ahead of her. The steamer was only able to go far enough ahead, for her barge towed astern, to go clear of the brig, and to her starboard side, being stopped by the other vessels at anchor ahead. Orders were then given to the brig to starboard her helm, and sheer back toward the dock to open room for the barge in tow to pass out. She continued her helm hard down, and the drift of the tide drove the stern barge against the starboard bows of the brig, and considerable damage was done her.

It was the duty of the brig, without notice or orders being given her, in her position and [considering] that of the steamer and her tows and the state of the tide, to have sheered upon her anchor in aid of the navigation of the steamer and her tows. Upon the evidence the collision could have been avoided by so doing. A vessel taking an anchorage in a place of frequent resort of other vessels, and in such a way as to impede their movements, or conduce to collisions with them, or if a vessel neglects applying the obviously proper and usual means of avoiding danger to herself or inflicting injury upon another vessel, approaching her, she cannot in either case cast upon the other vessel the consequences of that collision. *Strout v. Foster*, 1 How. [42 U. S.] 92; *Crockett v. Riley*, [Case No. 3,402a.] The brig can claim no exemption from liability to all the rules of navigation because she is a foreign vessel, and that no one on board her at the time understood English, so as to comprehend the orders or notice given her. It was a fault of her owners not to have her provided with mariners so important to her own and the safety of the other vessel.

The action cannot be maintained, and a decree must be rendered for the claimants, with costs.

Case No. 207b.

Ex parte ALLEN.

[3 App. Comr. Pat. 388.]

Circuit Court, District of Columbia. Oct 16, 1860.

PATENTS FOR INVENTIONS—ANTICIPATION—APPEAL FROM COMMISSIONER—MOWING MACHINES.

[1. A patent was issued for a device for raising by leverage the finger bar of a mowing machine to a perpendicular position, and holding it at rest there until reached by the hand for folding. Thereafter application was made for

a patent for a device to raise the finger bar to an angle of 45 degrees, and hold it in suspense until reached by means of a long handle, and folded by hand. *Held*, that there was an anticipation, and the second device was not patentable. *Prouty v. Ruggles*, 16 Pet. (41 U. S.) 336, distinguished.]

[2. When the court is in doubt, the decision of the commissioner of patents in an interference case should be affirmed.]

Appeal [by A. B. Allen] from the decision of the commissioner of patents for refusing to grant letters-patent to him for his improvement in mowing machines. [Affirmed.]

MORSELL, Circuit Judge. The claim, as stated by the appellant, is: "In mowing machines provided with but a simple lever arrangement for partially folding the finger bar by means of the same, I claim in combination with the track-board K, the long handle L, when so mounted and arranged in relation to the driver's seat, that on the outer end of the finger bar being raised partially up by the hand-lever or foot lever arranged on the machine, the driver is enabled to reach the end of said handle for the purpose of turning over the finger-bar in the manner substantially as specified. Also I claim the combination and relative arrangement of the outer shoe D, pivoted track-board K, and stop F, the whole being constructed substantially as set forth."

On the 26th of June, 1860, the commissioner ratified and confirmed the report of the board of examiners refusing to grant a patent. From which decision the following reasons of appeal were filed:

1st. That the references cited by the commissioner do not present an anticipation of the invention covered by the first clause of the claim.

2. That the commissioner erred in basing his opinion as to the admissibility of the first clause of the claim upon the general ground that the references cited illustrate arrangements for lifting and folding the finger-bar, whereas the appellant claims only his specific arrangement of means for lifting and folding the finger-bar, which arrangement is not shown in any of said references.

3. That the commissioner erred in refusing the second clause of the claim without qualifying his action by referring to a similar combination of all the elements constituting the particular combination claimed in and by said clause as the invention of the appellant.

4. That the commissioner, in his consideration of the second clause of the claim, wholly disregarded and ignored the difference existing between the operation of the combined elements, as well as the advantages and improved results thereby obtained, as compared with any of the arrangements cited as references; and therefore his decision was erroneous; as the difference in the result * * * produced is evidence that the means employed are not mechanical equivalents.

5. That the commissioner having to show

and establish that the subject-matter of invention as covered by and claimed in the appellant's application was void of novelty and utility, his action in refusing the patent was erroneous, and ought to be reversed.

The substance of the commissioner's report in reply to the reasons of appeal. He says: "The reasons of appeal are based on the insufficiency of the references alleging that they do not present the specific arrangements claimed by the appellant, or an equivalent combination of all the parts that go to make up his invention, nor do they anticipate the operation of the combination claimed,—in all of which the office was in error. The first clause of appellant's claim is limited to the combination of a long handle with the track-board, so that when partially raised the hinged finger-beam can be brought up and turned over onto the machine by the driver's taking hold of the handle when it comes within his reach. Now, there is no combination here, inasmuch as the track-clearer contributes nothing to the operation of the handle, which for all practical purposes of raising the finger-beam might just as well be attached to the end of the beam itself or to any part of it more convenient than the end. The references show with sufficient clearness examples of such an attachment of some means to some part of the finger-beam for raising it out of, and letting it back into, position, and even the handle to the hinged track-board on the hinged cutter-bar, is shown in Aultman & Miller's patent of June 17, 1856. This clause leaves but the matter of arrangement of the handle by appellant to sustain his claim, and I am wholly at a loss to perceive any invention in this, or indeed any thing more than would form itself an obvious suggestion to one accustomed to use such machines, if indeed the attachment of the handle to this part of the machine deserves to be regarded as in any degree an improvement. In operation there is no marked difference. The device of the appellant but serves to aid the driver in lifting the cutter-bar, and this is the case with the references. So of the second clause of the claim the references present an equivalent mechanism for effecting the same result as the appellant and by the same mode of operation, and this by a combination almost identical. A patent can only be granted for 'an arrangement' when such an arrangement involves invention, and is in itself new and useful; but it is not perceptible to me that the appellant in this case has presented even an arrangement of the well known parts of the mowing machine that meets the conditions, as the references will be necessarily consulted," &c. &c.

Such is the case as laid before me with all the original papers and documents by the commissioner according to previous notice duly given of the time and place of hearing, when and where the appellant appeared by his attorney, and filed his argument in writ-

ing, and submitted the case. The claim has been rejected upon the ground of its having been anticipated, as shown by sundry references to patents embracing the same invention in both branches of it. The appellant denies the application of them, and has shown his grounds and reason in a strong and clear discriminating argument, the force of which has been felt. He rests his claim on a specific technical combination of devices involving a specific arrangement and specific functions. He admits that the parts considered separately are not new. The three elements of his arranged combination are: The outer shoe, the track-board, and the stop. His argument is that "it cannot be met by any arrangement of two of the same elements although arranged in the same way; nor can it be met by any equal number of elements when arranged in a different way, and more especially when the functions discharged are different. To sustain the position he cites the rule of law as laid down by the court in the case of *Prouty v. Ruggles*, 16 Pet. [41 U. S.] 336." The patent is for a combination, and the improvement consists in arranging different portions of the plough, and combining them together in the manner stated in the specification for the purpose of producing a certain effect. None of the parts are new, and none are claimed as new, nor is any portion of the combination, less than the whole, claimed as new, or stated to produce any given result; the end in view is proposed to be accomplished by the union of all arranged and combined together in the manner described, and this combination, composed of all the parts mentioned in the specifications, and arranged with reference to each other, and to other parts of the plough in the manner therein described, is stated to be the improvement, and is the thing patented; the use of any two of these parts only, or of two combined with a third which is substantially different in form or manner of its arrangement and connection with the others, is therefore not the thing patented. It is not the same combination, if it substantially differs from it in any of its parts. Proof was offered of its utility, but it was admitted and waived.

The question in the case just recited was whether the use of any one or more of the parts was an infringement of a patent for an invention claimed upon the ground of a combination of old parts, and the court decided that the plaintiff could not recover for less than an infringement of the whole. It can therefore only be authority in this case to define the character of such a combination. Upon a comparison of the references to the Dodge invention with the first branch of the appellant's improvement, there appears to me to be a very strong resemblance; it appears to be embraced substantially within it. It is admitted that the two are alike in the operation by leverage and

the second half by hand. In the case of the appellant's means, the finger-bar is raised from the ground to an elevation of forty-five degrees, held in suspense until brought within reach of the hand by the long handle. In the case of Dodge it is by its levers brought by the first operation to a perpendicular position and at rest, and within reach of the hand. The principal purpose and object of both is that of folding the finger-bar and this seems to be the same after so reached by hand. Dodge's is performed much more perfectly than appellant's, and I think is at least an equivalent. The result of appellant's contrivance may be said to have been produced in a cheaper way, but there is no evidence to show that it was enough so to amount to a sufficient test of patentable invention. That of Dodge's is to be preferred as being scientifically effected, that of appellant's—rather of the backward order.

With respect to the second claim, I am not free from doubts, and feel, therefore, that I should yield to the commissioner's decision on the point.

My opinion is that the decision of the commissioner ought to be affirmed, and the same is accordingly affirmed.

ALLEN, In re.

[See Ex parte General Assignee, Case No. 5,306.]

Case No. 208.

In re ALLEN.

[13 Blatchf. 271.]¹

Circuit Court, D. Vermont. March 16, 1876.

CONTEMPT — REFUSAL TO OBEY ORDERS OF REGISTER IN BANKRUPTCY — JURISDICTION—HABEAS CORPUS—ARREST IN ANOTHER STATE.

1. An uncontested order, made by a register in bankruptcy, in Vermont, that a bankrupt produce certain books and papers relating to his business, was disobeyed by him. On proof thereof, and on service of notice on the bankrupt, the district court for Vermont adjudged him to have been guilty of a contempt, and ordered that he deliver up the books and papers to the marshal, and pay the costs, and that, in default thereof, he be arrested by the marshal, or his deputy, and committed to jail to be safely kept until discharged by order of said court. The deputy of the marshal demanded the books and papers and costs from the bankrupt, in New Hampshire, which he refused to deliver or pay, and then the deputy arrested him in New Hampshire, and committed him to jail in Vermont. On a habeas corpus sued out by the bankrupt: *Held*, (1.) The order of the register was the order of the court, and, when it was disobeyed, it was proper to institute proceedings for contempt directly on such disobedience.

[Cited in *Fischer v. Hayes*, 6 Fed. Rep. 74; *U. S. v. Anon.*, 21 Fed. Rep. 770.]

2. That it was proper to direct that the bankrupt be committed until discharged by order of the district court.

[Cited in *Fischer v. Hayes*, 6 Fed. Rep. 74.]

¹[Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

3. That the arrest in New Hampshire was illegal, and the imprisonment in Vermont, in pursuance of such arrest, was, therefore, illegal, although the warrant of arrest was valid.

[Application by Horatio N. Allen for a writ of habeas corpus.]

Romeo H. Start and Levi Underwood, for relator.

SHIPMAN, District Judge. From the return of the jailer it appears, that the relator, Horatio N. Allen, is held in custody upon a warrant which issued from the district court of the United States for the district of Vermont. The warrant or order of commitment recites, that the relator is a bankrupt, and was legally notified to appear, and did appear, before a register in bankruptcy, to submit to an examination under the provisions of the bankrupt act; that said examination disclosed that Allen had kept entries of his business transactions upon "diaries," which diaries and other memoranda and papers relating to his business it was necessary should be in the possession of the assignee, in order that he might obtain a full knowledge of the property of the bankrupt; that the assignee demanded said papers and books from the bankrupt, and procured an order to be made by the register, commanding said Allen to produce said papers and books, which order he neglected to obey; that, thereupon, the assignee brought a petition before the district court, praying that the bankrupt be proceeded against for contempt, and be ordered to surrender said books and papers to the petitioner; that an order was issued from the district court to said Allen, directing him to show cause why he should not be dealt with for contempt, and should not surrender said papers; that said order to show cause was duly served, and, said petition having been continued from time to time, at the request of the bankrupt, or by agreement of the parties, on the last adjourned day the petitioner appeared and the bankrupt appeared not; and that, upon the hearing, the bankrupt was adjudged guilty of contempt, and was commanded to deliver up the books and papers to the marshal, and pay the costs, and, upon neglect or refusal to comply with said order, the marshal or his deputy was commanded to take the body of said Allen, and him commit to the keeper of the jail in Chittenden county, to be safely kept until discharged by order of said court. The return of the deputy marshal upon the warrant is to the effect, that he demanded of the said Allen, in the state of New Hampshire, said books and papers, and said costs, which he refused to deliver or pay, whereupon he was arrested and committed to the jail in Chittenden county, in the state of Vermont.

It is contended that the return of the jailer is insufficient, upon three grounds: 1st. It appears upon the face of the warrant or

order of commitment, that the contempt of which the relator was adjudged guilty, consisted in not obeying an order of the register, which order was not an order of the court; 2d. That the warrant directed that the bankrupt should be imprisoned until he should be discharged by order of court, and that his imprisonment does not expire by effluxion of time, or upon the performance of any act, but is limited only by the pleasure of the court; 3d. That the relator was unlawfully arrested in the state of New Hampshire, by a Vermont officer, and was thence taken to jail in Vermont.

(1) Upon the first point it is urged that the statute of the United States (Rev. St. § 725) defines contempt to be misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the court in their official transactions, and disobedience or resistance to any lawful order or command of the court; that an order of the register is not an order of a court; and that, prior to the adjudication for contempt, no order had been made by a court in the premises. By the bankrupt act, the several district courts of the United States are constituted courts of bankruptcy, and it is the duty of the judges of the district courts in the several districts to appoint registers in bankruptcy to assist the judge in the performance of his duties under the act. The register is empowered to despatch such part of the administrative business of the court, and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct. The register has all powers vested in the district court, for the summoning and examination of persons and witnesses, and for requiring the production of books, papers, and documents, except the power of commitment. It is impossible that the laborious administrative business of a bankruptcy court can be performed by one judge. The intricate work connected with the settlement of bankrupt estates requires the time and attention of other persons. The statute has, therefore, empowered him to appoint persons, styled registers, to assist him in the performance of his duties. The powers of the register consist, in general, in the discharge of the administrative business of the bankruptcy court, and in passing such orders relative to the settlement of the estate as may be uncontested. Within the scope of their authority, the registers are not only officers of the court, but, in uncontested matters, act in lieu of the judge. Within this scope their acts are the acts of the bankruptcy court, and their uncontested orders are the orders of the court. Whenever, therefore, a bankrupt violates an order which the register has the power to make, and the making of which the bankrupt has not contested, and in regard to which he has not desired a refer-

ence to the district judge, a violation of such an order is a violation of the order of the bankruptcy court. The register cannot punish for a violation of his order. That power is reserved to the district judge. But it cannot be implied that, for a noncompliance with the uncontested order of the register, there is no power of punishment, and that the only course is to obtain a re-enactment of the order from the district judge, for a violation of which second order a punishment may be inflicted. The statute which placed so large a part of the details of the settlement of estates in the hands of the registers, evidently intended that their uncontested acts in reference to these details were the acts of the court of bankruptcy. Under this theory of the law the practice of the district courts has been to enforce the unbowed orders of the register by proceedings in contempt, which are instituted directly upon a neglect to comply with his order. In *re Gettleston*, [Case No. 5,373;] In *re Speyer*, [Id. 13,239.]

(2.) When the contempt consists of a violation of the order of the court, and is a contempt not committed in its presence, and the statute does not prescribe the form of the order of commitment, the defendant may be imprisoned until he be discharged by order of court, or until further order of court. *Green v. Elgie*, 8 Jur. pt. 1, p. 187, per Denman, C. J.; opinion of Ch. J. Kent in *Re Yates*, 4 Johns. 317; [*Yates v. Lansing*.] 9 Johns. 395.

(3.) The arrest of the relator by the deputy marshal was without his precincts and within the state of New Hampshire. The language of the officer's return is: "At Carroll, in the district of New Hampshire, I served this warrant by demanding, &c., whereupon I arrested his body, read the warrant in his hearing, and, on the same day, I committed him to the keeper of the common jail at Burlington, in the county of Chittenden, in the district of Vermont." The arrest in New Hampshire was not justified by the order of the district court, and, the arrest having been illegal, the subsequent imprisonment in the state of Vermont, in pursuance of the original arrest, cannot be justified. When the original arrest is unlawful, the detention is improper, although the warrant under which the improper arrest is made, is valid. The fact that the officer had power to arrest the bankrupt, after he was brought within the state of Vermont, is immaterial, inasmuch as that power was improperly obtained. The principle is thus declared by Lord Holt, in *Luttin v. Benin*, 11 Mod. 50: "If a man is wrongfully brought into a jurisdiction, and there lawfully arrested, yet he ought to be discharged, for no lawful thing, founded upon a wrongful act, can be supported." The general subject of the validity of the acts of sheriffs over persons or property, in cases where the possession of the person or property was

improperly obtained by the officer, is very elaborately discussed in *Hooper v. Lane*, 6 H. L. Cas. 443, and in *Ilsey v. Nichols*, 12 Pick. 270. In the latter case, Ch. J. Shaw, after reviewing the authorities, concludes as follows: "These cases seem to establish the general principle, that a valid and lawful act cannot be accomplished by unlawful means, and, whenever such unlawful means are resorted to, the law will interpose and afford some suitable remedy, according to the nature of the case, to restore the party injured by means of these unlawful means, to his rights." I refer also to *Percival v. Stamp*, 9 Exch. 167; *Barratt v. Price*, 9 Bing. 566; *Mandeville v. Guernsey*, 51 Barb. 99; *Hill v. Goodrich*, 32 Conn. 589. The relator having been improperly arrested by the deputy marshal beyond his precincts, although upon a warrant which was valid authority for an arrest within his precincts, the detention is invalid, and the relator is entitled to a discharge.

Case No. 209.

In re ALLEN.

[2 Month. Jur. (1878.) 58.]

District Court, N. D. New York.

BANKRUPTCY — COMPOSITION — CONFIRMATION BY COURT.

[The court must confirm a composition agreed upon by the requisite majority of the creditors where they are not shown to have some other motive than the desire to promote their own interests, as well as those of the other creditors, and where the composition will actually benefit all, though the bankrupt has made an assignment to a favored creditor, procured the petition in bankruptcy to be filed against himself, and taken proceedings to effect the composition solely in his own interest.]

[In bankruptcy. In the matter of the confirmation of a resolution of composition by the creditors of Anson C. Allen, Daniel Straus, and Solomon Straus, bankrupts.]

WALLACE, District Judge. The requisite quorum of creditors having assented to the resolution for composition, confirmation is opposed by dissenting creditors, on the grounds that the interests of creditors will not be promoted by the composition. The evidence presented discloses the common case of a composition conceived in the interests of the bankrupts. When insolvency was apprehended, the bankrupts began paying themselves and their favored creditors out of the firm assets, then attempted to compromise with their creditors; failing in this, made an assignment to a favored creditor; and shortly afterward procured a petition in bankruptcy to be filed against themselves, and thereupon took proceedings to effect a composition. In the mean time the bankrupts have had charge of their property ostensibly as agents for the assignee and the purchaser from the assignee. The attorneys who advised the assignment, and prosecuted

the petition in bankruptcy, now represent most of the creditors. From the beginning to the end of the transactions, not one step has been taken to protect the interests of the creditors. It shocks the moral sense to assist this dishonest scheme by judicial action. But this court is only an instrument to administer the law as it finds it. The bankrupt law permits just such schemes as this, and, if the requisite number of creditors consent, the court is powerless, unless it shall appear that the interests of the creditors will not be promoted by the terms of the composition. If, looking at the assets of the estate in their present condition, it is apparent that the pecuniary interests of the creditors will be better promoted by the composition than by administering the estate in bankruptcy, there is no alternative but to confirm the resolution of composition. I am constrained to agree with the register, that the interests of the creditors here will be promoted by confirming the resolution. I cannot say that there are any circumstances to show that the assenting creditors have been actuated by any motive other than to promote their own interests, as well as those of all the creditors. All the assets of the estate rest in litigation, and it seems to me a prudent consideration of the contingencies dictates the acceptance of the offer of the bankrupts. It is probable the bankrupts will profit by the composition, but this by no means proves that it will not be advantageous to the creditors.

Case No. 210.

In re ALLEN.

[17 N. B. R. 157; 17 Alb. Law J. 170; 6 N. Y. Wkly. Dig. 43; 25 Pittsb. Leg. J. 143.]

District Court, N. D. New York. 1878.

BANKRUPTCY — COMPOSITION — CONFIRMATION — FRAUD OF BANKRUPTS.

[Where the requisite number of creditors consent to a composition in bankruptcy, and it appears that the composition is advantageous to the creditors, it must be confirmed, though the proceeding in bankruptcy was fraudulently brought about by the bankrupts, and though they will profit by the composition.]

[Cited in Re Jacobs, Case No. 7,159.]

[In bankruptcy. Motion by Anson C. Allen, Daniel Straus, and Solomon Straus, bankrupts, for confirmation of a composition with their creditors. Composition confirmed.]

Col. Jenny, for bankrupts.

Fanning & Williams, for opposing creditors.

WALLACE, District Judge. The requisite quorum of creditors having assented to the resolution for composition, confirmation is opposed by dissenting creditors, on the grounds that the interests of creditors will not be promoted by the composition. The evidence presented discloses the common case of a composition conceived in the interests

of the bankrupts. When insolvency was apprehended, the bankrupts began paying themselves and their favored creditors out of the firm assets, then attempted to compromise with their creditors; failing in this, made an assignment to a favored creditor, and shortly after procured a petition in bankruptcy to be filed against themselves, and thereupon took proceedings to effect a composition. In the meantime the bankrupts have had charge of their property ostensibly as agents for the assignee and the purchaser from the assignee. The attorneys who advised the assignment and prosecuted the petition in bankruptcy now represent most of the creditors. From the beginning to the end of the transactions not one step has been taken to protect the interests of the creditors.

It shocks the moral sense to assist this dishonest scheme by judicial action. But this court is only an instrument to administer the law as it finds it. The bankrupt law permits just such schemes as this, and if the requisite number of creditors consent, the court is powerless, unless it shall appear that the interests of the creditors will not be promoted by the terms of the composition. If, looking at the assets of the estate in their present condition, it is apparent that the pecuniary interests of the creditors will be better promoted by the composition than by administering the estate in bankruptcy, there is no alternative but to confirm the resolution of composition. I am constrained to agree with the register that the interests of the creditors here will be promoted by confirming the resolution. I cannot say that there are any circumstances to show that the assenting creditors have been actuated by any motive other than to promote their own interests as well as those of all the creditors. All the assets of the estate rest in litigation, and it seems to me a prudent consideration of the contingencies dictates the acceptance of the offer of the bankrupts. It is probable the bankrupts will profit by the composition, but this by no means proves that it will not be advantageous to the creditors.

Case No. 211.

ALLEN v. ALLEN'S EX'RS.

[3 Wall. Jr. 248; 14 Leg. Int. 148; 5 Pittsb. Leg. J. 22.]

Circuit Court, W. D. Pennsylvania. May Sessions. 1857.

JURISDICTION—ORPHANS' COURT OF PENNSYLVANIA.

The fact that by the laws and customs of Pennsylvania, the orphans' court of the county, as a special court of equity, has jurisdiction of the accounts of executors, &c., is no bar to the federal courts exercising jurisdiction over exactly the same subjects;—other things allowing, and the orphans' court not having at the time actual possession of the case or parties.

¹[Reported by John William Wallace, Esq., and here reprinted by permission.]

In equity. This was a suit in equity at Pittsburgh, Allegheny county, in which the complainants set forth by their bill that one Allen, of that county, the testator of the defendants, being owner of a large real and personal estate, died, having made by his last will certain annuities, bequests and devises, some out and out, and several in trust. Then averring themselves to be interested under the will, and showing that they were on the grounds of alienage, &c., entitled to sue in the federal courts, they prayed that the rights of themselves and all parties might be ascertained and declared by a decree of this court; that an account of the personalty might be taken under the direction of this court; that after payment of debts, &c., the residue of the assets might be marshalled and applied to the exoneration of the real estate from the annuities; or if insufficient so to do, to do relief so far as it would go; praying further, a discovery of the personal assets, and how they had been applied, and whether the defendants meant to charge the realty with the payment of the annuities. To this part of the bill there was a plea, that "this court has no jurisdiction over the matters and things, &c., because the same are by the laws and customs of Pennsylvania within the exclusive cognizance of the orphans' court of Allegheny county, and are impleadable and ought to have been impleaded in the said court, &c., and not elsewhere; the said court being the only proper jurisdiction, and being, moreover, competent to administer a complete and adequate remedy in the premises." The plea did not allege the pendency in that court of any litigation between the parties on the same subject matter.

The question, therefore, now before this court was the sufficiency of the plea: a point on which, after arguments by Mr. Shaler and Mr. Loomis, for the complainant, and by Mr. Williams, for the respondent, the court's opinion was thus given by

GRIER, Circuit Justice. It is not disputed that the plaintiffs have a right under the constitution and laws of the United States to come into this court for relief, nor that the relief sought is such as a court of equity administers; but it is alleged that by the law of Pennsylvania, the orphans' court having exclusive cognizance of these matters, the defendant could not be impleaded, except before the judge of that court. This is no doubt true as between the various courts of Pennsylvania. Their courts of common law jurisdiction, whether criminal or civil, could not give the remedy sought for in this bill, for the reason that a special court has been constituted with chancery powers, having jurisdiction of the accounts of executors and administrators, the care of the persons of orphans, power to order the sale of the real estate of a deceased person, to pay his debts,

and many other matters. But it by no means follows that by such a distribution of the judicial powers of the state courts, the courts of the United States can be ousted of the jurisdiction conferred on them by the constitution and laws. The court of common pleas is the only one that can give a remedy by action of ejectment or debt, but it does not follow that because no other court in Pennsylvania can give such a remedy and the jurisdiction of the common pleas is consequently exclusive on the subjects, that foreigners and citizens of the other states of the Union may not have their remedy in courts of the United States. A party who has a right to sue in the courts of the United States cannot be divested of that right by the laws of any state. The relief sought by this bill is within the well established boundaries of the jurisdiction of a court of chancery. No other court has obtained possession of the subject matter or the parties. The action of this court cannot affect in any way the settlement of any amount by the executors in the orphans' court. It will produce no conflict of jurisdiction. In the case of *Aspden's Estate*, [Case No. 539;] (and see 1 Wall. Jr. 217, [*White v. Brown*, Case No. 17,538,]) which we decided in 1853 at Philadelphia, the orphans' court of that city settled the account of the executors whom Aspden had appointed, then removed them and appointed others, and had the whole care of the personal estate, while the various claimants under the will were contesting their rights in the court of the United States for twenty years. When money was ordered by the circuit court to be paid out of the fund by the executor, such order was a sufficient voucher for his settlement in the orphans' court; while the circuit court held the parties concluded as to amount and credits by the accounts settled in the orphans' court. The orphans' court of Pennsylvania is a court of chancery of limited jurisdiction, and is no more exclusive of the United States courts than is any other court in the state. There will be no necessary conflict of jurisdiction; and the plaintiff has an undoubted right to the relief prayed for in this bill. The plea to the jurisdiction is, therefore, overruled, and the clerk of this court is appointed master to state an account as prayed for in the bill, and the decision of other questions suspended till the coming in of the account.

Case No. 212.

ALLEN v. ALTER.

[3 App. Comr. Pat. 322.]

Circuit Court, District of Columbia. June 18, 1860.

PATENTS FOR INVENTIONS — COAL-OIL RETORTS—
INTERFERENCE—COMPETENCY OF WITNESS.

[1. Letters patent issued April 27, 1858, to David Alter and Samuel A. Hill, for a retort revolved horizontally so as to subject its contents to a uniform heat, and for use in the dis-

tillation of coal oil, does not cover a retort which is merely oscillated, instead of revolved, and the invention is prior to that of Franklin W. Willard, with which it interferes.]

[2. Where a witness in an interference case, before the commissioner of patents has been examined by both parties, objection to his competency cannot be first made on appeal.]

[On appeal from the commissioner of patents.]

[Application by E. G. Allen, assignee of F. W. Willard, for letters patent for a process of distilling the liquid products from coal. An interference was declared with letters patent issued April 27, 1888, to David Alter and Samuel A. Hill, and Allen's application was rejected by the commissioner. Applicant appeals. Affirmed.]

MORSELL, Circuit Judge. The appellant claims as his invention the process thereinbefore described for extracting the liquid products from coal, the same being effected by combining a retort so constructed and operated as to have a rotary or other equivalent motion for agitating its contents, and exposing all portions of the charge equally to the heat, with the use of a low red heat of about 850° Fahrenheit, as before set forth. The commissioner adopts for his decision the report of the examiners, dated 13th February, 1860, the substance of which is that "on the 1st of June, 1857, David Alter and Samuel A. Hill presented an application for letters patent for an improvement in retorts for obtaining the volatile products from coal, shale, &c., by dry distillation. The invention consisted in giving a continuous rotary motion to metallic retorts of a cylindrical shape for the extraction of the volatile products of coal for the purpose of subjecting the contents of the retort to a more uniform heat than can be obtained where the retort is stationary, and also greatly expediting the process without in any way diminishing the amount of product from a given quantity of coal. This retort revolved upon an axle, resting on masonry. To the axle at the front end is attached a large cog-wheel, which is turned by a wheel and pulley arrangement on the application of power. At the rear end of the retort, the axle is made hollow, forming a tube which communicates with the inside of the retort, and forms the means by which the volatile products are removed as they are distilled. The retort is kept in motion from the commencement to the close of the distillation of the coal contained within.

The patentees do not claim the use of the retorts so constructed as to be capable of being shifted on their axis from time to time, so as to expose a different portion of the retort to the action of the fire at each successive charge, but assert "that what we do claim as our invention, and desire to secure by letters patent, is the use of retorts so constructed, as hereinbefore described, as to revolve continuously on their axis dur-

ing the process of distillation substantially in the manner and for the purposes set forth." This claim being admitted, letters patent were issued to Alter and Hill dated April 27, 1858. On January 27, 1859, this patent was reissued, having the following claim. "The destructive distillation of coal or other bituminous substances for obtaining the liquid products thereof in the form of what is known as coal-oils by the process hereinbefore described, viz. combining the use of a low temperature not exceeding a low red heat, say about 850° Fahrenheit, with the use of retorts so constructed as to have a rotary or other equivalent motion for the purpose of agitating their contents substantially in the manner and for the purposes hereinbefore set forth." On June 24, 1850, Franklin W. Willard completed an application for letters patent for a method of obtaining volatile liquid products from coal, which invention involved the use of a revolving retort, and the temperature at which the distillation was to be effected was indicated as about 850° Fahrenheit. Willard claimed the process herein described for extracting the liquid products from coal, the same being effected by combining a retort so constructed and operated as to have a rotary or other equivalent motion for agitating its contents, and exposing all portions of the charge equally to the heat, with the use of a low red heat of about 850° F. as set forth. The commissioner then proceeds to state the testimony on the part of the appellees, upon which testimony he says: "By the foregoing testimony the invention of the patentees is shown to have been fully made out, as far back as the fall of 1855, either the month of September or October, and the invention as then seen by experiment was substantially that described in the patent of Alter and Hill. It was the distillation of coal in a cylindrical metallic retort, which revolved over the fire for the purpose of moderating the heat; it was not oscillation or agitation of the retort, it was revolution, which was practiced." The commissioner next proceeds to state the testimony on the part of the appellant.

The commissioner thinks the experiment of September or October, 1855, made by Willard, as testified by Conklin and Willard, is not the same invention with that of the patentees. That invention, he says, as shown, is not agitation or oscillation of a retort, but revolution upon the long axis of a cylindrical metallic retort with a low temperature; for long before this coals had been agitated in retorts and oscillation of retorts had been practiced, and even partial revolution of a retort had been many years patented abroad; so that mere agitation of the coal by other than by complete revolutions forms no part of this invention, to which must be added the exhibition of a low degree of heat.

Now, if we compare this experiment of Willard's with this statement of the true invention, we will find that it is not substan-

tially the invention in question. In the first place, the heat was a very dull cherry-red, says Conklin, and he stirred up the fire and turned the retort. A vey dull cherry red, seen by day light is above the temperature claimed by both parties; and from the shape and form of the retort, which was like model F, it was more probably turned on its bottom rather than on its inside. This is shown to be actually the case by referring to F. W. Willard's deposition, (answer 25,) where he records his experiment made about 1855, when he says Mr. Conklin was present. Willard says he hung the retort so that it could be rotated perpendicularly, end over end. This is obviously not the invention of Alter and Hill, nor is it the invention claimed by applicant himself. This was not the earliest experiment of Willard. According to his statement, he was thus engaged from the month of July, 1853; his experiments were tentative and unsatisfactory. In April, 1855, having experimented several times, he came to two conclusions: 1st, that a low degree of heat was a sine qua non, and, secondly, that some method of agitating the coal would be desirable. Now, agitation merely is not the invention in dispute; it is agitation by horizontal revolution, and this was not known to Willard, up to April, 1855. How much later it was before he attained the conception of revolving the retort we have already shown by the experiment of September, 1855, in which Willard was assisted by Conklin; that the retort was rotated, but not revolved horizontally, which is the true invention. A bare inspection of the glue-pot retort, (Exhibit O,) in which the experiment of May, 1855, was performed, shows that revolution of the retort was not contemplated. It was simply an action of oscillation, for the retort cannot be made to revolve except by inverting its head at the same time, which it is hardly probable Willard intended should occur. Willard states that about the last of March, 1856, he altered the construction of his retort (answer 32) so that the retort might lie horizontally over the fire, made his vessel tight, and rotated the retort horizontally by a monkey wrench, and the temperature was not over 800° Fahrenheit. Exhibits E, G, D, Y, represent this retort. This is the true invention, the one in dispute, and this appears to be the earliest date to which it can be traced as Willard's idea; the subsequent operations of Bradford are not of importance in this connection. Inasmuch then as the last of March, 1856, is the earliest period to which Willard can refer the date of his invention, and inasmuch as the evidence of Moorhead carries back the invention by Alter and Hill to September or October, 1855, it is obvious that priority of invention belongs to Alter and Hill.

The commissioner notices the testimony in relation to the various declarations of Willard respecting the time to which he could carry back his invention, and then says:

"Admitting, then, this as the date of the invention of Willard, and seeing that the application of Willard for a patent was made in the latter part of June, 1859, it appears that three years and nearly three months elapsed between the discovery or invention and the application to this office for a patent. The reason assigned by Willard is want of means, but it appears from his own evidence that prior to his meeting with Mr. Allen he was offered the means of placing his claim before the office. If priority of invention had been proved by Willard, the question of abandonment might be urged with considerable force against him on account of this delay, but as he has not succeeded in establishing priority, the consideration of that question does not rightly belong here. In view, therefore, of the facts proven by the testimony showing that Messrs. Alter and Hill anticipated Mr. Willard in the invention in dispute by a period of nearly six months, thereby proving priority of invention, it is recommended that this interference be dissolved, and that the application of F. W. Willard be refused." Which report was confirmed by the commissioner, adjudging priority of invention to Alter and Hill, and disallowing a patent to the appellee, February 14th, 1860.

From this decision Willard's assignee hath appealed, and filed sixteen reasons of appeal. They are full and sufficient specifications of the three general heads, assigned as errors: First, as to the nature and character of the invention; second, respecting the evidence on behalf of Alter and Hill, and their assignees, the patentees and appellees in this case; third, respecting the evidence on behalf of F. W. Willard's assignee, the appellant and applicant in this case. The reasons will have their due consideration.

To these reasons the commissioner filed his reply by way of report. This document refers to the report just recited, and is in substance very nearly the same. It states additionally that, when Alter and Hill obtained their original patent, it was not broadly for the distillation of coals in a revolving retort, nor for any mode which would agitate the coal during distillation, for these points were described in patents to which the two parties were referred, and who thereupon disclaimed such, and confined their invention to retorts so constructed as hereinbefore described as to revolve continually on their axes during the process of distillation, substantially in the manner and for the purposes set forth. The term "so constructed" involved the idea of a metallic retort, capable of continuous revolution, and the manner of distillation described a low red heat. When the patentees reissued their patent, they narrowed somewhat their claim by expressing the conditions of manufacture more fully, specifying in the claim the use of a temperature about 850° of Fahrenheit in retorts capable of distillation, and having ro-

tary or other equivalent motion during the distillation. The phrase "or other equivalent motion" has been dwelt upon by appellant as evidencing the claim, and thereby admitting his earlier experiments as coming within his scope. But when the history of this art is known, one may ask, what is the other motion equivalent to a rotary one? Agitation of the contents of the retort was patentable, as also rotation of the contents of the retort. The retort was fully rotated on its axis during distillation by Belslay and Rowen, and particularly so by Lahon and Gingembres. But with these was the exhibition of the high degree of heat, of these existing patents; as the patentees were aware when they obtained their reissue, and when the words "or other equivalent motion" was subjoined. Common phrases and forcible ones as they are in many patents, they had no meaning here, since every other motion like it was already described; and since Alter's and Hill's invention was thus narrowed, no wider construction must be allowed for Willard's experiments.

Upon this state of the case, the commissioner laid before me all the original papers and evidence with his decision, the reasons of appeal and his report according to law, and to previous notice given of the time and place appointed for the hearing of said appeal, when and where the parties respectively appeared by their advocates who filed their arguments in writing, and submitted the said case.

And first as to the question of competency of Willard as a witness for appellant on the ground of interest. The objection does not appear to have been regularly made, and both parties having examined him, the objection must be considered as waived.

I proceed therefore to consider the case upon the merits. The parties in this case must be looked upon as original, independent, meritorious inventors of a peculiar process for the distribution of coal-oil. They both accomplished the purpose of their invention as stated in their specifications. The inventions are substantially the same. The one has already obtained a patent; the other is an applicant for a patent, contending that he is the prior inventor, and this is the issue. The thing in issue is substantially this: Practically extracting oil from bituminous coal by subjecting the coal equally to a moderate heat while undergoing a constant or continuous agitation. The appellant contends that by his proof his invention dates back to early in May, 1855. For this he principally relies upon the testimony of Willard, who says that by his experiment in April and May, 1855, he ascertained that by a low degree of heat, say about 800° Fahrenheit, he obtained the largest quantities and best qualities of oil; that he likewise, in the course of his experiments spoken of, came to the conclusion that some method of agitating the coal whilst undergoing the process of distilla-

tion would be desirable. This conclusion he came to in April, 1855. In May, of the same year, he constructed his glue-pot contrivance, and when he had adjusted it to suit him he would screw the union-joint tight, for the purpose of saving his vapor, and preventing its leaking, and having the coal, in this way, he found he had obtained the object he was seeking for; that is, to expose as much surface of the coal as was possible to a slow fire, and obtaining the results of distillation at a low degree of heat, and at the same time agitating the coal inside of the retort, producing a less destruction of the vapor, and getting a larger and better product of oil. Upon the end of the gas pipe, projecting through the side of the glue-pot, into the inside of the retort, he screwed a nut, for the iron of which the glue-pot was composed was too thin to hold his gas-pipe with safety. He says that he afterward redistilled and purified the oil produced by this and other experiments made with the same apparatus, and as described above. Is there a sufficiency in this evidence to show that Willard had any fixed, regular idea of the invention at the time of this experiment? With respect to the machine used by him; he says that he connected his gas pipe by an union-joint with a condenser; he commenced an occasional turning of the glue-pot over the fire. When he had adjusted it to suit him, he would screw the union-joint tight, for the purpose of saving his vapor and preventing it leaking, but when he wanted to alter the position of the retort he unscrewed it. According, then, to this operation, when screwed, the retort could not turn at all; when unscrewed he altered the position of his retort to another angle, and screwed the joint again, and so on. No witness corroborates him as to the fact of rotation at this experiment, and he has shown inconsistencies in statements about the date. The relation in which he stands, the nature of the operation, with these circumstances, tend to impair the credit of his testimony; but even if unimpaired, it fails to show the existence of an essential feature, the continuous revolution and agitation for the purpose of exposing the charge of coal equally to the heat.

The commissioner says the invention is very much narrowed down by the English patents, which he says were very well understood by the parties, by which oscillation and agitation of the contents of the retort were patented, also rotation of the contents of the retort. The retort was fully rotated on its axis during distillation by those patents. The invention, he goes on to say, was confined to retorts so constructed as to revolve continuously on their axis during the process of distillation. Thus, it must plainly appear that the appellant's invention cannot date from the month of April or May, 1855.

The next experiment made by him was in September or October of the same year. He then made a pattern for a larger retort

that would hold some seven or eight pounds of coal, which he set into an oval upright stove made of sheet-iron, and lined with fire bricks. He says: "I hung the retort into the stove in such a manner as to be rotated perpendicularly or end over end;" and he then proceeds to state particularly the manner of hanging, &c. The result of the above experiment, he says, "I found, was more successful in attaining the desired product than the first experiment." Conklin says Willard (in the experiment just alluded to) took four or five pounds of coal, put it into an iron retort, about fourteen or fifteen inches long, about six inches at the bottom, about eight inches at the top, with a flange in the top. The lid was put on a strap across the top, with a set screw in it, to hold it down tight. He then placed it over the fire, and made oil. He stirred the fire up, and turned the retort. He gave it a rotation of probably three times in a minute. He thinks that, in the course of ten or twelve hours, they got from a pint to a quart of oil, on this occasion; also the glue-pot retort with the union screw was used. According to a particular description of it by one of appellant's witnesses, its contrivance was to oscillate perpendicularly; by "oscillate" he means a movement of the retort backwards and forwards. He says that he presumed that Willard did not think it necessary that it should be revolved all around; that any common mechanic might know from the construction of it, that such was not the intent. I think the testimony of this witness must be considered correct. Of course, therefore, there is no sufficient evidence that Willard had attained to the idea at that period, nor do I think Alter and Hill had.

The next period was in March or April, 1856. The commissioner thinks that the evidence shows that at this period Willard completed his invention, and I concur with him. But on the 19th of February, in the same year, Alter and Hill had made the discovery, and of course they must be considered as the prior inventors. There are parts of the testimony which prove that they were joint in the invention. Upon the whole, the decision of the commissioner ought to be, and is hereby, affirmed.

Case No. 213.

ALLEN v. ARGUELLES.

[4 Cranch, C. C. 170.]

Circuit Court, District of Columbia. May Term. 1831.

FOREIGN JUDGMENT—JUSTICE OF THE PEACE.

A transcript of a judgment and proceedings of a justice of the peace in Pennsylvania, entered of record in a county court, is not a judgment of that court.

¹[Reported by Hon. William Cranch, Chief Judge.]

At law. Debt [by John Allen against E. T. Arguelles] upon the judgment of the county court of Philadelphia county, in Pennsylvania. Plea nul tiel record, and issue. The plaintiff produced a certificate, under the seal of the county court, that a transcript of a judgment and proceedings before a justice of the peace was filed and entered of record in that court.

Mr. Lear, for plaintiff.

Mr. Wallach, for defendant.

THE COURT, (THRUSTON, [Circuit Judge,] doubting,) was of opinion that the judgment of the justice at his chambers, a transcript of which was filed and entered in the records of the county court, was not a judgment of the county court, although the prothonotary of that court was authorized by statute to issue a fieri facias thereon to bind lands.

Case No. 214.

ALLEN v. BENNETT.

[6 Amer. Law Rev. (1872,) 755.]

District Court. D. Connecticut.

LEASE—CONDITION AGAINST ASSIGNMENT—BREACH—BANKRUPTCY.

This was a bill in equity brought by an assignee in bankruptcy to enjoin one who had leased a store to the bankrupt from disturbing the petitioner's possession. The lease stated that the store was to be used by the bankrupt as a dry goods store, and provided for a forfeiture in case of an assignment without the written consent of the lessor.

The court (SHIPMAN, District Judge) held that the assignment to the petitioner, being the act of the law, did not work a forfeiture; and that an assignment by him, as the agent of the law, to a purchaser of the leasehold interest, would be equally without the proviso.

Case No. 215.

ALLEN v. BLUNT.

[1 Blatchf. 480; 1 Fish. Pat. Rep. 303; 8 N. Y. Leg. Obs. 105.]

Circuit Court, S. D. New York. Oct. Term, 1849.

CIRCUIT COURTS—JURISDICTION—SUBJECT MATTER—INFRINGEMENT OF PATENT—SERVICE OF WRIT—ACTION ON JUDGMENT.

1. In actions arising under the patent laws, the jurisdiction of the circuit courts of the United States does not depend upon the citizenship of the parties, but upon the subject matter.

2. The 11th section of the judiciary act of September 24th, 1789, (1 Stat. 79,) does not make it necessary, in such actions, that either the defendant or the plaintiff should be an inhabitant of the state where the suit is brought.

[Cited in Thayer v. Wales, Case No. 13-872.]

3. It is sufficient to give jurisdiction, in such cases, that the writ is served personally upon

¹[Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

the defendant in the district in which the suit is brought.

[Cited in *Thayer v. Wales*, Case No. 13, 572.]

4. On an injunction bill to restrain the infringement of a patent, where there is no dispute as to the title, the circuit courts of the United States have jurisdiction, under section 17 of the patent act of July 4th, 1836, (5 Stat. 124.) to refer the case to a master, to take an account of the profits of which the plaintiff has been deprived by reason of the infringement.

[Cited in *Hoffheins v. Brandt*, Case No. G, 575.]

5. A. filed a bill in equity against B., in the circuit court of the United States in Massachusetts, for the infringement of a patent: the bill was taken pro confesso, and a decree rendered against B. for a large amount, he not appearing in the case. Afterwards, A. brought an action of debt in this court against B., on the decree: *Held*, that A. could not recover, because it did not appear affirmatively on the face of the Massachusetts record, that B. was personally served with process in that district.

At law. This was an action of debt, brought [by Ethan Allen] upon a final decree of the circuit court of the United States for the district of Massachusetts, made in a suit in equity in that court founded upon letters patent granted to the plaintiff on the 3d of August, 1844, [No. 461,] for an "improvement in the method of constructing locks for fire-arms." The bill was filed on the 24th of June, 1846, against Orison Blunt and one William I. Syms, for an injunction, and for an account of the profits derived from an alleged infringement of the patent. It was taken pro confesso against Blunt, and a reference had before a master to take and state an account of the profits of which the plaintiff had been deprived by the infringement. The report of the master was confirmed, and a final decree entered for the sum of \$11,700, being the amount of the profits reported, and for \$397.84, the taxed costs. On the trial here, before Mr. Justice Nelson, in November, 1848, a certified copy of the record of the proceedings and decree in the suit in Massachusetts was produced on the part of the plaintiff, proving the above facts. But, it appeared from recitals in the record, that Allen was a citizen and resident of Norwich in the state of Connecticut, at the time the bill in equity was filed, and that Blunt and Syms were then citizens and residents of the city and state of New-York. The subpoena to appear and answer, which was set forth in the record, was directed to the defendants, and to it was subjoined the memorandum required by the twelfth rule in equity. The return by the marshal of the service of the subpoena was also set forth, in these words: "United States of America, Mass. Dist., ss: Boston, June 24, 1846. On this twenty-fourth day of June, 1846, I gave to the within named Orison Blunt, in hand, a true and attested copy of the within notice. I have made diligent search for the within named William I. Syms, and cannot find him within my district, so that I can notify him of the with-

in process. Isaac O. Barnes, Marshal." The plaintiff rested his case on the record, and the defendant objected to a recovery on the grounds: 1. That the court in Massachusetts had no jurisdiction of the suit in equity there, inasmuch as it appeared on the face of the record that neither Allen nor Blunt were citizens or inhabitants of Massachusetts when that suit was commenced. 2. That the damages in the suit in equity were assessed by a master of the court, and not by a jury. The court overruled the objections, and the jury found a verdict for the plaintiff, for \$12,097.84 debt, and \$786.25, interest thereon at six per cent., by way of damages. The defendant now moved for a new trial, on a bill of exceptions.

Francis B. Cutting, for the plaintiff

I. The circuit courts of the United States have original jurisdiction of all suits arising under the patent laws, as well in equity as at law, with authority to grant injunctions according to the course of courts of equity, and with capacity to compel an account and to grant any ancillary relief necessary for the full protection of a plaintiff's rights. Act July 4, 1836, § 17; Act Feb. 15, 1819, (3 Stat. 481;) Conk. Pr. 65. II. The jurisdiction of those courts in patent cases does not depend upon and is not affected by the citizenship or character of the parties or the amount involved in the controversy. Conk. Pr. 61; *Osborn v. Bank of U. S.*, 9 Wheat. [22 U. S.] 738; *Bank of U. S. v. Planters' Bank*, 9 Wheat. [22 U. S.] 904. And there are other instances of jurisdiction irrespective of the character of the parties. Judiciary Act 1789, § 12; Act March 2, 1833, § 3, (4 Stat. 633.) III. The provision contained in the 7th amendment to the constitution, that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, has no application to suits in equity. 3 Story, Comm. § 1762; *Parsons v. Bedford*, 3 Pet. [28 U. S.] 446. The phrase "common law" is used in contradistinction to "equity, and admiralty, and maritime jurisprudence."

Seth P. Staples and John B. Staples, for the defendant.

I. The acts of congress, in reference to the jurisdiction of the circuit courts, give them no jurisdiction in equity, except where a plain, adequate and complete remedy cannot be had at law. Article 7, Const. Amend. U. S.; Const. U. S. art. 3, § 2; 3 Story, Comm. §§ 1757-1762, for the history of this article and of the amendment; Judiciary Act Sept. 24, 1789, §§ 9, 12, 13, 16. (1 Stat. 76, 79, 80, 82.) The general jurisdiction clause of the 11th section of the act of 1789 is controlled and restricted by the other sections above cited. II. In this case there was such remedy at law. The complaint was for a tort, and for damages, which belong to a

jury exclusively. III. If the jurisdiction in equity attaches for any purpose, the extent and nature of its exercise depend on the character and object of the suit. If the aid of equity be required only as preliminary or auxiliary, its power ceases when that object is effected. *Baker v. Biddle*, [Case No. 764.] IV. The patent act of July 4th, 1836, (5 Stat. 117,) does not confer jurisdiction to assess damages in equity without a jury. Sections 14 and 17 of that act restrict the jurisdiction in equity to the injunction, and the remedy stops there. V. The remedy and the wrong, in this case, being both creatures of the statute, must follow the statute, and cannot be extended by the rules applicable to courts of chancery in England and in this country. *Hinsdale v. Larned*, 16 Mass. 65; *City of Boston v. Shaw*, 1 Metc. [Mass.] 130; *Moncrief v. Ely*, 19 Wend. 405; 2 Saund. Pl. & Ev. 829; *Baker v. Biddle*, before cited. VI. There was a fatal defect of jurisdiction in the suit in Massachusetts, by reason of a want of citizenship; neither the plaintiff nor the defendant being a citizen of the state where the suit was brought. *Kitchen v. Strawbridge*, [Case No. 7,854;] *Shute v. Davis*, [Id. 12,828;] 1 Pet. C. C. 431, [*Craig v. Cummins*, Case No. 3,331;] *Judiciary Act 1789*, § 11.

NELSON, Circuit Justice. 1. Article 1, § 8, Const. U. S. provides, among other things, that congress shall have power "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries"—and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

The first act of congress carrying into execution the above power was passed on the 10th of April, 1790, (1 Stat. 109,) the fourth section of which provided, that if any person should make or vend within the United States any art, manufacture, &c., the exclusive right of which should have been granted by patent to any person, every person so offending should forfeit and pay to the patentee such damages as should be assessed by a jury in an action on the case. This act was repealed by Act Feb. 21, 1793, (1 Stat. 318,) the fifth section of which enacted, that the party infringing should forfeit and pay three times the price for which the patentee had usually sold the article, which might be recovered "in the circuit court of the United States, or any other court having competent jurisdiction." The act of the 17th of April, 1800, (2 Stat. 37,) repealed the fifth section of the act of 1793, and provided, that the party infringing should pay to the patentee a sum equal to three times the actual damage sustained by him, which should be recovered in an action on the case, "in the circuit court of the United States having jurisdiction thereof." The present act, passed July 4, 1836, (5 Stat.

123, § 14,) provides, that the court may increase the damages, not exceeding three times the amount of the verdict, and that such damages may be recovered by action on the case, "in any court of competent jurisdiction." Section 17 of that act provides, that all actions, suits, &c., in cases arising under the patent laws, shall be originally cognizable "by the circuit courts of the United States, or any district court having the powers and jurisdiction of a circuit court."

It will be seen, by this brief reference to the acts of congress, that the remedy prescribed in behalf of the patentee, to enable him to recover damages for the violation of his right, is limited to a circuit court of the United States having jurisdiction of the case, leaving the question as to the appropriate circuit in which to bring the action in any given case, to be determined by the existing provisions on that subject. But the remedy is given to any patentee, against any person who has been guilty of an infringement, without any restriction as to the parties.

By the eleventh section of the judiciary act of 1789, (1 Stat. 78,) it is provided, that the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and (1.) "the United States are plaintiffs or petitioners; or" (2.) "an alien is a party; or" (3.) "the suit is between a citizen of the state where the suit is brought, and a citizen of another state."—"But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." In actions commenced under the first branch of this section, where the jurisdiction of the court depends upon the citizenship of the parties, it has been held, that the suit must be brought in the state in which the party plaintiff or defendant was at the time a resident or inhabitant. *Kitchen v. Strawbridge*, [Case No. 7,854;] *Shute v. Davis*, [Id. 12,828;] *Craig v. Cummins*, Id. 3,331.] And the citizenship must appear upon the face of the record. *Bingham v. Cabbot*, 3 Dall. [3 U. S.] 382; *Abercrombie v. Dupuis*, 1 Cranch, [5 U. S.] 343; *Wood v. Wagon*, 2 Cranch, [6 U. S.] 9.

Upon this clause of the section, and the authorities, it is contended on the part of the defendant, that the circuit court in Massachusetts had no jurisdiction over the suit in equity, inasmuch as it did not appear upon the record that either of the parties was at the time a citizen or resident of the state of Massachusetts, but the contrary; the one being a citizen and resident of Connecticut,

and the other of New-York. But we think the objection not well founded. The object of the clause is an enumeration of the classes of cases in which the jurisdiction of the court is made to depend upon the character of the parties; and it is founded upon section 2 art. 3 of the constitution. It has no bearing upon cases arising under the patent laws, where jurisdiction rests upon the subject matter, irrespective of parties or amount. The parties may be citizens of the same state, and the amount may be large or small.

The latter clause of the section referred to is general, and applies to all suits commenced in the circuit or district courts. A defendant cannot be arrested in a district other than that in which the suit is brought, nor can the suit be commenced against an inhabitant of the United States, by original process, in any other district than that of which he is an inhabitant, or in which he is found at the time of serving the writ. These are the only restrictions that apply to the power or right of the court to exercise jurisdiction over the person, in the present case.

2. The seventeenth section of the act of July 4, 1836, gives jurisdiction to the circuit courts of the United States, in all cases arising under any law of the United States granting or confirming to inventors the exclusive right to their inventions or discoveries, "as well in equity as at law;" "which courts shall have power, upon bill in equity filed by any party aggrieved, in any such case, to grant injunctions, &c." The jurisdiction thus conferred upon the circuit courts in patent cases in equity, is as broad and general in the terms of the grant, as is found in respect to the particular cases of jurisdiction enumerated in the eleventh section of the judiciary act of 1789, and in reference to which it has been repeatedly held, that jurisdiction exists independently of the local laws of the states; and is the same, in its nature and extent, as the equity jurisdiction in England, from which it was derived. *Robinson v. Campbell*, 3 Wheat. [16 U. S.] 212, 221; *U. S. v. Howland*, 4 Wheat. [17 U. S.] 108; *Parsons v. Bedford*, 3 Pet. [28 U. S.] 433, 447; *Gordon v. Hobart*, [Case No. 5,609.] The following cases will show that it is the settled practice of the English chancery, on injunction bills filed by the patentee, when there is no dispute about the title, to refer the case to a master, to take and state an account of the profits which the defendant has made by the use of plaintiff's invention, instead of sending it to a court of law to assess the damages. The defendant is regarded as having been in the use and enjoyment of property that belonged exclusively to the patentee, and as being bound in equity to account for the profits. *Crossley v. Derby*

Gas Light Co., *Webst. Pat. Cas.* 119, 3 Mylne & C. 428; *Hind. Pat.* 354, 355, 361, 363; *Bacon v. Jones*, 4 Mylne & C. 433, 436; *Pierpont v. Fowle*, [Case No. 11,152;] *Curt. Pat.* §§ 346, 348; *Ogle v. Ege*, [Case No. 10,462.]

The question before us is one of power, not whether the case was one fit and proper to be sent to the master, nor whether his report was properly confirmed. If the circuit court in Massachusetts had jurisdiction over the subject matter and parties, the correctness of the decree cannot be called in question collaterally.

3. But, on looking into the record, we find a defect, not noticed on the argument. That is, the omission to set forth, with reasonable certainty, the service of the subpoena upon the defendant in the district of Massachusetts. As the subpoena was doubtless thus served, and as that fact is also strongly inferable from the record, it was assumed both at the trial and argument. But, as the fact is vital to the jurisdictional question, it should have been stated upon the record made up and now before us, with strict certainty, and not have been left to implication or intendment. There is no averment whatever to be found in it, of service of the writ of subpoena. The only evidence of the fact is the return of the marshal upon the writ, which is set out; but that does not state where the service took place. There is, indeed, a strong implication arising out of the return as to Syms, namely, that he could not be found to be personally served in the district. But it does not necessarily follow from this, that the service upon Blunt was there. As the jurisdiction of the court over him rests altogether upon this fact, it should not, as before stated, have been left to doubtful implication.

The fact of the service upon the defendant in the district of Massachusetts resting wholly upon the subpoena and return as set forth, they are also subject to remark. The writ of subpoena is not directed to the marshal, for anything that appears in the record; and the return speaks of the service of a notice upon Blunt, which might very well refer to the memorandum accompanying the subpoena, directing that the appearance of the defendants must be entered on or before the return day of the writ, or the bill would be taken pro confesso. The return is vague, even as it respects the proper service of the writ; but the insuperable objection is, that it does not show affirmatively, that the service was made in the district of Massachusetts.

For this reason, a new trial must be granted, with costs to abide the event.

[NOTE. For other cases involving the same patent, see *Allen v. Sprague*, Case No. 238; *Same v. Blunt*, Id. 215, Id. 216, and Id. 217.]

Case No. 216.

ALLEN v. BLUNT.

[3 Story, 742; 2 Robb, Pat. Cas. 288; 8 Law Rep. 165.]

Circuit Court, D. Massachusetts. May Term, 1845.

PATENTS FOR INVENTIONS—REISSUE—DECISION OF COMMISSIONER—EXPERT TESTIMONY—EQUITY—VERDICT OF JURY.

1. The decision of the commissioner of patents is conclusive as to the law and facts arising under an application for a patent, unless it be impeached for fraud or connivance between him and the patentee; or unless his excess of authority be manifest on the face of the papers.

[Cited in Allen v. Blunt, Case No. 217; Brooks v. Fiske, 15 How. (56 U. S.) 228; Sickles v. Evans, Case No. 12,839; Morris v. Royer, Id. 9,835; Blake v. Stafford, Id. 1,504; Jordan v. Dobson, Id. 7,519; Seymour v. Osborne, 11 Wall. (78 U. S.) 544; U. S. v. Wright, Id. 650; Bridge v. Brown, Case No. 1,857; Chicago Fruit House v. Busch, Id. 2,669; Aultman v. Holley, Id. 656; Smith v. Merriam, 6 Fed. Rep. 718; Combined Patents Can Co. v. Lloyd, 11 Fed. Rep. 151; Spaeth v. Barney, 22 Fed. Rep. 829.]

2. Where a particular authority is confided in a public officer, to be exercised in his discretion upon an examination of facts of which he is the appropriate judge, his decision upon those facts is, in the absence of any controlling provision, absolutely conclusive.

[Cited in Spaeth v. Barney, 22 Fed. Rep. 829; Allen v. Blunt, Case No. 217; Sickles v. Evans, Id. 12,839; House v. Young, Id. 6,738; Seymour v. Osborne, 11 Wall. (78 U. S.) 544; Parham v. American Button-Hole, etc., Sewing-Mach. Co., Case No. 10,713; Chicago Fruit House v. Busch, Id. 2,669; Aultman v. Holley, Id. 656.]

3. A verdict upon an issue, ordered by a court of equity, is not final upon the facts it finds, nor binding upon the judgment of the court, unless it is sanctioned and adopted by the court upon the subsequent hearing on the merits. *Quere*—Whether a verdict in a suit at law is evidence of anything but the fact that it was rendered, unless a judgment be duly rendered thereon.

[Cited in Allen v. Blunt, Case No. 217; McLaughlin v. Bank of Potomac, 7 How. (48 U. S.) 228; Brooks v. Norcross, Case No. 1,957.]

4. The patent act contemplates two classes of persons, as peculiarly appropriate witnesses in patent cases, viz.—1st, Practical mechanics, to determine the sufficiency of the specification as to the mode of constructing, compounding, and using the patent. 2d, Scientific and theoretic mechanics, to determine whether the patented thing is substantially new in its structure and mode of operation, or a mere change of equivalents; and the second class is by far the higher and most important of the two.

[At law. Action on the case by Ethan Allen against Orisson Blunt and others] for infringing patent [No. 461] for "an improvement in the method of constructing locks for fire arms." Plea the general issue, with a special statement of matters of defence. At the trial it appeared that the original

patent was granted on the 11th of November, 1837, and was surrendered for some imperfections in the specifications, and a new amended patent was taken out on the 15th of January, 1841, which was again for a like defect, surrendered, and a new, amended patent was taken out on the 3rd of August, 1844.

Upon the opening of the defence, Gray (with whom was Dexter), for the defendants, took a preliminary objection, that the last (the present) patent was not good as an amended patent, for the specifications attached to the three patents were for different things, and not for one and the same invention; and that consequently the commissioner of patents had exceeded his authority in granting the present patent, and he cited the 13th section of the patent act of 1836, ch. 357.

B. R. Curtis and R. Choate, for the plaintiff, contended, that the present patent was for the same invention as the two former; and they also insisted that the commissioner of patents was the proper judge of the matter, and his decision, in granting the patent, was conclusive.

Before STORY, Circuit Justice, and SPRAGUE, District Judge.

STORY, Circuit Justice. The 13th section of the patent act of 1836, c. 357, enacts, that whenever any patent shall be inoperative or invalid, by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention, more than he had, or shall have a right to claim as new, if the error has or shall have arisen by inadvertency, accident or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender to him of such patent, and the payment of the further duty of fifteen dollars, to cause a new patent to be issued for the same invention for the residue of the term then unexpired, for which the original patent was granted, in accordance with the patentee's corrected description and specification. Now the specification may be defective or insufficient either by a mistake of law, as to what is required to be stated therein in respect to the claim of the inventor, or by a mistake of fact, in omitting things which are indispensable to the completeness and exactness of the description of the invention, or of the mode of constructing or making or using the same. Whether the invention claimed in the original patent, and that claimed in the new amended patent, is substantially the same, is and must be in many cases a matter of great nicety and difficulty to decide. It may involve considerations of fact as well as of law. Who is to decide the question? The true answer is, the commissioner of patents; for the law entrusts him with the authority, not only to accept the

¹[Reported by William W. Story, Esq.]

surrender, but to grant the new amended patent. He is bound, therefore, by the very nature of his duties, to inquire into and ascertain, whether the specification is definite or insufficient, in point of law or fact, and whether the inventor has claimed more than he has invented, and in each case, whether the error has arisen from inadvertency, accident or mistake, or with a fraudulent or deceptive intention. No one can well doubt, that, in the first instance, therefore, he is bound to decide the whole law and facts arising under the application for the new patent. *Prima facie*, therefore, it must be presumed that the new amended patent has been properly and rightfully granted by him. I very much doubt whether his decision is or can be re-examinable in any other place, or in any other tribunal, at least, unless his decision is impeached on account of gross fraud or connivance between him and the patentee; or unless his excess of authority is manifest upon the very face of the papers; as, for example, if the original patent were for a chemical combination, and the new amended patent were for a machine. In other cases, it seems to me, that the law, having entrusted him with authority to ascertain the facts, and to grant the patent, his decision, *bona fide* made, is conclusive. It is like many other cases, where the law has referred the decision of the matter to the sound discretion of a public officer, whose adjudication becomes conclusive. Suppose the secretary of the treasury should remit a penalty or forfeiture incurred by a breach of the laws of the United States, would his decision be re-examinable in any court of law upon a suit for the penalty or forfeiture? The president of the United States is, by law, invested with authority to call forth the militia to suppress insurrections, to repel invasions, and to execute the laws of the Union; and it has been held by the supreme court of the United States, that his decision as to the occurrence of the exigency is conclusive. *Martin v. Mott*, 12 Wheat. [25 U. S.] 19. In short, it may be laid down as a general rule, that, where a particular authority is confided to a public officer, to be exercised by him in his discretion upon an examination of the facts, of which he is made the appropriate judge, his decision upon these facts is, in the absence of any controlling provisions, absolutely conclusive as to the existence of those facts. My opinion, therefore, is, that the grant of the present amended patent by the commissioner of patents is conclusive as to the existence of all the facts, which were by law necessary to entitle him to issue it; at least, unless it was apparent on the very face of the patent itself, without any auxiliary evidence, that he was guilty of a clear excess of authority, or that the patent was procured by a fraud between him and the patentee, which is not pretended in the present case.

The defence upon the merits turned upon

two points: (1) That the defendants did not use the same combination as the plaintiff, and consequently there was no violation of his patent. (2) That the invention patented did not belong to the patentee, he not being the first inventor thereof. In the course of the trial, the counsel for the defendant, in support of their defence, offered in evidence the record of a suit in equity between the same parties in the circuit court of the United States, for the district of New York, in which the court had directed an issue upon the same points, which were now in controversy, and the jury found a verdict upon those points in favor of the defendants. But it further appeared upon the record, that no further proceedings were had upon the verdict, and no hearing was had upon the merits of the case by the court; but the plaintiff, by the leave of the court, was allowed to dismiss his own bill without any final hearing thereon.

Curtis and Choate, for the plaintiff, contended that, under these circumstances, the record was not admissible as evidence. Gray and Dexter, for the defendants, contended that it was, being a verdict upon the very points now in controversy.

STORY, Circuit Justice. My opinion is, that the record is not admissible as evidence. No hearing was ever had by the court subsequently to the verdict, and no decree rendered upon the merits of the case. A verdict upon an issue ordered by a court of equity is, in no just sense, final upon the facts it finds, or binding upon the judgment of the court. The court may at its pleasure set it aside, and grant a new trial, or, disregarding it, may proceed to hear the cause and decide in contradiction to the verdict; or it may adopt the verdict, *sub modo*, and give it a limited effect only. But it can never be known what effect is given to the verdict, or whether any is given to it, until the subsequent hearing upon the merits, and a decree rendered thereon by the court. Under such circumstances, it is plain to me, that this verdict is not admissible in evidence, for it has not been sanctioned or established by the court, and without such sanction it is no proof of any fact, but that it was actually rendered in the case, and not proof of the facts found thereby. Indeed, I entertain great doubts, whether a verdict given in a suit at law is ever evidence of anything, but the fact that it was rendered, unless a judgment has been duly rendered thereon; for judgment may have been arrested therein, or a new trial granted; and then the verdict would become a nullity. *Phil. & A. Ev.* (Ed. 1838,) pt. 2, c. 3, § 1, p. 618. See 3 *Phil. Ev.* (Cow. & H.) note 729, p. 1070. But in a court of equity, the verdict, independent of the adoption and sanction of it by the court, can establish nothing in the case.

The cause was afterwards argued to the jury upon the facts.

STORY, Circuit Justice, in summing up to the jury, said: There is one consideration applicable to the evidence, which has been much discussed by the learned counsel, and upon which it is proper that I should say a few words. It is as to the relative weight of the evidence of persons practically engaged in the trade, employment or business of the particular branch of mechanics to which the patent right applies, and the evidence of persons who, although not practical artisans, are thoroughly conversant with the subject of mechanics as a science. It appears to me, that the patent acts look to both classes of persons, not only as competent, but as peculiarly appropriate witnesses, but for different purposes. Two important points are necessary to support the claim to an invention: First, that it should be substantially new, as, for example, if it be a piece of mechanism, that it should be substantially new in its structure or mode of operation. Secondly, that the specification should express the mode of constructing, compounding and using the same in such full, clear and exact terms, "as to enable any person skilled in the art or science, to which it appertains, or with which it is most nearly connected, to make, construct, compound and use the same." Now for the latter purpose, a mere artisan, skilled in the art with which it is connected, may in many cases be an important and satisfactory witness. If, as a mere artisan, he can, from the description in the specification, so make, construct, compound and use the same, it would be very cogent evidence of the sufficiency of the specification. Still, it is obvious, that although a mere artisan, who had no scientific knowledge on the subject, and who was unacquainted with the various mechanical or chemical equivalents employed in such cases, might not be able to make or compound the thing patented, from the specification; yet a person who was skilled in the very science on which it depended, and with the mechanical and chemical powers and equivalents, might be able to teach and demonstrate to an artisan how it was to be made or constructed, or compounded or used. A fortiori he would be enabled so to do, if he combined practical skill with a thorough knowledge of the scientific principles on which it depended. But upon the question of the novelty of an invention, and in reference to this, the identity or diversity of two or more machines, or compounds, it is obvious, that mere artisans, however well skilled in the mere details of their art, might be wholly incapable of giving a satisfactory answer; when a person trained in the science to which it belonged, would, at a glance, ascertain whether the mechanical apparatus or chemical compound was identical in its composition and structure or not, or whether the

differences consisted in the mere change of one known mechanical equivalent for another. In short, science alone would be able to answer the question whether or not a particular machine was substantially in its mode of operation new, or identical with another, although with apparent differences of form and structure, which might mislead the unscientific mind. The like considerations would apply to a chemical compound; Sir Humphrey Davy, for example, might, from his vast knowledge of the chemical affinities of different substances, be able to tell, what must be the effect of the combination thereof from their known qualities, and what would be a mere change of known chemical equivalents without any exercise of the inventive powers, although he might never, perhaps, have made the particular compound then before the court. I should, therefore, say to the jury that each of these classes of witnesses was important and competent for different purposes in causes respecting patents for inventions. But that the very highest witnesses to ascertain and verify the novelty of an invention, and the identity or diversity of mechanical apparatus and contrivances, and equivalents, were, beyond all question, all other circumstances being equal, scientific mechanics; that they were far the most important and most useful to guide the judgment, and to enable the jury to draw a safe conclusion, whether the modes of operation were new or old, were identical or diverse.

The judge then proceeded to sum up the facts, and left them to the jury. The jury, not being able to agree upon a verdict, were discharged.

[NOTE. This case was again tried by a jury in June, 1846, and a verdict was rendered for the plaintiff for \$1,200 damages. For the hearing on motion for new trial, and for leave to file a bill of exceptions, see *Allen v. Blunt*, Case No. 217. For other litigation involving this patent, see *Allen v. Sprague*, Id. 238, and *Allen v. Blunt*, Id. 215.]

Case No. 217.

ALLEN v. BLUNT.

[2 Woodb. & M. 121; 2 Robb, Pat. Cas. 530.]
Circuit Court, D. Massachusetts. Oct. Term, 1846.

EVIDENCE — OFFICIAL CORRESPONDENCE — RES GESTÆ — RES JUDICATA — DEPOSITION — PATENTS FOR INVENTIONS — RENEWAL — NOVELTY — PRIOR USER — DAMAGES — JURY — NEW TRIAL — BILL OF EXCEPTIONS.

1. In a motion for a new trial; because an official letter from the commissioner of the patent office on an official matter was admitted as evidence, tending to prove the time of making the invention, there is some analogy to justify its admission after proving its signature as official correspondence, and also as a declaration made at the time containing [concerning] a particular act, as part of the *res gestæ*; and though its competency may be questionable,

¹[Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

if subsequent evidence in the progress of the case rendered it unnecessary to prove the fact for which it was offered, a new trial will not be granted on account of its admission.

[Cited in *Tufts v. Tufts*, Case No. 14,232; *Carr v. Gale*, Id. 2,435; *Jewett v. Cunard*, Id. 7,310; *Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.*, 26 Fed. Rep. 601.]

2. So it will not be granted, where parol evidence was offered of the contents of a former letter, and rejected, because no satisfactory proof was first furnished to the court of the loss of that letter, or its having come to the possession of the opposite party. Courts will receive the affidavits of either party, to establish or rebut such preliminary facts, to be proved to them.

[Cited in *Tufts v. Tufts*, Case No. 14,232; *Carr v. Gale*, Id. 2,435; *Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.*, 26 Fed. Rep. 601; *Richardson v. Hicks*, Case No. 11,783.]

3. Letters put in the post-office are not of course in all cases, and under all circumstances, presumed to have been received, though putting them in, may be using due diligence as to notice by the holders of negotiable paper. But in questions of fact addressed to the court, to lay the foundation of secondary evidence of a written paper, such a letter will not be presumed to have been received, merely from putting it in a post-office, if no answer was returned, and the party, to which it was addressed, makes affidavit it never came to hand.

4. A former verdict between these parties on an issue out of chancery in a bill in which an injunction was prayed for against the further use of a patent, and a trial of an action for damages for its violation, and on an amended specification, seems not to have been a trial of the same matter, and if it was, the former is not a bar when no judgment was ever rendered on that verdict, or on the merits of the bill, praying an injunction, the bill having been dismissed on the plaintiff's own motion.

5. A deposition should not be taken during the session of the court, at which the case is to be tried, except by its order or consent of parties, or taken merely *de bene esse* in case of death or absence abroad.

6. When counsel have acted publicly in former trials of a like cause, between these parties, and are still employed, though not one of the counsel, whose name appears on the record, if living within a hundred miles of the place where the deposition was taken, he ought to be notified.

7. It is doubtful whether a caption is not insufficient by describing the action as against one, when it was against two, and so entered and defended, though with service since only on one. If the ruling had been erroneous, no new trial is proper when no injury resulted, as the minutes of counsel containing the testimony of the witness on a former trial went to the jury, and, for aught which appeared, contained all that was material in his deposition.

8. A renewal of a patent by the commissioner with an amended specification, is presumed to have been made legally, that is, to correct a mistake or inadvertence, and for the same invention.

[Cited in *Woodworth v. Edwards*, Case No. 18,014; *Morris v. Royer*, Id. 9,835; *Aultman v. Holley*, Id. 656.]

9. But this presumption may be rebutted by evidence, and if so, it should be submitted to the jury when requested to decide as a fact, whether the last letters issued for the same invention.

[Cited in *Morris v. Royer*, Case No. 9,835; *Aultman v. Holley*, Id. 656.]

10. Under the acts of 1836 and 1839, the earliest invention is to prevail over any subsequent one, unless it was allowed to go into public use, or be on sale for two years before taking out a patent, in all trials where no point is made of a subsequent inventor having perfected and patented his invention, while the other neglected to use due diligence to complete his.

11. An invention, to be valid as the first, must be seasonably reduced to practice, and put in use.

[Cited in *Wood v. Cleveland Rolling Mills*, Case No. 17,941.]

12. A patentee, who uses certain words in his specification, and then takes out an amended one, omitting them, is not estopped by those words, after being thus withdrawn.

13. Where the plaintiff makes out a prima facie case for the violation of his patent, and then the defendant goes forward to prove his special defence under a notice, that the invention had been known and used at divers places by divers persons, it is right to instruct the jury, that on this defence it is the duty of the defendant to turn the scales of evidence in his favor.

14. To indemnify a patentee in damages, the jury may allow actual cost in suits relating to it, and also counsel fees, if reasonable in amount; and this court, under the act of congress, will award treble what is found by the jury as damages, if deemed proper to protect useful inventors from combinations and ruin.

[Cited in *Parkhurst v. Kinsman*, Case No. 10,761.]

15. If one of the jury, before retiring, publicly inquire as to a particular fact on the records of the court, and no objection being then interposed by counsel on either side, it is publicly answered by the clerk, it cannot be taken advantage of by a motion for a new trial after a verdict is returned.

[Cited in *Parkhurst v. Kinsman*, Case No. 10,761.]

16. Damages in cases of this kind and of torts, where the jury passed on them fairly and legally, will not be considered excessive, unless they clearly exceed what is necessary to indemnify the patentee; and a court will not set aside a verdict for such excess, unless large and palpably unreasonable. When a motion for a new trial is not drawn up for some weeks, and the counsel disagree as to some of the rulings made, the court must settle the differences, and will not award a new trial on account of them if no injustice seems on the whole case to have been done by the verdict.

[Cited in *Jay v. Almy*, Case No. 7,236.]

17. Nor when such is the result will the court allow a new trial, if the counsel believe that in his argument he expressed a wish for the court to instruct the jury on some points, and it was not done, but furnished no written list of the instructions desired, nor stated verbally, after the charge was through, and before the jury retired, that any point had been omitted, or any further directions were desired.

18. It is not the duty of the court to instruct the jury on abstract or irrelevant questions, but only such as arise on the evidence in the case; and though, as general rules, new trials are granted for the admission of evidence not competent, or the rejection of what is legal, or for a misdirection in point of law, yet by well established exceptions, in the exercise of a sound discretion, this is not to be done, if in the course of the trial the evidence became immaterial, or on the whole case, notwithstanding some erroneous ruling or instruction, the verdict does not seem to have been influenced by them, or to be against the justice of the cause.

19. A motion for an allowance of a bill of exceptions, under the authority given by the patent act to this court in all cases under it, where it seems "reasonable," in order to enable the parties to carry questions contained in it to the supreme court, when the damages are less than \$2,000, ought to be granted in the exercise of a sound discretion, as to cases involving points, which arise in the construction of the patent law itself, where those are important in their character and really doubtful, but as to no cases involving points of a different character.

[20. Cited in *Russell v. McLellan*, Case No. 12,158, as authority for permitting a departure from the rule requiring notice and written interrogatories to be filed with the clerk before depositions can be taken.]

[21. Cited in *Aiken v. Bemis*, Case No. 109, to the point that the damages allowed by the jury must be plainly exorbitant to require the interference of the court.]

At law. This was an action on the case [by Ethan Allen against Orson Blunt and others] for a violation of a patent right for a self-cocking pistol. The suit was instituted September 2, 1844, and counted on a patent [No. 461] issued for the last time on the 3d of August, 1844, but which had originally issued, November 11, 1837, and been surrendered and cancelled for a defective specification, January 15, 1844, as well as again August 3, 1844. The plea was not guilty, accompanied by notices of a prior knowledge and use of the same modes of constructing locks to fire-arms, in various places and by various persons, that need not be recapitulated. The writ was served on Blunt only, and the cause came on for trial here in June, 1845, when the jury disagreed. It was tried again in June, 1846, and after ten days spent in putting in the testimony, and in arguments of counsel, was submitted to the jury, and a verdict returned for the plaintiff for \$1,200 damages. In the progress of the trial, several rulings were made of disputed questions on the admission of evidence, and the jury were instructed on certain points of law connected with the case. But a bill of exceptions was not then filed by the counsel for the defendant, from an impression that, as the damages were less than \$2,000, the case could not be carried up to the supreme court by a writ of error.

A motion for a new trial, however, was made, and the reasons assigned for it were filed, July 14, 1846, a copy of which follows: "And now, after verdict, defendants move the court here for a new trial, and assign the following causes. 1. Because the court, notwithstanding the objection of defendants, allowed the plaintiff to read in evidence a certain letter, purporting to have been written and addressed by one Ellsworth, assuming to be commissioner of patents, bearing date the 15th July, 1837. 2. Because the court refused to allow defendants to read in evidence and exhibit a portion of the deposition of one William H. Elliot, in relation to his said Elliot's having transmitted to plaintiff a certain letter and certain drawings of pistol locks, copies of which were

annexed to said deposition, on the ground that the plaintiff by his affidavit denied the receipt of any such letter and drawings. 3. Because the court refused to permit defendants to give in evidence the record of the proceedings, verdict and final disposition of a suit in equity between the plaintiff and defendants in the state of New York, touching the same subject-matter, which is at issue in this suit. 4. Because the court refused to permit defendants to read in evidence the deposition of Samuel Colt, taken by said defendants in and for said suit. 5. Because defendants' counsel having insisted that the first letters patent were for another and different invention from those claimed in the second and third letters patent, the court ruled as a matter of law, that the re-issue by the commissioner of patents to plaintiff of the two letters by him obtained upon surrender of his first and of his second letters patent, was conclusive that all said letters were for one and the same invention. 6. Because the court, having permitted the plaintiff to introduce evidence as tending to show that plaintiff, several years prior to his first application for letters patent therefor, did invent and put in use the invention claimed by him and set forth in said letters patent, did thereupon rule that although the same invention had subsequent to plaintiff's making his said invention, and before his making his said application, been made and put in use by Elliot or any other persons, yet the plaintiff's patent would still be valid. 7. Because the court, although requested by defendants' counsel, omitted to instruct the jury as matter of law, that unless they should find that plaintiff had not merely first discovered, but first reduced to practice, and put to use his said invention prior to the discovery, and putting in use by others of the same invention, the plaintiff's patent would be void. 8. Because the court did not instruct the jury as matter of law, though requested by defendants' counsel, that plaintiff was estopped as against defendant and the public by his first letters patent from asserting that the mode of disengagement of the slide trigger does not constitute a substantial difference between the lock of plaintiff and a lock disengaged in the mode of detaching such slide trigger. 9. Because the court omitted to instruct the jury, though requested by defendants so to do, that if plaintiff made his said invention in 1833, and reduced the same to practice, yet if he concealed the same, and did not apply for letters patent until July, 1837, the letters patent thus obtained would be void in case of a subsequent similar invention reduced to practice, and put in use prior to said application for letters patent; but instructed the jury that if they should be satisfied that plaintiff made his said supposed invention in the year 1833, and reduced it to practice, but did not apply for letters patent therefor until July, 1837, yet that plain-

tiff's patent was valid. 10. Because the court instructed the jury, that if plaintiff had made out a prima facie case of originality of invention, and of a violation of his patent by defendants, the evidence on the part of defendants to entitle them to a verdict, must be sufficient to turn the scale; that if defendants impugn the originality of the invention, or the similarity of the instruments, they must offer such evidence as shall render it probable that plaintiff was not the first inventor, or that the machines are not similar. 11. Because the court instructed the jury in relation to damages, that they were at liberty to include therein the costs and expenditures of plaintiff in conducting this suit, other than and besides the costs by law taxable therein. 12. Because the jury were permitted, upon the question of damages, to inquire of the clerk and ascertain what damages had been given in two other patent cases that had been tried in said court. 13. Because the damages assessed by the verdict were without evidence, against the evidence and the weight of the evidence, and are also excessive."

At the adjourned session of the court, held in September, 1846, the new motion was made for leave of the court, then to file a bill of exceptions, embracing some of the causes assigned for a new trial, in order to carry the case up by a writ of error under the special provision as to the subject of allowing writs of error in all patent cases when deemed reasonable by the court under the 17th section of the patent act of July 4, 1836. This motion was made without abandoning that for a new trial, in case it should not succeed; and both were argued at the September session. [Motions refused, and judgment entered on the verdict.]

Bartlett and C. G. Loring, for the motions.
B. R. Curtis and Choate, opposed.

WOODBURY, Circuit Justice. The counsel for the defendants have assigned reasons for these two motions, which undoubtedly seemed to them well founded in fact, as well as sufficient in law. But the trial having ended June 24, 1846, and these reasons not having been filed till July 15, 1846, twenty-one days after, and when the court was not in session, they are open to greater chances of mistake, and cannot so easily and satisfactorily be corrected, if erroneous, as when filed near the time of the trial. The reasons for the delay, however, are satisfactory; but do not lessen or remove at all the difficulties produced by it. These have still got to be met, and having listened to the respective views of the counsel on both sides as to the facts and the law involved in these motions, I shall now proceed to perform my further unpleasant portion of duty in respect to them, by deciding first, what it appears to me actually took place at the trial in connection with each point, and next, whether it

furnishes a reasonable ground for a new trial, or the allowance of a bill of exceptions under the special provision of the 17th section of the patent act. There are thirteen reasons assigned for the new trial, and it will be more convenient, intelligible, and useful in examining so many, to consider them in relation to a new trial, separately from the motion for a bill of exceptions.

1. The first one is the admission of a letter from the commissioner of patents, which was objected to by the defendants. There is no difference of views between the counsel as to the ruling of the court on this point having been as stated. But the letter was admitted merely as evidence to prove that as early as the 15th of July, 1837, the day of its date, the plaintiff had made this discovery in fire-arms, and applied to the patent office for a patent for it. This letter was an acknowledgment of such an application. I entertained doubts at the trial whether the letter must not be regarded like that of any third person not a party, and hence was not so good evidence as his statements under oath as a witness. But it may be, that coming from a public officer under an official oath and on official business, it is competent as an official act and document of a public officer in relation to such a subject; and being duly proved as to its signature, there is some analogy for making it competent evidence for the jury to weigh in deciding whether the invention of the plaintiff had not at that time been completed. If copies are admissible in such cases on general principles, a fortiori are the originals. The rules as to admitting official correspondence to prove official facts in this manner in certain cases may be seen in 1 Greenl. Ev. p. 359, 554; [Hatten v. Speyer,] 1 Johns. 38-41; [Talbot v. Seeman,] 1 Cranch, [5 U. S.] 1, 37, 38. Another principle, urged at the hearing, though not at the trial, in support of the admission of this letter is, that it was a part of the transaction, when the plaintiff applied for a patent. And being made at the time and in relation to that subject is a competent declaration, as a part of the res gestae and explanatory of what took place. [Philadelphia & T. R. Co. v. Stimpson,] 14 Pet. [39 U. S.] 448; [Rawson v. Haigh,] 2 Bing. 102; [Forman v. Jacob,] 1 Starkie, 46; 1 Greenl. Ev. 120, 122. This is certainly plausible as to any letters then written by the plaintiff, or declarations then made by him. But whether these should not be proved by witnesses, may be questionable, and if the person with whom he was thus dealing is a competent witness, as Mr. Ellsworth is, for aught which appears, it would seem that his testimony is more proper evidence of what the plaintiff said or did than his letter, unless, as before remarked, that letter coming from a public officer, and under oath in respect to an official matter, be legal evidence as to that matter, in the light of a public document or record to prove it, and not as

mere private letter admitted for being a part of the *res gestae*. But there is another circumstance connected with this testimony, which seems decisive against the objection to its admission. It is to be remembered in considering both of these motions, that they are not matters of right as to being granted, but the discretion of the court is to be exercised; and if, in the hurry of a trial, a dictation was erroneous, but afterwards became immaterial or unnecessary in consequence of other evidence, a new trial ought not to be granted. See on this, *Greenleaf's case v. Birth*, 5 Pet. [30 U. S.] 132; *Thorndike v. City of Boston*, 1 Metc. [Mass.] 242. Now it is certain, that the letter of the commissioner was admitted to show an invention of this lock by the plaintiff, he having applied for a patent for it as early as July, 1836. But in the chain of proof on this subject, evidence was subsequently offered, proving an invention of it by the plaintiff by having made arms, or caused them to be made with this lock on them, several months earlier. By that, therefore, the date of the application, as shown in this letter, became of no importance for this purpose, and there is no pretense or suggestion that the date was in truth erroneous, and would not be sustained by the commissioner as a witness, if placed on the stand. This ground for a new trial, therefore, cannot be sustained.

2. The next objection relates to the ruling of the court, that a portion of a deposition by Wm. H. Elliot, as to the contents of a certain letter, could not be read. It is alleged to have been excluded on the ground of the plaintiff's denial that he received any such letter. But there is a mistake in part as to this. It is true, that the court decided against the competency of a portion of Elliot's deposition, but it was because it went to prove the contents of a written paper and drawings of pistols, which paper and drawings were not first shown to be lost, nor in the possession of the plaintiff with notice to produce them. The fact, that he wrote letters to him at a particular time, and on the subject of pistols, was not ruled out, as may be seen by looking at the deposition filed in the case, and the marks now existing on what was deemed inadmissible. They were only as to the particular contents of the letter and drawings. These were ruled out till the usual previous proof was given of the loss of the originals, or of their being actually in the possession of the plaintiff, and notice given to produce them. The correctness of such a ruling is sustained by all the books on evidence, and rests on the familiar principle, that a resort will not, as a general rule, be allowed to parol or secondary evidence of a fact, when written, or higher evidence exists and may be obtained. The defendant then gave notice to the plaintiff in court to produce the letter and drawings, and the plaintiff thereupon filed his affidavit, that no

such letter had ever been received by him. Another question thus arose and was decided by the court, whether the defendants had offered to the court, not the jury, satisfactory proof to justify it in point of law in the admission of parol evidence to the jury of the contents of that letter and drawings. Nothing had been offered to the jury to weigh on this point, and nothing could be by law, except the original letter itself and the drawings, until proof was furnished to the court that they had been lost or had gone into the plaintiff's custody. [*Tayloe v. Riggs*, 1 Pet. [26 U. S.] 597; [Page v. Page], 15 Pick. 374; [*Jackson v. Frier*], 16 Johns. 193; *Woods v. Gassett*, 11 N. H. 445; *Schermerhorn v. Schermerhorn*, 1 Wend. 123. Nobody testified to these last facts. The deponent swore he sent the letter, rather than delivered it. If sent by a private hand, then the person carrying it could testify whether it was delivered or not to the plaintiff. If sent by mail, then, where notice is to be brought home to the correspondent, the letter must be shown to have been received, and the more especially, where the correspondent denies under oath to the court that it ever was received. *Carpenter v. Providence Washington Ins. Co.*, 4 How. [45 U. S.] 185.

It is a mistake to suppose that in case of letters, put in the mail to give notice of demand of commercial paper and non-payment, the law considers it sufficient on the presumption that the letter is always received. But it is on the fact, that writing and doing so are using due diligence to give notice. If such a presumption of the receipt of letters put in the post-office, is to be made in all cases, it is a presumption, contradicted daily by the immense dead letter collections never received by correspondents, and requiring the constant employment of several clerks to overhaul and dispose of, in our own general post-office alone. But however that may be, this letter was not proved to have been put in the post-office at all, and the proof addressed to the court, and the contradiction by the oath of the plaintiff's and Elliot's own testimony, that he never got any reply, failed entirely to convince me that the letter was ever received by Allen. That a party, before being allowed to give secondary or parol evidence of the contents of a writing, supposed to be in the possession of the opposite party, must first prove to the court the possession of it as well as the notice, may be seen in the following books. 1 Greenl. Ev. 597; [*Henry v. Leigh*], 3 Camp. 499; [*Jackson v. Frier*], 16 Johns. 193; [*Tayloe v. Riggs*], 1 Pet. [26 U. S.] 597. This may be done by the affidavit of the party, and be disproved by like affidavits of his opponent, and interrogatories be put in the discretion of the court, to each by the other, if desiring it and pertinent. *Woods v. Gassett*, 11 N. H. 447. For it is all addressed to the court and not to the jury, and it is weighed under liberal views rather than technical scruples,

and in connection with all the other evidence and circumstances bearing on the point. *Tayloe v. Riggs*, 1 Pet. [26 U. S.] 596; *Schermerhorn v. Schermerhorn*, 1 Wend. 123. Were it necessary to go farther on this objection, it would be seen that the evidence thus rejected became, likewise, immaterial; because it related to a communication of certain drawings by Elliot to Allen at a particular date in the summer of 1837, in order to show that Elliot was then the inventor before Allen; whereas Allen afterwards proved that on two occasions, both some time previous to that date, he had caused locks of this kind to be made.

3. The next ruling of the court was, not admitting in evidence the former verdict and proceedings between these parties in New York. My predecessor, on a former trial of this cause, considered this question, and gave an elaborate written opinion against the admission of this testimony. 3 Story, 742, [*Allen v. Blunt*, Case No. 216.] I have examined it with care, and feel satisfied it is correct, unless in point of fact the judgment of the court in New York, dismissing the bill, was a judgment made on the merits, and grounded on this very verdict. That court on its law side may not have saved questions, or ordered a new trial as to that verdict. But something still more than that fact is necessary to give it "vitality and finality," and that is judgment, actually rendered upon and enforcing the verdict. [*Hopkins v. Lee*,] 6 Wheat. [19 U. S.] 113. The bill in chancery, to aid which this verdict was taken, was dismissed. But that is an equivocal act unless explained. Dismissing bills is sometimes done for want of prosecution, and is then like a nonsuit in a court of law, which is of course no bar, nor competent evidence to affect a subsequent suit. Sometimes it is by agreement, without any examination or action on the merits by the court itself. *Jenkins v. Eldredge*, [Case No. 7,266.] Sometimes it is done to enforce an order or rule of the court, and not to bar the party from a subsequent prosecution, and sometimes it is a judgment on the whole case, and is then meant to settle fully the rights of the parties. *Sibbald v. U. S.*, 12 Pet. [37 U. S.] 492; [*Martin v. Hunter's Lessee*,] 1 Wheat. [14 U. S.] 355; *Hopkins v. Lee*, 6 Wheat. [19 U. S.] 113-116. When it is of the latter character, it is usually pleaded in bar to a subsequent proceeding, and averments are made, that the dismissal was on the merits. But if it is not so pleaded and averred, and is only offered in evidence, then the evidence dehors the record, if not in it, should accompany the record, and prove all which is proper to show that the dismissal was the result of a judicial inquiry and disposal of the rights of the parties involved in the proceedings and verdict. See *Aspden v. Nixon*, 4 How. [45 U. S.] 467, especially cases cited in the arguments. See *Burnham v. Webster*, [Case No. 2,179.] But aside from

these principles, it appears in this case, that before any judgment was rendered on or against this verdict, the plaintiff, on his own motion, had his bill dismissed without any decision on the verdict, or the merits of the case. A mere verdict in any suit does not, as a matter of course, settle the right of the parties. *Butler v. Stephens*, Walk. [Miss.] 219. It is open, as the verdict in the very case now under consideration strongly illustrates, to numerous exceptions growing out of rulings on evidence that was offered, and opinions or principles involved in the merits, and is open to be set aside for various errors in them, or for misbehavior of the jury, and, as the counsel for the defendants contend in this very case, ought in law and justice often to be set aside, rather than stand and be given in evidence to control or influence other trials between the same parties. But after all the objections to such a verdict have been weighed by the court deliberately, and the court proceeds to pronounce judgment on it, and does pronounce one sustaining it, then it should put an end to further litigation between the parties of the same points involved in that case. It is for public quiet, the interests of the republic to do this, but not to prevent one full decision on the merits between the parties. Again, if the same merits or points once decided are not again agitated in the second suit, then of course the principle in question does not make or allow the first decision, being on different matters, to bind or control the second. [*Towns v. Nims*,] 5 N. H. 262; *Burnham v. Webster*, [Case No. 2,179;] *Bank of U. S. v. Beverly*, 1 How. [42 U. S.] 148, 149. Accordingly, it is further contended in this case by the plaintiff, that if a judgment had been rendered in the first proceeding in New York on the merits, it did not involve the points here agitated. That was an application in equity for an injunction. This is a suit at law for damages for a violation of a patent right. An injunction will not always be granted, though the patent be a valid one. So the specification in the patent then relied on, was not the same as now, and hence that proceeding may have failed on the very objection since obviated by a correction of the specification. There should have been further evidence and explanations on both of these questions before that verdict could safely or properly be allowed to go to the jury. These views are sustained not only by sound reason, but various authorities cited in *Aspden v. Nixon*, [supra.] and by Judge Story in the present cause; and I do not regard the remarks of 1 Greenl. Ev. § 510, as sustaining a contrary doctrine when applied (as they are understood by me to be) either to the necessity not existing of any judgment at law on verdicts found on issues out of chancery, but leaving the necessity of judgments on them in chancery as imperative, as principle and the precedents just cited require. But it must appear of course.

that the court decided the merits, relying on that verdict, in order to show that the question involved in that verdict has been settled or adjudged on once by a proper tribunal. That is the gist of the principle in its ever being a bar or possessing weight. *Bul. N. P.* 234; 1 *Story*, 166, [*Magoun v. New England Marine Ins. Co.*, Case No. 8,961;] [*Perkins v. Knight*,] 2 *N. H.* 474. Hence in *Willes*, 367, note, it is said, there must be a decree in chancery; and that is evidence that the verdict is in force. *Gres. Eq. Ev.* 109; 1 *Grah. N. Tr.* 596; 1 *Newl. Ch. Pr.* 353.

4. The fourth reason assigned for a new trial is the exclusion of Colt's deposition. It will be recollected that this deposition was taken without giving any notice to the opposite party or his counsel, and during the sitting of this court at which the cause was to be tried. Such depositions, if admissible at all under the act of congress, are very dangerous in their *ex parte* character, for the fair trial of the final merits of a cause, and according to the views of this court expressed with much deliberation, are to be very closely scrutinized. *Bell v. Morrison*, 1 *Pet.* [23 *U. S.*] 356. It is there settled, that no presumptions are to be made in aid of evidence taken contrary to common law principles. See, also, [*The George*,] 2 *Wheat.* [15 *U. S.*] 287; [*Patapsco Ins. Co. v. Southgate*,] 5 *Pet.* [30 *U. S.*] 604; 1 *Gall.* 488, [*U. S. v. Coolidge*, Case No. 14,857;] 3 *Wash. C. C.* 408, [*Evans v. Hettick*, Case No. 4,562;] 1 *Brock* 367, [*The Thomas and Henry v. U. S.*, Case No. 13,919.] My own opinion is, that when taken during the session of the court, though over a hundred miles distant, whether with or without notice, they are entirely inadmissible. The admission of depositions, taken in perpetuum rei memoriam, under authority from the United States courts, and those authorized by some states by express statutes in cases of sickness, or going abroad, or old age, are to be used only in case the witness dies, or has not returned; and often in the states notice in these cases must be given to the party likely to be affected by them. See Act Sept. 24, 1789, § 30. See statutes in New Hampshire and Massachusetts. It is held in *Patapsco Ins. Co. v. Southgate*, 5 *Pet.* [30 *U. S.*] 616, that when taken *de bene esse* under the United States statute, as here without notice, they cannot be used, if the disability is removed. But when the witness lived over one hundred miles distant at the time taken, the opposite side must show the witness to be now nearer, and that this provision applies to cases of over one hundred miles distant out of the district, as well as within it. 3 *Wash. C. C.* 409, [*Evans v. Hettick*, Case No. 4,562.] 3 *Wash. C. C.* 531, [*Bleecker v. Bond*, Case No. 1,534,] is against this, and in my view on the soundest reasons, though the other decision being by the supreme court must govern till altered by that court. Here, however, a new prin-

ciple interposes as to a deposition taken while this court is in session.

The party and his counsel, (getting express notice from the other side, or getting none in that way, but learning as they may accidentally when and where the deposition is to be taken, and) anxious as they may be to attend and cross-examine, have a prior and paramount legal duty to perform here in court to attend and be ready for the trial here. This is a duty enjoined by law, and not to be neglected. By a rule in the English courts counsel cannot be required to attend elsewhere during the sittings at Westminster. 1 *Tidd*, Pr. 57. In Maine the courts usually will not allow depositions to be used, taken during the session of the court, unless in the same place, and when the court is not in actual session, &c. *Wyman v. Wood*, 25 *Me.* 439. So, not the day before the court sits. [*Ulmer v. Hills*,] 8 *Greenl.* 326. *Sed quaere*, [*Wymau v. Wood*,] 25 *Me.* 440, as to the last. It is only by consent of parties, or discretion of the court under peculiar circumstances, that in ordinary cases of taking depositions, this prior and paramount duty in court should be required to be neglected or suspended, by absence in attending on the taking of depositions. They ought to be all taken, and the case prepared before the term begins. But beside this, the plaintiff had counsel in this case, residing in the very city where this deposition was taken, and though his name was not entered on the record here, he had acted in the former trial, and this was known to the defendants. Furthermore, the names of the parties in this suit are not given correctly in the caption, being described as a suit against Blunt, when it is against Blunt and Simmes, though not served on the latter. It is entered against both, and both plead and defend. Whether for such a variance the witnesses would be exonerated or not, if indicted for perjury, it is an objection, when the proceedings are to be strictly scrutinized as here, not without some weight. The exceptions to the admission of this deposition are the more readily sustained also; because, instead of a continuance to take it over again, the testimony of the witness was still allowed to go to the jury, as given in a previous trial, and contained in the minutes of the counsel on both sides; and if the deposition varied from that, by containing any material and new facts, it was not stated, either at the trial or in the argument of these motions, that in truth it did so vary. My predecessor, in one district of this circuit, made it an invariable rule, if depositions were taken without notice, to allow a continuance to enable the other party to cross-examine the witness, or repel his testimony; and such I understand to be the practice of most of the judges of the supreme court in their circuits. The 68th rule of this court in equity virtually does the same.

5. In respect to the next objection, a supposed ruling by the court, that the different letters patent to the plaintiff for his lock, must in point of law be regarded as conclusively for one and the same invention, the counsel for the plaintiff contend, that no such ruling was made by the court. My own minutes and recollection are, that the plaintiff's counsel in the opening, stated something as to the opinion of my predecessor about the binding force of the doings of the commissioner, unless it was set up and proved that fraud had been practised in procuring the last letters from the commissioner; and that the counsel on the other side expressed doubts as to the correctness of this doctrine. But no attempt was made during the trial to offer any evidence to show that these last letters were not for the same invention, or to show fraud practised on the commissioner in obtaining the last letters, and I can find no minute that my own views on this point were expressed at all. Indeed, in the closing argument for the defendants on this motion, the counsel admit that the court made no such charge or ruling. No doubt, however, exists in my mind that if any direction had been required by the evidence and given, I should have said that in point of law the jury ought, until the contrary was shown, to presume the commissioner, in issuing new letters, had discharged his duty faithfully and correctly. *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. [39 U. S.] 458. This involves the idea, that he issued them on account of mistake or inadvertence in the description or specification of the invention attached to the first letters. And therefore that he issued the new ones, as a matter of course, with a different amended description or specification, but for the "same invention," as he is expressly required to do by the thirteenth section of the act. But this *prima facie* inference or presumption in respect to the identity was open to be contradicted by proper evidence, though if none had been offered, it should stand as a fact, that the invention meant to be described in both, was the same. I entertain the same impressions now, and the correctness of them is fortified by my view of the decision of the supreme court in *Stimpson v. Westchester R. Co.*, 4 How. [45 U. S.] 404. See, also, [*Philadelphia & T. R. Co. v. Stimpson*], 14 Pet. [39 U. S.] 458.

Probably my predecessor deemed the decision of the commissioner binding or conclusive farther than I should, and not, as I am informed, to be overturned, either as to the question of mistake in the specification, or as to the identity of the patent, unless fraud was shown, or an error by the commissioner was apparent on the face of the paper. *Allen v. Blunt*, [Case No. 216.] It is not extraordinary, that no such attempt at counter proof was made; because it is now stated in the argument, that the counsel for the defendant then considered the question of iden-

tity as a question of law merely for the court, and asked a ruling of the court on that point, whether as a question of law, after examining the descriptions in the two specifications, the new letters were or were not for the same invention. If I omitted, then, to give such a ruling, which is all contended for in the closing argument, the omission seems to have been right. But had I done what the defendants' counsel now say they wished, that is, given a ruling on the identity as a question of law, and looking to the specification alone, it would have been then, as it is now, against the defendants. On the face of the two specifications, without other evidence, neither a court nor a jury could much hesitate to believe the renewed letters and the original ones were for the same invention. So the commissioner must have meant, and so only had the plaintiff any motive to make them. Because new letters could then with equal ease have been taken out for any new invention; and its use for fourteen years from that date protected by them, instead of only for the residue of the term as in the renewed letters. These last, also, could not operate back on violations any more than new letters. To be sure he uses in the renewed letters words somewhat different from those in the old ones. That he might do this, was doubtless one of the very reasons for obtaining the renewed letters. But it was different language to describe more correctly the same invention, and this was proper. A part of the opinion of my predecessor on those specifications illustrates this point also. *Allen v. Blunt*, [Case No. 216;] *Woodworth v. Stone*, [Id. 18,021.] The whole mistake on this matter is perhaps in the defendant's supposition, that the commissioner's renewal was held by me to be conclusive in law as to the identity; because he understood my predecessor to have thought so, unless fraud was shown, or an error on the face of the papers. But from what has been said, it does not appear that the defendant is likely to have suffered from his mistake as to this, so as to justify a new trial for it.

6. The next ruling involves the question, whether under the act of 1836, when the inquiry is, which is the original invention, the earliest is not to prevail over a succeeding one, though a succeeding one may be made, and used before letters patent are taken out for the first. There is no doubt it must prevail as a matter of historical or chronological truth. It is, in truth, the first invention. Is there then any provision in the patent laws which contradicts or annuls this truth? Whatever may be the law abroad, or whatever it may have been here under the act of 1793, or whatever may have been the speculative opinions of writers as to what seems most appropriate, it is clear now, that no act of congress makes delay in taking out a patent fatal to the earliest or first inventor, unless he abandons his discovery to the

public, or, by his "consent," allows it to be put in "public use or on sale" for two years before taking out a patent. Then he forfeits his right in it. See Patent Act July 4, 1836, § 15; (5 Stat. 123;) Act March 3, 1839, (5 Stat. 353.) The plaintiff's patent would be good under the above qualification or the above statutory provisions. The great contest in the present case was, which person in point of fact first invented this kind of self-cocking pistol. There was no pretense that Elliot, the rival inventor, ever actually took out any patent for his supposed invention, or that either of them made, except one or two experimental pistols, or put any others in "public use," or on sale, till the year previous to the patent of the plaintiff, when several were made under the direction of the plaintiff, and not of Elliot. The plaintiff's invention then and thus, if not earlier, became perfected prior to Elliot's completing his. Allen's was also first patented, being the only one patented. Elliot sleeping twenty years after, and taking out no patent, is strong presumptive evidence against him as inventor. 3 Story, 171, [Woodworth v. Sherman, Case No. 18,019;] 3 Story, 754, [Same v. Stone, Case No. 18,021;] 1 Story, 336, [Alden v. Dewey, Case No. 153.] Again, though I have referred to all the statutory provisions now governing this point, there may, under former statutes, have been established a principle like the following. That is, notwithstanding priority in date of an invention, the party must proceed to perfect and patent it, with due diligence, otherwise a succeeding inventor, who is more diligent in perfecting his, though not getting out a patent, may prevail against or defeat him. But there was no attempt here to offer evidence, that Allen was not employed after his invention till his patent, or the year previous, in perfecting and improving his invention, or that he ever dedicated it to the public or meant to; or allowed it to be in "public use" without any patent "for more than two years prior to such application for a patent." See section 7, Patent Act of March 2, 1839. The laws were different in phraseology before these last acts, and the construction of them may be seen in 4 Mason, 108, [Mellus v. Silsbee, Case No. 9,404.] By the act of February 1, 1793, the invention must not have been "known or used before the application" for a patent. They were not so strong as now for the patentee, being now "not known or used" "before the discovery." Yet, under the old law, Judge Story held, "that the first inventor has a right to a patent, though there may have been a knowledge and use of the thing invented by others before his application for a patent, if such knowledge or use was not anterior to his discovery." Mellus v. Silsbee, [Case No. 9,404;] Washburn v. Gould, [Id. 17,214;] Pierson v. Eagle Screw Co., [Id. 11,156.] This he conceded was different from the English decisions on their patent law. But the language and de-

sign of their law in this respect were not like ours. See Hall R. 58; Davies, Pat. 429. He held, that there the use must be such as to show a dedication to the public, (1 Gall. 482, [Whittemore v. Cutter, Case No. 17,601;]) that the use must have been a public use, (Shaw v. Cooper, 7 Pet. [32 U. S.] 292; 1 Wash. C. C. 440, [Russel v. Union Ins. Co., Case No. 12,147;]) and with his knowledge, (Whitney v. Emmett, [Id. 17,585;] [Pennock v. Dialogue,] 2 Pet. [27 U. S.] 12, 20.) See, also, [Grant v. Raymond,] 6 Pet. [31 U. S.] 248; [McClurg v. Kingsland,] 1 How. [42 U. S.] 202. Hence, whatever may have been thought on this in England, as in Dollond's Case, in the special language of their law, (2 H. Bl. 487,) or by Phillips here, (Ev. p. 395,) before the act of 1839, it is clear under that act and the act of 1836, the intervening use, in order to defeat a prior invention, must be public, and with consent of the inventor, and continue two years. Reed v. Cutter, [Case No. 11,645.] Again, through the whole trial, as well as in his notice, the defendant denied that the plaintiff had made the invention earlier in time than Elliot, and went on the ground, that prior in tempore, potior in re. Hence he could not, without an absurdity, have insisted at the same time, that Allen had invented it first, but abandoned it afterwards to the public. The instruction then, as given, was correct upon the point raised, and on which it was given, and which alone was then under consideration. And no instruction should be given on any other points than such ones. The court, though seasonably requested, is not bound to instruct the jury on points not arising in the case, or on abstract and irrelevant propositions, points not raised by the evidence. [Van Hoesen v. Van Alstyne,] 3 Wend. 75; [U. S. v. McLemore,] 4 How. [45 U. S.] 289; [Doe v. Garrison,] 1 Dana, 35; [Sodousky v. McGee,] 4 J. J. Marsh. 194; [McNiel v. Holbrook,] 12 Pet. [37 U. S.] 84.

7. This disposes also of part of the seventh objection. The counsel for the plaintiff think an instruction was given, such as was desired under that head with the above explanation, and such is my own impression; and, on the second argument the counsel for the defendant waived this exception.

8. The eighth objection is overruled, because if the law allows a party to withdraw expressions, used in his first specification by inadvertence or mistake, and he does withdraw them, it would involve no little absurdity for the law afterwards to estop him in consequence of the very words which have been withdrawn or cancelled under its permission. The case of Kimball v. Belows, 13 N. H. 58, is very analogous to this view. It was a case of words, struck out of a count in a declaration, and afterwards attempted to be proved against the plaintiff, as his admissions and refused.

9. The next objection is a supposed omis-

sion by the court to instruct the jury, that if the plaintiff made his invention in 1833, and reduced it to practice, and concealed the same till he applied for a patent in July, 1837, the letters would be void in case that a similar invention was subsequently made, reduced to practice and put in use before he applied. It will be seen, by what has before been remarked under another head, that no question was made at the trial in relation to an use by the public of the plaintiff's patent for two years before he applied for it; and that there was no evidence whatever offered of such a "public" use of any other patent like his. It is also equally certain, that no evidence whatever was offered, or point made, that the plaintiff had invented, and improperly concealed his invention, till another person made and perfected a similar one. But, on the contrary, as before remarked, the contest was, whether he had invented it at all first, and this was inconsistent with any position, that he had invented but concealed it. The latter clause of this objection as to the instruction which was actually given, has before been considered, and, as before explained and limited, was the instruction proper on the evidence.

10. The next objection relates to that part of the charge to the jury, where the court stated, that if they believed in the first instance on the paper evidence, that the plaintiff had made out a case, he was entitled to recover, unless the defendant had in his defence rebutted or overcome it, or, in other words, turned the scales. The sentence, which follows in this objection, shows how the remark about turning the scales of evidence was applied and intended to be understood. It was thus. The plaintiff having made out his case, he stopped, and then the defendant went on and tried to make out a special defence, to overcome the right which the plaintiff had proved prima facie to recover, that is, he tried to "impugn the originality of the invention, or the similarity of the instruments," and of this, as a special defence, notice had been given on the record. It was observed on this by the court, that the defendants, to support that special defence, must, in the language of this objection, "offer such evidence as shall render it probable that the plaintiff was not the first inventor, or that the machines are not similar." The burthen of proof was on him to turn the scales in respect to this new matter which he had attempted to prove under his special notice. All remarks, like this now questioned, are right or wrong as applied or not to a particular state of pleadings, or particular course of trial and evidence. So far as regards these, the notice here was like a special plea in bar, the support of which belongs to the defendant in all cases. He must, in relation to that, after the plaintiff has gone far enough to make out a prima facie case, turn the scales in his own favor, or, in other words, take on himself the bur-

then of proof and discharge it. Thus one of the defences set up in the notice was a use of a like lock abroad in England before the plaintiff's supposed invention, and another was the use of such a lock previously in Westchester county in the state of New York. The idea intended to be inculcated was that the defendant, in respect to these particulars, must render them probable, he must turn the scales, the burthen was on him. If there could be any doubt of the correctness of such a direction in point of law, it will be removed by reading the case of *Powers v. Russell*, 13 Pick. 76. There is still another view of this matter. If some points in the declaration or claim by the plaintiff were contested, on which the plaintiff had made out a prima facie case, or offered enough evidence to turn the scales in his favor, it may have been suggested that then the defendant must offer enough, standing by itself, to render his position probable, or turn the scales as to that in his favor, else there would not be sufficient to overcome the balance already proved for the plaintiff. But it never was intended, and nothing is offered to show that the jury understood, they were on all controverted points in the declaration, which were common to that and the defence, not to compare in the end all the evidence on both sides, and find for whichever party the whole appeared to preponderate.

11. The next objection is, that the court instructed the jury, they might allow to the plaintiff in damages his actual costs, as well as any taxable cost he had paid in consequence of any violation of his patent, which the defendants had committed. I think so still. The fees of counsel were specially authorized to be allowed by my predecessor, (2 Mason, 119, [*Boston Manuf'g Co. v. Fiske*, Case No. 1,631,]) though at first he thought differently, (1 Gall. 482, [*Whittemore v. Cutter*, Case No. 17,601,]) Of course they must be reasonable fees. In cases of actions for breaches of covenants of seizin, where the object is an indemnity for the injury sustained, costs in former suits are not only allowed, but "reasonable counsel fees" beside. *Staats v. Ten Eyck's Ex'rs*, 3 Caines, 111; *Kingsbury v. Smith*, 13 N. H. 122; [*Pitcher v. Livingston*,] 4 Johns. 1; *Swett v. Patrick*, 12 Me. 9; *Beale v. Thompson*, 3 Bos. & P. 407; *Pitkin v. Leavitt*, 13 Vt. 379. The "actual damages" sustained, include all necessary and proper expenses in protecting one's violated rights. And though they should not include "smart money," or what is proper merely for example, they may well embrace everything really suffered by the wrong. 1 Baldw. 328, [*Whitney v. Emmett*, Case No. 17,585;] *Gray v. James*, [Id. 5,718;] *Whittemore v. Cutter*, [Id. 17,601;] *Washburn v. Gould*, [Id. 17,214.] In the admiralty courts, counsel fees are allowed by way of damages, and in one case \$500. *The Apollon*. 9 Wheat. [22 U. S.] 379. There is no exact

measure of damages, except in cases founded on contracts; and unless patentees are to be fully indemnified for injuries inflicted on them, they are destined in all valuable patents to be broken down by litigation alone. If they can escape that untoward fate now, from which Arkwright and Watts suffered so much at first, and by which Oliver Evans and many others have been ruined, and which the very importance and worth to the world of the property their genius has created, exposes them to only the more, it will be effected solely by giving to them an ample indemnity, a real and substantial, and not a mere technical one for rights, which are sacredly recognized both by the laws and the constitution. Indeed I am prepared, in all cases of wanton and persevering encroachments on the fruits of their honest inventions and labors, to go further, and do what congress, doubtless for this useful purpose, empowered this court to do, and that is, treble the damages, if required for the full indemnity and protection of any wronged patentee. See section 14, of Patent Law of July 4, 1846. This, I understand, has been done here on some former occasions.

12. The next objection on account of the damages is, that the jury were permitted to inquire of the clerk, and ascertain what damages had been given in two other patent cases recently tried here. I am surprised at this objection, when the inquiry was made by one of the jury in the box, in the presence of the court, counsel, and parties, and no objection raised to it at the time, nor any pretence now set up, that the reply of the clerk did not correspond with the record. The proper time to object to the admission of such a question and reply, is that which is conformed to in all other cases of testimony, where the parties and counsel and court are present, and is the time when the question is asked. It is not permissible to acquiesce then by silence, and take the chance of a favorable verdict on the sums stated in former trials, they both having been in this instance comparatively small, and make the objection for the first time after the jury have returned a verdict for a larger sum. It is well settled, that a new trial should not be granted for a cause existing at the trial, but which was not stated or excepted to then. Davidson v. Bridgeport, 8 Conn. 472; Nichols v. Alsop, 10 Conn. 263; Torry v. Holmes,] Id. 499; [Alsop v. Swathel,] 7 Conn. 500; State v. Hascall, 6 N. H. 352; 1 Wash. C. C. 440, [Russel v. Union Ins. Co., Case No. 12,147;] [Jackson v. Jackson,] 5 Cow. 173; [Wait v. Maxwell,] 5 Pick. 217; [Rice v. Bancroft,] 11 Pick. 469; [Ritchie v. Putnam,] 13 Wend. 524; [Den v. Geiger,] 4 Halst. [9 N. J. Law,] 225; [Worford v. Isbel,] 1 Bibb, 247; [Cannon v. Alsbury,] 1 A. K. Marsh. 76; [Pennock v. Dialogue,] 2 Pet. [27 U. S.] 15. The more especially is this so, when any wrong or misleading of the jury was likely to flow from the objection not

being then made. [Train v. Collins,] 2 Pick. 145; [Brazler v. Clap,] 5 Mass. 1, 4; [Newhall v. Hopkins,] 6 Mass. 350. New evidence may be admitted after a case is closed, and even after a jury has gone out, if no objection is taken at the time. [Jackson v. Tallmadge,] 4 Cow. 451; [Hutchins v. Childress,] 4 Stew. & P. 34; Parish v. Fite, 1 Law Rep. [Car. Law Repos.] 238.

13. The last objection is, that the sum returned by the jury as damages, was excessive. The court, from what had been noticed in respect to the probable damages, did not anticipate so large a sum. But it must be a very aggravated and oppressive case, where the court would feel justified in setting up its own opinion, even if decidedly different from that of the jury as to the true amount of damages in an injury in practical life, and as to business not susceptible of exact proof in its details, but peculiarly lying within the range of the experience and observation of a jury. It must stand, notwithstanding such difference, if the matter was submitted to their "fair judgment." Alden v. Dewey, [Case No. 153.] So nothing was left to the jury to be weighed in estimating the damages which the court, on reconsideration, deems to have been improper. Indeed, my predecessor was inclined to leave a very wide range to the jury on this subject, and hardly exclude any thing at all bearing on it from their consideration. Earle v. Sawyer, [Id. 4,247;] Pierson v. Eagle Screw Co., [Id. 11,156.] Retiring then with what is proper, or not objected to at the proper time, if in weighing all that is pertinent, the jury give more damages than any one witness testified to, it has been considered to be no ground for a new trial, as being excessive. [Brewer v. Inhabitants of Tyringham,] 12 Pick. 547; [Thompson v. Porter,] 4 Bibb, 70; [Tarlton v. Briscoe,] 1 A. K. Marsh. 67. The being excessive, is the last branch of this exception. If damages are slightly more than the court deem proper, they are not to be regarded as a ground for a new trial. [Luckett v. Clark,] Litt. Sel. Cas. 178; [Caldwell v. Roberts,] 1 Dana, 355; [Smith v. Carr,] Hardin, 317; [Van Slyck v. Hogeboom,] 6 Johns. 270; Stanley v. Whipple, [Case No. 13,286.] Some cases hold, that they must be extravagantly excessive, ([Worford v. Isbel,] 1 Bibb, 247; [North v. Cates,] 2 Bibb, 591; [Roberts v. Swift,] 1 Yeates, 209;) unless some exact measure of damages exists in the case, as it does in suits on some contracts, (5 Mason, 497, [Thurston v. Martin, Case No. 14,018;] [Coffin v. Coffin,] 4 Mass. 1, 11; [Com. v. Justices of the Court of Sessions,] 5 Mass. 435.) Others, that they must be unreasonable. Sampson v. Smith, 15 Mass. 365. Or, in torts, flagrantly excessive. [Vanzant v. Jones,] 3 Dana, 464; [Outton v. Barnes,] Litt. Sel. Cas. 136; [Respass v. Farmer,] 2 A. K. Marsh. 365; [Webber v. Kenney,] 1 A. K. Marsh. 345; [Owings v. Ulory,] 3 A. K. Marsh. 454; [Vunck v. Hull,] 2 Penn.

[3 N. J. Law,] 814; [Deacon v. Allen,] 1 South. [4 N. J. Law,] 338, 386; [Clark v. Binney,] 2 Pick. 113; [Shute v. Barrett,] 7 Pick. 82; [Bodwell v. Osgood,] 3 Pick. 379; [Coffin v. Coffin,] 4 Mass. 1; [Coleman v. Southwick,] 9 Johns. 45; [Southwick v. Stevens,] 10 Johns. 443; [Sargent v. —,] 5 Cow. 106; [Ives v. Bartholomew,] 9 Conn. 309.

It is true in this case as stated by the counsel for the defendant, the evidence as to damages on either side was general and somewhat loose. This arose from the fact, that the contested right was the main question. But the objection is not well founded, that nothing was submitted to the jury which justified any damages, or anything like the sum given. 1 Baldw. 328, [Whitney v. Emmett, Case No. 17,585.] For it was certainly shown, that the respondents made and sold pistols similar in principle to the plaintiff's, that the improvement in them was a valuable one, that there had been a long and expensive trial between these parties on the subject in New York, and another here before the present one; and every man fit for the jury box could, from all this, without having the particulars in bills of cost, form a general opinion, likely to be very sound and not unjust, as to the sum in damages which would probably indemnify the plaintiff. Washburn v. Gould, [Case No. 17,214.]

Having gone through with the specific reasons assigned for a new trial, and come to a conclusion against their sufficiency, it seems proper now to advert to some other considerations of a general character, connected with several of the objections that might in some cases operate in favor of a new trial. They are, that the counsel on the part of the defendants, and those on the part of the plaintiff, do not always agree in respect of what was in fact done or omitted to be done at this trial; and that some requests to the court, made in the argument of the cause as to charging the jury, were not complied with when the charge was finally given.

I can readily conceive of cases, where the differences in recollection between the counsel were so great after the lapse of several weeks, and the point so material, about which they differed, that the court might deem a new trial necessary to a right disposal of the case. But here, the court feels satisfied, where they differ on what is material, and it is for the court in such case to decide on these differences. (Bond v. Cutler, 7 Mass. 205; [Inhabitants of the First Parish in Brunswick v. McKean,] 4 Greenl. 508.) that, looking to its own minutes and the leading points made on each side, the course pursued at the trial was such as it has just explained under the different objections; and in respect to the merits of the case, as tried and settled in the end, that no injustice is likely to happen from coming to the conclusion, not to disturb the verdict. Again, I can con-

ceive of cases in the hurry of a trial at nisi prius, and one like this of ten days' length, where some omission of the court or counsel must have had such an influence on the verdict as to require a new trial. For there may be mistakes, not to say sins of omission as well as commission, in all concerned in administering the laws. But the omissions, supposed to have occurred here in charging the jury on particular points, are not admitted by the counsel on the other side to have happened in some of the cases supposed; and, in the others, they related to questions as before shown, which did not arise on the evidence, and on which instructions ought not to be given. It is well, also, in all cases to remember, that after a judge has charged the jury, in a written list of the points, on which instructions are requested by either party, has not been handed to him in conformity to the practice in most of the states south of us, it is their duty after the charge is closed, to call his attention to any point which has been omitted, as some oversights are likely to happen where the points are numerous, and the evidence to be commented on to the jury is very abundant and complicated. Stanton v. Barrister, 2 Vt. 464. If the counsel do observe such omissions at the time, and do not mention them, so that they may be corrected and supplied at once, before the jury go out, it would be a very dangerous practice to let his client take the chance of a verdict, before naming them, and then, if losing the verdict, for the first time proceed to suggest the omission as a ground for a new trial. On the contrary, if counsel do not at the time observe any omissions, it is pretty conclusive evidence, that the points omitted were not then deemed very material, since they did not make so much impression on their minds as to cause them to notice that instructions had not been given concerning them.

My own opinion as to the importance of any points omitted, which were relevant, corresponds with this supposition, that they were of little weight, and did not alter the verdict in any respect. There are some cases on this point not uninteresting. Thus it has been settled, that it is no ground for a new trial, if the judge omitted to charge on some points, unless the omission probably influenced or changed the verdict. [Grimes v. Coyle,] 6 B. Mon. 301; Grah. N. Tr. 273; [Morrison v. Muspratt,] 12 Moore, 231; Armstrong v. Toler, 11 Wheat. [24 U. S.] 277; Calbreath v. Gracy, [Case No. 2,295;] [Den v. Sinnickson,] 4 Halst. [9 N. J. Law,] 149. And that it is too late to remind the court of any omission after the jury have retired. State v. Catlin, 3 Vt. 534. In fine, the general rule as to new trials throughout is not to disturb the verdict, if it appears to be according to the justice of the case, and the ruling is only doubtful in point of law. [Rodgers v. Page,] Brayt. 169; [Breckinridge

v. Anderson,] 3 J. J. Marsh. 710. Though, if the ruling be clearly wrong, it will be, as a general rule, a good ground for a new trial. [Doe v. Buford,] 1 Dana, 481, 502; [Gillespie v. Gillespie's Heirs,] 2 Bibb, 89; [Wardell v. Hughes,] 3 Wend. 418. But in examining the elementary books and cases on this subject, it is highly important to discriminate what are the exceptions from what is the general rule on this last point. Thus, as a general rule, though it will be a ground for a new trial, if illegal testimony is admitted, ([1] Grah. N. T. 236, 237, and cases cited; 2 Wash. C. C. 276, [Stevellie v. Read, Case No. 13,389]; [Walker v. Leighton,] 11 Mass. 140,) yet it is equally well established as an exception, not to grant a new trial if it be manifest that the illegal evidence has not prejudiced the case, ([Winchell v. Latham,] 6 Cow. 682; [Tullidge v. Wade,] 3 Wils. 18; [Horford v. Wilson,] 1 Taunt. 12; [Strange v. Wigney,] 6 Bing. 681.) Or if the legal objection is merely technical, e. g. as to admitting a printed statute when an exemplification is proper; and when on a new trial the same result will probably happen. [Ackley v. Kellogg,] 8 Cow. 223; [Watkins v. Towers,] 2 Term R. 275; [Norris v. Badger,] 6 Cow. 449. Or if the evidence became immaterial, and the jury did not rely on it probably. [Marquand v. Webb,] 16 Johns. 92; [Osgood v. Manhattan Co.,] 3 Cow. 621; [Preston v. Harvey,] 2 Hen. & M. 55. Or if there was enough to justify the verdict without it, on examining the report of the case. [Doe v. Tyler,] 6 Bing. 561. Or if the rejection was right, but on a ground different from that assigned. [Lessee of Ludlow's Heirs v. Park,] 4 Ham. [4 Ohio,] 5; [Longes v. Kennedy,] 2 Bibb, 608. So, if incompetent evidence be admitted, the court will not grant a new trial if it was not material. [State v. Chesley,] 4 N. H. 369; [Bunce v. Wolcott,] 2 Conn. 31; [Jewett v. Stevens,] 6 N. H. 80, sed quaere; [Prince v. Shepard,] 9 Pick. 176. Or if no injustice appears to have been done by it. [Brown v. Wilde,] 12 Johns. 455; [Den. v. Vancleve,] 2 South. [5 N. J. Law,] 765; [Barney v. Goff,] 1 D. Chip. 304; [Thurlow v. Massachusetts,] 5 How. [46 U. S.] 509; [Hamblett v. Hamblett,] 6 N. H. 333. Or if cumulative merely. [Lessee of Allen v. Parish,] 3 Ham. [3 Ohio,] 107; [Stone v. Stevens,] 12 Conn. 219. Or if not controverted. [Crosby v. Fitch,] Id. 410. Or if the fact was proved also by other evidence. [Norris v. Badger,] 6 Cow. 449. So, [Horford v. Wilson,] 1 Taunt. 12, and [Nathan v. Buckland,] 2 Moore, 153; [Prince v. Shepard,] 9 Pick. 176; [Supervisors of Chenango v. Birdsall,] 4 Wend. 453; [Stiles v. Tilford,] 10 Wend. 338. Again, it is a general rule to grant a new trial if there was any misdirection on the law to the jury. [1] Grah. N. T. 262, cases cited; [Boyden v. Moore,] 5 Mass. 365. But it is an exception, if no injustice seems to have been done by it, as if it was on a trifling or immaterial point; or did not affect

the verdict; or if justice appears to have been done. [Johnson v. Blackman,] 11 Conn. 342; [Olmsted v. Hoyt,] Id. 377; [Lee v. Chambers,] 3 J. J. Marsh. 506; [Dole v. Lyon,] 10 Johns. 447; [Woodbeck v. Keller,] 6 Cow. 118; [Hoyt v. Dimon,] 5 Day, 479; [High v. Wilson,] 2 Johns. 46; [Boyden v. Moore,] 5 Mass. 368; [Dudley v. Sumner,] 5 Mass. 438, 487; [Estwick v. Caillaud,] 5 Term R. 425; [McLanahan v. Universal Ins. Co.,] 1 Pet. [26 U. S.] 183; [1] Grah. N. T. 301, 341, 342, and cases cited; [Smith v. Frampton,] 2 Salk. 644; [Deerly v. Duchess of Mazarine,] Id. 646. Or the objection was only technical. [Edmondson v. Machell,] 2 Term R. 4; [Cox v. Kitchin,] 1 Bos. & P. 338, and note; [Robinson v. Cook,] 6 Taunt. 336; [Springer v. Rowdoinham,] 7 Greenl. 442; [Haynes v. Jenks,] 2 Pick. 177; [Baylies v. Davis,] 1 Pick. 206; [Hoyt v. Dimon,] 5 Day. 479; [Brown v. McConnell,] 1 Bibb, 265; [Owens v. Conner,] Id. 606. It is an exception, too, if the point was frivolous or litigious. [Coit v. Tracy,] 9 Conn. 1; [Aylwin v. Ulmer,] 12 Mass. 22; [Tyler v. Ulmer,] Id. 163; [Hyatt v. Wood,] 3 Johns. 239; [Jaques v. Todd,] 3 Wend. 83; [Goodrich v. Walker,] 1 Johns. Cas. 250; [Hunt v. Burrel,] 5 Johns. 137; [Robbins v. Treadway,] 2 J. J. Marsh. 546.

Furthermore, if I could find errors in the instructions to the jury, not specified, which led or were likely to lead to injustice, such as my remarks, that the improvement was useful in itself, though in fire-arms or instruments of war and death, because increasing the powers of high civilization over barbarism, and thus tending to preserve and perpetuate all the benefits of the former from the destruction which, in former ages, often assailed it from rude force; and my other remark, that if this invention was not useful to the community in making pistols, the defendants would not be likely to use it; or if other presumptions of error existed, because the finding for the plaintiff by the jury was unexpected and strange, when in fact the plaintiff alone had taken out any patent for this improvement, and had first brought it into general use, and the defendants had not pretended themselves to have invented it; or because the giving so much damages for a violation of so useful a patent, was matter of surprise, when the whole amount was not likely more than to indemnify him for all his costs and expenses in so protracted and severe a litigation, and much less all his losses of larger sales and profits. I say, if injustice was thus apparently stamped on any part of the proceedings by observations not objected to, or by occurrences, which the court is now conscious were wrong, it would make me hesitate in refusing another trial. But when the whole aspect of the case is the other way, it seems to be my duty, in the exercise of a sound discretion, not to disturb what the jury have decided.

The second motion for the allowance of a bill of exceptions to be now filed, so as to embrace these reasons assigned for a new trial, in order to bring a writ of error on them, involves several considerations, different from those in the naked motion for a new trial. This second motion is founded upon the special proviso to the seventeenth section of the patent act of July 4, 1836. That section allows a writ of error and appeals "to the supreme court of the United States in the same manner and under the same circumstances as is now provided by law in other judgments and decrees of the circuit courts, and in all other cases in which the court shall deem it reasonable to allow the same." This presents a novel question. I am not aware of any case, and none is referred to on either side, where this portion of the patent law has received a construction in any court during the ten years since its passage. In the absence of any decision, I am inclined to the opinion, that however anxious my wishes are to facilitate attempts of parties to have a revision of the decisions of this court whenever dissatisfied with them; yet I am limited by congress in my power to allow it, and must confine the indulgence to cases where it appears to the court to be "reasonable," looking to the subject-matter of this provision, and the general law as to appeals. Opposing parties, also, have an interest in this matter against further delay and expense; and the public has a policy as to limited jurisdiction in suits, which is to be respected; and, therefore, without yielding to my own wishes to permit a writ of error or appeal in all cases, I must execute the act of congress as it exists in regard to the public interest and the convenience and rights of parties.

What then is reasonable as a general rule in respect to this request? Adverting to the manifest policy of the law as to appeals and writs of error, independent of this particular provision, it will be seen, that most cases are to be disposed of finally, in the states where one of the parties resides, as less expensive and more convenient, unless the amount in controversy be as large as \$2,000, or unless the judges disagree in their opinions. There is nothing in the public policy as to the sum being now too large, which limits appeals, and hence causing a disposition to carry up cases of smaller pecuniary importance. On the contrary, two thousand dollars was regarded as high here in 1789, as three or four thousand would be now. The necessary delay of justice in the supreme court, beyond what once existed before the country grew to be so much larger and wealthier, increases the grievance of being compelled to go there unless required by strict law. I regard these objections more than any additional expense in further

hearings there, at such a distance, instead of nearer home, as the attendance of witnesses and parties is not required there. But they all show, that in a case where the amount, as here, is little over half of what was required in 1798 to carry a case up, it should not be deemed reasonable to aid in doing it, unless to promote some great end or interest, not involved simply in the payment of the sum, found as damages in this particular case. One of those ends undoubtedly is, uniformity in the construction of our great system of patent laws throughout the United States, and because questions connected with the patent laws themselves, when decided, govern numerous other cases and much larger amounts than are disclosed in any one verdict.

These considerations show that the exceptions to be allowed, using a reasonable discretion, ought to relate to constructions of the patent laws. If not to be confined to these, why limit the indulgence to patent cases? There is no reason why, as to the other incidental questions, not relating to patents, the parties in these suits should enjoy privileges concerning their decision, not enjoyed by other suitors as to such questions. Why should it be permitted, then, as to matters casually connected with suits upon the patent acts? Why, if adverting to the public interests, or the rights of opposing parties, prolong litigation on such points at great inconvenience, delay, and expense? So it is discreet and reasonable to confine the appeals, even on patent questions under the patent laws, to such as involve important and not trifling matters, connected with those laws, not mere technical difficulties; also to such as involve questions really doubtful. If the discretion concerning what is "reasonable," which is to be exercised by the court, is not to extend to a selection of cases having questions, that really relate to the patent laws, congress would have provided, that appeals should exist in respect to all patent actions without distinction. Looking to the first test, none of the causes assigned for a new trial, are to be considered in deciding as to a bill of exceptions, but the 5th, 6th, 7th, and 9th, as none others relate to the construction of the patent laws. Now the fifth, as it will be seen, if allowed in any form, must be in one already substantially settled by the supreme court in *Stimpson v. Westchester R. Co.*, 4 How. [45 U. S.] 380, before cited; and one, probably not controverted by the defendant, when explained as it is understood by the court. The sixth, as has been shown, either attempts in its present form to raise a point about a "public use" of the plaintiff's patent, which was not made at the trial; or if it merely relies on the position, that a prior invention is not valid when a subsequent one is made, but not patented, before the first one is patented,

it seems too clear against the defendant to hang a doubt on. The seventh is now abandoned. The eighth is for a supposed omission to instruct the jury on particular points, and not for mis-instructions, and of course cannot be ground for a bill of exceptions independent of what has before been said against the intrinsic character of the rulings desired upon it. The case does not, therefore, seem to contain matter to make it a reasonable one for granting this privilege. Both motions are refused; and judgment must be entered on the verdict.

Case No. 218.

ALLEN v. BROOKLYN.

[8 Blatchf. 535; 4 Fish. Pat. Cas. 598.]¹

Circuit Court, E. D. New York. July 12, 1871.

PATENTS FOR INVENTIONS — INFRINGEMENT BY BOARD OF EDUCATION—LIABILITY OF CITY.

The city of Brooklyn is not liable to the patentee of a patented seat, for the use thereof in the public schools of the city, under the direction of the board of education, which purchased and owns the seats, the corporation of the city not using the seats, and having no power, by law, to direct the discontinuance of their use.

[In equity. Bill by Aaron H. Allen against the city of Brooklyn to enjoin infringement of letters patent No. 12,017. Injunction refused.]

John A. Beall, for plaintiff.
William C. De Witt, for defendants.

BENEDICT, District Judge. I am of the opinion that this action cannot be maintained against the city of Brooklyn—not, however, by reason of any exemption from liability secured by the act of 1862, (Bliss v. City of Brooklyn, [Case No. 1,544,]) but because the use of the complainant's patent seats in the public schools of the city, under the direction of the board of education, to which body the seats belong, does not create a liability on the part of the corporation of the city of Brooklyn to pay the complainant for the use of his patent. The injunction prayed for, if granted, would be of no effect, as the corporation of the city has no power, by law, to direct the discontinuance of the use of the seats. The seats are not used by the corporation of the city, but by the board of education, the purchaser, and any injunction, to be effectual, must issue against that body.

[NOTE. For other cases involving this patent see note to Allen v. New York, Case No. 232.]

¹[Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

Case No. 219.

ALLEN v. The CANADA.

[Bee, 90.]¹

District Court, D. South Carolina. March, 1798.
SALVAGE SERVICE — WHAT CONSTITUTES — COMPENSATION.

1. Compensation granted for keeping company with the distressed vessel, at the earnest request of her captain.

[2. Cited in The Williams, Case No. 17,710, as authority for remedy in rem for services not upon or in contract with the ship, nor upon which the salvation of the vessel depended.]

[In admiralty. Libel for compensation for services. Decree for libelants.]

From the pleadings and evidence it appeared that the Canada, [John] Sewall, master, on a voyage from Jamaica to England, having lost her rudder, and sprung her foremast in a storm, was obliged to bear away for the first port. She came to anchor off the bar of Charleston; when the captain came ashore for assistance, and returned with a new rudder, six fresh hands, and a pilot. The ship, in another storm, parted her cables, and was driven out to sea. After several days she fell in with Allen's brig, bound from New York to Charleston, and entreated Allen to stay by the ship, and assist, if necessary, in conducting her back to the bar. With this he readily complied; kept company all day, and carried a light through the night. The next day they made the lighthouse; and, the wind being more moderate, the brig towed the ship towards the bar for two or three hours; after which the ship anchored, and the brig came up to Charleston. The ship arrived, without further assistance, on the following day; and the present suit is brought for compensation. Salvage was claimed in the libel, but that ground was abandoned. Though the captain of the ship had expressed great solicitude to have the brig in company, yet the pilot and others from Charleston, who went to her assistance, concur in saying that the ship was in no immediate danger. She carried sail, notwithstanding the injury done to the foremast, and was manageable, notwithstanding the loss of her rudder. Though leaky, she was cleared of water by pumping half an hour in every hour, and that with a single pump; the cargo was not at all damaged. The crew of the ship, however, acknowledge that they derived much comfort from the presence of the brig, as they could rely upon her aid in case of greater danger. The two vessels were together a day and a half; but the brig never went out of her course, nor did she receive the least damage. Three hundred dollars had been offered by way of compensation, but refused.

The judge decreed four hundred, and ordered the defendant to pay costs of suit.

¹[Reported by Hon. Thomas Bee, District Judge.]

Case No. 220.

ALLEN v. CROGHAN.

[5 Cranch, C. C. 517.]¹

Circuit Court, District of Columbia. Nov. Term, 1838.

JUDGMENT — EXECUTION — GARNISHMENT — INTEREST.

When the judgment against the principal is for a larger sum than the real debt, to be released on payment of the real debt, with interest until paid, upon which judgment an attachment is issued by way of execution, under the Maryland act of 1715, c. 40, § 8, and judgment of condemnation is rendered of the effects in the hands of the garnishee, and execution is issued thereupon, the marshal may levy the whole debt and interest to the time of payment, if there are effects of the principal to that amount in the hands of the garnishee.

This was an attachment issued by way of execution under the Maryland act of 1715, c. 40, § 8, to condemn the effects of Isaac S. Nicholls, in the hands of George Croghan, his garnishee, upon a judgment obtained against Nicholls for \$1,000, damages and costs, to be released on the payment of \$560, with interest thereon from the 7th of April, 1832, until paid.

Judgment of condemnation having been obtained, Mr. C. Cox, for the garnishee, contended that the marshal could not levy interest upon the debt accruing after the day upon which the judgment of condemnation was entered up.

But THE COURT decided and said, that as the original judgment was for a larger amount than the real debt, to be released upon payment of the real debt, with interest from a certain day until paid, the interest may be levied up to the day of payment, if there are sufficient effects in the hands of the garnishee.

Case No. 221.

ALLEN v. DALLAS & W. R. CO.

[3 Woods, 316.]²

Circuit Court, W. D. Texas. Aug., 1878.

RAILROADS — BONDS AND MORTGAGES — FORECLOSURE — RECEIVERS.

1. Service of notice or process upon the officer of a railroad company, authorized by its charter or the law to receive service, is good, although such officer may fraudulently conceal the fact of such service from other officers of the company.

2. But where such officer fraudulently conceals the service upon him of a motion for the appointment of a receiver of the property and effects of the railroad company, and by means of such concealment the company fails to resist such appointment, and claims that the same is an invasion of its rights, and ought not to have

¹[Reported by Hon. William Cranch, Chief Judge.]

²[Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

been made, the court will re-open the case and allow the company to move to vacate the appointment.

3. An unreasonable delay in making the motion to vacate the appointment of the receiver will be regarded as an acquiescence in such appointment.

4. Persons who hold negotiable railroad bonds as collateral security for the payment of debts due them by the railroad company, are bona fide holders for value, and are entitled to enforce the payment of the bonds as long as the debts for which they were hypothecated remain unpaid.

5. Where a deed of trust executed by a railroad company mortgaged its income and profits, as well as its railroad and other property, to secure the payment of the principal and interest of its bonds, and authorized the trustees, in default of the payment of the interest, to take possession of the mortgaged property, and apply the income to the payment of the interest: *Held*, upon the application of the trustees, that such default was a sufficient ground for the appointment of a receiver.

6. In such a case, the appointment of a receiver should not be denied because it is not shown that the property mortgaged is insufficient to pay the mortgage debt, or that it is in jeopardy, or that the company is insolvent, or because the amount due on some of the bonds is in dispute.

7. The charter of a railroad company conferred on it a large grant of land, but provided that unless twenty miles of its road were completed and in order for use before a date named, both the charter and the land grant should become forfeited. The company had issued and sold 250 bonds of \$1,000 each, which were secured by a deed of trust on its road and other property. The company was insolvent. About two miles of the twenty miles of its track remained to be built, and little over one month of the time limited for the completion of the twenty miles remained. The company was unable to procure the means to build the remaining two miles, the contractor for building the road had failed and had abandoned his contract, and there was imminent danger of the forfeiture of the charter of the company and of its grant of lands. *Held*, that under these circumstances, it was the duty of the court, upon the application of trustees of the bondholders, to appoint a receiver, with authority and orders to complete the twenty miles of road within the time limited by the charter.

8. Where a contractor for constructing a railroad was entitled, under his contract, to the possession of the road until his contract was completed, and he received from the railroad company a large number of bonds which were secured by a trust deed on the road, which authorized the trustees to take possession of the road upon default in the payment of the interest on the bonds, and the contractor transferred the bonds for value: *Held*, that his right to the possession of the road, under his contract with the company, was subordinate to the right of the trustees to the possession upon default in the payment of interest on the bonds.

[In equity. Suit by Thomas Allen and George H. Nettleton against the Dallas & Wichita Railroad Company for foreclosure of mortgage.] Heard at chambers, on motion of defendants to vacate order for appointment of receiver. [Motion overruled.]

On May 24, 1878, the complainants filed their bill, and moved at chambers, before the circuit judge, for the appointment of a receiver of the property and effects of the

defendant railroad company. Counsel appeared for the railroad company and the defendant Malcolm Henderson, who was a contractor for the construction of the railroad, and was alleged to be in possession of its track and other property, and, upon the showing made by the bill and the testimony submitted, the court appointed a receiver, the defendants' counsel making no opposition. The receiver took possession of the property of the defendant railroad company on May 27, and proceeded, under the authority of the orders of the court, to expend about \$5,000 thereon. Afterwards, on June 26, a notice was served on complainants that, on July 8, the defendant railroad company and Silas Reed, also a defendant, would move the court to vacate the order for the appointment of a receiver upon the answers and affidavits on file. Complainants and defendants being both represented by counsel, the motion of the defendants was heard upon July 8, the day named in the notice.

The bill was filed by Thomas Allen and George H. Nettleton, citizens of Missouri, as trustees named in a deed of trust executed by the defendant railroad company to secure its first mortgage bonds. The bill averred, in substance, that the Dallas & Wichita Railroad Company was duly incorporated by the state of Texas to construct and use a railroad from Dallas, in said state, northwestwardly through the town of Denton to any point on the waters of the Red or Canadian rivers, within the territory of Texas. That the company had constructed a railroad from Dallas to an unnamed point about 18 miles distant, in a northwestwardly direction, and was maintaining and using the same. That the legislature had granted to the railroad company sixteen sections of land, of 640 acres each, for every mile of railroad constructed by it, in accordance with the provisions of the act making the grant, and that the company had received a portion of said lands. On June 5, 1877, as the bill alleged, the railroad company had constructed ten miles of its road, and for the purpose of securing 1,250 bonds, of \$1,000, each, to be issued by it, in order to raise money thereon to complete its line of road, did, being duly authorized so to do, execute and deliver to complainants, as trustees, a deed of trust upon all the right and title which the company had or might thereafter acquire in lands granted to it by the state of Texas by act approved May 24, 1873, and also upon the railroad of said company then or thereafter to be constructed from the city of Dallas, for the distance of one hundred miles in a northwestwardly direction, and all its equipments then owned or to be thereafter purchased, and "all the income, revenue and tolls of said railroad and property and all the franchises and rights" of said company, and all property of any description acquired and to be thereafter acquired by it.

The bonds were made payable to complainants as trustees, or bearer, on July 1, 1897, at the office of the Union Insurance Company in New York, with interest at the rate of seven per cent per annum, payable semi-annually at the place aforesaid, on the first days of January and July of each year, and as the bonds declared, "on the presentation and surrender of the annexed coupons as they severally fall due;" and in case of default in the payment of any semi-annual installments of interest which had become due and had been demanded, and in case such interest should remain unpaid for three months after such default and demand, then the principal of the bonds might be declared and made due in the manner provided in the deed of trust. The deed of trust also provided that upon default in the payment of the principal or interest, and a continuance of such default for the period of three months, then all of said bonds should immediately become due, and it should be competent and lawful for said trustees to enter upon and take possession of the premises and property conveyed by the trust deed, and upon the written request of the holders of one-tenth of said bonds, at any time outstanding and unpaid, it was made the duty of said trustees to enter upon and take possession of all the trust property, and to have, use and employ the railroad and all its appurtenances and property thereto belonging and proper for its use, and to manage and operate the same, and to apply the proceeds thereof pro rata to the payment of the principal and interest of the bonds outstanding and unpaid, for all which they were to receive a reasonable compensation. Or they might cause the trust property, or so much as might be necessary to pay the amount due and unpaid on said bonds, to be sold after ninety days' notice, and upon such sale to make and deliver to the purchaser a deed in fee simple for the same, and to apply the proceeds of such sale, after paying the costs and expenses of the sale, to the payment of the principal and interest of said bonds. The deed of trust further provided that it should be lawful for the railroad company to manage and use said railroad and property, and to receive and dispose of the current revenues thereof until default in the payment of the principal or interest of said bonds, or some of them. After the said deed of trust had been duly executed and recorded, the railroad company, according to the averments of the bill, executed and sold in the market, for a valuable consideration, its two hundred and fifty bonds of one thousand dollars each, all dated July 5, 1877, payable, both principal and interest, as above stated, and the bonds are all outstanding, and are now owned by bona fide purchasers for value. The railroad company made default in the payment of the interest due on said bonds on January 1, 1878, and payment thereof was demanded, and such

default continued more than three months after such demand, and it was therefore claimed and averred that all said bonds, both principal and interest, had become due, and it was averred that all the holders of the bonds had united in a request to the complainants, as trustees, to enforce the said deed of trust and the trust thereby created.

The bill further alleged that the defendant Malcolm Henderson was and had been in possession of the company's railroad, receiving the tolls and profits thereof ever since the execution of said mortgage, under a contract whereby he was to construct said railroad for a certain consideration, and in the mean time, and while such construction was going on, to possess and use the same, and said Henderson had not only failed to provide for and pay the interest on the bonds issued by the company, but had stopped the further construction of the railroad. The charter of the railroad company, and the acts of the legislature amendatory thereof, declared that unless twenty miles of its railroad should be fully completed and in operation by the first day of July, 1878, the charter, with the land grant thereto attached, should become forfeited, whereby the security of the bondholders would be wholly lost. Henderson, in the construction of the eighteen miles of said railroad, had contracted many debts for labor and materials; suit had been brought on the same against the railroad company, and judgment obtained thereon against the company, although said debts were the debts of Henderson, and executions had issued on the judgments, and the railroad had been levied on and advertised for sale. The complainants further alleged that they were apprehensive, not only that the charter of said railroad company would become forfeited, but that the income and tolls of said railroad would be wholly diverted from the payment of the interest on the bonds, and applied to the payment of said judgments and other unsecured claims against said Henderson and the railroad company. Henderson, Silas Reed and other persons, who, it was alleged, had, or claimed, some interest or lien upon the railroad, were made defendants to the bill, and the bill prayed for the appointment of a receiver to take possession of the railroad and other property of the railroad company, and to manage and use the same, and for a foreclosure and sale of the property covered by the deed of trust. This bill was verified by the oath of Geo. H. Nettleton, one of the complainants, who swore that he had read and knew the contents thereof, and that he believed the same to be true.

Upon the statements of the bill, and the production of the coupons due January 1, 1878, with the protest of the notary showing demand of payment on that day and non-payment, and proof that the holders of all the bonds had united in a request to

the trustees, complainants, that they should enforce said deed of trust and the trusts thereby created, and no objection being made by either the railroad company or the defendant Henderson, the court appointed Ira Harris, the secretary of the Kansas Rolling Mill, receiver of the said trust property.

The grounds of the motion to discharge the receiver were: 1. That the railroad company was not served with notice of the motion to appoint a receiver, and the appointment, so far as it was concerned, was *ex parte*. 2. That the railroad company had never negotiated any of its bonds, and that there had been no default on its part. 3. That there was, in fact, no necessity for the appointment of a receiver, and upon all the facts of the case one should not have been appointed.

Alexander White, for the motion.

J. Brumback and C. W. Blair, contra.

WOODS, Circuit Judge. 1. The facts concerning notice to this company, of the motion for the appointment of a receiver, were these: A notice was served on J. W. Calder, the vice-president of the company, on May 18, 1878, in the city of Dallas, Texas, where the principal office of the defendant railroad company was, during the absence from the city of W. H. Gaston, the president, and Calder authorized counsel to appear for the railroad company. The service of a notice upon the vice-president of the company, under these circumstances, was a good service upon the company, according to the statutes of Texas and the by-laws of the company. No objection was made by Calder to the form of the notice or the manner in which it was served on him. Neither the complainants nor their counsel were responsible for what Calder did after this notice was served on him. He was the representative of the company, appointed by it, and if he was an unfaithful agent, the principal of the agent, according to the general law, and not other parties, must suffer by his neglect or misconduct. There is no proof and no claim that either the complainants or their counsel were in any complicity with Calder to prevent notice of the motion for a receiver from coming to the knowledge of other officers of the company. The proof shows that Calder was acting as agent for one of the bondholders, and that he did not communicate the fact that a motion was to be made for a receiver to any other officer of the company. There is no doubt, also, that if the president and other agents of the company had received notice of the motion, the company would have resisted it, and there is little doubt that Calder purposely kept them in ignorance of the fact that the motion was to be made. This is the conviction left on my mind by all the evidence. Waiving for the present any consideration of the delay of the defendants in giving

notice of their purpose to make the present motion, under the circumstances of the case, if now, any of the defendants in interest can make it appear that the appointment of a receiver by the court was an invasion of their rights, that the facts did not justify such an appointment, and that the same was unadvisedly and improvidently made, I think they ought to be heard and the appointment revoked, and the condition of things before the appointment, as far as possible, restored. The question, therefore, is presented whether, in view of all the facts now made to appear, the court should in the first instance have appointed a receiver. To sustain its side of this issue, the railroad company has filed its own answer, sworn to by W. H. Gaston, its president, the answers of Silas Reed, A. T. Obenhain and Jules Schneider, and the affidavits of W. H. Gaston, president, and Geo. Shields, secretary of the railroad company, and W. M. Johnson, engineer. The complainants, to sustain the appointment of the receiver, offer the bill verified, as before stated, by one of the complainants, and the affidavits of Wallace Pratt, C. W. Blair, J. W. Calder, Ira Harris, W. L. Doane, J. Brumback, J. B. J. Fenton and C. F. Stevens. They also again produce 250 coupons due January 1, 1878, cut from the first mortgage bonds of the railroad company, with evidence of their presentation for payment and of their non-payment.

2. The claim that the railroad company has never issued its bonds and that no default has been made in the payment of the coupons is entirely unsustainable. On the contrary, the proof is conclusive not only that the bonds were issued by the company, but that it received full value for every bond issued. The facts, as shown by the testimony, are as follows: One Alexander Calder was a creditor of the railroad company to the amount of twenty thousand dollars, for which he held the obligation of the company, secured by a mortgage duly recorded on February 12, 1876, on the company's road and property; and that, to secure a release and cancellation of this mortgage, the railroad company caused to be transferred to him sixty of the first mortgage bonds in suit, to be held by him as collateral security for the payment of his claim. This stipulation was carried into effect. The sixty bonds were delivered to W. E. Hughes, as trustee for Alexander Calder, who thereupon dismissed a suit which he (Calder) had commenced in this court to foreclose his mortgage, and entered a release of the mortgage on record. Afterwards, about April 1, 1878, the railroad company having failed to comply with the stipulations which said bonds were pledged to secure, the same were, in strict conformity with the terms of the contract of pledge, sold in New York city after due notice by an auctioneer, and bought in by said Alexander Calder, who thereupon

became their absolute owner. As to the remaining one hundred and ninety bonds, the proof shows that they were delivered by the railroad company to Malcolm Henderson, the contractor for the construction of the railroad, in payment of the work done and to be done by him, and to enable him to procure materials to carry on and complete his contract for the construction of the railroad, and that by the assent of Henderson and of the railroad company, the one hundred and ninety bonds were transferred to Ira Harris, the agent of the Kansas Rolling Mill, as trustee, to hold as collateral security for the payment of certain notes given by Henderson to the Kansas Rolling Mill Company, for iron furnished for the railroad, and which had been laid down in the track, and with power to sell said bonds at public or private sale in the event the said notes of Henderson were not paid at maturity, the proceeds of the sale to be applied to the payment of Henderson's notes. In fact, all the iron used in laying the track of the railroad was furnished by the Kansas Rolling Mill Company, and it has received nothing therefor except the notes of Henderson, secured by the transfer of the said one hundred and ninety bonds. Henderson paid nothing on his notes to the Kansas Rolling Mill Company, and on May 3, 1878, the one hundred and ninety bonds were sold to one W. L. Doane, who claimed to be the holder and in possession of the same. There is nothing in the record to show that, while Alexander Calder and the Kansas Rolling Mill Company held these bonds, they were not holders for value without notice, nor is there anything in the record tending to show that there are any defenses whatever which the railroad company could set up, even as against Henderson, the first transferee of the bonds. On this state of facts, which is clearly shown by the proof, and which there is no satisfactory evidence to contradict, it is hard to conceive on what grounds the railroad company can claim that it never issued or negotiated its bonds. Even if the bonds were still held by Alexander Calder and the Kansas Rolling Mill Company as collateral security, they would be bona fide holders for value and entitled to enforce the payment of the bonds, as long as the debts for which they were hypothecated were unsatisfied: *Wheeler v. Newbould*, 16 N. Y. 392; *Alexandria, etc., R. Co. v. Burke*, 22 Grat. 254; *Goodman v. Simonds*, 20 How. [61 U. S.] 343. The claim is further interposed by the railroad company that there was an understanding that the coupons due January 1, 1878, were to be cut from said bonds delivered to the Kansas Rolling Mill Company before the same were so delivered. The proof utterly fails to sustain this claim. The agent of the Kansas Rolling Mill, who was engaged in transacting this business, swears that they never heard of any such understanding until it was set up in the an-

swer of the railroad company, and the joint written order of Henderson and Gaston, the president of the railroad company, dated November 2, 1877, is produced, directing the trustees of the trust deed to deliver to Harris, trustee for the Kansas Rolling Mill Company, the one hundred and ninety bonds in question, "to be held by him as collateral security for the payment of iron delivered in Dallas to the said company, pursuant to contract." In this order nothing is said about detaching the coupons due January 1, 1878, and the proof shows that the rolling mill company was entitled to the possession of one hundred and twenty-five of these bonds as early as May, 1877. As to the sixty bonds held by Alexander Calder, it is not claimed that the coupons due January 1, 1878, were not properly transferred with them. I conclude, therefore, that the 250 bonds of the railroad company were issued and put in circulation, that they are held bona fide and for value by either Alexander Calder and the Kansas Rolling Mill Company or those to whom they have been transferred, and that default has been made by the company in the payment of the interest due January 1, 1878.

3. It remains to consider whether there was any necessity for the appointment of a receiver, and whether, under all the circumstances as they now appear, a receiver should have been appointed. In my judgment, independent of any necessity for the appointment of a receiver to protect and preserve the trust property, it was the right of the bondholders, under the terms of the trust deed, to have a receiver appointed to take possession of the trust property. The rights of holders of negotiable bonds issued by a railroad company and secured by a mortgage on its property are not to be measured by the same rules as are applied to an ordinary mortgage of a farm or house and lot, to secure one or two notes held by one mortgagee. In this case the trust deed pledged the receipts and income of the railroad property for the payment of the principal and interest of the bonds. It declared that after three months' default in the payment of the principal or interest on the bonds, or any part of either, upon the written request of one-tenth of the holders of the bonds, it should be competent and lawful for the trustees to enter upon and take possession of the trust property, and upon the written request of one-tenth of the holders of the bonds, it should be the duty of the trustees to enter upon and take possession of the trust property, and to use and employ the said railroad and the property and appurtenances proper for its use, to make all necessary repairs, pay all proper expenses of the management thereof, including taxes, and to apply the proceeds to the payment, pro rata, of the principal and interest due on the bonds. In short, it was made the duty of the trustees, in the contingency named, to exercise the

rights and perform the duties of receivers appointed by the court. These provisions were inserted in the deed of trust to give credit to the bonds, to enhance their value and induce capitalists to purchase them. They constituted a part of the consideration which the railroad company offered to purchasers of its bonds: *State v. Northern Cent. R. Co.*, 18 Md. 193; *Dumville v. Ashbrooke*, 3 Russ. 99, note. A mere default in the payment of the debt is no ground for the appointment of a receiver, but this is not true where there is a stipulation in the mortgage that the mortgagee shall have the rents: *Whitehead v. Wooten*, 43 Miss. 523; *Morrison v. Buckner*, [Case No. 9,844.]

Are all these provisions of the deed of trust to be disregarded? If not, are the rights of the bondholders impaired by the fact that the trustees, instead of taking possession of the trust property, as they had a right, and it was their duty to do, have applied to this court to assist them in the execution of the trust whose duties they had assumed. These trustees might, as is sometimes done, have first taken possession of the trust property, under the authority of the trust deed, and upon written demand of one-tenth of the bondholders, and afterwards filed their bill asking the court to protect their possession and aid and instruct them in the discharge of their trust. Such a course would have been perfectly proper and competent. But having chosen to file their bill in the first instance, neither they nor any bondholder has lost any right, and it is the clear duty of the court to give them all the rights conferred by the deed of trust. By the terms of this trust deed the bondholders, upon default in the payment of interest, are entitled to have the income and profits of the trust property applied to the payment of their debt. This can be done only by possession taken of the trust property, either by the trustees or a receiver. By a failure to take possession the bondholders are in danger of losing their right to the income and profits: *American Bridge Co. v. Heidelbach*, 94 U. S. 798. It is evident that the rules applicable to the appointment of a receiver upon an ordinary mortgage do not apply here. The bondholders are not precluded from the appointment of a receiver because it is not shown that the property is insufficient to pay the mortgage debt, that the mortgagee [mortgagor] is insolvent, or that the trust property is in jeopardy, or because the amount due is in dispute, etc. For instance, are the rights of Alexander Calder to proceed on his sixty bonds, no part of which are in dispute, to be affected because some unfounded claim is set up, that some of the coupons due January 1, 1878, held by the Kansas Rolling Mill Company, are not justly due? The rights of one holder of bonds are not to be impaired because some dispute may be started affecting the rights of another holder: *High, Rec. § 387*. The value of railroad bonds, as commercial paper, depends in large

degree upon the punctual payment of the interest as it falls due. The trust deed has therefore provided not only a pledge of the income and profits of the trust property to pay the interest and principal of the bonds, but has pointed out the method by which, in default of the company to pay the interest, the bondholders may compel the application of the issues and profits to its payment as it matures. Therefore, under the terms of the trust deed, I should feel compelled, upon demand made upon the trustees by one-tenth of the bondholders, to appoint, upon a bill filed for that purpose, a receiver, through whose agency the bondholders could enjoy all their rights, and it would be no answer to such an application to say that the trust property was sufficient to pay all the bonds, or that some of the bonds were in dispute, or that the corpus of the trust property was in no danger. Regarding, therefore, only the terms of the trust deed, upon proof of a three month's default in the payment of interest, and of a written request made by one-tenth of the holders of the bonds upon the trustees, that they exert the powers conferred upon them by the trust deed, it would be the duty of the court, without further showing, to appoint a receiver, so that the value of the bonds, as commercial paper, might be preserved, and all the rights of the bondholders secured.

But independent of the peculiar terms of the trust deed, the situation of the trust property, as shown by the evidence, was such as, in my judgment, to justify and require the appointment of a receiver at the time when the application was first made. It sufficiently appears that the main reliance of the railroad company for means to construct its road, was on the sale of its first mortgage bonds. It is true, it had a land grant from the state, but this could only be secured as the sections of the road were completed, and could only be used as a means of affording additional security and value to the bonds. The condition of the railroad company on May 24, 1878, the date at which the receiver was appointed, appears by the proof to have been as follows: The company had issued its bonds to the amount of \$250,000, on which the coupons due January 1, 1878, were unpaid, and the bonds held as collateral security had been sold in New York city, at fifty cents on the dollar. The company had allowed judgments to be recovered against itself, on which executions had been issued and the company's property advertised for sale, and on one judgment a sale had been actually made. In short, the company was insolvent, and without means either to pay the interest on its bonds, or to construct its road. Malcolm Henderson, with whom the railroad company had contracted for the construction of its road, had failed, and had abandoned the work of construction. Reed, who appears to have been a subcontractor under

Henderson, or in some way connected with him, was in possession of the railroad, about eighteen miles of which had been completed, and was receiving its issues and profits. As already stated, if twenty miles of the railroad were not completed by July 1, 1878, the charter of the railroad company and its land grant would become forfeited, and the security of the bondholders be entirely lost. There was not sufficient iron on hand to complete the road for the remaining two miles, necessary to be completed to save the charter and land grant. This was the condition of affairs when the application for the appointment of a receiver was made and granted. It is true, that after the appointment of the receiver, and before the order of appointment had reached the city of Dallas, the defendant Reed, who, according to the answer of the railroad company, was engaged in the construction of the railroad under a contract with Henderson, had, as he alleges, entered into a contract with a competent engineer to complete said railroad a distance of nineteen and a half miles by June 7. But by the showing of the railroad company and of Reed, no such contract had been made when the receiver was appointed. The significant and unexplained fact remains, however, that even this contract did not provide for the completion of the road for the distance of twenty miles in due time to avoid the forfeiture of the charter and the land grant. It is true that the railroad company, speaking by Gaston, its president, says that it had no doubt that Reed would have completed the road for the distance of nineteen and one-half miles by June 10, and upon information and belief, that he could have completed the road for the distance of twenty miles by July 1, and that the president of the railroad company had received assurance and ample indemnity from Reed that he would have finished the road the distance of twenty miles by July 1, and Reed declares in his answer his purpose to have finished the road the distance, and within the time necessary to save a forfeiture of the charter. In what shape the assurances [were] received by the president from Reed, whether verbal or in writing, is not shown. What the ample guarantee was is not stated. Could it be expected that a court, where interests amounting to more than \$250,000 were depending, should be satisfied with such a showing as that? If Reed intended, in good faith and without seeking any undue advantage, to construct the twenty miles of road by July 1, why did he not contract with competent engineers to construct the road to the twenty mile point, and not to the nineteen and a half mile point? If he intended to allow the use of the road which was in his possession to carry the iron necessary to lay the last half mile, why did he decline to enter into a contract to that effect, as required by the city council of Dallas? Stevens, who was the engineer

with whom Reed contracted to build the road to a point nineteen and one-half miles distant from Dallas, swears that Reed would not contract for laying the track to the twenty-mile post, and refused to provide the necessary material for that purpose.

The condition, in short, was this: the railroad was insolvent and its property under execution; it was unable to furnish means to complete the twenty miles of its road in time to save the forfeiture of its land grant and charter. Henderson, the person with whom the company had contracted for the construction of its road, was insolvent and had abandoned the work. When the receiver was appointed there was no provision made by contract for completing the twenty miles, and it was three days after the appointment of a receiver that Reed, a subcontractor under Henderson, entered into a contract with Stevens for the completion of the road for the distance of nineteen and one-half miles. It seems to me that, under this state of facts, when such fatal consequences to the interests of the railroad and bondholders were threatened, it was the duty of the court to interfere by the appointment of a receiver, and that it would have been an indefensible trifling with the rights of others if the court had refused the application, relying on the assurance, fairly presumed to be verbal, which Gaston says he received from Reed that the latter would complete the road twenty miles by July 1, and on the guarantees which Gaston says he received from Reed, but whose nature he does not reveal.

It is urged in behalf of the possession of Reed, which was displaced by the receiver, that Henderson's contract for construction antedated the deed of trust and provided that Henderson should retain the possession of the road and receive its issues and profits until the completion of the contract of construction, and that Reed had all the rights of Henderson, and his right to possession and use and enjoyment of the railroad under the construction contract was older and better than the rights of the trustees named in the trust deed. Conceding that Reed stands in the shoes of Henderson, what were Henderson's rights under the facts? He transferred, as collateral security to the rolling mill company, one hundred and ninety bonds secured by a deed of trust which, on a certain default, gave the trustees the right to take possession of the railroad company's property and receive its rents and profits. As between him, therefore, and the trustees, he would be estopped from asserting his right of possession under his contract for construction. The transfer of the bonds, secured by such a deed of trust, was a clear waiver of his rights under his contract. So that neither Henderson nor Reed can be heard to claim possession as against the trustees of the deed of trust.

It has been urged by counsel for the rail-

road company that the plaintiff is never entitled to a receiver when the equities of the case are fully and fairly denied by the sworn answers of the defendant. This is true when the motion for a receiver is heard on bill and answer only. But when there is other evidence besides the bill to support the application, the court will consider whether the evidence adduced in support of the bill does not overcome the denials of the answer, and if they do, the receiver will be appointed, notwithstanding the denials of the answer: *Thompson v. Diffenderfer*, 1 Md. Ch. 489; *Simmons v. Henderson*, Freem. Ch. (Miss.) 493; *Henn v. Walsh*, 2 Edw. Ch. 129; *Buchanan v. Comstock*, 57 Barb. 568; *Fairbairn v. Fisher*, 4 Jones Eq. 390; *Callanan v. Shaw*, 19 Iowa, 183; *Rhodes v. Lee*, 32 Ga. 470. It is in all cases a question of evidence. If on a consideration of all the proof, the court thinks a case is made for the appointment, a receiver will be appointed, notwithstanding the denials of the answer. In this case, it seems to me that the proof to justify the appointment was ample. But in the view I have taken of the case, the answer does not deny the equities of the bill. On the contrary, enough is admitted fully to warrant the appointment, namely, the terms of the trust deed, the issue of at least \$125,000 in bonds with all coupons attached, for a valuable consideration, default in the payment of the interest for three months, and the demand of the bondholders on the trustees that they should execute the powers conferred by the trust deed.

It has been ably insisted that the interests of the railroad company and of the people of a large part of the state of Texas will be injured by the action of the court, and that these considerations ought to aid the discretion of the court in coming to a conclusion adverse to the appointment of the receiver. These considerations cannot weigh when the rights of creditors are involved. But so far as the railroad corporation is concerned, it cannot justly complain. And as to the people of Texas, it seems clear to me that they are interested only in the railroad, and are not at all concerned about the railroad company. The appointment of a receiver does not put an end to the construction of the railroad. It only takes it from the hands of an incompetent and insolvent corporation and gives it to other and more vigorous agencies.

My conclusion upon the whole subject is, that if on May 24, when the receiver was appointed, the same evidence had been presented and the same arguments made as have been on this hearing, I should have felt constrained to appoint a receiver according to the prayer of the bill. Finally, a sufficient reason why the order appointing the receiver should not be revoked is, that the motion for that purpose comes too late. The receiver appointed by the court went forward promptly and vigorously in the discharge of his du-

ties, and within the time limited he completed the railroad to the twenty-mile point, and thus saved the forfeiture of both the railroad charter and land grant. In doing this he expended the sum of five thousand dollars. The iron necessary to complete the track was furnished by the Kansas Rolling Mill Company. The receiver took possession of the railroad on May 29, of course with the full knowledge of the railroad company and of Silas Reed, who, up to that time, had been in possession. It was not until June 26 that notice of the present motion was given. The officers of the railroad company, as soon as the receiver took possession of the road, learned how the notice of the motion to appoint the receiver had been served, to wit, on Calder, the vice-president. If they intended to claim that the notice was insufficient and defective, it was their duty to move at once. The delay of nearly a month, while the receiver was going on with the construction of the road and expending money and materials, furnished certainly not by the railroad company, but by others interested in its prosecution, was an acquiescence in the action of the court, and they are estopped now from making objection. It was not until the receiver had completed the railroad to the twenty-mile post and secured the railroad charter and land grant from forfeiture that notice of this motion was given. On the whole case, I am well settled in the opinion that the motion to vacate the appointment of the receiver should be overruled, and it is so ordered.

Case No. 222.

ALLEN v. GREENWOOD.

[1 Cranch, C. C. 60.]¹

Circuit Court, District of Columbia. Jan. Term, 1802.

ATTACHMENT—ABSCONDING DEBTOR.

Attachment lies against an absconding debtor, under Virginia law, notwithstanding the 6th section of the act concerning the District of Columbia.

At law. Motion for judgment on attachment from a justice of the peace, under Act Va. Dec. 26, 1792, pp. 116, 117. The affidavit stated that Greenwood, late of the county of Alexandria, &c., hath privately removed himself out of the county, &c. The question was whether this attachment will lie, notwithstanding the 6th section of the act of congress concerning the District of Columbia. (2 Stat. 103.)

THE COURT ordered the judgment to be entered.

KILTY, Chief Judge, doubting.

¹[Reported by Hon. William Cranch, Chief Judge.]

Case No. 223.

ALLEN v. HALLET.

[Abb. Adm. 573.]¹

District Court, S. D. New York. Nov., 1849.
SEAMEN — SECRETED ON VESSEL — LIABILITY TO PERFORM SERVICE.

1. The master of a vessel is entitled to call upon the ship's cook to perform service as a seaman, so far as he possesses the requisite experience and ability.

2. Where a seaman deserts from the vessel while in port, and another hand is shipped in his place, and he afterwards returns and secretes himself on board, and is discovered by the master after the ship has left port, the master is entitled to call upon him to perform any service as seaman which may be within his ability but is not entitled to assume that he is an able seaman, and to require him to do duty as such.

3. In an action brought against a master by a seaman found secreted on board and ordered to do duty and punished for refusal, to recover damages for the punishment inflicted, it is imperatively incumbent on the master to prove, in order to justify the punishment, that before giving the order he informed himself as to the seaman's experience and capacity, and ascertained that he was able to perform the work required of him.

In admiralty. This was a libel in personam filed by James Allen against Franklin Hallet, master, and George Gibson, first mate of the packet-ship Queen of the West, to recover damages for ill usage inflicted on the libellant, on board that vessel. The facts are stated in the opinion of the court. [Decree for libellant.]

Alanson Nash, for libellant.

O. Sturtevant, for respondents.

BETTS, District Judge. This is an action of tort against the master and first mate of the packet-ship Queen of the West, for confining the libellant in irons in a painful position and posture on board the ship, and putting him on insufficient allowance of food, on her voyage from Liverpool to New York. The libellant shipped at New York as cook on board. His conduct in that capacity was unexceptionable. At Liverpool he had no duty to perform as cook, and he was ordered by the mate, and the order was confirmed by the master, to go over the side of the ship with others of the crew, and standing on a staging prepared for the purpose, or on the dock against which the ship rested, to assist in scrubbing down her sides. This was a necessary service to be performed by the crew. The libellant refused to obey the order, alleging it was not his duty. He stated his willingness to perform any seaman's duty on deck. He was ordered to perform that particular service or that he should not be fed by the ship. He and the second cook thereupon went ashore; the second cook deserting the vessel, and the libellant remaining ashore without leave until the ship sailed.

Just before the ship sailed a first and

¹[Reported by Abbott Bros.]

second cook were shipped in the places of the others. When the ship got out to sea the libellant was found on board. The answer alleges that he entered surreptitiously without the knowledge of the officers. No proof is made of the fact, nor does the libellant show when or how he returned to her. His place was, however, occupied by another cook, and he does not appear to have been at first recognized or admitted by the officers as one of the ship's company. When four or five days out from Liverpool he was ordered with other men to go over the side of the ship, in fine weather, and scrub her. This order is alleged, by the libellant, to have been given by way of punishment, and was only applied to him and one other man. On that point the testimony is in discord; some witnesses swearing that only one man was put to the duty, and others, that two or three men were so employed. So the answer asserts, and the fair weight of evidence may be regarded as supporting it, although the point is not clear, nor is it of sufficient importance to render its particular examination and discussion necessary.

The libellant refused to obey the order. This he did peremptorily to the captain, and with coarse and insulting language, and therefore he was gagged for a few moments, and handcuffed, and so kept for several days; during the daytime, when fair, on the after-deck, and at nights in the wheel-house; and until, as the answer asserts, he submitted, and consented to go to duty on board. On the second day after he was handcuffed, a bolt was put in his mouth as a gag. The witnesses saw it there for a few minutes, but were unable to say who put it in or for what cause. After his confinement terminated the libellant was restored to his place, and performed the duty of cook to the arrival of the ship here.

It seems to me that the case, stripped of the inflated and reproachful terms in which the parties speak in their pleadings, is to be disposed of upon these considerations:—Was the libellant, after placing himself in the ship without the authority of the master, entitled to claim his former position? and if so, was he bound to do ordinary ship's duty when not on service in the capacity of cook? If the order of the master to the libellant to perform that duty, was a recognition of him as one of the crew, was any inexcusable violence or severity applied by his orders, in bringing the libellant to obedience? In respect to the first mate, Gibson, there is no color of evidence implicating him beyond the act of applying the handcuffs on the libellant, under the orders of the master. This was not done with harshness, or so as to cause needless pain or suffering to the libellant. In that, and in confining the libellant subsequently, he only pursued the directions and orders of the master, which were a sufficient justification for his acts. *Butler v. McLelland*, [Case No. 2,242.] The libel,

therefore, as to him, must be dismissed with costs.

Had the master, then, rightful authority to impose those services on the libellant, and compel his submission to them? I perceive no reason to question his power in respect to the orders given at Liverpool. 2 Pet. Adm. 368, [*Bond v. The Cora*, Case No. 1,620;] *The Elizabeth Fritz*, [Frith,] [Id. 4,361.] His command is supreme in the navigation and management of the ship at sea. This necessarily includes the employment of the crew, subject only to his responsibility to the men for any tortious or oppressive conduct towards them. A cook ships and rates as a seaman, except as to wages. He signs the articles, and designates himself as such; he commonly is a sailor, and not unfrequently acts in the double capacity of sailor and cook on the voyage, being only rated at higher wages because of that quality. He has also the privileges of a seaman, as to remedy against the ship for his cure in case of sickness, and his protection abroad if left by the vessel. *Turner's Case*, [Case No. 14,248;] *The Louisiana*, [Id. 1,461.] And he may be removed for reasonable cause, from the particular employment of cook and assigned to the common duties of a sailor. This is so even in respect to subofficers. *Shermond [Sherwood] v. McIntosh*, [Id. 12,778;] *Mitchell v. The Rogambo*, [Orozimbo,] [Id. 9,667;] *The Mentor*, [Id. 9,428.] And the cook, if he is entitled to any special designation of rank or privilege distinguishing him from a common sailor, he can be only so upon the terms of his contract, limiting his obligation to perform that particular service. The law will secure him the benefit of such special agreement, so long as he observes it with fidelity and intelligence, subject always to the rightful authority of the master to regulate the discipline and service of the ship at his discretion. When the orders were given at Liverpool directing him to do other duty, the libellant was not acting as cook; there was no duty for him to perform in that capacity; this employment was not taken from him; but when idle, and the state of the ship required his assistance, he was directed to aid the crew in a piece of seaman's work about the ship. He did not question his obligation to obey any order to render services on deck, but puts his refusal on the assumption that he could not be required to go over the ship's side. I see no reason for this distinction. He does not show he would be exposed to risk, in standing on the staging or the dock, nor that he was to be placed in a situation requiring experience and skill he did not possess. Whether the labor of scrubbing was then to be done on the deck or sides of the ship, in the dock, cannot, in this case, make any distinction as to his obligation to perform it. I hold, under the facts in proof, that the libellant was bound to obey the orders given him in Liverpool, and that his

refusal was refractory and mutinous, and would have justified his punishment by forfeiture of wages, or by personal coercion.

The libellant then abandoned the ship. The manner of his getting on board and to sea is not disclosed by the proofs. It is manifest, however, that he did not come back to her with a claim to his place of cook, rendering himself to the officers to perform that duty. The place had been filled by another person. The first time when he appears to have been noticed on board by the officers, was when the order was given him to go over the side and assist one or more of the men in scrubbing the ship. The ship was then some days out; according to some of the testimony two days, to others, four or five days. The relationship between the respondent and libellant was never changed. It has been held in this court, that a seaman who had abandoned his ship in a foreign port, could not, by joining her clandestinely after his place on board had been supplied, acquire the right to restoration to it or to wages. The Philadelphia, [Case No. 11,084.] If any new agreement is to be inferred from his being in the ship and the exercise of authority over him by the master, it is, that he should render such services as might be demanded of him and what he was capable of performing. The master would have no right to assume from his acting as cook on board that he was an able seaman, and compel him to go aloft, or take the wheel, or engage in work requiring professional skill and involving personal hazard. He must first inform himself of the libellant's capacity, and then most properly he might expect of him any reasonable service within his ability to render. The libellant proves, that when he refused to go over the sides of the ship on the staging, he offered to do any work on the ship's deck. The master gives no evidence that his experience or capacity qualified him to venture safely on a staging at sea whilst the ship was under way. I think it was incumbent on him in order to justify such order and the infliction of punishment by way of close confinement on board for disobedience of it by libellant, to prove the man possessed experience and capacity enabling him to fulfil the order with safety. In my opinion, the master in this act transcended his reasonable and rightful powers. He could no more enforce the orders against the libellant, on the facts in evidence before the court, than he could have done to any man found on board not shipped as one of the crew. And even if he claimed authority over him under his broken contract, he was bound to inform himself whether a man who shipped as cook, and had only served with him as such, was also competent to perform the duty of a seaman, before imposing on him any service apparently hazardous, and which might involve danger to his life. The wrongful conduct of the libellant at Liverpool, no doubt

conducted to the harsh proceedings adopted by the respondent at sea. The libellant was afterwards restored to his first position as cook on board, and spoke to his companions of this transaction as of no importance, and said he should take no further notice of it; and though the court is compelled to pronounce in his favor that a tort has been committed, yet it cannot be regarded as one aggravated by any manifestation of vindictive feelings or cruel purpose on the part of the respondent.

In view of the antecedent misconduct of the libellant in the same particular, and the apparent reconciliation between the parties, in his restoration to his former place, and it is to be assumed the payment of full wages to him out and home, as he claims no balance of wages, I shall decree him damages against the respondent, Hallet, only to the amount of fifty dollars and costs, for the improper imprisonment and treatment to which he was subjected. Decree accordingly.

Case No. 224.

ALLEN v. HITCH.

[2 Curt. 147.]¹

Circuit Court, D. Massachusetts. Oct. Term, 1854.²

ADMIRALTY—APPEALS—SEAMEN'S WAGES.

1. If the libellant does not appeal, he cannot ask to have the damages increased here, except by an allowance for the delay of payment.

[Cited in *The Stephen Morgan v. Good*, 94 U. S. 604; *The Maggie P.*, 25 Fed. Rep. 206; *Bush v. The Alonzo*, Case No. 2,223; *Shaw v. Folsom*, 40 Fed. Rep. 512.]

[See *Airey v. Merrill*, Case No. 115; *The Peytona*, Id. 11,058; *The Quickstep*, Id. 11,509.]

2. In fixing a quantum meruit for wages on a whaling voyage, it is competent for the court to take into view the unusual protraction of the voyage, and the condition of the vessel and the crew, though not specially alleged or relied on in the libel.

[On appeal from the district court of the United States for the district of Massachusetts.]

[In admiralty. Libel by William F. Hitch, in a cause of subtraction of wages, against Edmund Allen and others. Decree for libellant. Respondents appeal. Affirmed.]

L. F. Brigham, for appellants.
Mackay, contra.

CURTIS, Circuit Justice. This is an appeal from a decree of the district court,³ in a cause of subtraction of wages, alleged to have been earned on board the bark *Belle*, on a whaling voyage. That court made a

¹[Reported by Hon. B. R. Curtis, Circuit Justice.]

²[Affirming an unreported decree of the district court.]

³[Nowhere reported; opinion not now accessible.]

decree in favor of Hitch, the libellant, for the sum of \$490.93. The respondents appealed. At the hearing they have not denied the title of the libellant to wages, but insist that his just claim amounts only to a lay of 1-165. The district court allowed the libellant 1-145, and the difference in money between these two lays is only about sixty dollars; a sum which both parties agree would hardly afford prudential grounds for an appeal to this court. But it was considered by the counsel on both sides that something of importance, beyond this sum of sixty dollars, was involved in the appeal. The libellant's counsel desired to claim and insist upon greater damages than were allowed below. But no appeal appears to have been claimed by the libellant, and, as I have had occasion repeatedly to declare, a party who has not appealed can claim here nothing more than an affirmation of the decree below, with reasonable damages for the delay. Counsel have been often misled on this subject by the practice of the state courts, and by the loose manner in which appeals from the district to the circuit courts in admiralty cases have sometimes been spoken of in books of practice. But I consider the point free from all doubt. Not to advert to the nature of an appeal, as considered by courts of admiralty, and to the rules requiring reasons to be assigned, it is sufficient to refer to two decisions of the supreme court which are in point. In *Stratton v. Jarvis*, 8 Pet. [33 U. S.] 4, the court say: "The district court decreed a salvage of one-fifth of the gross proceeds of the sales; from this decree an appeal was interposed, in behalf of all the owners of the goods and merchandise, to the circuit court; but no appeal was interposed by the libellant. The consequence is the decree of the district court is conclusive upon him as to the amount of salvage in his favor. He cannot, in the appellate court, claim anything beyond that amount, since he has not, by any appeal on his part, controverted its sufficiency." In *Canter v. American Ins. Co.*, 3 Pet. [23 U. S.] 307, the circuit court had decreed restitution of property to the claimant, but the decree was silent as to damages. [Case No. 302a.] The libellant only, appealed.* It was held that the silence of the decree respecting damages was a virtual denial of them; that if the claimant meant to rely on his claim for damages, he should have entered a cross appeal; and that his omission to do so was a final waiver of his claim. These cases show that the appellate court will neither increase the amount awarded below, nor consider a subject of

claim there decreed upon and denied, unless the party who desires a reversal of the decree take an appeal. See, also, *Airey v. Merrill*, [Case No. 115.]

The counsel for the respondents in this case has prayed the opinion of the court upon the question, whether the court, in fixing the reasonable wages of the libellant upon a quantum meruit, will take into account certain circumstances which I will now state. It appears that the libellant shipped at Fairhaven, on board the bark *Belle*, on the 10th of December, 1844, as cabin boy, for a whaling voyage, then expected not to exceed four years in duration. In point of fact, instead of pursuing the usual course of whaling voyages, the catchings of the *Belle* were sent home from time to time, and her voyage was protracted, so that she did not return home until the 10th of September, 1852, after an absence of nearly eight years. The libellant was about thirteen years of age when he shipped. After the expiration of about four years, the libellant did seaman's duty; and it is not denied by the respondents that he is entitled to a reasonable compensation therefor. But they insist that this did not exceed a lay of 1-165. And they do deny that in fixing his compensation the court can take into consideration any wrong done to the libellant by his detention from home, and his consequent deprivation of the means of education, by reason of the protraction of the voyage for about four years beyond the time for which the libellant shipped. Viewed as a breach of contract, laying a foundation for a claim of damages, it is true the court cannot consider this subject-matter; for there are no allegations in the libel upon which to rest such a claim. But in determining what wages the respondents are reasonably entitled to recover, all the circumstances bearing on that question are to be considered. The service, for which this compensation is to be awarded, began about four years before the return of the vessel. She was then in the Indian ocean, or perhaps at Sidney, or one of the islands in that part of the world. Her men were all entitled to leave her, and most of them did leave her during the voyage. The difficulty of obtaining good hands to supply their places considerably enhanced the value to the owners, of the plaintiff's services. On the other hand, the long protracted absence of the libellant from home, and the disadvantage to him of remaining still longer, would naturally render him unwilling to serve for the same compensation as he might accept under other circumstances. To fix the lay at what it would have been in a port where seamen are obtainable in great numbers, as wanted, and for an ordinary voyage, would be manifestly wrong. It cannot be doubted that the owners would be obliged to pay a higher price, and that the service would be reasonably worth a higher lay, if one, who

*[The supreme court affirmed this decree upon appeals by both parties in *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. (26 U. S.) 511, and remanded the cause. The question of damages was then first raised. Case No. 302b. From the decree of the circuit court thereon libellant only appealed. The decision on this latter appeal is the one cited in the text.]

had already been absent four years from home, were required to remain four years longer, and serve and take his ay on board a vessel, which had already cruised four years, and whose crew, by desertions, absences, and other causes, had been so changed, and so filled up, as it appears this crew had been. The staunchness and consequent safety of the vessel, the completeness of her fitting and finding, and the efficiency of her crew, are circumstances in which the seamen on board a whaleship have a direct and substantial interest; and I do not consider it improper for the court below, in fixing a quantum meruit, to take into consideration, upon this libel, the circumstances of the protraction of the voyage, and the great length of time the libellant was detained from home. The decree of the district court is affirmed, with costs, and damages at the rate of six per centum per annum from the date of its decree.

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Case No. 225.

ALLEN v. HUNTER.

[6 McLean, 303.]

Circuit Court, D. Ohio. April Term, 1855.

PATENTS FOR INVENTIONS—WHO ENTITLED TO—
SPECIFICATIONS—EXPERT TESTIMONY—ANTICIPATION—CAVEAT.

1. A patent is prima facie evidence of the right of the patentee.

[Cited in *Hoffheins v. Brandt*, Case No. 6,575.]

2. The thing invented or discovered must be so clearly described as to enable a person well skilled in the subject matter of the invention to construct or make it.

3. In a matter of science, no individual can be a fit expert, who does not understand the science involved.

4. And a jury in such a matter will give weight to the witnesses as they may be competent to speak on the subject.

5. A specification in regard to a chemical compound is not addressed to persons who are ignorant of chemistry.

6. A specification must be construed according to the true import of the words used, rather than by their grammatical arrangement.

7. In a case of a prior invention, a patent is not to be superseded unless the thing patented was invented before the invention patented.

8. Nothing more than experiments being made before the emanation of the patent, although such experiments resulted in the invention or discovery subsequently patented, the first patent must stand.

9. A caveat is intended to give notice of an invention or discovery, and prevent a patent from being granted to another for the same thing.

[At law. Action by John Allen against William M. Hunter for damages for infringement of letters patent No. 8,621, granted to J. Allen, December 23, 1851. Tried by jury. Verdict for defendant.]

[Reported by Hon. John McLean, Circuit Justice.]

Stanbery, Coffin & Newton, for plaintiff.
Mr. Matthews, for defendant.

Instruction of the Court.

This, gentlemen of the jury, is an action for the infringement of a patent. The plaintiff, who is the patentee, "claims to have invented a new and useful mode of setting mineral teeth on metallic plates," and he describes as follows the composition and mode of application: "The cement may be formed of any of the known fluxes, combined with silix, wedgewood and asbestos intermixed with gold and platinum scraps, which form a metallic union with the plate upon which the teeth are set. The compound which I prefer is composed of silix 2 oz., white or fluid glass 2 oz., borax 1 oz., wedgewood 1½ oz., asbestos 2 drms., feldspar 2 drms., haolin 1 drm. This compound should be intermixed or underlaid upon the plate, with gold or platinum scraps. The gum color consists of feldspar ½ oz., white glass 1 oz., oxyd of gold 1½ grs.: moisten and apply with a brush." After describing how the application is to be made, the patentee says: "I claim as my invention, and desire to secure, by letters patent, a new mode of setting mineral teeth on metallic plates by means of a fusible silicious cement, which forms an artificial gum, and which also unites single teeth to each other, and to the plates on which they are set." "I also claim to be the inventor of said cement or compound, a full and exact description of which is herein given." "I also claim the combination of asbestos with plaster of paris, for covering the teeth and plates for the purpose of sustaining them in their proper position, while the cement is being fused."

A caveat was entered by the plaintiff, in the office of the commissioner of patents, the 29th of April, 1851. This notice to the office that the plaintiff was the first inventor, for which he claimed a patent, was to answer a double purpose. First, to give notice of his claim as inventor, and, second, to prevent a patent from issuing to another for the same thing. The patent issued to the plaintiff bears date the 23d of December, 1851. Under the law, before this patent could be issued, a thorough examination of the claim was made by examiners of the patent office, who were appointed, it is to be presumed, on account of their knowledge and experience in matters of science, mechanism, chemistry and natural philosophy, which enables them to judge of the feasibility and utility of inventions and discoveries made, and for which the inventors or discoverers apply for a patent. A claim which has thus been examined and sanctioned by the granting of a patent, gives to the patentee a prima facie right to the invention or discovery claimed. And the individual who disputes the right must produce evidence to counterbalance the legal presumption of right in the plaintiff from his patent. On the subject of patents.

we are governed by the law, and not by our own notions of policy. Some individuals who prefer their own theories to the practical results of society, which have been established and sanctioned by the wisdom of ages, hold that there can be no property in a discovery or an invention. And these notions may have an influence on their judgment, when they are called to act on the subject of patents. Such an influence should be regarded as unjust and against law. You are sworn, gentlemen, to act on the subject before you according to the law and the evidence.

The defenses made to the right claimed by the plaintiff are: 1. That the patent is void upon its face, for want of certainty in its specifications. The law requires "every inventor to swear that he does verily believe that he is the true inventor or discoverer of the art, machine, or improvement for which he solicits a patent; and he shall deliver a written description of his invention, and of the manner of using or process of compounding the same, in such full, clear and exact terms as to distinguish the same from all other things before known, and to enable any person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make, compound and use the same." In requiring this particularity, the law has two objects in view: 1. That the invention or discovery claimed may be clearly distinguished from all other inventions or discoveries. 2. That when the patent shall expire and the invention or discovery shall become public property, any one skilled in the art or science may construct or compound it.

Patentees are not monopolists. This objection is often made, and it has its effect on society. The imputation is unjust and impolitic. A monopolist is one who, by the exercise of the sovereign power, takes from the public that which belongs to it, and gives to the grantee and his assigns an exclusive use. On this ground monopolies are justly odious. It enables a favored individual to tax the community, for his exclusive benefit, for the use of that to which every other person in the community, abstractly, has an equal right with himself. Under the patent law this can never be done. No exclusive right can be granted for anything which the patentee has not invented or discovered. If he claim anything which was before known, his patent is void. So that the law repudiates a monopoly. The right of the patentee entirely rests on his invention or discovery of that which is useful, and which was not known before. And the law gives him the exclusive use of the thing invented or discovered, for a few years, as a compensation for "his ingenuity, labor, and expense in producing it." This, then, in no sense, partakes of the character of monopoly. Inventors are often great benefactors. And how ill are they generally rewarded! If the invention or dis-

covery be of great value, a system of piracy is commenced, not so much to injure the patentee, as to benefit the actors. And it cannot be denied that this course of action is made popular in the community by the charge of monopoly against the patentee, and his realization of large profits. His expenses are not considered, the benefit he has conferred on society, nor the shortness of seven or fourteen years, to which his exclusive right is limited. For the maintenance of his right he is subjected to legal controversies, which, not unfrequently involve him in an expenditure beyond the amount of his profits. Inventors and discoverers are proverbially poor. It is said that the man, by the operations of whose genius the streets of the city of London were first lighted, was a wanderer and a beggar in those streets. The gas company, who were made rich by his invention, eventually made some provision for him. What have inventors done for our country? The application of steam to the propulsion of vessels upon the water, and carriages upon the land, have advanced our country a century in commercial intercourse, in civilization and in everything which constitutes a great nation. And look at the numberless labor-saving machines, the cotton gin, the planing machine, the reaping machine, and many other machines and inventions, which by the force of machinery accomplish wonderful results. It then appears that patentees, so far from being monopolists hanging as dead weights upon the community, are the benefactors of their country.

By the law an extension of a patent can be given only where it is made clearly to appear that by the profits from the term of the grant the patentee has not been remunerated for his ingenuity, labor and expense, in bringing his invention into operation.

In this case the patentee says that the cement may be formed of any of the known fluxes; and it is argued that as this includes all fluxes, "if there be any which cannot be so used, the patent is void." The words of the specifications are to be taken together, and they are to be so construed as to give effect to the meaning and intention of the person using them. Words are not to be distorted from their meaning, so as to effect what may be supposed to have been the intention of the person using them. But they are to have a reasonable construction, as connected with the sentence in which they are used. The words, "known fluxes," belong to chemistry, and none but those who understand the science of chemistry should have weight as experts on this subject. A dentist who extracts and fills teeth, or who sets teeth, may be expert in what he professes, and yet be ignorant of chemistry. This has been verified in the present case. As the invention is claimed to be a new and useful mode of setting teeth, &c., it seems to be supposed that dentists are proper experts to define the meaning of chemical terms. But if they

have not a scientific knowledge of chemistry, they are not experts in the application of chemical terms. The law says the description shall be such as to enable any person skilled in the art or science, of which it is a branch, or with which it is most nearly connected, to make, compose, and use the same. If the person called be not skilled in chemistry, he cannot be considered as an expert in regard to chemical affinities. A mechanic may as well be called as an expert on this subject, as a practical dentist who has no knowledge of chemistry. The same may be said in regard to the term borax. The making up of the compound or the manufacture of teeth is not necessarily connected with dentistry. The specifications must be so full and clear as to enable a competent person to make the compound without experiment. And the enquiry for the jury is, has this been done in the plaintiff's patent? In passing upon this point, the jury will be governed in matters of science by the opinion of experts.

Doctor Clark, of New Orleans, has practiced dentistry fourteen years, and now has the largest practice in that city. He has received his composition for setting teeth from Doctor Allen. He says he could make the compound from the patent. Dr. Samuel Hazlett, of New York, says he could make the compound and the teeth from the patent. Dr. Stockton says a dentist properly informed would be at no loss to make the compound from the formula of Dr. Allen. Doctor Barlow says that Dr. Allen's plan requires mechanical skill. He has made the compound and set the teeth under Dr. Allen's direction. Doctor Chapman says, from Doctor Allen's formula, he constructed the work. And Dr. Kingsly, who is a dentist, says a manufacturer of teeth would know borax cannot be used in a crude state, but must be fritted before use under Doctor Allen's plan. Doctor Wardle manufactures teeth, and he put up the work by Dr. Allen's plan; and he thinks that a man of ordinary skill could make the gum from the directions given. Professor Silliman says borax is usually prepared, which is done easily.

Several witnesses in behalf of the defendant were examined. Doctor White, a manufacturer of teeth, says, without the knowledge he now has, he would have been at a loss how borax was to be used according to Doctor Allen's formula. Doctor Semple, dentist, purchased a right of Doctor Allen, with special instructions how to use the compound. Doctor Rochart made an experiment on Doctor Allen's formula, put the teeth in eleven times in all. Doctor Babcock made the experiment on Doctor Allen's formula, but could not make the compound, and he considers the recipe of no practical utility. Doctor Porter says the formula of Doctor Allen is not practicable. Doctor Smith tried the formula of Doctor Allen, and found it impracticable. Doctor How

purchased a right of Doctor Allen, but could not set the teeth, to do well, without back plates. Doctor Doughty tried Doctor Allen's formula without success, on a gold plate or silver. Doctor Talbert tried Doctor Allen's formula without success. Doctor Maine says, from Doctor Allen's specification, he would have used, in making the gum, the borax of commerce. And Doctor Hays says that from the specifications to Doctor Allen's patent he could not make the compound of Dr. Allen. This is substantially the evidence in regard to the specifications of the plaintiff. Whether they are sufficient is a mixed question of law and fact. The opinions of the experts who have been examined are in conflict; and so far as my personal knowledge goes, this has been uniformly the case where experts have been examined. This may show, however honestly witnesses called by the respective parties may swear, that slight circumstances, imperceptibly or otherwise, influence the opinions of men, even in matters of science. The fact to be established by the plaintiff was whether his compound and the setting of teeth were so described as to enable a person of competent knowledge to make the compound and set the teeth.

In regard to the compound, no one can be competent to testify as to it, who is not acquainted with chemistry. He must know something of the affinities of the constituent parts of the compound, and of its strength and durability. A mere mechanical dentist is no more competent to judge of this matter than the ordinary mechanic whose skill consists in applying the materials made ready to his hands, for the structure of a machine, without knowing by what process these materials were formed. It is, therefore, gentlemen, your duty, in considering the testimony, to give weight to it in proportion to the competency of the witnesses to judge of the matters sworn to. In this view, no one may be supposed to have misrepresented the facts, speaking from the lights of his own knowledge; and yet the statement of one witness who has a thorough knowledge of chemistry, and speaking on that subject, should be relied on more than the statement of any number of witnesses, who speak without the requisite knowledge.

Some of the witnesses say that, in making the compound by the formula of Doctor Allen, they would use borax in its crude state, or what is called the borax of commerce. The most, if not all of these witnesses do not profess to have a knowledge of chemistry; while other witnesses say, who are acquainted with the science, they would know that borax was not referred to by Doctor Allen in its crude state. And these are the men who can be confided in as experts, and to whom, under the patent law, the specifications are addressed. The description must be such, the law says, as "to

enable any person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make, compound, and use the same." The objection that, as all the fluxes are claimed in making the compound, if any one can be found which cannot be used for that purpose, the patent is void, cannot be sustained.

The word "flux" is derived from the Latin word "flus," to flow, and is applied in chemistry to substances which are in themselves very fusible, or which promote the fusion of other bodies. Any substance or mixture used to promote the fusion of metals or minerals, as alkalis, borax, tartar, or other saline matter, are called fluxes. Now, in the first place, it is not shown that there is any one flux which may not be used to make the compound; and if this were made to appear, it could not affect the validity of the patent, as the reference to fluxes was general, and should be held to include those which are in general use, and which will overcome, by their chemical attractions, the opposing powers of the other ingredients of the compound. This, all chemists would understand, and to such persons is the description addressed. Formerly, a strict construction was given in this country and in England to the claims of a patentee, but a more liberal and favorable view is now taken of his claim. He must describe it within the law; but courts do not go beyond the law for technical objections to defeat it.

The next question for your consideration, gentlemen of the jury, is whether defendant has infringed the plaintiff's patent. An infringement consists in constructing a machine, or making a compound, substantially in the same mode as that for which a patent has been obtained. Certain publications have been made in the "Dental Recorder," in New York, and the "Dental Register," in this city, which show the formulas, the plaintiff alleges, are claimed by the defendant, and which are similar to those claimed in the patent. Doctor Slack, one of the oldest and most experienced chemists in this country, says that the formula of defendant is in substance the same as that claimed by the plaintiff. And he strongly illustrates his opinion by saying "they are as much so as two and two make four, or that three and one make four." Doctor Locke, Jr., who is a professed chemist, and who analyzed the formulas of Doctors Allen and Hunter, says there is no substantial difference. Other witnesses called by the plaintiff corroborate the statement that the two formulas are substantially the same. But on the part of the defendant several witnesses have been examined, who give their opinion that the formulas are different. This with most of them is supposed to consist in the mode of combining the ingredients, that the finer particles of the pulverized ingredients were separated by a sieve, by the

defendant, which left the larger particles granulated, which on being fused make a stronger gum.

It will be for you, gentlemen, to determine the fact of infringement, from this conflict of testimony. I have only to refer you to the rule before stated, of giving weight to such witnesses as were best qualified to judge of the matter about which they have testified. A further remark on this point is not only justified, but called for by the justice of the case,—that one of the two chemists who have sworn that the formulas were in substance the same, has analyzed the ingredients of both, and he finds them substantially the same. His testimony then is given, not as matter of opinion, but as a fact clearly demonstrated. This is the only mode by which the human judgment can rest upon absolute certainty. There are but few questions which may be decided by the power of analysis, chemically or mathematically. But where this is done satisfactorily, truth is attained. An unsubstantial or colorable alteration in a machine or a compound does not protect an individual from the character and consequence of an infringer. Where the machine is constructed, or the compound formed, on the same principle, however varied in form, there is an infringement. In a machine where the same powers are employed, with only formal alterations as to the size or position of the machinery, to produce a certain result, the principle of the machine remains the same. And so of a compound, where the ingredients are the same, and the change is merely in the mode of combining them. Or where there is a substitute of one ingredient, having the same qualities and producing the same result, being within the scope of the claim.

The next point for your consideration will be whether the discovery was useful. Of this there can be no doubt, if the claim of the plaintiff shall be sustained. Doctor Jobson, of London, England, considers the improvement the greatest in dentistry of the present age. He is corroborated by many other witnesses who speak from experience. It is unnecessary to advert to the testimony on this point, as there is no conflict in it. Every invention or discovery must be useful, to entitle the party to a patent.

Whether the plaintiff was the first and original inventor of what he claims is the subject of your next inquiry. To sustain his patent, the plaintiff must show that he was the first and original inventor or discoverer. That he was neither is strongly urged in the defense. It is contended that a work published by Doctor Fitch, of New York, on dental surgery, which was a translation from a French work by Delabarre, was substantially the same as the plaintiff's. If this be so, it bars the plaintiff's right. So cautiously does the law guard the public rights, that if the thing invented or discovered has been described in any foreign pub-

lication, it is declared to be fatal to the patentee. This provision goes upon the presumption, if such foreign publication has been made, the patentee may have acquired a knowledge of it. And this presumption is not rebutted by proving, as far as a negative can be proved, that the inventor had no knowledge of it. The publication may be proved, as to its contents, and the fact of publication by the production of the book, or by parol testimony. Doctor Clark, of New Orleans, says that Delabarre's formula was somewhat like that of the plaintiff's, but that it was different, and was impracticable, and has been long since abandoned. Doctor Fitch, the translator, says Delabarre's system was never brought, into practical use. Doctor Jobson, evidently eminent in his profession, was personally and intimately acquainted with Delabarre, in Paris. And while in France, the Doctor became acquainted with the most eminent dentists in Paris, and he says that they all considered the plan of Delabarre as a failure, and that it had been abandoned by him; but although abandoned, yet if he published substantially the formula of the plaintiff, it is fatal to his right. Several other witnesses speak of Delabarre's formula, as having been abandoned in this country. On the part of the defendant, a set of teeth was given in evidence to the jury said to have been made on Delabarre's plan, and which were worn by the famous Aaron Burr. The teeth in this specimen were very irregular, some inclining one way and some another, so as to form no continuous and even circle. Doctor Jobson, on examining it, said the teeth may have been set on Delabarre's plan, as their irregularity was the defect in his system. Several of the witnesses called by the defendant considered the plan of Delabarre as similar, or very much like the plaintiff's. To defeat the plaintiff's patent on this ground, Delabarre's plan must be shown to be substantially the same as Doctor Allen's.

It is further alleged that Steamer communicated to the plaintiff his alleged discovery. If this be true, the plaintiff's right cannot be supported, as he could not, if the supposition be true, be the original inventor or discoverer. Steamer states that he was employed by the plaintiff, and sold to him, in 1851, a formula for an enamel; and also, that he prepared in Allen's laboratory the gum used by him, for which he agreed to pay thirty dollars. This witness seems to have been a worker in metals. It is proved, however, that he took back the facts stated, in a publication under his signature. The equivocations and inconsistencies of the witness, do not recommend his statements to the confidence of the jury. Mr. Thonin, who is a manufacturer of porcelain teeth, says, that Doctor Allen proposed to pay witness what Steamer owed him, if he would procure Steamer's signature to a certain paper. At the same time Doctor

Allen observed that he had paid Steamer a hundred dollars for his services. It does not appear, however, what the paper was, which Doctor Allen was anxious Steamer should sign. Doctor Darling is a dentist, and he says that Doctor Allen called on him, and advised him not to purchase a formula for setting teeth from Steamer, as the Doctor alleged Steamer procured it from his laboratory, and he threatened to sue Steamer. Elias Wildman, who has been a dentist since 1836, considers the formula of Delabarre sufficient, and that it is substantially the same as Doctor Allen's. Doctor Lane says, that in 1845 he became acquainted with a continuous gum for setting teeth, as practiced by Doctor Dodge of New York, who not long afterwards died, and no further account of his plan has been given.

These facts, disconnected and certainly not very satisfactory from their nature or the manner of relating them by the witnesses, are left with the jury, with the remark that the plaintiff's patent ought not to be avoided in this particular, except on clear and undoubted evidence.

But the defendant claims to have discovered the same thing as contained in the formula of the plaintiff, before he made the discovery. If this be so, the plaintiff cannot recover. Mr. Aldrich states that Doctor Allen, in the fall of 1847, made an upper set of teeth with the gum, for his wife. Witness is the brother-in-law of Doctor Allen, who, to the knowledge of the witness, has been engaged, for several years in making experiments on the subject of setting teeth. Mrs. Aldrich says she wore the set of teeth first made by Doctor Allen, four or five years. Then a full set were made, which she now wears alternately with another set. Doctor Wickersham knows, that in April, 1847, Doctor Allen was experimenting to find how to set teeth by a continuous gum on a platinum plate. Doctor Curtis states, that Doctor Allen made for him a full set of teeth in 1849, having the continuous gum. These lasted until 1853, when a new set was made, which the witness now wears. He thinks, in 1843 Doctor Allen informed him that he was experimenting to fasten teeth on a plate. The last set of teeth made for the witness had a back plate. This was done at his own request. Doctor Ward: Ten years ago Doctor Allen was working night and day, to make an improvement in setting teeth. Doctor Bacharjin, is a manufacturer of teeth, and he says that Doctor Allen was experimenting to set teeth by a continuous gum on a plate, in 1843. The witness saw a specimen similar to what is called for in his patent. Doctor Taylor, was at the convention in Louisville in September, 1851. Several specimens of Doctor Allen's work were presented to the convention. In April, 1851, a paper was published in Cincinnati, in which the editor speaks of the improvement of Doctor Allen, which will supersede block work. In July,

1851, Doctor Allen showed witness a specimen somewhat improved from the one he had before seen, and of which he spoke in terms of high approbation in the dental paper of which the witness was editor. He says that Doctor Allen, some two years before his patent, exhibited to him a specimen of work similar to the one described in his patent. He saw Doctor Hunter's improvement, which he supposed was block work, in April, 1852. The work of Hunter is like that of Allen's in many respects. He says Hunter's work was block work, up to 1851, and he supposed Hunter's work was intended to be an improvement on block work. He thinks, in principle the improvement of Hunter, as claimed, and Allen's, are the same; Hunter's mode of fastening is different from Allen's. The report of the convention of physicians at Louisville, in the fall of 1851, spoke in high terms of the improvement of Doctor Allen, and the convention voted him a gold medal. Hugh McCullum says, two or three years after 1841, Doctor Allen said he was making improvements to fasten teeth on a plate with a continuous gum, but that he had not yet perfected his improvement. Professor Wood states that in the college session of 1851-2, Doctor Allen made a specimen in which the teeth were fastened to the plate by a continuous gum. Several unavailing efforts were made to break the teeth from the gum; at length one of the teeth was broken. Mr. Colburn, dentist, says, that Doctor Allen's method of setting teeth is the best, and that the old plan has been abandoned. The platina plate is used. Peter Van Emmon, dentist, was eleven years in company with Doctor Allen, and he says the improvement of Allen has superseded the other modes of setting teeth. Between five and six years ago, he saw the first specimen. A dentist accustomed to block work could make the work of Doctor Allen, and would know how to use borax. Doctor Putnam is a dentist, has manufactured teeth, made fluxes, &c., and practiced under Doctor Allen. Doctor Robinson, of London, England, has been a dentist twenty-three years, and he considers Doctor Allen's plan as new and useful. Doctors Stockton, Chapman, Barlow, Kingby, Harlet, Wilson, Halman, Shope and Smith, all speak of Doctor Allen's plan as the best, &c. Mrs. Bartlett, lives in Covington. In 1846 or 7, Doctor Allen made for her a temporary set of teeth, then a set with springs, at her request, with a gum like the set she now wears, which was within five months of the time her teeth were taken out. C. E. Allen, is not the inventor; he heard Steamer say that he regretted injustice had been done to Doctor Allen through his instrumentality. C. Buchart regrets that Doctor Allen was unjustly dealt with. Mr. Monter, dentist, was employed by Doctor Allen in 1852. Was acquainted with Steamer, who had no knowledge of dentistry. Doctor Darling says,

Steamer's enamel was of no value for dental purposes. Has been working on Doctor Allen's plan three years and finds it good. Dr. Irwin: Allen's plan is new and very useful. Doctor Miller, has treated between two and three hundred cases on Doctor Allen's plan, which is best; thinks Hunter's plan would be better for block work. Doctor Wardle, says he is a manufacturer of mineral teeth. He makes the compound from Doctor Allen's formula; thinks a man of ordinary skill could make the gum by the formula.

Defendant's evidence as to his priority of invention or discovery.

Mrs. Guilford: In January, 1851, Doctor Hunter made her a set of teeth which she has worn ever since, and on which the continuous gum was used. In 1848 he made a set for her, somewhat different. Her present teeth are better than the natural teeth. Doctor King, in November, 1850, saw a specimen of upper teeth which Doctor Hunter said he had prepared for the World's Fair. Mr. Toland: Doctor Hunter frequently purchased teeth of him. In the fall of 1850, he showed the witness specimens which he intended to send to the World's Fair. This was three months before the fair. The witness saw the teeth after they were returned from the fair. Mr. Jones says, prior to 1848, in 1846 or 7, Hunter stated to him his object was to set teeth on a plate by a continuous gum. In the fall of 1850 he saw the experiments, now exhibited, three or four months before the World's Fair. Doctor Crane has known Doctor Hunter for twelve years, and knows that he was experimenting on continuous gum work. In 1847 Doctor Hunter said he had succeeded so far as to convince himself that he would succeed in setting a full set of teeth in a continuous gum. In the fall of 1850 he saw the specimens now exhibited. Mr. McKinney saw at the Crystal Palace in London the specimens before the jury, connected together. Doctor Lesley: In 1846 he knew that Doctor Hunter was making experiments to overcome shrinkage. He stated his object was to unite the teeth singly on a plate by a gum. At the Louisville convention, being one of the committee to whom the paper presented by Doctor Allen was referred, in regard to his invention, he differed from the other members of the committee, and made a counter report to that which was made by the other members of the committee. Doctor Locke, sen., says, in 1844 or 6, he knew that Doctor Hunter was experimenting, and about a year before October, 1851, Doctor Hunter said to him that he had succeeded in making a gum in which to set teeth. Doctor Tallafarro has known Doctor Hunter ten years, and knows that he experimented to improve teeth. In 1848, he made a set of teeth for witness, perhaps block work. The teeth were soldered to a back plate. Mr. Wayne says, in 1847 Doctor Hunter was experimenting,—object was to make a compound to fasten teeth. Doctor

Maise says, in 1846 a lady got him to insert a tooth in an artificial set, and the teeth appeared to have been set in a gum body. The witness saw the work of Doctor Dodge in New York, could see no other fastening than the gum. This was prior to July, 1850. Doctor Brown says, in the fall of 1850, Doctor Allen enquired of the witness what kind of work Hunter was getting up. Witness replied that he was getting up a gum work. Doctor Hamlin says the teeth in Hatch's mouth looked like Levatt's enamel; but Allen showed a plan with a gum that adhered to it. Doctor Crane says, five or six years ago, Levatt's enamel was the same as Doctor Allen's work in Hatch's mouth. That a gum body cannot be made out of it. In Doctor Hunter's specifications, he says, "the teeth are first arranged on the plates according to the knowledge of the manipulator and state of the patient, after which the gum is applied, which does not shrink in the fire, and the whole brought up to the proper degree of heat in a muffle, and suffered to cool, when they will be ready for soldering to the plates, without having changed by working or otherwise in the fire, thereby enabling any dentist who cements single teeth well, to make block work with a greater degree of certainty, and much more accuracy than by carving, and without that act."

In the Dental Register of the West, published in this city, October, 1852, there was published a "new method of supplying artificial teeth and gums," by Doctor Hunter, parts of which were read as rebutting evidence by the counsel. He says, 15th page, "Where is the new principle in the patent claim now made? A flux is combined with what is technically termed a body or base, and the application is in every respect similar." "I stand upon the ground that I have perfected a body, (as applied to certain bodies and enamels made into artificial teeth, by Jones, White and McCurdy,) which does not materially contract in the fire, and possesses more strength than any other body known to me, and which, with skillful handling, requires but one heat, independent of the soldering of the teeth to the plate, to make perfect work." "It is applicable, he says, to the ordinary gold plate as used by dentists, generally, in the form of block work, and is made by me in continuous arches where a full denture is required, and it is equally applicable to cases where a few teeth are required, and can be fastened to the plate by soldering, riveting, or any other known method now in use."

In regard to the first inventor, gentlemen, it is not sufficient to defeat a patent that another person has conceived the possibility of effecting what the patentee has accomplished. To constitute a prior invention, the party alleged to have made it must have proceeded so far as to have entitled himself to a patent in case he had made an application. And you will apply this test to the

work of the defendant. The caveat of the plaintiff was filed in the patent office the 29th of April, 1851, and bears date at Cincinnati, 7th of April, 1851. In this paper the plaintiff says, "What I claim as my invention is a fusible cement of which an artificial gum is formed, applicable to artificial teeth, by means of which mineral teeth are firmly united to each other, and also to the metallic plate upon which they are set." And he says, "The mode of applying the cement is as follows: When the teeth and plate are properly arranged upon a cast of plaster of paris, and the teeth covered with the plaster, I use the cement under, between, and around the teeth. This cement is composed of silic, oxide of tin, oxide of lead, manganese, potash and wedgewood. The teeth, being thus arranged, are put into a furnace, and other cement is used; the cast is then removed, and when cooled, the outside plaster is taken off. I then use a preparation of the oxide of gold, so combined with the cement and so applied, as to produce, when finished, a true gum color. Again the cast is put into the furnace until the latter preparation flows; it is then removed, cooled slowly, and is ready for the mouth."

The caveat, which is in evidence, shows beyond controversy how far the plaintiff had progressed with his invention on the 29th of April, 1851. when the caveat was filed in the patent office; and as it bears date, at Cincinnati, on the 7th of that month, it may be presumed that it was prepared at that time to be forwarded to Washington. This peculiarity of the plaintiff's invention and discovery [is] supposed to exist [consist] in the mode of fastening his teeth on the plate, with or without back straps and without rivets, by the consistence and strength of the paste he uses, which keeps the teeth firmly in their places, and lessens the weight and size of the work in the mouth. The patent of the plaintiff bears date the 24th of December, 1851. From that time his specifications became public, and every one had a right to inspect them, and for proper purposes to obtain a copy of them.

The question arises under the caveat and the patent of the plaintiff, whether he is protected from the experiments and invention of the defendant. He is protected by the law, unless the defendant's invention entitled him to a patent before the plaintiff applied for his patent. If both the plaintiff and defendant are inventors of the thing claimed by them respectively, the one who perfected his invention first is protected by the law. A general remark that he had accomplished his object, without particularizing what he had invented or discovered, is not satisfactory. But a statement of the thing invented or discovered should be considered as evidence, so far as it agrees with the patent subsequently obtained, or with the work claimed to have been perfected. One of the specimens exhibited by the defendant

in the fall of 1851, and which he expressed an intention of sending to the great Fair, was block work; the other is alleged to be a continuous setting of the teeth, to fit the mouth, and not consisting of parts put together, as block work. These specimens, or at least one of them, some of the witnesses saw at the World's Fair, in 1852. The defendant has made no application for a patent; and it would seem, from his publication in the "Dental Register" above referred to, he contests the fact of any discovery having been made by the plaintiff. In page 14, he says, "to Delabarre must be given the credit of having first conceived and executed the union of artificial teeth already baked, with an artificial gum and plate." "To Adibran," he says, 15th page, "must we give the credit of having first made the claim, so far as I am informed, of having overcome the shrinkage of material, which claim was made in his published work, and was contested twenty years after [by] Lefoulon, but which principle is claimed by no other author." "Desirabode and Lefoulon both gave Delabarre credit for having done this kind of work, and published his formula, the principle of which consisted in uniting a flux with the material used as an ordinary base or body, that it might fuse at a less heat than the teeth then in use." And the defendant then asks, "Where is the new principle in the patent claim now made?" This publication, as before stated, was made in October, 1852.

Several witnesses have been examined by both parties, to show that each, for a number of years, has been experimenting to obtain what both of them, as they allege, have accomplished. The caveat and the patent show what the plaintiff has attained, and the defendant's work is shown by the evidence. The evidence of the plaintiff has shown the work done by him on his principle before his patent was obtained. The acrimony excited in the course of this controversy, as shown by the testimony, is much to be regretted. The subjects involved are interesting to the cause of science and the arts, to the public at large, and especially to the parties in this suit. The plaintiff claims no more than nominal damages, as he is desirous only of sustaining his claim under his patent. Neither the court nor the jury can enter into the feelings of the parties in any cause. It is their duty to consider and decide every case on its merits, as the law requires. There should be no other solicitude felt than to attain this result. And having attained this, in the careful exercise of their best judgments, they have nothing to apprehend.

After being out a short time, the jury returned with a verdict for the defendant. A motion for a new trial was made, which remains undecided.

[NOTE. No other cases involving patent No. 8,621 have been found in the Reports prior to 1880.]

ALLEN, The STEPHEN.

[See The Stephen Allen, Case No. 13,361.]

ALLEN v. ALLEN.

[See Allen's Heirs v. Allen's Ex'rs, Case No. 211.]

ALLEN, (BLAIR v.)

[See Blair v. Allen, Case No. 1,483.]

ALLEN, (BOND v.)

[See Bond v. Allen, Case No. 1,619.]

ALLEN, (CRAMER v.)

[See Cramer v. Allen, Case No. 3,346.]

ALLEN, (CRAPO v.)

[See Crapo v. Allen, Case No. 3,360.]

ALLEN, (CULL v.)

[See Cull v. Allen, Case No. 3,465.]

ALLEN, (GREEN v.)

[See Green v. Allen, Case No. 5,753.]

ALLEN, (HAMMOND v.)

[See Hammond v. Allen, Case No. 6,000.]

ALLEN, (HARVEY v.)

[See Harvey v. Allen, Case No. 6,177.]

ALLEN v. The H. P. BALDWIN.

[See The H. P. Baldwin, Case No. 6,811.]

ALLEN, (JAY v.)

[See Jay v. Allen, Case No. 7,235.]

ALLEN, (JOY v.)

[See Joy v. Allen, Case No. 7,552.]

Case No. 226.

ALLEN v. KING.

[4 McLean, 128.]¹

Circuit Court, D. Michigan. June Term, 1846.
PAYMENT—WHAT CONSTITUTES—NEGOTIABLE INSTRUMENTS—DEMAND AND NOTICE—AGENCY.

1. Taking a note is no discharge of a pre-existing debt, unless there be an agreement to that effect.

[Cited in Moore v. The Fashion, Case No. 9,772. See Gallagher v. Roberts, Id. 5,195; Cooper v. Gibbs, Id. 3,194; Lyman v. Bank

¹[Reported by Hon. John McLean, Circuit Judge.]

of U. S., 12 How. (53 U. S.) 225; Weed v. Snow, Case No. 17,347; Peter v. Beverly, 10 Pet. (35 U. S.) 532; Beers v. Knapp, Case No. 1,232; Bank of U. S. v. Daniel, 12 Pet. (37 U. S.) 32; Reppert v. Robinson, Case No. 11,703.]

2. The taking of such note from the indorser, imposes an obligation on the holder to demand payment when the money is due, and give notice of non-payment. If he fail in this, he makes the note his own.

[See Foote v. Brown, Case No. 4,909.]

3. A mere agent is responsible for the damages incurred, when he fails to make demand and give notice.

4. Where a note was received, the proceeds to be applied in discharge of a debt, if demand be not made and notice given to the indorser at the proper time, so as to charge him, he makes the note his own, in discharge of the debt.

[See note at end of case.]

5. Where there are no effects in the hands of the drawee, the holder may be excused, as against the drawer, from making demand and giving notice.

6. But in such case, it must appear that the drawer had no right to expect the draft would be accepted and paid.

[7. Cited in Moore v. Newbury, Case No. 9,772, to the proposition that receipt of payment by note is not conclusive, but only prima facie evidence of the payment of the debt.]

[8. Cited in Jewett v. Hone, Case No. 7,311, to the proposition that taking a bill of exchange as collateral security for a prior debt is sufficient to shut out equitable defenses of an accommodation acceptor.]

[At law. On motion for new trial. Motion overruled.]

Joy & Porter, for plaintiff.
Mr. Fraser, for defendant.

THE COURT. This action was brought to recover a balance which the defendant owes to the plaintiff, for goods, wares, and merchandize, purchased. A draft, payable in four months, drawn by Harleston, on N. G. Ogden, of New York, and indorsed by King, was procured by King and handed to the counsel of the plaintiff, with the view of paying, when the proceeds should be received, so much on account. This draft was forwarded and accepted, but was eventually protested for non-payment. It seems that due notice was not given to the drawer and indorser, and that was made the principal ground of defense. The trial took place in the absence of the circuit judge, and now a motion is made for a new trial, on points stated, before a full court. The jury found for the defendant.

A new trial is asked—

1. Because the court rejected Harleston, the drawer of the draft, who was offered as a witness, to show that the remedy against him has not been lost, as the drawer of the bill, for want of strict notice.

2. Because the jury were instructed that it was incumbent on the plaintiff to prove that the draft had been presented for payment at maturity, at the place where payable, and that it had been regularly protest-

ed for non-payment, and notice to the drawer and indorser given.

3. Because, in the instruction, a decision in 2 Wash. C. C. 191, [Gallagher v. Roberts, Case No. 5,195;] 2 Wash. C. C. 157, [Webster v. Massey, Case No. 17,336,] was not followed, on which the plaintiff relied.

4. Because the court refused to charge the jury, upon the request of plaintiff's counsel, that unless the jury are satisfied, from the testimony, there was an express agreement by the plaintiff to take the thousand dollars' draft in payment, and at his own risk; that the plaintiff was but the agent of King, for the collection of said draft; and that the draft remained his property, and at his risk; and that although the draft was not presented for payment, at maturity, and no notice of non-payment given, yet that constitutes no defense to this action.

5. That if the draft was not taken in payment, although no notice was given, if thereby the amount of the draft, or any part were lost, by reason of such neglect, it was a ground of action for damages he thereby sustained, against the plaintiff, by the defendant.

6. Because the court charged the jury that by failing to make the demand and give notice, the plaintiff made the bill his own, and that the remedy against the defendant upon the open account, was consequently lost.

Other causes were assigned, but which are substantially embraced in those above stated.

There can be no doubt, that where a bill has been received payable on time, that it is no discharge of a pre-existing debt, unless there be an agreement to that effect. Nor would a draft payable on presentation, be a payment, unless it was agreed to be so received. Until the money on a bill is paid, it is at the risk of the drawer and the holder of the bill, whether he be entitled to the money, or a mere agent for the drawer, he is bound to make the demand, and give notice of nonpayment, and if he fail he will, in many cases, be responsible to the drawer or indorser for damages.

The damages are not to be estimated by the face of the bill, in regard to the drawer, he having no effects in the hands of the drawee, but by the actual damages suffered by him. It is true, when the holder of a bill, regularly negotiated, neglects to make a demand at its maturity, and give notice, he loses his recourse against the names on the bill, who are entitled to notice.

There is no evidence to show that the bill in question was taken in payment. It must then have been received, for the purpose of applying the proceeds when paid, to the payment of the balance due by the defendant to the plaintiff. [Frier v. Jackson,] 8 Johns. 396; [Tobey v. Barber,] 5 Johns. 69; [Olcott v. Rathbone,] 5 Wend. 492; [Johnson v. Weed,] 9 Johns. 310; [Muldon v. Whitlock,] 1 Cow. 306; 4 Mason, 248, [Franklin

Fire Ins. Co. v. Lord, Case No. 5,057.] If it be agreed to receive the bill in payment, the rule is different. [Tobey v. Barber,] 5 Johns. 69; [Rowley v. Ball,] 3 Cow. 303; [McNair v. Gilbert,] 3 Wend. 344; [Peter v. Beverly,] 10 Pet. [35 U. S.] 532. In all cases the plaintiff may produce the note at the trial to be cancelled. [Pintard v. Tackington,] 10 Johns. 104; [Burdick v. Green,] 15 Johns. 249; [Hughes v. Wheeler,] 8 Cow. 80. And the court will require the bill to be produced.

The holder of the bill, being an agent merely, is not considered a party to it. As, where a bill is forwarded to a bank for collection, and demand or notice is neglected, the bank is responsible only for the damages sustained, and they are to be ascertained by a jury. The same principle, it is contended, applies where a bill is received, the proceeds of which, when received, are to discharge a debt. Until the proceeds shall be received, the risk is the drawer's, and if there be a failure, the agent is responsible to the extent of the damages suffered. This, it is argued, is under the law of agency. Story, Ag. 217; [Smedes v. Bank of Utica,] 20 Johns. 384; [Bank of Utica v. Smedes,] 3 Cow. 662. "The drawer of a bill, or the indorser of a note, is not discharged by the omission of the holder to make presentment or demand, or to give notice of non-acceptance or non-payment, where it is clearly shown that he has sustained no damages in consequence of such omission." Commercial Bank of Albany v. Hughes, 17 Wend. 94.

Where this duty of an agent has been neglected, damages are presumed, but this presumption is rebutted by proof of the entire want of effects in the hands of the drawee continually, from the time of drawing the bill, until and after the day it fell due, and this, under such circumstances, as to show that the drawer had no right to expect payment. In Dennis v. Morrice, 3 Esp. 158, an action was brought by an indorser against the drawer; it appeared that no notice had been given to the defendant, of non-payment by the acceptor, to excuse which, the plaintiff offered to prove that in fact the defendant had not been prejudiced by the want of such notice. But Lord Kenyon said: The only case in which notice is dispensed with is, where the drawer has no effects in the hands of the drawee. The rule is, that every person is entitled to notice whose name is on the bill, and who has any recourse against some other person or persons. On this ground it was held by Lord Kenyon, in 1 Pardess, 459, in an action against the indorser of a bill, drawn by Vaughan on Eustace and Holland; it appeared that notice had not been given to defendant, upon which plaintiff offered to show that Vaughan had no effects in the hands of Eustace and Holland; but the court said that the want of effects in the hands of the drawee by the draw-

er, will not avail the plaintiff, and that the rule extends only to actions brought against the drawer; the indorser is in all cases entitled to notice, for he has no concern with the accounts between the drawer and the drawee. "The plaintiff then proved a letter from the defendant, acknowledging the debt, and promising to pay, and upon that he had a verdict." Now, if the plaintiff in this case was strictly a party to the bill, his recourse against King, the indorser, was lost, by not giving him notice. For it seems he has nothing to do with the matter of account, between the drawer and drawee. From the statement of the drawer, there can be no doubt that King had his recourse against the drawer of the bill, who admitted his liability continued. From this, it would seem that he could have had no effects in the hands of Ogden, or any just expectation that any one would honor the bill. But still the question recurs, did the plaintiff, by failing to give notice to the indorser, release him from responsibility. And if he did, can the fact be set up in defense to the present action? Although the bill was not received by the plaintiff in payment, yet he cannot be treated as a mere agent. The proceeds of the bill, when received, were his, to be applied in part payment of the balance due him. He was a holder of the bill, and neither the drawer nor indorser had a right to withdraw it, nor take any steps in regard to it, which might in the least degree be prejudicial to the interest of the plaintiff. Now this is not the case with a mere agent, who has no interest in the bill, and the owner of it has a right to withdraw it, or appropriate the proceeds of it as may suit his convenience. In this view, it is difficult to distinguish between the rights and duties of the plaintiff in regard to the bill, and those which appertain to the holder who has received the bill in the ordinary course of business. It is his property, and he has a right to negotiate it if he shall choose to do so. He may receive payment of it in property, and make any other disposition of the bill that may be convenient for him. He is then, more than an agent. He is the holder of the bill, and has recourse against the indorser, on condition of demand and notice. The drawer may be responsible, but the question here is, whether the indorser is responsible, no notice having been given to him of the non-payment of the bill? He was entitled to notice, and the fact, that the drawer still acknowledges himself responsible, does not, as regards the indorser, affect the question. In failing to give the notice, the plaintiff made the bill his own, and his recourse against the indorser is lost. He received the bill, and was bound, by the commercial law, to demand payment, and give notice. Whatever recourse the plaintiff may have against the drawer, he can have none against the indorser, as such. And if he can not re-

cover in this form, by reason of his negligence, it is a good defense against an action on the original consideration. Had the plaintiff given the notice, he might have had his choice, whether to proceed against the defendant, as indorser, or on the original ground of action. The evidence of the drawer was rightfully rejected, as his admission of liability on the bill could not affect the rights of the defendant in this action. And this was the object for which tife witness was offered. Upon the whole, the motion for a new trial is overruled.

[NOTE. Where a note is deposited as collateral security for an existing debt, and for collection, it falls within the law of agency, and not within the strict rules of commercial law applicable to negotiable paper, so that the agent is bound only to use due diligence to collect the same. *Lawrence v. McCalmont*, 2 How. (43 U. S.) 426; *Hamilton v. Cunningham*, Case No. 5,978; *Westphal v. Ludlow*, 6 Fed. 348. If the holder of a bill as collateral refuses to return it or to make any effort to collect it, he is liable for the loss resulting from his negligence. *Childs v. Corp.*, Case No. 2,677. Whether or not a note was in fact received in satisfaction of a debt is for the jury. *Lyman v. Bank of U. S.*, 12 How. (53 U. S.) 225.]

ALLEN, (KINNEY v.)

[See *Kinney v. Allen*, Case No. 7,826.]

Case No. 227.

ALLEN v. LYONS.

[2 Wash. C. C. 475.]¹

Circuit Court, D. Pennsylvania. Jan., 1811.

EJECTMENT—TITLE TO SUPPORT—ORPHANS' COURT—JURISDICTION—WILLS—CONSTRUCTION—LATENT AMBIGUITY.

1. In an ejectment against any other person than the proprietor, or one claiming under him, it is not necessary to prove the title out of the proprietaries of Pennsylvania, if a right of entry is proved.

2. The orphans' court, established by the laws of Pennsylvania, has a general jurisdiction, as to intestates' estates, and to direct a sale of real property for payment of debts; and it is not competent for this court to examine the order of that court, whilst it remains in force.

3. The jury, after forty-eight years since the order of the orphans' court, and a conveyance under it, without any pretence of an opposing title in all that time, may presume one dead, intestate, and without issue, alleged to have been so at the time of the proceedings of the court.

4. When, in a will, a devise was of a house and lot in Fourth [Third] street, Philadelphia, and the testator had no property in Fourth [Third] street, but he had a house and lot in Third [Fourth] street, it is a latent ambiguity, and may be explained by parol testimony.

[At law. Action of ejectment. Tried by jury. Verdict for plaintiff.]

The plaintiff, in tracing his title, began with a deed from one R. to William Carter,

¹Originally published from the MS. of Mr. Justice Washington, under the supervision of Richard Peters, Jr., Esq.]

dated April 1733, granting a rent charge out of this ground, being a lot in Philadelphia; a deed from R. to Benjamin Clark, of the fee simple of the lot, charged with the rent, in 1738: the will of Clark, devising this lot to his wife for life, and to his seven children: deed from the widow and five children to Thomas Campbell, of five-sevenths of the lot: an order of the orphans' court, authorizing the administrator of William Clark, (the son of Benjamin Clark,) to sell the remaining two-sevenths, being his own one-seventh, and the part of a deceased sister, who, it was alleged, but not proved, died without issue, by which William Clark became her heir, dated in 1762: the return and report of the sale, confirmed by that court, and a deed founded thereon in 1762, for the other two-sevenths to Thomas Campbell: the will of Thomas Campbell, by which he devises his lot on Third street, in the occupation of R. H., to his daughter, the lessor of the plaintiff. This property lies on Fourth street, and it appeared from the tax-books, and accounts of the executor of Campbell, that the lot in question, about the time of the making of Thomas Campbell's will, was in the occupation of R. H., and that the rents were received for Sarah, the lessor of the plaintiff, down to 1771. In 1781, this property was confiscated, as belonging to Mr. Allen, the husband of the lessor of the plaintiff, and he is now dead.

The defendant's counsel objected, first; that the plaintiff should show the title to be out of the proprietaries. Secondly; that it did not appear that the orphans' court were authorized to direct a sale of William Clark's share. Thirdly; that it did not appear that he was heir to his sister of her one-seventh. Fourthly; the devise is of a lot on Third street, and this lies on Fourth street; and parol evidence is inadmissible to explain it.

WASHINGTON, Circuit Justice, charged the jury. The case of *Hylton v. Brown*, [Case No. 6,980,] is express, that in an ejectment against other than the proprietor, or one claiming under him, it is not necessary to show the title out of him, if a right of entry is proved. Secondly; the orphans' court has a general jurisdiction, as to intestates' estates, and to direct a sale for payment of debts, which it appears was necessary in this case, and it is not competent to this court to examine the order of that court, which remains in full force. Thirdly; whether William Clark was the heir to Elizabeth, and became entitled to her one-seventh, is a fact proper for the jury. It is forty-eight years since this order was made by the court, confirmed by them, and the conveyance to Thomas Campbell, in all which time, no pretence of title, adverse to William Clark's, and those claiming under him, has been set up; and in this case, the plaintiff and defendant both claim under his title. In such a case, the jury may presume that

Elizabeth Clark died intestate, and without issue, by which William became entitled to her one-seventh. Fourthly; the ambiguity in the case of Thomas Campbell's will is latent, and may be explained by parol evidence. It does not appear that he had any lot on Third street, but he had one on Fourth street, and that was in the occupation of R. H. If the jury are satisfied that this was the lot intended, and are also satisfied upon the third point, their verdict ought to be for the plaintiff. Verdict for the plaintiff.

ALLEN, (McARTHUR v.)

[See *McArthur v. Allen*, Case No. 8,659.]

Case No. 228.

ALLEN et al. v. MACKAY et al.

[1 Spr. 219; 16 Law Rep. 686.]

District Court, D. Massachusetts. Feb., 1854.

COLLISION — DAMAGES — ACT 1851, c. 43, § 3 —
FREIGHT PENDING.

1. It is the established rule in this court, that in case of collision, if both parties are in fault, the loss must be divided.

[Cited in *The F. W. Gifford*, Case No. 5,166.]

2. Where sailing vessels are approaching each other, one close-hauled, the other going free, it is the duty of the latter to clear the former. To this general rule, there may be exceptions.

[Cited in *The F. W. Gifford*, Case No. 5,166.]

[See *The Argus*, Case No. 521.]

3. A vessel lost by a collision, is to be paid for at her value when lost. By the statute of 1851, c. 43, § 3. [9 Stat. 635; Rev. St. 4283,] the owners of the vessel in fault are liable to the extent of the "freight then pending," as well as of the value of their vessel; and the term, "freight," includes the earnings of the vessel, in transporting the goods of her owners.

[Cited in *The Glaucus*, Case No. 5,478; *The Ontario*, *Id.* 10,543; *The Bristol*, 29 Fed. Rep. 873.]

4. Cited in *The Aleppo*, Case No. 158, to the proposition that, in computing damages for marine torts, interest at six per cent. may be allowed on the cost of cargo, and all expenses and insurance actually paid.]

5. Cited in *The Mary Doane*, Case No. 9,205, to the point that the lookout must be a person competent to give the requisite orders to the helmsman, in case of meeting a ship.]

[In admiralty. Libel in rem by Walter Allen and others, owners of the barque Hindoo, against R. C. Mackey and others, respondents, and owners of the ship John Quincy Adams. Decree for libellants.]

This was a cause of collision. The libellants were the owners of the barque Hindoo, of Newcastle-on-Tyne, which sailed from Liverpool, in January, 1851, on a voyage to Aden, in the Red Sea, with a cargo of coal. On the 24th of March, 1851, at about one o'clock at night, the Hindoo being then in lat. 5° 22' S., and lon. 25° 17' W., the wind

being the south-east trade, and blowing about S. S. E., the Hindoo being close-hauled on the larboard tack, with all plain sail set, and going about five knots, the watch on her deck saw a large ship bearing down towards them, with all sails set, including studding-sails aloft and aloft, and going dead before the wind, at about nine or ten knots. The ship proved to be the John Quincy Adams, of Boston, owned by the respondents. The captain of the Hindoo was called, came on deck, and corrected his reckoning; supposing, as he testified, that the ship intended to speak him. Finding, however, that she was coming too close, he hailed her to port her helm, as did also the mate and all the watch. The helm of the Adams, however, was put first to starboard and then to port; but at what precise time these orders were given, and whether her course was changed essentially, or not, from the time she was first seen, was disputed. The master of the Hindoo testified, that he saw the Adams obey her helm, when it was put to starboard, and that he then perceived that a collision was unavoidable, and gave orders to put up the helm of his own vessel, and square her after-yards, in order to diminish the force of the shock. This order was given and obeyed, but the Hindoo had not time to get round, when the Adams struck her, just aft the mainmast, and cut her down to the water's edge, so that she sunk in fifteen minutes, or less, the officers and crew saving themselves by the bowsprit of the Adams. Much conflicting evidence was given, as to the state of the atmosphere on the night of the collision, whether clear or hazy; as to whether the vessels respectively pursued the proper course, and as to the state and condition of the Hindoo.

William Sohler and John Lowell, for libellants.

S. Bartlett and E. D. Sohler, for respondents.

SPRAGUE, District Judge. Some of the leading facts in this case are not disputed; the total loss of the Hindoo, by collision with the John Quincy Adams; the time and place where this disaster happened; the tacks on which the vessels were sailing. There is no doubt that the sea was smooth, and the night fair, with a moon, but whether there was any, and if so, how much haze or fog, is in controversy. Upon this point, the evidence satisfies me that there was not so much haze, as to make this a case of inevitable accident. It is certain, that the Adams was seen a mile and a half, some witnesses say two miles, off. And I am satisfied that the Hindoo might have been seen from the Adams, at least three-quarters of a mile. This is the testimony of Captain Nickels, the master of the Adams. The collision, then, ought to have been avoided. One or both of the parties must be in fault. If both, the loss must

¹[Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

be divided; this is the settled rule in admiralty. *The Rival*, Case No. 11,867. Some doubt has been expressed on this point, at the bar, but it is the established doctrine of this court.

1st. Was the *Adams* in fault? It was her duty to clear the *Hindoo*, because she was going free, and the barque was close-hauled. The vessels were approaching each other, nearly at right angles, and it was the duty of the *Adams* to go under the stern of the *Hindoo*. It has been said at the bar, that there is no general rule, and experts have so testified here, but this is a mistake. There are general rules, and it is very important that they should be known, in order that when vessels meet each other suddenly, each may at once adopt the proper measures. These rules are, of course, liable to exceptions and modifications. Thus, if the vessel which is bound to give way, or to take a particular direction, cannot do so with safety, by reason of the proximity of the shore, or of other obstructions, the rule does not apply; but, subject to such variations as peculiar circumstances of this sort may impose, there are general rules, which should be known and adhered to. See 2 Pars. Mar. Law, 202, note 3. In this case, the ship should have gone under the stern of the barque, because, by doing so, the vessels would be constantly increasing their distance from each other, and because this course would not require, on her part, any calculation of the rate of speed at which the other vessel was going. The *Adams* had ample time to do this, for she might have seen the *Hindoo* at the distance of three-quarters of a mile, as I have already observed; and if she had attempted to do so, when within half a mile, or a quarter of a mile, with a smooth sea, and with the headway which she had, there is no doubt that she would have cleared the barque. It is so testified by the experts called by the respondents. She did not do so, and the inference is that she must have been in fault.

A good deal has been said about the lookout kept on board the *Adams*. The build of the ship, and the position of her sails, were such, that from the quarter-deck, those on board could not see much, if at all, forward of the beam, nor could the men of the watch, excepting from the topgallant-forecastle. Some doubt has been raised, as to the number of men on the topgallant-forecastle. I am satisfied that there was but one person there; he was seventeen years old, and rated as a boy. I do not think that this was a sufficient lookout. The respondents ought to have had a man there; one who, if any emergency arose, would be able to give the proper order. In this very case, the boy cried "starboard," which was wrong. The moment the captain came on deck, he at once gave the order to "port" the helm, although from the quarter-deck he could not see the *Hindoo*; but he says that he knew

that any vessel, which they should meet in that place, would be sailing in the direction which the *Hindoo* actually was taking, in which case the order should have been to port the helm. And he was right. The *Adams*, then, was to blame for not seeing the *Hindoo* sooner, and for taking the wrong course after she was seen.

2d. The next question is, was the *Hindoo* to blame? It is said that she intended to speak the *Adams*, and that she ought, therefore, to have shown a light, and none was shown. But if she did nothing to carry out this intention, did not alter her course, nor deaden her way, she is not to be accounted blameworthy for a mere intention. The *Hindoo* was justified in presuming that the *Adams* would keep out of the way; she had a right to keep her course. It is contended that she deadened her way, first, by backing her topsail, secondly, by taking in her gaff-topsail. It is doubtful whether she did take in her gaff-topsail; and the only two witnesses who speak of it, do not say when it was done. The evidence, as to the main-topsail, is quite clear, that it was not backed till just before the collision, when there was great danger, and then she had a right to do it, in order to try to evade or diminish the imminent shock. If the gaff-topsail was taken in, or let go, it was probably done at the same moment. I do not think, therefore, that the *Hindoo* was in fault, and the decree must be for the libellants. The case was sent to an assessor, and upon the report made by him, several questions were argued.

SPRAGUE, District Judge. The *Hindoo* is to be paid for, at her value when lost. The master reported her value, at the port of departure, to be £3500, and he has, upon a rehearing, decided that he can ascertain no diminution of value, from the time of her leaving Liverpool, up to the day of her loss. In his estimate, he has deducted £500 from the value which the witnesses affixed to the vessel, because he was satisfied from the testimony, as to the leak, that she could not have been so well repaired after her former voyage, as those witnesses have supposed.

The respondents contend, that the leak was a great and increasing one, and that the vessel would have been obliged to put into Rio for repairs; and experts were called to show, that the repairs at Rio would have been very expensive. The evidence is very contradictory. I do not think it proves that the leak was an increasing one; the weight of testimony is the other way. Then, as to the testimony of the experts, they were asked what they should judge, from the whole evidence, would be the expense of repairs at Rio. This was not the proper mode of examining witnesses. The evidence was contradictory and voluminous; and instead of thus asking them, in the first place,

to judge of the result of the evidence, and then their opinion, as experts, upon that result, a suppositious case should have been put to them, for their opinion, and the court would have judged whether that case existed. It is no part of the duty or power of experts, to decide upon conflicting evidence. The *Clement*, [Case No. 2,879; U. S. v. *McGlue*, Id. 15,679.] And I cannot tell what evidence they adopted; certainly not that of the captain and mate, who testified that there was no leak. There does not appear to be any evidence in the case, from which any one can say what the cause of the leak was; and therefore I cannot adopt these opinions of the experts, nor could they, with any certainty, estimate the amount of repairs required, nor the sum which they would cost.

The libellants, on the other hand, think that too much has been allowed for the leak. I am convinced, by the whole evidence taken together, that the vessel leaked a good deal, and I cannot disturb the master's report, as to the allowance to be made for it. Assuming the master to be correct in his estimate of the value, at the port of departure, I think it is for the respondents to show a deterioration, or depreciation, after the vessel sailed. This they have not done. I have already considered the evidence concerning the leak, and it does not show that the leak increased, or that anything occurred to injure the vessel, from the beginning of the voyage. I think, therefore, the value at the port of departure, must be taken to be the value at the place of the disaster.

Another question, of considerable interest, has been raised and discussed; whether, under the statute of the United States, (1851, c. 43, § 3; 9 Stat. 635; [Rev. St. § 4283,]) limiting the liability of ship owners to the value of the vessel and freight then pending, the freight of the *Adams* is to be brought in; the same persons owning the vessel and cargo. This is a new question, so far as I know. No cases have been cited at the bar, and I suppose there are none. Under the English statute, the question cannot arise, as it is provided for in terms. It is argued, that no freight was to be paid in this case, and therefore, that none was pending. I think, however, that "freight" is often used in a sense broad enough to cover this case. The old maxim was, "freight is the mother of wages." If you take this literally, and extend to it the rule contended for here, it would exclude the sailors from wages, where the owner carries his own goods. I think the expression "freight pending," is perhaps a little broader than that of the English statute, "freight due or to grow due;" and it may fairly cover the increased value of goods conferred on them by their carriage, which is just as real a gain to the owner of the vessel, and just as real a payment by the owner of the

goods, in the one case as in the other. I take into consideration, also, that this statute limits a responsibility which existed at common law, and therefore must not be extended beyond the fair import of its language. I think that the earnings of the vessel, in transporting the goods of the owner, may well be deemed "freight," within the meaning of this statute, and the amount will be what would have been a fair compensation for transporting the same goods, had they belonged to other persons.

Decree for libellant, for £3500, the value of the *Hindoo*, and for £900 freight. Total, £4400, or \$21,315.36, with interest from the date when the vessel would have arrived at her port of destination, in the ordinary course of such a voyage, \$3408.84.

NOTE, [in 16 Law Rep. 692.] A separate libel was filed for the cargo, and interest was allowed on its value from the date of the loss.

Case No. 229.

ALLEN v. McKEAN.

[1 Sumn. 276.]

Circuit Court, D. Maine. May Term, 1833.

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS
—CORPORATE FRANCHISES—COLLEGE CHARTER
—ASSUMPSIT.

1. A college, merely because it receives a charter from the government, though founded by private benefactors, is not thereby constituted a public corporation controllable by the government; nor does it make any difference, that the funds have been generally derived from the bounty of the government itself.

[Cited in Pennsylvania College Cases, 13 Wall. (80 U. S.) 220.]

2. The visitatorial power is a mere power to control and arrest abuses, and to enforce a due observance of the statutes of a charity; it is not a power to revoke the gift, to change its uses, or to divest the rights of the parties entitled to the bounty.

3. The visitatorial power is an hereditament founded in property, and valuable in the intentment of law; and where it is vested in trustees, there can be no amotion of them from their corporate capacity, and no interference with the just exercise of their authority, unless it is reserved by the statutes of the foundation or charter. The trustees are, however, subject to the general superintendence of a court of chancery for any abuse of their trust.

4. Bowdoin College is a private, and not a public, corporation, of which the commonwealth of Massachusetts was founder, and the visitatorial and all other powers, franchises, and rights of property of the college are vested in the boards of trustees and overseers, established by the charter, who have a permanent right and title to their offices, which cannot be divested, except in the manner pointed out in the charter. In the charter of the college, (section 16,) it is declared, that the legislature "may grant further powers to, or alter, limit, annul, or restrain any of the powers by this act vested in the said corporation, as shall be judged necessary to promote the best interest of the college." Under this clause the authority of the legislature of the state of Maine is confined to the enlarging, altering, annulling,

[Reported by Hon. Charles Sumner.]

or restraining of the powers of the corporation, and does not extend to any intermeddling with its property, or extinction of its corporate existence.

[Cited in *Pennsylvania College Cases*, 13 Wall. (80 U. S.) 220.]

[Distinguished in *Lothrop v. Stedman*, Case No. 8,519.]

5. By the act of separation of Maine from Massachusetts, the powers and privileges of the president, trustees, and overseers of the college, are guaranteed under the charter, so that they cannot be altered, limited, annulled, or restrained, except by judicial process, according to the principles of law, unless that act has been modified by the subsequent agreement of both states. Afterwards the legislature of Massachusetts passed a resolve, "that the consent and agreement of this commonwealth be, and the same is hereby, given to any alteration or modification of the above-mentioned clause or provision in said act, relating to Bowdoin College, not affecting the rights or interests of this commonwealth, which the president, and trustees, and overseers of the said college, or others having authority to act for said corporation, may make therein, with the consent of the legislature of said state of Maine; and such alterations or modifications, made as aforesaid, are hereby ratified on the part of this commonwealth." This resolve does not authorize the legislature of Maine to make alterations in the college charter, which shall divert the funds of the founder from their original objects, or vest the visitatorial power in any other bodies, or persons, than the trustees and overseers, marked out in the original charter; and, a fortiori, it does not justify the transfer of these powers from the trustees to any other persons not in privity with them.

6. According to the foregoing resolve, the alterations and modifications are to be made by the boards of the college, or by their agents, with the consent of the legislature, and not by the legislature, without their consent.

7. The terms of ratification in the foregoing resolve, being in presenti, it seems that they cannot be applicable to all possible alterations in all future times.

8. By the terms of the act of separation of Maine from Massachusetts, no modification of it can be made, except by the subsequent agreement of the legislatures of both states. To effect this agreement, there must be a concurrence of the legislatures of both states ad idem, that is, an express assent to some specific proposition. Therefore the act of Maine of the 16th March, 1820, which was never responded to by the legislature of Massachusetts, and which in its terms does not look to any antecedent resolve of Massachusetts, (though the foregoing resolve of Massachusetts was passed four days previous,) but expressly looks to some future act or assent of Massachusetts, is not a sufficient compliance with the articles of separation.

9. By the act of Maine of the 16th of June, 1830, it is enacted, that "the president, and trustees, and the overseers of Bowdoin College shall have, hold, and enjoy their powers and privileges in all respects, subject, however, to be altered, restrained, or extended by the legislature, &c., as shall, &c., be judged necessary to promote the best interests of said institution." This cannot be construed to include an authority to annul the charter, or the corporation created by it, or the institution itself, or to create new boards, in whom the corporate powers and privileges may be vested; or to transfer to other persons the powers and privileges of the old boards; or to add new members to the board by the nomination of the legislature, or by that of the governor and council of the state. The act of the 19th of March, 1821, enlarging the boards, the act of the 27th of

February, 1826, making the governor, ex officio, a member of the board of trustees, and the act of the 31st of March, 1831, declaring, that no person holding the office of president in any college in the state, should hold his office beyond the day of the next commencement of the college, and altering the tenure of their offices, are therefore unconstitutional.

10. Where the boards voted, that they "acquiesced" in an act of the legislature, it was held, that this did not import an assent on their part; and, farther, that their approval could not give effect to an unconstitutional act.

[Cited in *Carr v. Hilton*, Case No. 2,437; *Slocomb v. Lurty*, Id. 12,949.]

11. Where a person holds an office during good behavior, with a fixed salary and certain fees annexed thereto, the tenure of the office cannot be altered without impairing the obligation of a contract. Therefore, the act of the legislature of Maine of 1831, removing President Allen from the office of president, and establishing a different tenure for the office, is contrary to the constitution of the United States.

12. Where one man receives money, which ought to be paid to another, or belongs to another, an action of money had and received, will lie in favor of him, to whom of right the money belongs; and this, notwithstanding it may involve a trial of the title to an office, if the party has once been in possession.

[13. Cited in *Townsend v. Jemison*, 7 How. (48 U. S.) 721, to the proposition that a verdict does not cure defects not preceding or not necessary to its rendition, but those matters which were necessary are after the verdict presumed to have been shown.]

[14. Cited in *Sala v. City of New Orleans*, Case No. 12,246, to the proposition that a charter grant to a bank is a contract, the obligation of which cannot be impaired by subsequent legislation.]

[At law. Action of assumpsit by William Allen against Joseph McKean. Verdict for defendant, taken subject to opinion of the court, set aside, and verdict for plaintiff entered.]

This was an action of assumpsit for money had and received, brought by the plaintiff, who claimed to be president of Bowdoin College, against the defendant, who was treasurer of the college, for the recovery of the salary and perquisites of the office of president of the college. The following is an outline of the material facts of the case.

Bowdoin College was established in Brunswick, in the present state of Maine, by an act of the legislature of Massachusetts, passed on the twenty-fourth day of June, 1794. The act or charter of incorporation, after providing, that there should be erected and established a college, &c., to be under the government and regulation of two certain bodies politic and corporate in the act mentioned, proceeds in the second section to enact that certain persons, (naming them,) eleven in number, together with the president and treasurer of the college for the time being, be created a body politic by the name of the president and trustees of Bowdoin College, with perpetual succession. The third section declares, that the corporation so created, for the more orderly conducting the business thereof, shall have full power

and authority, from time to time, to elect a vice-president and secretary of the corporation, and to declare the tenures and duties of their respective offices; and also to remove any trustee from the same corporation, when in their judgment he shall be rendered incapable, by age or otherwise, of discharging the duties of his office, or shall neglect or refuse to perform them, and to fill up all vacancies in the corporation, &c.; provided, that the number of trustees, including the president and treasurer, shall never be greater than thirteen, nor less than seven. The fourth section confers on the corporation the usual powers of corporate bodies, and among others the power to hold real estate, the clear annual income of which shall not exceed £10,000. The fifth section authorizes them to elect a president, treasurer, professors, and trustees, and other college officers; to purchase lands, erect colleges, &c., and to make all reasonable regulations and by-laws, not repugnant to the laws of the state; and to confer degrees. The sixth section declares, that the clear rents, issues, and profits of all the estate, real and personal of which the corporation shall be seised or possessed, shall be appropriated to the endowment of the college, in such manner as shall most effectually promote virtue and piety, the knowledge of languages, and the useful and liberal arts and sciences, as shall be directed from time to time by the corporation. The seventh section proceeds to declare, that the acts of the corporation respecting elections, the purchase and erection of houses, the duties, salaries, and tenures of officers, the appropriation of moneys, the acceptance of conditional donations, the conferring of degrees, the making and altering of the rules and orders, &c. &c., shall not have any force or validity, until agreed to by the board of overseers created by the same act. The ninth section proceeds to appoint certain persons by name, (in number forty-three,) together with the president of the college, and the secretary of the corporation, the board of overseers of the college, creating them a body corporate with the usual powers, and among others with the power of amotion of the members of the board, and providing, that the board shall never be greater than forty-five, nor less than twenty-five. The sixteenth section provides, "that the legislature of this commonwealth may grant any further powers to, or alter, limit, annul, or restrain any of the powers by this act vested in the said corporation, as shall be judged necessary to promote the best interests of the said college." The seventeenth section grants to the college five townships of land, of the contents of six miles square, to be laid out and assigned from any of the unappropriated lands belonging to the commonwealth, in the then district of Maine, the same to be vested in the trustees of the college and their successors for ever, for the use, benefit, and

purpose of supporting the college, with power to dispose of them, &c., and subject to certain conditions of settlement.

Such are the most material clauses of the charter. The lands so granted by the commonwealth have been vested in the corporation; and other donations have from time to time been received by it from the munificence of private individuals. The college boards, soon after the grant of the charter, were duly organized under the charter, and suitable arrangements were made, so that the college went into operation in the year 1801, and has ever since continued to perform the functions, for which it was established, in the promotion of sound literature, and the liberal arts and sciences. No alteration was ever proposed, or made to the charter, during the union of Massachusetts and Maine. But upon the separation of the latter, as an independent state, from the former, it was provided by the act of separation of the 19th of June, 1819, (which was incorporated into the constitution of Maine, which went into effect on the 15th of March, 1820,) among the fundamental articles, that "all grants of land, franchises, immunities, corporate, or other rights, &c., which have been or may be made by the said commonwealth before the separation, &c., shall continue in force, after the said district shall become a separate state. But the grant, which has been made to the president and trustees of Bowdoin College out of the tax laid upon the banks, &c., shall be charged upon the tax upon the banks within the said district of Maine, and paid according to the terms of the grants. And the president and trustees, and the overseers of the said college shall have, hold, and enjoy their powers and privileges in all respects, so that the same shall not be subject to be altered, limited, annulled, or restrained, except by judicial process according to the principles of law." And the ninth article of the same act declares, that the fundamental article shall be incorporated, ipso facto, into the state constitution, "subject, however, to be modified or annulled by the agreement of the legislature of both the said states; but by no other power or body whatsoever." With a view, doubtless, to meet the special security thus given to the rights and privileges of Bowdoin College, another article (the 8th) of the constitution of Maine declares, "that no donation, grant, or endowment, shall at any time be made by the legislature to any literary institution, now established or which may hereafter be established, unless at the time of making of such endowment, the legislature of the state shall have the right to grant any further powers to, alter, limit, or restrain any of the powers vested in any such literary institution; as shall be judged necessary to promote the best interests thereof."

By a vote passed by the trustees of the college in July, 1801, and duly concurred in by the

board of overseers, the salary of the president of the college was fixed at \$1,000 per annum, (an addition of \$200 was afterwards made in 1805,) to be paid in quarterly instalments, and to commence, when he shall enter on the duties of his office; and it has accordingly been constantly so paid by the treasurer, without any further order of either board, from time to time, to the president for the time being, without objection. By another vote of the college boards of November 4th, 1801, the tenure of the office of the president was declared to be during good behavior. By the by-laws of the institution, every candidate for a degree was required to pay five dollars to the treasurer for the president; and a like fee was subsequently required for every medical degree. Dr. Allen, (the plaintiff,) was duly elected president of the college in December, 1819; and in May, 1820, he was inaugurated, and assumed the duties of the office under this known tenure of office, and the salary and perquisites annexed thereto. In the same month, with the zealous co-operation of President Allen, the college boards passed a vote, which, after reciting the clause of the constitution of Maine as to endowments, already referred to, declared, that the consent of the boards be given, that the right may be vested in the legislature of the state of Maine, (that is, the right to enlarge, alter, limit, or restrain the powers given by the college charter,) and that a committee be authorized in behalf of the institution to take such measures as may be necessary to vest such right in the said legislature, so as to enable them to make the endowment thereby prayed for, or any further endowment, which they in their wisdom might be disposed to make. President Allen was appointed one of this committee; and accordingly application was made to the legislatures of Massachusetts and Maine for their assent to such modification of the college charter, as should enable the college constitutionally to receive patronage and endowments from the legislature of Maine. The legislature of Massachusetts accordingly passed a resolve on the 12th June, 1820, and the legislature of Maine one on the 16th of the same month, on this subject, the terms of which were fully discussed by the court. The legislature of Maine, supposing that by the conjoint operation of the state legislatures, all restraint upon their constitutional authority to alter the charter was removed, in March, 1821, passed an act providing, that the number of trustees of the college, including the president, should never be less than twenty nor more than twenty-five, and a quorum to be thirteen; and the number of overseers should never be less than forty-five nor more than sixty; that the governor and council should appoint twelve persons as trustees, and fifteen as overseers, &c. &c.; that the boards respectively should thereafter fill all other vacancies. Other acts were passed in June, 1820,

in February, 1822, and in February, 1826, respecting the college, upon the terms of which it is unnecessary to dwell. On the 31st of March, 1831, the act was passed, which has given rise to the present controversy. The first section declares, "that no person holding the office or place of president in any college in this state" (and there were at that time, and are now, but two colleges in the state,) "shall hold said office or place beyond the day of the next commencement of the college, in which he holds the same, unless he shall be re-elected. And no person shall be elected or re-elected to the office or place of president, unless he shall receive in each board two thirds of all the votes given in the question of his election. And every person elected to said office or place after the passing of this act, shall be liable to be removed at the pleasure of the board of trustees, or board of trustees and overseers, which shall elect him." The second section provides, "that the fees paid for any diploma, or medical or academical degree, &c., shall be paid into the treasury for the use of the college, and no part shall be received by any officer, as a perquisite of office." At the annual meeting of the boards of the college in September, 1831, they passed a vote, "that they acquiesce in said act, and will now, &c., proceed to carry the provisions thereof into effect." The board of trustees then proceeded, (after having given due notice to President Allen,) to an election of president; but no candidate having a majority of votes, no choice was made, and the college has ever since remained without any acknowledged president. The present action has been brought by Dr. Allen, against the defendant, who is treasurer of the college, for the salary and perquisites of office due to him (as he contends) as president of the college, de jure, notwithstanding his ejection from office in September, 1831.

Greenleaf, for plaintiff.

The corporation of Bowdoin College is in its nature a private eleemosynary corporation. This is manifest from the terms of the charter; the legislature having reserved to itself the right to alter or annul the powers therein granted. If it were a public corporation, such reservation would be superfluous. It was so treated in the separation act, and in the constitution of Maine, by which the rights and privileges of this college were placed beyond the reach of the legislature. The purpose of general education did not make it a public corporation. [Dartmouth College v. Woodward,] 4 Wheat. [17 U. S.] 631, 667. The charity of almost every hospital and college may be public, while the corporation is private. 2 Kent, Comm. 222, 223; Dartmouth College v. Woodward, 4 Wheat. [17 U. S.] 634; Phillips v. Bury, 2 Term R. 346, note. The great object of an incorporation is to bestow the character and properties of individuality on

a collective and changing body of men. [*Providence Bank v. Billings*,] 4 Pet. [29 U. S.] 562. And wherever the acceptance of the charter is necessary to give operation to the act of the government, it is a private corporation. *Ang. & A. Corp.* 46. Such acceptance created a contract between the state and all parties interested in the college. *Lincoln & Kennebec Bank v. Richardson*, 1 Greenl. 81. The property granted to the college became private property, out of which any judgment against the corporation might be satisfied; and which the state could not resume, nor again acquire, but for public uses, and upon the payment of compensation. And the contract thus created could not be rescinded, nor the rights vested under it be divested, by any act of the legislature. *Fletcher v. Peck*, 6 Cranch, [10 U. S.] 87; *New Jersey v. Wilson*, 7 Cranch, [11 U. S.] 164; *King v. Dedham Bank*, 15 Mass. 454; *Charles River Bridge v. Warren Bridge*, 7 Pick. 344; *Society for Propagation v. Wheeler*, [Case No. 13,156;] *Dash v. Van Kleeck*, 7 Johns. 477; *Terrett v. Taylor*, 9 Cranch, [13 U. S.] 43. The college thus erected consists of two distinct corporations; namely, the president and trustees, and the board of overseers. The latter is, in the sixth section, styled "the supervising body," having a negative on the acts of the president and trustees, and possessing all the essential attributes of visitor of the college. The right of visitation is evidently granted away by the state to the board of overseers. The two corporations are empowered, by the charter, to elect a president and other officers; "and to determine the duties, salaries, emoluments, and tenures of their several offices aforesaid." The power of annulment, for just cause and in a legal manner, may be considered as granted by necessary implication; such power being one of the incidents of every corporation. Per Lord Mansfield in *Rex v. Richardson*, 1 Burrows, 539; *Lord Bruce's Case*, 2 Strange, 819; *Rex v. Lyme Regis*, 1 Doug. 149; *Ang. & A. Corp.* 410, 413, 246. In the exercise of these powers, the college declared the tenure of the office of president to be during good behavior; and fixed his salary; and the invariable usage, proved in the case, and amounting to a contemporaneous practical exposition of the vote, has been to pay it quarterly; generally without demand, and always without any special order of the corporation or its officers. Certain perquisites also were directed by the by-laws to be paid by candidates for degrees, "to the treasurer for the president." This office, moreover, being of the essence of the corporation, the incumbent had a franchise in it. *Dighton's Case*, 1 Vent. 77, 82. The place also of trustee, which he held *virtute officii*, though no emoluments were attached to it, is a franchise. And in either case the party unlawfully put out may be restored by mandamus *Fuller v. Trustees of Plainfield*

Academic School, 6 Conn. 532. From these premises it results, that the acceptance of the office of president created a private contract of service between the plaintiff and the college, which neither party, nor the legislature could annul or impair. He was an officer of private instruction; as truly so as the principal of a private academy, and his rights were as absolutely vested. Having been thus elected, and having performed the duties of his office, the plaintiff is entitled to his salary and perquisites; for the recovery of which the proper remedy is by action against the treasurer, for money had and received. It is in evidence, that the treasurer had in his hands sufficient funds for this purpose; that the salary was payable quarterly; and that by the usage of his office, and the practice of the college, no special order was required for the payment. It was therefore, at the end of each quarter, the money of the president, in the hands of the treasurer, who became his trustee for the sums he was entitled to demand, whenever they became payable. And the payment to the president would have been a conclusive answer to any action brought by the college against its treasurer for the same money. It is simply the case of money deposited with A, to be paid over to B; who may always recover it of A, in this form of action. *Scott v. Surman*, Willes, 404; *Com. Cont.* 270; *Heard v. Bradford*, 4 Mass. 326; *Oliver v. Smith*, 5 Mass. 183; *Hall v. Marston*, 17 Mass. 575; *Eagle Bank v. Smith*, 5 Conn. 71; *Arris v. Stukely*, 2 Mod. 260; *Boyster v. Dodsworth*, 6 Term R. 681; *Hearsey v. Pruyn*, 7 Johns. 179; *Sadler v. Evans*, 4 Burrows, 1984. The authority of Maine to modify the college charter, upon which the defence in the present case is understood to be founded, is supposed to be derived from the transactions of the corporations, and of the two states in the year 1820; but upon an examination of those acts, no such authority will be found to have been given. Massachusetts, by its resolve of June 12th, 1820, consented to such alterations of the charter, not affecting the rights and interests of the commonwealth, as the president and trustees, and the overseers, or their agents might make, with the consent of the legislature of Maine. It contemplated specific alterations, to be originated from time to time, by the college or its immediate agents, remote from the influence of popular excitement and the strife of party; which, being submitted in a matured form to the legislature of Maine, might with its approbation, become a law. But, instead of this, the corporations were understood by the legislature of Maine to have sold out to this state the whole trust confided to them, with the right to originate and establish alterations at its pleasure; thus exposing the college to all the storms of political and sectarian violence in a legislative assembly. Under this impression, and without acting

on the proposal of the parent state, Maine passed the subsequent act of June 16th, 1820, taking to itself the right to modify the charter at its pleasure, and making the act to take effect, provided Massachusetts shall consent thereto. This consent never has been given; and as no provision is made for securing the rights or interests of Massachusetts, its consent is not to be presumed. Its plain intent, in the resolve of June 12th, has evidently been disregarded; and neither state has acted on the proposition of the other. Hence all the subsequent legislation of Maine in relation to the college is merely void, and the college still enjoys the immunity secured to it by the constitution.

The assent of the plaintiff is, in this view, of no importance. It could not give to the state a jurisdiction, which the constitution had inhibited; nor surrender the rights of Massachusetts, over which he had no control. But if the law of 1820 were a valid act, it would not justify the ulterior proceedings of Maine. It gives authority to "alter, limit, and restrain, or extend the powers and privileges" of the corporations. The powers of a corporation are those things which it may lawfully do; its privileges are those things which it may lawfully enjoy. Hence the legislature could only modify the capacities of the corporations. It could not do corporate acts in their stead. It could neither make by-laws, nor create trustees nor overseers, nor displace any member of the corporation. If it might limit powers, it could not assume to exercise them. If it might invigorate the arm, it could not cut it off. Therefore the act of March 19th, 1821, authorizing the governor and council to appoint twelve additional trustees and fifteen overseers, and to fill certain vacancies, is void; it being not within the authority professedly granted, and being also a direct exercise of corporate powers. And the subsequent acts of the corporations are vitiated by the votes of these newly appointed trustees and overseers, unless it is made apparent, that such votes could not affect them. Nor can the defence be supported by the statute of 1832, c. 517; for this act also is in violation of the constitution, both of Maine and of the United States. Its provisions are obviously pointed at President Allen, since the language cannot apply to the other college in this state, which has no board of overseers. It is, in effect, an act to remove him from office. It destroys his vested right in the office, and violates the contract of his election, by creating a new tenure of the office, which, till then, was held during good behaviour. It places the contract wholly in the power of one party. It is an exercise of the power of amotion; and this, too, without notice or judgment of law. But even the corporation could not remove from office till after notice to appear and show cause. *Ang. & A. Corp. 244; Fuller v. Trustees of Plainfield, 6 Conn. 532.* And the no-

tice should specify the charges preferred against the incumbent. *Exeter v. Glide, 4 Mod. 33, 37.* It ousts the plaintiff from his franchise, as a trustee and overseer, without judgment of law, and without any offense on his part. *Com. v. St. Patrick's Benevolent Soc., 2 Bin. 449, 450; 2 Kent, Comm. 239; Ang. & A. Corp. 244; Dartmouth College v. Woodward, 4 Wheat. [17 U. S.] 518.* It is a direct and original exercise of corporate powers. And it transcends even the limits of the act of 1820, which permits the legislature to modify the powers of the corporation, but not to annul them. Yet this statute annuls the powers of the college to grant fees and perquisites to the president, and to fix the tenure of his office; which were secured to the corporations by the original charter. In fine, constituted as this college was, with duties so important, and privileges so valuable, the right of control, reserved to the legislature, should be exercised with extreme caution; and should be so limited as to promote the original and peculiar objects of the foundation, and to enlarge rather than restrain the benefits of its relation to the public.

Longfellow for defendant.

The preliminary inquiry in this case is, whether the action can be maintained against this defendant. He is charged, it is true, as the treasurer of the college; but this is merely descriptio personae. He is not the corporation, but its agent; receiving its money in that character alone. His exhibits show, that the sums he received were "for the corporation," and not for the president. He has charged himself with the amount, and is liable to the corporation alone. The privity of contract, on which this action is to be maintained, if at all, is between the plaintiff and the college. If the treasurer had wasted the moneys in his hands, will it be contended, that the plaintiff would have no remedy against the college? On the other hand, if the corporation were insolvent, is the treasurer therefore liable de bonis propriis to the plaintiff? His situation involves no other responsibilities than those of the cashier of a bank, having received the amount of a note left in the bank for collection; in which case the remedy of the depositor would be against the corporation, and not against its servant. The moneys received "for the president" went into the common mass of the college funds, the legislature, by the act of 1831, having repealed the by-law by which he formerly had received them. And in this act both the corporations had acquiesced, and were therefore bound by its provisions, which they had in fact attempted to carry into effect. The authorities cited by the plaintiff in support of the action, may be answered by the single remark, that they all are cases of money received by the party in his private capacity, and not by virtue of any office, like that of

the present defendant. They therefore furnish no support to this action. But if this action would lie, under other circumstances, yet this plaintiff cannot maintain it, not being the president of the college. He was removed from office by the operation of the act of 1831; which it was the constitutional right of the legislature to pass. For the college is in every respect a public institution. It was originally established and endowed by the state; the legislature reserving the right to modify and even to annul its charter. In each of these essential particulars it differs from Dartmouth College; and therefore the case of that college furnishes no analogy for the decision of this. Bowdoin College, it is true, has received munificent donations from the Bowdoin family; but these gifts were made to an institution already established by the public, and do not, in any degree, make it a private corporation. Neither is it private because trustees have been appointed to manage its concerns. This power must be vested somewhere; and the effect is the same whether it is exercised immediately by the legislature, or more remotely by agents of its appointment. Every institution, whether hospital or college, created and endowed by the government, as this was, for purposes of general charity, is a public corporation. The subsequent gifts of private benefactors, without statutes directing their employment, are engrafted into the original foundation, but do not change its character. The state, as the founder, still retains the visitatorial power; and may restrain and control the trustees, should they abuse their trust. *St. John's College v. Todington*, 1 Burrows, 200. This power of the state may be farther argued from the patronage it has bestowed; the visitation always following the patronage. [*Dartmouth College v. Woodward*,] 4 Wheat. [17 U. S.] 675. In the present instance it has also been expressly reserved.

It is conceded, that the legislature has not the right to "annul" the corporation; but it may take away any of its powers, and substitute others, whenever it may deem the interests of the institution to require it. Or it may lawfully resume to itself the power of appointing to office, fixing tenures, and filling vacancies in the corporations. Of the expediency of such a measure, it is not necessary now to speak; but the existence of the power, and the right to exert it, are clear. It was to an office subject to this legislative control, that the plaintiff was elected. Though a provision for the immunity of the college was inserted in the act of separation, yet he was aware that its effect might be done away by the joint power of the two states. And if, by a joint act, they have modified the condition of the college, pursuant to such known powers, he has no right to complain. Nay more, it is proved that he himself procured the passage of the act of 1820, of which he was strongly in favor;

and his assent being, not merely his official, but his private act, he is subject to all its consequences. The argument against the binding force of the act of 1820, founded on the supposed want of assent on the part of Massachusetts, proceeds on a construction altogether too narrow. The meaning of all parties was, only that the power of control should not be assumed by Maine, without the consent of Massachusetts. Whether the restriction was expressed by the words "shall agree," or "shall have agreed," is wholly immaterial; as is farther evident from the fact, that Massachusetts, in the same statute, engaged to ratify whatever arrangements should be made between the corporation and the new state. And the corporation having instructed its committee to vest the power of control in the legislature of Maine, and this state having accepted and exercised the power thus granted, it has therefore been ratified by Massachusetts, and the act is binding. If it be true, that alterations should originate with the president and trustees, this has been done. The committee, who addressed the legislature of Maine, communicated the terms of a modification originally proposed by the corporations of the college. The condition of the college, after the passage of the act of 1820, was the same as it was under the original charter, and before the separation, excepting the power to annul. Hence the enlargement of the two boards, under the act of 1821, was within the purview of the terms of the surrender in the preceding year. The legislature might lawfully have gone farther, and assumed to itself the right to fill all vacancies. But if this power were doubtful, it has been ratified by the college; and the right can no longer be questioned. Had either corporation been disposed to resist, its dissent should have been expressed at the time. Instead of which, the members newly admitted have been tacitly recognized by each board, as legally entitled to their seats; and twelve years of profound acquiescence by all parties have already elapsed, affording the strongest presumptive proof of assent to the statute. This is one of the arrangements to which the ratification of Massachusetts is to be extended. If, however, these members were not legally appointed, it would not follow, that their votes vitiated the subsequent transactions of the boards, unless it should appear, that such measures were actually decided by their votes. And the burden of this proof is on the plaintiff, the legal presumption being in favor of their validity. The act of 1831 is nothing more than a legitimate exercise of the powers vested in the state by the statute of 1820. It violates no vested rights of the plaintiff, for he accepted the office of president, subject to the legislative right of modification. To this right he personally assented. The statute does not remove him from office; but merely declares, that no president shall

hold his office unless re-elected. The motion resulted from the act of the trustees and overseers, under the statute. But whether it resulted from a corporate or a legislative act, it is legal, being only an exercise of visitatorial power. And no notice was necessary, it being a public and not a private corporation. Neither is this statute void, as impairing the obligation of a contract. All presumptions and doubts must lean in favor of its constitutionality. It would be dangerous to presume otherwise. The unconstitutionality of any statute must be clearly manifest, to justify any court in so pronouncing it. Is such the character of this statute, so solemnly enacted, and so deliberately assented to, by those whose obedience was required to its provisions?

Greenleaf, in reply. The treasurer, in his exhibit, states, that the perquisites were received "for the corporation;" but the law says, he received them "for the president." If the latter is entitled to them, he may recover them in this action. They were originally paid to him by the persons graduated; and afterwards, from motives of convenience and decorum, were paid to the treasurer for his use. For the salary, at least, the plaintiff has a double remedy; either against the corporation, as the contracting party, or against the treasurer, as trustee to his use. The supposed acquiescence of the corporation in the act of 1831, was merely a silent submission to superior force. However mistaken the policy which dictated this submission, it was nothing more than the bending of the rush before the tempest. It can never amount to a deliberate and voluntary adoption of the extraordinary enactments of that statute, as a lawful amendment of the college charter. The state is not the visitor of this corporation. All the attributes of a visitor are, by the sixth and seventh sections of the original charter expressly vested in the board of overseers, as "a supervising body." The legislature reserved no such right to itself, nor has it ever been withdrawn from the overseers.

STORY, Circuit Justice. This cause has been argued with a degree of learning and ability proportionate to its importance. I have taken time to consider it, and propose now to deliver the judgment, which, upon mature deliberation, I feel bound to adopt.

Two questions have been made at the bar. First, whether the present action is maintainable against the defendant, as treasurer, supposing the plaintiff still to be rightfully in office. Secondly, whether the plaintiff is rightfully in office, notwithstanding the act of 1831, and the proceedings of the board thereupon; so that he is entitled to recover the amount of his salary and perquisites, or either, against the college.

A strong desire has been expressed at the bar in behalf of the parties, that the court would not, even if it might, confine its judgment to the first question; but that it would proceed to decide the whole merits of the controversy, as essential to the good order and prosperity of the college, as well as to the rights of the defendant. Under these circumstances, although I am conscious of the delicacy and difficulty of the task, (a task, from which I would gladly have been spared,) I shall express the opinion, which I have deliberately formed upon both the questions in the case without hesitation, but at the same time with all the diffidence, which the magnitude of the interests involved in them cannot fail to create. For the present, I shall pass the question, whether the action is maintainable against the present defendant, and proceed at once to the main points upon the merits. And the first point naturally arising upon the discussion is, in what light the original charter granted by Massachusetts for the establishment of Bowdoin College, is to be viewed. Is it the erection of a private corporation for objects of a public nature, like other institutions for the general administration of charity? Or is it, in the strict sense of law, a public corporation, solely for public purposes, and controllable at will by the legislative power, which erected it, or which has succeeded to the like authority? The former is asserted by the plaintiff's counsel to be its true predicament; the latter is as strenuously contended for on the other side.

That a college established for the promotion of education, and for instruction in virtue and piety, and in the liberal arts and sciences, is in some sense a public institution or corporation, cannot well be denied; for it is for the benefit of the public at large, or at least for all persons, who are suitable objects of the bounty; and this is the popular sense, in which the language is commonly used. And in this sense an institution founded exclusively by private donors for purposes of general charity, such as a hospital for the poor, the sick, the disabled, or the insane, may well be called a public institution. But in the sense of the law a far more limited, as well as more exact, meaning is intended by a public institution or corporation. Upon this subject, however, I may well spare myself from any elaborate exposition, since it was fully considered in the great case of Dartmouth College v. Woodward, 4 Wheat. [17 U. S.] 518, from which I will make a quotation, contained in the opinion of one of the judges, which it is well known had the approbation of the court: "public corporations," says the opinion, "are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interests. But, strictly speaking,

public corporations are such only, as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under a charter of the government, the corporation is private, however extensive the uses may be, to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution. For instance, a bank created by the government for its own use, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. So is a hospital created and endowed by the government for general charity," (meaning, as is obvious from the context, a hospital like the Navy Hospital, or the General Marine Hospital, established and supported by the United States out of its own funds, and over which it retains the entire government.) "But a bank, whose stock is owned by private persons," (and it might have been added, partly by private persons and partly by the government.) "is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases the uses may, in a certain sense, be called public; but the corporations are private; as much so, indeed, as if the franchise were vested in a single person." "This reasoning applies in its full force to eleemosynary corporations. A hospital, founded by a private benefactor, is in point of law a private corporation, although dedicated by its charter to general charity. So is a college, founded and endowed in the same manner, although, being for the promotion of learning and piety, it may extend its charity to scholars from every class of the community, and thus acquire the character of a public institution. This is the unequivocal doctrine of the authorities; and cannot be shaken, but by undermining the most solid foundations of the common law." It is afterwards added: "The fact, then, that the charity is public, affords no proof, that the corporation is also public; and consequently the argument, so far as it is built upon this foundation, falls to the ground. If, indeed, the argument were correct, it would follow, that almost every hospital and college would be a public corporation, a doctrine irreconcilable with the whole current of decisions since the time of Lord Coke." And it is further stated, that no authority exists in the government to regulate, control, or direct a corporation, or its funds, "except where the corporation is in the strictest sense public; that is, where its whole interests and franchises are the exclusive property and domain of the government itself." See [Dartmouth College v. Woodward.] 4 Wheat. [17 U. S.] 603-672.

That a college, merely because it receives a charter from the government, though

founded by private benefactors, is not thereby constituted a public corporation, controllable by the government, is clear beyond any reasonable doubt. So the law was understood by Lord Holt, in his celebrated judgments in *Phillips v. Bury*, 1 Ld. Raym. 8, 2 Term. R. 346. Lord Hardwicke, in *Attorney General v. Pearce*, 2 Atk. 87, said: "The charter of the crown cannot make a charity more or less public, but only more permanent than it would otherwise be." And the decision of the supreme court, in the case of *Dartmouth College v. Woodward*, is direct to the same purpose.

Nor does it make any difference, that the funds have been generally derived from the bounty of the government itself. The government may as well bestow its bounty upon a private corporation for charity, as upon a public corporation; and its funds once bestowed upon the former become irrevocable, precisely in the same manner, and to the same extent, as if they had been bestowed upon an individual. The government cannot resume a gift, once absolutely made to a private person; neither can it resume a like gift to a private corporation. It is true, that the government may reserve such a power in granting a charter, if it chooses so to do; but, then, the power arises from the very terms of the grant, and not from any implied authority derived from the bounty being for general charity, any more than it would from its being for private charity. The government may reserve a right to revoke at pleasure even its private gifts; but certainly the law will not imply such right without some positive expression of such an intention. Mr. Chancellor Kent has stated the true principles of law on this subject, with his usual accuracy and clearness: "An eleemosynary corporation," (says he) "is a private charity, constituted for the perpetual distribution of the alms and bounty of the founder. In this class are ranked hospitals for the relief of poor, sick, and impotent persons, and colleges and academies established for the promotion of learning and piety, and endowed with property, by public and private donations." 2 Kent, Comm. (2d Ed.) Lect. 23, p. 274. To be sure, where the government is the founder of a college, it has certain rights and privileges attached to it in point of law; but in this respect it is not distinguishable from any private founder. Every founder of an eleemosynary corporation, (that is, the fundator periciens, or person, who originally gives to it its funds and revenues,) and his heirs, have a right to visit, inquire into, and correct all irregularities and abuses, which may arise in the course of the administration of its funds, unless he has conferred (as he has a right to do) the power upon some other person. This power is commonly known by the name of the visitatorial power, and it is a necessary incident to all eleemosynary corporations; for, these corporations being composed of indi-

viduals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution; and therefore ought to be liable to some supervision and control. 1 Bl. Comm. 480. But, what is the nature and extent of this visitatorial power? Is it a power to revoke the gift, to change its uses, to divest the rights of the parties entitled to the bounty? Certainly not. It is a mere power to control and arrest abuses, and to enforce a due observance of the statutes of the charity. Lord Holt, in *Philips v. Bury*, 2 Term R. 352, says: "The visitatorial power is an appointment of law. It ariseth from the property, which the founder had in the lands assigned to support the charity; and, as he is the author of the charity, the law gives him and his heirs a visitatorial power, that is, an authority to inspect the accounts, and regulate the behavior of the members, that partake of the charity; for it is fit the members, that are endowed, and that have the charity bestowed upon them, should not be left to themselves, (for divisions and contests will arise amongst them about the dividend of the charity,) but pursue the intent and design of him that bestowed it upon them."

But the founder may part with his visitatorial power, and vest it in other persons; and when he does so, they exclusively succeed to his authority. No technical terms are necessary to assign over, or vest the visitatorial power. It is sufficient, if, from the nature of the duties to be performed by particular persons under the charter, it can be inferred, that the founder meant to part with it in their favor; and he may divide it among various persons, or subject it to any modification or control by the fundamental statutes of the foundation.² Now, it is a general rule in the construction of charters, that if the objects of the charity are not incorporated, but certain trustees are incorporated to manage the charity, the visitatorial power is deemed to belong to such trustees in their corporate capacity.³ And so the law is laid down by Lord Holt in *Philips v. Bury*, 2 Term R. 352, 353. This visitatorial power is an hereditament, founded in property, and valuable in the intendment of law; and where it is vested in trustees, there can be no amotion of them from their corporate capacity, and no disturbance or interference with the just exercise of their authority, unless it is reserved by the statutes of the foundation or charter. But, still, as managers of the revenues of the charity, they are not beyond control; but are subject to the general superintendence of a court of chancery, for any abuse of their trust in

the management of it. If, with these principles in view, we examine the charter of Bowdoin College, we shall find, that it is a private and not a public corporation. It answers the very description of a private college, as laid down by Mr. Chief Justice Marshall, in *Dartmouth College v. Woodward*, 4 Wheat. [17 U. S.] 640, 641. It "is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the objects of that bounty. Its trustees were originally named by the founder, and invested with the power of perpetuating themselves. They are not public officers; nor is it a civil institution; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation." The commonwealth of Massachusetts is its founder, having given it its original funds. But it is made capable of receiving, and has actually received, funds from the bounty of private donors. As founder, the commonwealth of Massachusetts would have possessed the visitatorial power, if it had not intrusted that, and all other powers, and franchises, and rights of property of the college, to the boards of trustees and overseers established by the charter, and in the manner therein stated. As soon as that charter was accepted, and carried into operation, by the trustees and overseers named in it, they acquired a permanent right and title in their offices, which could not be divested, except in the manner pointed out in that charter. The legislature was bound by the act; they could not resume their grant; and they could not touch the vested rights, privileges, or franchises of the college, except so far as the power was reserved by the 16th section of the act. The language of that section is certainly very broad; but it is not unlimited. It is there declared, that the legislature "may grant further powers to, or alter, limit, annul, or restrain any of the powers by this act vested in the said corporation, as shall be judged necessary to promote the best interest of the college." Whatever it may do, then, must be done to promote the best interest of the college. It is true, that it is constituted the sole judge, what is the best interest of the college; but still it cannot do any thing pointedly destructive of that interest. Its authority is confined to the enlarging, altering, annulling, or restraining of the powers of the corporation. It cannot intermeddle with its property; it cannot extinguish its corporate existence; it cannot resume all its property, and annihilate all its powers and franchises. The legislature must leave its vitality and property, and enable it still to act as a college. It cannot remove the trustees, or overseers, though it may abridge, as well as enlarge, their powers. At least, any argument, which should attempt to establish a different doctrine, must proceed upon

² *Dartmouth College v. Woodward*, 4 Wheat. [17 U. S.] 675; *Philips v. Bury*, 2 Term R. 350, 352, 353.

³ *Id.*: *Green v. Rutherford*, 1 Ves. Sr. 472; *Attorney General v. Middleton*, 2 Ves. Sr. 327; *Case of Sutton's Hospital*, 10 Coke, 23, 31; 2 Kent, Comm. (2d. Ed.) p. 300, § 23 et seq.

the difficult assumption, that a power "to promote the best interest of the college," included a power to destroy all its interests, nay its very existence. But it is unnecessary to enlarge upon this topic, since the present case does not rest upon the effect of this clause of the original charter. The act of separation, which is constitutionally binding upon the legislature of Maine, gives, as we have seen, a complete guaranty to the powers and privileges of the president, trustees, and overseers, under the charter; so that they are incapable of being altered, limited, annulled, or restrained, except by judicial process according to the principles of law, unless that act has been modified by the subsequent agreement of the legislatures of both states.

The next inquiry naturally is, whether any such modification has been made, as is contemplated by the act of separation. If it has, another inquiry will be, what is the true extent of the modification actually made and authorized. The resolve of the legislature of Massachusetts was passed, as we have seen, on the 12th day of June, 1820. After reciting the clause in the act of separation, above referred to, and the petition of the trustees and overseers of Bowdoin College for such a modification of that clause, as would enable the legislature of Maine to make donations, grants, and endowments to the college, it is resolved, "That the consent and agreement of this commonwealth be, and the same is hereby, given to any alteration or modification of the aforementioned clause or provision in said act relating to Bowdoin College, not affecting the rights or interests of this commonwealth, which the president and trustees, and overseers of the said college, or others having authority to act for said corporation, may make therein with the consent of the legislature of said state of Maine; and such alterations or modifications, made as aforesaid, are hereby ratified on the part of this commonwealth." Now, whether this resolve is exactly in conformity to the petition of the trustees and overseers, and carried into effect their objects, or not, is a point wholly unnecessary to be here discussed; for the state of Massachusetts had a right to prescribe such terms, as it pleased; and was not bound to grant what was asked, but what it deemed in its discretion fit to be granted. We must, then, construe the resolve, as we should any other solemn act of legislation, according to its true intent to be collected from its terms. Now, it is very clear, that Massachusetts was not willing to make an unconditional surrender of all rights and interests under the charter to the legislature of Maine; for an express exception or reservation is made of alterations or modifications "affecting the rights and interests of the commonwealth," under the clause of the act of separation. The very exception or reservation supposes, that there are some rights

and privileges and interests of the commonwealth, arising under the charter; for otherwise the language of the exception or reservation would be useless, if not absurd. Nor is it difficult to perceive, that the commonwealth of Massachusetts had rights, privileges, and interests, which might be affected by certain alterations of the charter. In the first place, the commonwealth was the founder of the college, and had given certain lands to be appropriated to the uses of the charity. It had a right and interest in having these funds perpetually applied to the original objects of the institution. As founder, too, it was entitled to the visitatorial power over the college; and having delegated that power to certain trustees and overseers in perpetual succession, as its chosen, substituted agents and visitors, it had also a right and interest in having that power perpetually exercised by the very bodies, and by none others, which it had constituted for this purpose. Nothing is clearer in point of law, than the right of a founder to have his visitatorial power exclusively exercised by the very functionaries, in whom he has vested it. It is the very substratum of his dotation.

This is not all. The founder has a right to have the statutes of his foundation, as to the powers of the trustees, strictly adhered to, except so far as he has consented to any alteration of them. But an authority to alter or modify those powers can never be fairly construed into an authority to take them away from his trustees, and confer the same powers on other persons. My view of this resolve, therefore, is, that it authorizes no alterations or modifications of the college charter, which shall divert the funds of the founder from their original objects, or shall vest the visitatorial power in any other bodies, or persons, than the trustees and overseers marked out in the original charter; and a fortiori, that it does not justify the transfer of these powers from the trustees to any other persons not in privity with them. It does not authorize the legislature of Maine to assume to itself the powers of the trustees, or overseers, or either of them, or to appoint new trustees or overseers; for that would affect the rights and interests of the founder, who has a right to select his own administrators of his own bounty in perpetuity. I do not say, that the legislature of Maine might not have authorized an increase of the number of both boards, leaving the appointment to be made by the existing boards; for that would still leave the funds to be administered by agents selected by the proper visitors of the founder. Upon that point I give no opinion. What I do mean to say is, that the legislature of Maine was not authorized by this resolve of Massachusetts to affect the rights and interests of the latter state, by making appointments of trustees and overseers of the charity through its own agency, and independent of the agency of the charter trustees, and overseers. Massa-

chusetts has nowhere therein given any assent to such an alteration or modification of the charter of the college.

But this is not all. The language of the resolve is, that Massachusetts assents and agrees to any alteration and modification, "which the president and trustees, and overseers, of said college may make therein, with the consent and agreement of the legislature of said state of Maine; and such alterations or modifications, made as aforesaid, are hereby ratified on the part of this commonwealth." Now, I confess, that I think there is great force in the argument, that this resolve had in view certain alterations and modifications, then to be made, *uno flatu*, and not any subsequent alterations and modifications, which might from time to time, and in all future times and ages, be made in the charter. It is scarcely conceivable, that Massachusetts should use terms of ratification in present, as applicable to all such possible alterations in all future times. That was not necessary to accomplish the objects of the petitioners. A single alteration or modification, which should confer upon the legislature of Maine the authority required by the constitution to authorize any donation, grant, or endowment of that legislature to the college, would have been sufficient, without any general and sweeping authority for unlimited changes. But, be this as it may, it is very clear, that Massachusetts has not assented or agreed to any alterations or modifications, which the legislature of Maine might in virtue of its own sole authority make, but to such only, as the president and trustees, and overseers, of the college may make with the consent and agreement of the legislature of Maine. The alterations and modifications are, then, to be made by the boards of the college, or by their agents, with the consent of the legislature, and not by the legislature without their consent. It short, the alterations or modifications are to originate with the boards, and to be made by them; but they are inoperative, unless ratified by the legislature. If, therefore, the legislature of Maine has undertaken to make laws, altering or modifying the charter of the college, without making the validity of such laws dependent upon the adoption of the boards before or after their passage, I have no hesitation in saying, that such laws have never been assented to by Massachusetts, and are, consequently, unconstitutional and void.

But let us see, whether the legislature of Maine has adopted this resolve of Massachusetts; for there must be a concurrence of the legislatures of both states *ad idem*, to repeal or modify the clause in the act of separation. It is very certain, that the legislature of Maine has passed no correspondent resolve or act, in *totidem verbis*, nor has it in terms assented or agreed to the resolve of Massachusetts. How, then, can the resolve have any operation? The act of sepa-

ration declares, that the fundamental articles, the terms and conditions of the separation, shall be, *ipso facto*, incorporated into the constitution of Maine, "subject, however, to be modified or annulled by the agreement of the legislatures of both the said states." To constitute such an agreement, both parties must assent to the same thing. The whole proposition must be adopted, or nothing. From the very nature and force of the term, an agreement can be but one thing; and in that one thing, both parties must concur. If, then, Massachusetts and Maine have not agreed to the same identical thing, the *casus foederis* has not arisen. Indeed, I am inclined to go much farther. I do exceedingly doubt, if any modification or amendment can be made in any of these fundamental articles, without the specific modifications or amendment being drawn out, and expressly assented to by both states. I do not think, consistently with the letter or spirit of the qualifying or enacting clause, that the legislature of either state can delegate to other persons its authority to assent to, or frame, any such agreement. It cannot agree, *ab ante*, to any modifications or amendments, which third persons may make. It must agree to some specific proposition, purporting to be its own final act in the premises.

But, it is argued, that the act of Maine of the 16th of March, 1820, (which was passed four days after the Massachusetts resolve,) contains a virtual assent to that resolve, and that therefore there has been a sufficient compliance with the requisites of the articles of separation. Let us see, then, what the purport of that act is. It is entitled "An act to modify and limit the terms and conditions of the act of separation, relative to Bowdoin College, and encourage literature, and the arts and sciences;" and it enacts, "that, provided the legislature of Massachusetts shall agree thereto, the president and trustees, and the overseers, of Bowdoin College having already assented thereto, the terms and conditions mentioned in the act of the commonwealth of Massachusetts, passed on the 19th of June, A. D. 1819, entitled, &c., be and the same hereby are so far modified, limited, or annulled, as that the president and trustees, and the overseers, shall have, hold, and enjoy their powers and privileges in all respects, subject, however, to be altered, limited, restrained, or extended by the legislature of the state of Maine, as shall by the said legislature be judged necessary to promote the best interests of said institution." Now, it seems to me, that this act is precisely in the form contemplated by the act of separation, in order to justify a modification of the charter. It presents a specific alteration for the consideration and agreement of Massachusetts; and thus affords a very strong confirmation of the view, which has been already taken of this point by the court. The act is to take effect, and the modification is to be incorporated into the

charter, provided the legislature of the commonwealth of Massachusetts shall agree thereto, that is, to the specific modification proposed in the act. Now, it is certain, that the act of Maine; or the specific modification of the charter therein proposed, has never been agreed to by the legislature of Massachusetts. The act has never, as far as any of us know, been laid before the legislature of Massachusetts, either for consideration or for confirmation. The act does not look to any antecedent resolve of Massachusetts, and dispense with any farther assent; but it expressly looks to some future act or assent of Massachusetts. The language is, provided the legislature shall agree thereto, not has agreed thereto. Nor is this a mere matter of form. It is, in my judgment, a matter of substance, and was so rightly understood by the legislature of Maine, as indispensable to the constitutional efficacy of the act of 1820. In no just sense can this act be construed to be an adoption of the Massachusetts resolve. The terms are not the same; the objects are not the same; the limitations are not the same. Massachusetts signifies her assent to any alteration or modification "not affecting the rights and interests of this commonwealth." No such qualification or limitation is to be found engraved on the act of Maine. The latter saves no rights and no interests of Massachusetts. Massachusetts signifies her assent to any alterations, &c., which the president, trustees, and overseers, &c., may make in the charter, with the consent and agreement of the legislature of Maine. The act of the latter assents to no such general authority; but confines itself to a single proposition; and that conceived almost in the very terms of the eighth article of the constitution of the state. It is impossible, therefore, in an exact and legal sense to assert, that the resolve of Massachusetts, and the act of Maine, speak *ad idem*. The proposition of neither legislature has been specifically acted upon by the other. There has been a miscarriage of the parties, unintentional, in all probability, but not, in my judgment, the less fatal on that account.

But although I am clear in this opinion, it is not my intention to rest the present case upon this ground alone, though it seems to me impregnable. There is another point of view in which the constitutional doctrine is equally clear, and equally fatal. Let it be conceded, that the act of Maine of the 16th of June, 1830, is constitutional, and has become incorporated into the charter of the college, and there yet remains a very important inquiry; what is the true extent of the authority of the legislature conferred by that act over the college? The words are, that "the president and trustees, and the overseers, of Bowdoin College shall have, hold, and enjoy their powers and privileges in all respects, subject, however, to be altered, limited, restrained, or extended by

the legislature, &c., as shall, &c., be judged necessary to promote the best interests of said institution." In the first place, it is clear, that this language can by no reasonable, indeed, I may say, by no possible interpretation be construed to include an authority to annul the charter, or the corporation created by it, or the institution itself. The word "annul" is not in it, as it was in the sixteenth section of the original charter of 1794; but the other words of that section are retained, except that the word "extend" is substituted for the word "grant." This alone would furnish an almost irresistible argument, that the authority to annul was intended to be withheld from the legislature. But the words of the section in their actual connexion exclude any authority to annul the charter. It would be utterly repugnant to all common sense to say, that an annihilation of the college would be an act to promote its "best interests." The authority is also limited in other respects. It is not an authority to alter, limit, restrain, or extend the charter generally; but only to alter, limit, restrain, or extend the powers and privileges conferred by the charter on the president, trustees, and overseers, as may be judged necessary to promote the best interests of the institution. The act, then, does not authorize the creation of new boards, in whom the corporate powers and privileges may be vested; nor any transfer whatsoever to other persons of the powers and privileges of the old boards. The powers and privileges of the existing boards may be extended or restrained, limited or altered; but they cannot be transferred over to other persons; for that would be an act of a very different character. Whatever powers and privileges are allowed by the legislature to be exercised for the promotion of the best interests of the institution, are to be exercised by the charter boards. No authority is conferred upon the legislature to add new members to the boards by its own nomination or by that of the governor and counsel of the state. That would be an extension not of the power and privileges of the boards, but of the legislative action over them. If the legislature could add one new member of its own choice or appointment, and not of the choice or appointment of the charter boards, it could add any number whatsoever, five, or fifty, or five hundred. It could annihilate the powers and privileges of the charter boards, under the pretence of alteration or extension. It will hardly be contended, that the legislature possesses a right to substitute itself in the management of the college and its interests, for the charter boards; and if not, how can it confer such an authority upon other persons? The president, trustees, and overseers are to "hold and enjoy their powers and privileges in all respects, subject," &c. &c. But how can they hold

or enjoy any such powers or privileges, if these are liable to be transferred to any other persons, and taken from themselves? If such had been the intent of the parties, other language would have been used; the charter, the college, and the boards would have been made subject to the pleasure of the legislature. The power to annul and transfer the powers and privileges would have found its way into the act in a clear and determinate manner. I agree, that the legislature might authorize an enlargement of the boards, by the appointment of new members to be nominated by the boards; for it would be but an enlargement of the powers and privileges of the existing boards. But it is morally impossible, as I think, to ingraft upon the terms of the act an authority in the legislature to make, of itself, new boards, or to change the whole organization of the old boards, by the addition of members not chosen by those boards. I am not prepared, therefore, to admit, that the act of the 19th of March, 1821, enlarging the boards, or the act of the 27th of February, 1826, making the governor, ex officio, a member of the board of trustees, can be maintained as constitutional exercises of authority. I do not say, that the proceedings of the boards, as actually constituted since the passage of those acts, are void. That is a very different question, turning upon very different considerations. There is a marked distinction in the law, which allows the acts of many officers de facto to be good, although they may not be officers de jure, or regularly elected. The present case is quite enough loaded with difficulties for the court not to desire to plunge into that point, although, from the strong desire expressed, and the discussions pressed at the bar for an opinion upon this point, it has not been very easy wholly to avoid it.

Let us see, then, how far the act of the 31st of March, 1831, is affected by any of these considerations. It is in its terms an act of positive and direct legislation. It legislates the existing presidents of Bowdoin and Waterville Colleges (the only colleges in the state) out of office from and after the next annual commencement of the colleges. It is a direct exercise of the power of annihilation from office by the legislature itself. That very power was expressly and exclusively conferred upon the college boards by the original charter. Massachusetts has never consented, that it should be taken away from those boards, and be exercised by the legislature of Maine; for it is an alteration or modification "affecting the rights and interests of that commonwealth," in regard to those very boards. The act of Maine of June, 1820, has not conferred this power on the legislature; for that act authorizes no transfer of any of the powers of the boards to the legislature, or to any other persons. It would have been quite a different question,

if the legislature had undertaken merely to alter the term of office of the future presidents chosen by the boards, with a grant of power to remove such future presidents at the pleasure of the boards. The wisdom of such a provision might be more than doubtful. The authority to make it, might perhaps be more clear. But it is said, that the boards have assented to the act, and have adopted it; and it has, therefore, become binding upon the college. I think, that the argument is not correct. The boards have not adopted it; they have merely "acquiesced" in it, a phrase evidently chosen, ex industria, by the boards, as expressive of mere submission to the legislative will, and not of approbation; a course, which might naturally be adopted to avoid a direct collision with the legislature, and as a respectful appeal for a future revision of the act by the legislature itself. But if the acquiescence of the boards could be construed into an approval of the act, (as, I think, it ought not to be,) still, that approval cannot give effect to an unconstitutional act. The legislature and the boards are not the only parties in interest upon such constitutional questions. The people have a deep and vested interest in maintaining all the constitutional limitations upon the exercise of legislative powers; and no private arrangements between such parties can supersede them. Independent, however, of this general ground, there is another of great weight and importance; and that is, that President Allen was in office under a lawful contract made with the boards, by which contract he was to hold that office during good behavior, with a fixed salary and certain fees annexed thereto. This was a contract for a valuable consideration, the obligation of which could not, consistently with the constitution of the United States, be impaired by the state legislature. The act of 1831 directly impairs the obligations of that contract. It, ipso facto, takes away from President Allen the tenure by which he held his office; and removes him from it. Now, it was as little competent for the legislature to exercise this authority, as it was for the boards of the college. The president, holding his office during good behavior, could not be removed from office, except for gross misbehavior; and then only by the boards, in the manner pointed out in the original charter. It is no answer to say, that the president personally assented to the proposition to clothe the legislature with an authority of this sort, in futuro. However indefensible any act might be on his part, by which he should surrender for all his successors the tenure of office during good behaviour, which he should yet retain for himself, (a design which I am very far from imputing to him;) still the act of June, 1820, could in no legal sense be construed to apply to past contracts. It could operate only in relation to powers to be exercised by the boards, in futuro. And, at

all events, he has not assented to the act of 1831; and has resisted it, as in his opinion oppressive, vindictive, and unconstitutional.

In every view, therefore, in which I have been able to contemplate this subject, it seems to me, that the act of 1831 is unconstitutional and void, so far as it seeks to remove President Allen from office. The legislature could not constitutionally deprive him of his office, or of his right to the salary and perquisites annexed thereto.

The other question in the case is of minor importance to the parties; but still in a legal point of view it is entitled to grave consideration. From what has been already stated, President Allen is *de jure* in office; and as there is no pretence to say, that he has not always been ready to perform the duties of his office, he is entitled to recover against the corporation the entire emoluments, annexed by his contract to the office at the time, when he accepted it, or which have since been annexed to it. But the present suit is not brought against the corporation. It is against the treasurer of the corporation personally, as having received money for the use of the plaintiff. To justify a recovery, then, it must be clearly made out, that there is in his hands money, which has been specifically appropriated to, and belongs to the plaintiff, as president of the college. As to this part of the case, there may arise a distinction between the salary, and the fees of office. Since the college commencement in 1831, no money has come into the hands of the treasurer, which by any order of the board has been specifically directed to be paid to the president of the college, *eo nomine*, or to the plaintiff. Before that period the salary was payable quarterly, and was accordingly paid by the treasurer, under the general vote of the board already stated. It was a duty incumbent upon him so to do, in order to carry that vote into effect; and if funds existed in his hands sufficient for the purpose, there was an implied appropriation of those funds for that purpose. But the acquiescence of the boards at that period in the act of the legislature of 1831, and their information to the plaintiff of that acquiescence, and their proceeding to elect a new president, (though ineffectual,) amounts, as I think, to an implied revocation of the authority to pay over any future salary to the plaintiff, as president. They treated him, as no longer in office, and had a right to take from their treasurer (who is but their agent) the authority to pay to the plaintiff any farther salary, and to assume upon themselves all the consequences of a breach of their contract. But as to the fees for academical and medical degrees, the posture of the case is somewhat different. It is true, that the act of 1831, in the second section, declares, that the fees paid for degrees shall thereafter be paid into the treasury for the use of the college. But, so

far as regarded the plaintiff, who, by his contract and the by-laws, was entitled to those fees, the act was inoperative. Besides, the boards have never acquiesced *de facto* in this part of the act. On the contrary, in September, 1832, there was an express refusal to change the former by-laws, by which "candidates for either degree shall pay five dollars each to the treasurer for the use of the president;" so that those by-laws, at least so far as the plaintiff is concerned, remain unrepealed; and the fees received by the treasurer for such degrees, have been expressly received by him for the use of the president. They are strictly money had and received for his use; and as the plaintiff still continues *de jure* president, he is entitled to them, unless there is some stubborn rule of law, which stands in his way.

It is a very clearly established principle of law, that if one man receive money, which ought to be paid to another, or belongs to him, this action for money had and received will lie in favor of the party, to whom of right the money belongs. So it is laid down by Lord Chief Justice Willes, in *Scott v. Surman*, Willes, 400;⁴ and the doctrine has ever since been adhered to. Nor is there any difficulty in maintaining such a suit, simply because it involves a trial of the title to office, if the party has once been in possession. Upon this point nothing more is necessary than to refer to *Arris v. Stukely*, 2 Mod. 260, and *Boyer v. Dodsworth*, 6 Term R. 681.⁵ It seems to me, therefore, that, as to the fees actually received for degrees by the treasurer for the president, the suit is maintainable, and, as to the salary, not.

I have now finished all that is necessary to be said for the decision of this cause. But I cannot dismiss it without expressing my regret, that it has ever come before the court, and that I have been deprived of the assistance of my learned brother, the district judge, in deciding it. If this court were permitted to have any choice, as to the causes, which should come before it, this is one of the last, which it would desire to entertain. But no choice is left. This court is bound to a single duty, and that is, to decide the causes brought before it according to law, leaving the consequences to fall as they may. It is impossible, in any aspect of the case, not to feel that the decision is full of embarrassment. On the one hand, the importance of the vested rights and franchises of this literary institution has not been ex-

⁴ See, also, *Woodward v. Aston*, Freem. 429; *Mayor of London v. Gorey*, Id. 433; *Howard v. Wood*, Id. 474, and note of Mr. Smirke.

⁵ *Green v. Hewett, Peake*, N. P. 182; *Rains v. Commissary of Canterbury*, 7 Mod. 147; *Bowell v. Milbank*, 1 Term R. 399, note; *Sadler v. Evans*, 4 Burrows, 1984; *Drew v. Fletcher*, 1 Barn. & C. 283; *Lightly v. Clouston*, 1 Taunt. 115, per Heath J.; *Hall v. Marston*, 17 Mass. 575; *Hearsey v. Pruyne*, 7 Johns. 179, 182.

aggerated; and on the other hand, the extreme difficulty of successfully conducting any literary institution without the patronage and cordial support of the government, and under a head, who may (however undeservedly) not enjoy its highest confidence, is not less obvious. But these are considerations proper to be weighed by others, who possess a discretion and voice in a fit adjustment of controversies of this sort. To the court is left the humbler, but unenviable task of pronouncing a judgment, such as a just reverence for the law, and a conscientious discharge of its duty, impose upon it.

The verdict taken for the defendant must, pursuant to the agreement of the parties, be set aside, and a verdict entered for the plaintiff, for such a sum, as shall be ascertained by an auditor to be appointed by the court, as due to him for the fees for degrees, received by the defendant for the use of the president.

Case No. 230.

ALLEN v. MAGRUDER.

[3 Cranch, C. C. 6.]¹

Circuit Court, District of Columbia. Dec. Term, 1826.

ESTOPPEL BY RECORD—PLEADINGS—AMENDING ANSWER.

1. In an action upon a prison-bonds bond the defendant is estopped to deny that there was such a judgment as that recited in the bond; and the plaintiff is not bound to produce the record of the judgment.

2. The court will not, at the trial, permit the defendant to amend his pleadings unless they are satisfied of the justice of the defence intended to be made by the new pleas.

At law. Debt on a prison-bonds bond. Breach, that the defendant departed, &c. Plea, payment. Replication, non-payment, and issue.

R. S. Coxé, for defendant, objected to the bond, because he said that there was no such judgment as that recited in the bond.

THE COURT (nem. con.) was of opinion that upon this issue the defendant was estopped by his bond to deny that there was such a judgment; and that the plaintiff was not bound to produce the record of the judgment.

Mr. Coxé then moved to amend the pleas.

But THE COURT said that they must be satisfied of the justice of the defence intended to be made by the new pleas.

Mr. Coxé did not show that the proposed amendment was necessary to the justice of the case.

Verdict for plaintiff. Motion for new trial, and in arrest of judgment, overruled.

¹[Reported by Hon. William Cranch, Chief Judge.]

Case No. 231.

ALLEN v. MASSEY.

[2 Abb. U. S. 60; 1 Dill. 40; 4 N. B. R. 248, (Quarto 75); 2 Chi. Leg. News, 309; 3 Amer. Law T. Bankr. 188; 1 Amer. Law T. Bankr. 218.]

Circuit Court, D. Missouri. April Term, 1870.*

FRAUDULENT CONVEYANCES—RIGHTS OF ASSIGNEE IN BANKRUPTCY.

1. Where household furniture in a dwelling inhabited by the owner and another person, was transferred by the owner to such other person, by bill of sale, and pointing out the property, but without any other circumstances to indicate an actual change of possession, and the parties continued to dwell together and to use the furniture, as before,—*Held*, the transfer was void against creditors, and under the statute of the state (Missouri) against fraudulent conveyances, as it had been construed by the supreme court of the state.

[See note at end of case.]

2. For the purpose of sustaining an action to set aside a transfer of property by a bankrupt as fraudulent against creditors, an assignee in bankruptcy is deemed to represent the creditors; and may impeach the transfer, notwithstanding it may be held valid and binding against the bankrupt himself.

[Cited in *Bean v. Brookmire*, Case No. 1,170; *Martin v. Smith*, Id. 9,164; *In re Duncan*, Id. 4,131; *In re Werner*, Id. 17,416.]

[See *Cookingham v. Ferguson*, Case No. 3,182; *Cookingham v. Morgan*, Id. 3,183; *Cady v. Whaling*, Id. 2,285.]

[See note at end of case.]

In bankruptcy. This is an appeal from the district court of the United States for the eastern district of Missouri. The plaintiff, as the assignee in bankruptcy of William Downing, filed his petition in February, 1870, in the said district court, against the defendants, representing that in October, 1868, the said bankrupt executed a bill of sale to Eliza A. Massey of certain household furniture in the possession of the bankrupt; that the property was never actually delivered to her, but the same has ever since been in the residence and possession of the bankrupt; that by reason thereof the bill of sale is void by force of the statute of Missouri relating to fraudulent conveyances, and the prayer is that an order may be entered declaring the sale to be fraudulent and void, and the property delivered by the defendants to the assignee.

The answer admits the execution of the bill of sale as alleged; denies that the property was never delivered to the said Eliza A., and alleges that the same was purchased by her in good faith of the said Downing, and that the same has ever since been and now is in her actual possession. The evi-

*[Reported by Benjamin Vaughan Abbott, Esq., and Hon. John F. Dillon, Circuit Judge, and here compiled and reprinted by permission. Syllabus and briefs reprinted from 2 Abb. U. S. 60, and statement from 1 Dill. 40.]

²[Affirmed by supreme court. *Allen v. Massey*, 17 Wall. (84 U. S.) 351. Affirming an unreported decree of the district court.]

dence adduced in the court below consisted of the bill of sale and the deposition of Downing. The bill of sale, acknowledged but never recorded, is dated October 31, 1868, and by it Downing, for the recited consideration of \$3,645 sells and conveys to Eliza A. Massey "the following furniture and other personal property now owned by me and being in my residence, situated on the north side of Washington avenue, being No. 1,347, in the city of St. Louis"—here follows a detailed description of the furniture in library, parlor, and bed-rooms, consisting of chairs, sofas, books, carpets, pictures, mirrors, etc.

The deposition of Downing, the bankrupt, disclosed the following facts:—That he had lived in house No. 1,347, on Washington avenue, above mentioned, for five years or more, and still lived there; that the house belonged to him; that Mrs. Massey was his sister-in-law, and that she and her husband, John Massey, had lived with him and his family for over fifteen years, the two making from time to time an amicable adjustment of expenses. Downing's name was on the door-plate of the house, and the house and establishment were known as his. The furniture and property in question were his prior to the alleged sale to Mrs. Massey. Downing was engaged largely in business, but in October, 1868, his partner allowed a note of the firm to go to protest, and fearing the consequences and desiring to secure his sister-in-law \$3,645 which he owed her, he made to her the bill of sale above mentioned, she being at the time in the house and living with him in the manner before stated. An inventory seems to have been taken of the property; no separate valuation was, however, affixed to the different articles, but the whole was sold for the sum named. It is shown that the chief purpose of the inventory or list of the articles was to enable the property to be described in the bill of sale, which it was in contemplation to have drawn. No act of delivery is testified to, except that the bankrupt says he took Mrs. Massey around and showed the property to her. It is admitted that the parties continued to live together as before in the house; that no change was made; that the property continued to be used as it previously had been; and that Downing's name still continued on the door-plate, etc. On the hearing before Treat, [District Judge,] the district court found that the bill of sale was void, and ordered the defendants to deliver the property therein described to the assignee.

From this order or decree the defendants appeal.

Daniel Dillon, for appellants, cited:

Steward v. Lombe, 1 Brod. & B. 506; Benton v. Thornhill, 7 Taunt. 149; Ludlow v. Hurd, 19 Johns. 220; [Archer v. Hubbell,] 4 Wend. 514; Waldie v. Doll, 29 Cal. 556;

Hamill v. Willett, 6 Bosw. 534; Funk v. Staats, 24 Ill. 646; Kenningham v. McLaughlin, 3 T. B. Mon. 30; [Forsythe v. Kreakbaum,] 7 T. B. Mon. 99; Born v. Shaw, 29 Pa. St. 292; Hutchins v. Gilchrist, 23 Vt. 82; McVicker v. May, 3 Pa. St. 224; Clayton v. Brown, 17 Ga. 217; Bissell v. Hopkins, 3 Cow. 166, and note, where the authorities are collected and reviewed, and the general rule with its twenty-four exceptions laid down; State v. King, 44 Mo. 239. He also contended that as an assignee in bankruptcy stands in the place of the bankrupt, he cannot maintain an action to set aside a sale which would be binding upon the bankrupt.

Hitchcock & Lubke, for appellee.

I. The assignee had a right to the relief sought in his petition. Hill. Bankr. pp. 134, 135, § 43.

II. The bill of sale was fraudulent and void in law under the statute of Missouri. Gen. St. Mo. 1865, § 10, c. 107, p. 440; Clafflin v. Rosenberg, 42 Mo. 439, 43 Mo. 593; State v. King, 44 Mo. 238.

Before DILLON, Circuit Judge, and KREKEL, District Judge.

DILLON, Circuit Judge, delivered the opinion of the court.—I. Neither in his petition nor in argument does the assignee base his right to the relief demanded upon the ground that the bankrupt did not in fact owe Mrs. Massey the debt which the bill of sale was made to pay or secure, nor upon the ground that the sale was fraudulent, because made to hinder and delay the creditors of Downing, the vendor. The assignee places his case solely upon the statute of the state of Missouri relating to fraudulent conveyances, the tenth section of which is in these words: "Every sale made by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by delivery in a reasonable time (regard being had to the situation of the property), and be followed by an actual and continued change of possession of the things sold, shall be held to be fraudulent and void, as against the creditors of the vendor, or subsequent purchasers in good faith." St. Mo. 1865, p. 440, c. 107.

The sale by the bankrupt to Mrs. Massey is within the statute. It was an absolute sale of goods in the possession of the vendor. There was no delivery of the property, or, if any, but a momentary one, and it was not followed by any actual or continued change of possession. This being so, the statute enacts that the sale "shall be held to be fraudulent and void as against the creditors of the vendor, or subsequent purchasers in good faith." With the policy of a statute which, irrespective of the fact of fraud or the intention of the parties to defraud, inexorably denounces as fraudulent per se all

sales not accompanied by the required delivery and by actual and continued change of possession, the courts have nothing to do, and it does not become them to question the legislative wisdom.

The purpose of the statute is to prevent the vendor from acquiring a false and delusive credit, and to prevent purchasers from being ensnared by means of secret sales. Hence, the provision that the sale shall, as required, be accompanied with delivery, and this by an actual and continued change of possession. The purpose of the enactment being to protect the public from deception, the indicia of a change of owners should be such as to accomplish this end. The new owner should fly his own, and not his vendor's flag. This is the construction which the statute has received from the supreme court of the state. In *Claffin v. Rosenberg*, 42 Mo. 439, speaking of this statute, Wagner, J., remarks that "the vendee must take actual possession, and the possession must be open, notorious, and unequivocal, such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands. . . . This necessarily excludes the idea of a joint or concurrent possession." On a critical examination of the case just cited, it will be seen that the exact point of the decision is that the possession of the vendee must, as against the vendor, be actual and exclusive. This is the leading case upon the statute in question, and it has been subsequently reaffirmed and followed. *Claffin v. Rosenberg*, 43 Mo. 593; *State v. King*, 44 Mo. 238; *Lesem v. Herriford*, Id. 323. See *Twyne's Case*, and *American Notes*, 1 Smith, Lead. Cas. 33.

We deem it prudent to observe that in the case at bar, it is not necessary to go so far as to say that in no case can a sale be upheld where the vendor is in possession concurrently with, or rather subordinate to, the vendee or his agent. This may depend upon the existence of circumstances of a nature fairly to put the public upon notice. In this case there was no actual delivery, no continued change of possession, no circumstances of any kind, whereby either creditors or purchasers could know that any change of owners had taken place.

II. The defendants make a point that the situation of the parties to the sale and property was such that no delivery and change of possession other than such as were made was practicable, and hence more ought not to be required. The statute refers to "the situation of the property," not of the parties; but, without emphasizing this suggestion, it seems to us that the statute has reference to property so situated as not to be at the time capable of immediate actual delivery and change of possession, such as growing crops, bulky articles, &c., and not to cases where the property is present and capable of being delivered to the vendee

and retained in his possession and control. Since, in a case like the present, this court will follow the construction given to the local statute by the highest court of the state, it is not deemed to be necessary to follow the appellant's counsel into an examination of the decisions under the statute of Elizabeth or the statutes of other states.

III. The defendants also contend that even if such be the construction of the statute, the assignee has no right to impeach the sale and have the property delivered to him. This view cannot be maintained. If Downing had not gone into bankruptcy, any creditor of his could have subjected the property to the payment of his debt. In this respect the assignee represents the creditors. In consequence of Downing being adjudicated a bankrupt, his creditors are precluded from proceeding against him, and hence the assignee has the right given to him in terms by the bankrupt act, to proceed in the way which the present plaintiff is pursuing. *Carr v. Hilton*, [Case No. 2,436;] *Hill. Bankr.* 134, § 43, and cases cited; *Bankrupt Act* 1867, §§ 14, 35. The result is that the order of the district court must be affirmed.

KREKEL, District Judge, concurred.

[NOTE. On appeal to the supreme court the above decree of the circuit court was affirmed. Mr. Justice Field, in delivering the opinion of the court, said: "The sale of Downing to Mrs. Massey was, within the terms of the statute, fraudulent and void as against his creditors. It was not accompanied by any delivery of the property, and was not followed by any change of possession. * * * There was no outward sign manifested, nor indicia exhibited, nor notice given, which could apprise the community of any change of ownership. * * * The assignee of Downing's estate was authorized by the express terms of the fourteenth section of the bankrupt act (14 Stat. 439) to pursue the property thus attempted to be transferred, and, as auxiliary to its recovery, to ask that the sale of the bankrupt be annulled." *Allen v. Massey*, 17 Wall. (84 U. S.) 351.]

Case No. 232.

ALLEN v. NEW YORK et al.

[17 Blatchf. 350; 5 Ban. & A. 57;¹ 17 O. G. 1281.]

Circuit Court, S. D. New York. Dec. 18, 1879.

PATENTS FOR INVENTIONS — INFRINGEMENT BY BOARD OF EDUCATION — LIABILITY OF CITY — PARTIES.

1. Reissued letters patent No. 21, granted to the complainant, for improvements in seats for public buildings, 15th January 1861, held valid.
2. Seats embodying a patented invention were bought by the board of education of the city of New York for the use of the schools of the

¹[Reported by Hon. Samuel Blatchford, Circuit Judge, and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here compiled and reprinted by permission. The syllabus was taken from 5 Ban. & A. 57, and the statement and opinion, with the exceptions noted, from 17 Blatchf. 350.]

city, and were used in such schools, such board being a corporation created by the state, having exclusive charge of such schools: *Held*, that the city, in its corporate capacity, was liable, in a suit in equity, for the infringement of the patent.

[Cited in *Brickill v. Mayor, etc., of City of New York*, 7 Fed. 479; *Munson v. Mayor, etc., of City of New York*, 3 Fed. 339.]

3. The board of education is a proper party to the suit, and is also liable for the infringement.

In equity. This was a suit in equity [by Aaron H. Allen against the mayor, aldermen, and commonalty of the city of New York and the board of education of the city of New York for infringement of] re-issued letters patent [No. 1,126 of patent No. 12,017,] granted to the plaintiff for "improvements in seats for public buildings." [Decree for complainant.]

Andrew J. Todd, for plaintiff.

Frederic H. Betts, for defendants.

WHEELER, District Judge. This suit is brought upon reissued letters patent No. 21,² granted to the orator, for "improvements in seats for public buildings;" on the 15th day of January 1861, for the term of fourteen years from December 5th, 1854, and extended for the term of seven years from the 5th day of December, 1868, to the date of its expiration. The defences are that the patent is void because the reissue is for a different invention from that covered by the original; that the invention was anticipated by a stove-door, a carriage-seat for a child, an opera-board to a carriage, and a description in a patent to one Eliaers, dated November 28th, 1854; and that the city of New York is not liable for any infringement shown. Other defences were set up in the answer, but have not been relied upon at the hearing. The improvement described in the patent consists in making the seats so they may be turned up out of the way when not in use. In the original patent, they were to be turned up by weights when not held down by being sat upon. In the reissue, the weights may be dispensed with, and the seats moved upward otherwise, or retained. It is argued that, so far as they are dispensed with, one element of a combination is removed, and a different invention produced. This, if well founded, might be fatal to the patent; but the weights have nothing to do with the capability of the seats for being turned up out of the way. They were means only for putting them out of the way. They were one part of the invention when arranged for that purpose; the construction of the seats was another. The reissue divided the invention into its two parts. When divided, the parts together were the same as the whole before, and separately were the same as the parts were before. The contrivances, relied upon as anticipations, each turn down to a horizontal position when so wanted, and are

stopped and held there substantially as these seats are, and are likewise turned up out of the way when not so wanted; and, if the use made by the orator is merely a new use, they are clearly anticipations; but it seems quite clear that it is not. The stove-door was arranged with the front of a stove or furnace, the child's seat with the dash-board of a carriage and the opera-board with the rear of a carriage. These seats are arranged with the standards of seats in public halls, and are so described as arranged. Those other things could not be arranged as seats in such halls without contriving the alterations and additions necessary by the exercise of inventive faculties. They are not the same things, but are different. Although the patent to Eliaers is prior in date to this, the application for this is prior to that, and shows this invention prior to the description of it there. He did not have a patent for this invention, so there was no patent, as such, for the orator to overcome. The evidence furnished by the description was all that was to be met, and the prior application accomplishes that object.*

The proof in respect to infringement is to the effect, that seats embodying this invention were bought by the board of education of the city of New York for the use of the schools of the city, and have been in use in those schools under the direction of the board of education, and the department of public instruction which has superseded the board of education. It is argued, that, upon this proof, the city is not liable in this suit, for two reasons—one is, because these instrumentalities having charge of the schools are corporations themselves, over which the city has no control; the other is, that the use is under sovereign authority, delegated by the state of New York in its sovereign capacity, for which the city or the board of education, or the department of public instruction, can no more be held liable to suit than the state itself. It is understood that the board of education was, and that the department of public instruction is, a corporation under the laws of the state, recognized and treated as such by the courts of the state, and having exclusive charge and control of the schools of the city, without whose action the city cannot be made liable for anything connected with the schools, and for whose contracts the city cannot be held liable otherwise than through proceedings against them. *Ham v. Mayor, etc., of New York*, 70 N. Y. 459; *Dannat v. Mayor, etc., of New York*, 6 Hun, 88. But still, the schools are the schools of the city, the board of education or department of public instruction takes charge of them for the city, they are paid for with the money of the city, and whatever is saved in providing for them is to the advantage of the city. The corporation which that department or board constitutes is within that

*[Should be No. 1,126.]

*[From 5 Ban. & A. 58.]

of the city, and is an instrumentality through which the educational interests of the city are cared for, the same as if done by officers having the same powers, except that the officers could have only a personal and official period of existence, while that of the corporation is, under the law, theoretically perpetual. One principal ground of a suit in equity for the infringement of a patent is, to compel an account of the gains or profits accrued to those proceeded against, by means of the infringement. Obviously, the proper party to proceed against is the one that has received the profits or to whom the gains have accrued. If any party has saved or made anything by this infringement it is the city, and the city seems clearly to be a proper party to account for these savings or profits. The board and department are proper parties, also, for they have been directly engaged in the infringement. It is argued, that the city, as such, could not stop the infringement nor control it, and, therefore, could not be guilty of any tort by which to acquire profits to account for. Probably, the city could not, independently of this board or department, stop the infringement; but that is on account of the mode in which the law requires the educational matters of the city to be attended to, and not because the city has any just right to advantages which the wrongful acts of its board or department may acquire. Officers might be able to do the same, but, if so, the city would not be shielded.

That the acts constituting the infringement were committed in the exercise of authority derived from the state, cannot shield the defendants from liability. The grant of the exclusive right to this invention came from the sovereign power of the general government, and the right is a species of property secured to the inventor by law. It is not subservient to public uses without just compensation ascertained and furnished, upon being taken in a regular and lawful mode, any more than other property of any kind is. It has not been taken by any regular proceeding, but only by mere wrong doing, which could, of itself, furnish no legal right. *Cam-meyer v. Newton*, 94 U. S. 225, 234.

Let a decree be entered, that the patent is valid and that the defendants have infringed, and for an account, according to the prayer of the bill.

[NOTE. For opinion, on the hearing of plaintiff's motion, to take from the file an answer subsequently filed in this case by a new board of education, see *Allen v. Mayor, etc., of City of New York*, 7 Fed. 433. Patent No. 12,017 was granted December 5, 1854, to A. H. Allen, and reissued January 15, 1861, No. 1,126. For other cases involving this patent or the reissue, see *Allen v. City of Brooklyn*, Case No. 218; *Hayward v. Andrews*, 12 Fed. 786; *Same v. City of St. Louis*, 11 Fed. 427.]

ALLEN, (NOURSE v.)

[See *Nourse v. Allen*, Case No. 10,367.]

Case No. 233.

ALLEN v. OGDEN.

[1 Wash. C. C. 174.]¹

Circuit Court, D. Pennsylvania. Oct. Term, 1804.

PRINCIPAL AND AGENT—POWERS OF AGENT—CONVERSION—TENDER—LIENS.

1. Where a power to an agent is general, he may do any thing to bind his principal, which is within the scope of his authority.

2. If the agency be special, every thing is void, which may be done, unless in strict conformity with the authority.

3. If, upon demand, the defendant said he would retain the goods demanded, and that he knew a suit would be brought; this is evidence of a conversion.

4. When a party, holding goods in his possession adversely, has paid rent for the premises in which they are stored; it is not necessary to tender the rent, in order to enable the owner of the goods to recover them in an action of trover.

5. Liens depend upon contracts, express or implied; and none can be implied, where the defendant acts adversely to the rights of the person for whom he has paid the money.

[Cited in *Guntton v. Nock*, 9 Wall. (76 U. S.) 332.]

At law. The case will appear in the charge of the court.

WASHINGTON, [Circuit Justice.] This is an action of trover and conversion, for forty-one tons of pig iron. John Davis, in January 1802; being possessed of a quantity of pig iron, at different places, and amongst others, the quantity in question, it being in Swartout's yard, in New-York, rented by Davis as a place of deposit for that article; empowered a Mr. Champless, in New-York, in writing, to sell the same for the highest market price in cash; or if this could not be done, to offer the same to the defendant, at the market price, on condition that he should pay down 6000 dollars, and that the residue might go to the credit of Davis, against a demand which Ogden had in his own right, or as agent against Davis. The offer was made to Ogden in February, but he took time to consider, and never afterwards gave an answer to that proposition. Champless sold the iron to Watkins; but afterwards, upon receiving a letter from Davis, informing him that he had sold all the iron to the plaintiff, he, Champless, cancelled the sale he had made. The sale to the plaintiff was made on the 6th of February, at 25 dollars a ton; which, with the expense of removing a great part of it, was supposed equivalent to the market price in New-York, and the amount was to go to Davis's credit, against a demand of the plaintiff; and if the iron should be sold for more than the 25 dollars, and expenses, the excess was also to be placed to the credit of said Davis. On the

¹Originally published from the MS. of Mr. Justice Washington, under the supervision of Richard Peters, Jr., Esq.]

19th of February, a bill of parcels was delivered to the plaintiff, on which day, the credit was entered on the plaintiff's books. The sale to the plaintiff, is proved by Davis, to have been real and bona fide. Late in February, Champless being alarmed by a letter from a Mr. Bond, stating, that unless a note of Davis's for 600 dollars was paid, the iron would be sacrificed, thought he would benefit Davis by selling it to Ogden, provided this could be done. The subject was proposed to Ogden, and the original power to Champless laid before counsel; and the sale to the plaintiff revealed both to the defendant, and his counsel. The counsel thought the sale to the defendant might nevertheless be valid, and in consequence of this, the sale was made, on the 1st March, for \$2 50 cts. less than the market price; and the whole amount was agreed to be put to the credit of Davis, against the claim of defendant, as before mentioned. The defendant paid the rent due to Swartout, and removed the iron from the yard. The defendant informed one of the witnesses, that the plaintiff had claimed of him the iron, and that there would be a suit about it. The defendant also said he would retain the iron. Upon this case, if the witnesses who prove it on the part of the plaintiff, (for the defendant has called none,) be believed, one thing is clear, and that is, that whether the plaintiff has a right or not, the defendant most clearly has none. The authority to Champless was special, and therefore he had no power to sell the iron to the defendant, upon any other terms than receiving 6000 dollars in cash; yet it was sold on terms very different. Where a power is general, the attorney may do any thing to bind his principal, which is within the scope of his authority. But if it be special, every thing is void, if he does not act in strict conformity to his authority. But, if the power had been general, still, every thing done under it, after it was revoked, and this made known to the defendant, (as in this case it was,) was void.

As to the plaintiff's title, it is complete, if the witnesses are believed. The moment the sale took place, Davis was receiving credit for the amount; as much so, as if he had received so much money: delivery of the iron then was not necessary. Two objections were made to the plaintiff's right of recovery; first, in the form of a motion for a non-suit, and then before the jury. First, that a conversion is not proved. It is proved that the iron had been demanded, and the defendant said he would retain it, and that a suit would be brought. This is evidence of a conversion. Secondly, that the plaintiff ought, before he brought his suit, to have tendered the money paid by defendant, for the rent of the yard. No case can be produced, in which it is necessary to do this, where the defendant acts under a claim of property, adverse to the plaintiff's right. Here, Ogden, without a shadow of title, in-

terferes with the plaintiff's property; removes it from the place where he had deposited it; and now claims what he had officiously paid, in order to give him possession. Liens depend upon contracts, express, or implied; and none can be implied, where the defendant acts adversely to the right of the person, for whom he has paid the money.

Cases cited, to show that a lien exists in this case. [The Perseverance,] 2 C. Rob. [Adm.] 239; [Beningsage v. Ralphson,] 2 Show. 261; [Arnold v. Jeffreyson,] 2 Salk. 654; [Yorke v. Grenaugh,] 2 Ld. Raym. 866; [Green v. Farmer,] 4 Burrows, 2214. Cases cited to show, that if a man assumes a right to another's property, as if they were his own, it is a conversion. [Doe v. Richards,] 3 Term R. 357; [Baldwin v. Cole,] 6 Mod. 212; 6 Bac. Abr. (Last ed.) 679.

Verdict for plaintiff.

NOTE, [from original report.] He who has an absolute or general property, may bring trover, though he never had the actual possession; for property, in personal things, draws to it the possession, to enable him to bring trover or trespass against a stranger who takes it away; but, he must have a right of possession. Yet, if a person having a special property as a bailee, sells and delivers the goods to another as his own, bona fide, and without notice; the general owner cannot bring trover, or any other action, against the vendee; for, by the sale, his property is altered. So, possession, with an assertion of title, or even possession alone, gives such a property, as will enable a man to bring this action against a wrong doer; for possession is prima facie evidence of property, sufficient to put the defendant upon proof of property. So, the finder of a thing, may bring trover against a stranger, who converts it. If the goods come to the defendant by delivery or finding, the plaintiff must demand them; and refusal is evidence of a conversion. But, it is not evidence of a conversion, where it is obvious that the defendant has made no conversion; as if he has cut down trees, and left them lying there; nor in the case of a carrier, &c. where the goods were lost through negligence, or were stolen; but action on the case is the remedy: but, if it does not appear that they were lost, or if the carrier had them, when he denied to deliver them, it is a conversion. Bull. N. P. 44. Nor where that carrier has a lien on the goods for a debt due him, which is not paid, nor tendered; but trover will lie, if the carrier breaks open the box containing the goods, or sells them, or has them in possession when the demand is made. Not only claiming the property as one's own, but asserting the right of another over it, is, upon demand and refusal, evidence of a conversion. Denial to one who has a right to demand goods, is an actual conversion, and not merely evidence of it; for the assuming upon one's self the property in, and right of disposing of, another's goods, is a conversion. So, where one intrusted with the goods of another, puts them into the hands of a third person, without orders, it is a conversion. Making up of a thing found, or delivered, is a conversion; so is a misuse of it. So, taking and carrying away is a conversion, without demand or refusal. Wilbraham v. Snow, 2 Saund. 47, note 1; [Doe v. Richards,] 3 Term R. 357; [Baldwin v. Cole,] 6 Mod. 212; 6 Bac. Abr. 679. In [Green v. Farmer,] 4 Burrows, 2213, Lord Mansfield lays it down, that courts are disposed to maintain liens: 1. Where there is an express contract. 2. Where it is implied from the usage of trade. 3. Where it may be implied from the manner of dealing

between the parties, in the particular case. 4. Where the factor claims it, for the balance of his general accounts.

ALLEN, (OSGOOD v.)

[See Osgood v. Allen, Case No. 10,603.]

ALLEN, (PAYNE v.)

[See Payne v. Allen, Case No. 10,855.]

ALLEN, (PEDRO v.)

[See Pedro v. Allen. Case No. 10,901.]

Case No. 234.

ALLEN et al. v. PHILADELPHIA SAV.
FUND SOC.

[36 Leg. Int. 204; 7 Reporter, 775; 4 Cin. Law Bul. 350; 14 Phila. 408; 25 Int. Rev. Rec. 170; 7 Wkly. Notes Cas. 231; 26 Pittsb. Leg. J. 171; 11 Chi. Leg. News, 344.]

Circuit Court, E. D. Pennsylvania. May 16, 1879.

COLLATERAL INHERITANCE TAX—BANK DEPOSITS—
LIABILITY OF BANK—EXECUTORS.

[1. Deposits in a Pennsylvania savings bank made by a citizen of New Jersey, since deceased, are not subject to the collateral inheritance tax of Pennsylvania, and the executors can recover them, although they must come to Pennsylvania to reduce their right to possession.]

[2. The state cannot sustain a claim for the tax against the bank, but must look to the estate in the hands of the legal representatives after they have reduced it to possession.]

[See Kintzing v. Hutchinson, Case No. 7,834.]

[At law. Suit by executors of M. A. English to recover a deposit in a savings bank. Judgment for plaintiff.]

Rule for judgment for want of a sufficient affidavit of defense. The plaintiffs, citizens of New Jersey, and executors of Mary Ann English, deceased, who, at the time of her death, was a citizen of New Jersey and domiciled in said state, filed a copy of the book of deposit of their decedent with the Philadelphia Saving Fund Society, the defendants, showing a balance due decedent of \$800. The defendant filed the following affidavit of defense:

"William Purves, secretary and treasurer of the Philadelphia Saving Fund Society, being duly affirmed according to law, saith as follows: 1. That defendants admit that the copy of the deposit book of Mary Ann English with the said society, is correct. 2. That the defendants submit to the court that there is a defense to the demand of the plaintiffs as follows: The said Mary Ann English, as defendants are informed and believe, died without leaving father, mother, husband, children or lineal descendants, by reason whereof, under the statutes of the commonwealth of Pennsylvania, in such case made and provided, all the personal property of

her, the said testatrix, within said commonwealth, including the balance due of the said amount so deposited with defendants, became subject, after payment of debts, to a tax of five per cent. on the net amount thereof to the said commonwealth, which tax has never been paid. 3. The defendants further submit to the court that letters testamentary granted to foreign executors, if they authorize them to sue in the courts of the United States, a debtor of their testatrix can give no higher power or authority for collecting the assets of the estate in this commonwealth than is given by the law thereof to domestic executors. (Signed,) William Purves."

Counsel for the rule cited Kintzing v. Hutchinson, [Case No. 7,834] and argued that it did not lie with defendants to set up the non-payment of the collateral inheritance tax, and that at all events, under the ruling of Kintzing v. Hutchinson, the tax was not due upon the choses in action in question.

E. P. Allinson and Dallas Sanders, for plaintiffs.

Henry Wharton, for defendants.

BUTLER, District Judge. The plaintiffs, citizens of New Jersey, and executors of the will of M. A. English, who was also a resident of New Jersey at the time of her death, sue the defendants, the Philadelphia Saving Fund Society, to recover a debt of \$838.90, with interest. The affidavit of defense admits the existence of the debt; but avers that M. A. English died "without leaving father, mother, husband, children or other lineal descendants;" that the money due is, therefore, subject to collateral inheritance tax, under the statutes of Pennsylvania, and sets this averment up as an answer to the suit. No other defense is presented, and no other can therefore be considered. That this is insufficient, cannot, we think, be seriously doubted. In Kintzing v. Hutchinson, [Case No. 7,834,] Oct. 19, 1877, Judge Strong, sitting in the circuit court for the district of New Jersey, held that the statutes referred to have no application to choses in action here, belonging to one domiciled in another state at the time of his death, though his legal representatives may have to come here to reduce them to possession. Even if this were in conflict with the construction put on these statutes by the courts of this state it would bind us. The learned judge, however, on careful review of the cases, concludes that it is not.

If the law were otherwise, the result would be the same; the averment still would not constitute a defense. If the plaintiffs based their right to sue on letters issued here, the contrary would not, we presume, be suggested. But if they may sue here on the letters issued elsewhere, (and the defendant has not questioned this,) their right to recover is precisely the same as if the letters had been

issued here. If the state can sustain a claim for the tax, as suggested, it cannot sustain it against the defendant, but must look to the balance of estate in the hands of the legal representatives of the deceased, after they have reduced it to possession and paid the debts. When necessary it may raise an administration for this purpose. Judgment must therefore be entered for the plaintiffs notwithstanding the affidavit of defense. We desire it distinctly understood that the defense set up by the affidavit and urged in the argument, does not, as we understand it, involve the question whether the plaintiffs can sue for the debt on the letters issued in New Jersey. That question was not presented in any form.

ALLEN, (ROCKSELL v.)

[See *Rocksell v. Allen*, Case No. 11,983.]

ALLEN, (RUSSELL v.)

[See *Russell v. Allen*, Case No. 12,149.]

Case No. 235.

ALLEN v. RYERSON.

[2 Dill. 501.]¹

Circuit Court, D. Iowa. 1873.

REMOVAL OF CAUSES—ACT OF JULY 27, 1866, CONSTRUED.

1. A cause removed from the state to the federal court, under the act of July 27, 1866, will not be remanded to the state court, merely because the petition for removal does not appear to have been verified.

2. Under the act of July 27, 1866, the non-resident defendant may remove the cause, as to him, where there can be a final determination of the controversy without the presence of a resident co-defendant.

3. In this case it was held that there could be such a final determination.

4. Where a case is made for removal of a cause, under the act of July 27, 1866, the petitioner therefor is not obliged to make an affidavit, such as is required by the act of March 2, 1867.

On motion by plaintiff to remand the cause to the state court.

The material facts are as follows: The plaintiff, B. F. Allen, is a citizen of Iowa. The defendant, Joseph T. Ryerson, is a citizen of Illinois. The other defendant is the sheriff of Polk county, Iowa. The plaintiff brought this suit in one of the state courts of Iowa. The defendants pleaded, and, before the final hearing, the defendant Ryerson filed an application, under the act of congress of July 27, 1866, (14 Stat. 306,) to have the cause, as to him, removed into the circuit court of the United States for the district of Iowa. The application was not verified, but stated the citizenship of the

parties, and that the action was to enjoin the defendants; that there could be a final determination of the controversy as to Ryerson without his co-defendant, and offered the requisite security for filing copies of pleadings, etc., in the federal court. The state court made an order transferring the cause to the circuit court of the United States, and now motion is made by the plaintiff to remand the cause to the state court, for the reason that the petition for removal was not verified, and also, among other reasons, that the controversy as to Ryerson could not be determined without the presence of the sheriff, his co-defendant, and that the application does not state that there is any prejudice or local influence, as required by the act of March 2, 1867. From the bill, it appears that the plaintiff, as a judgment creditor of the "Des Moines Iron Works," had purchased certain real estate belonging to said company, sold on execution, and claimed to have taken with the realty certain machinery, as fixtures. The defendant Ryerson, a junior judgment creditor of said company, claiming that the machinery was not fixtures, and did not pass with the realty, ordered an execution upon his judgment, and caused the same to be levied by the sheriff, his co-defendant, upon the machinery, as the property of the Des Moines Iron Works. Plaintiff's bill was to restrain the defendant from selling, or in any way interfering with, said property, and for injury for the seizure of the same, alleges irreparable damages, etc., and asks that the injunction be made perpetual at the hearing. Defendants, in answer, deny the substance of the bill, and the damages, and ask that the injunction be dissolved.

John D. Rivers, for the motion.

Brown & Dudley, opposed.

Before DILLON, Circuit Judge, and LOVE, District Judge.

DILLON, Circuit Judge.—1. The motion to remand is made upon three grounds. The first ground is that the petition for the removal, upon which the state court acted, was not verified. The removal was applied for and ordered under the act of July 27, 1866. This act does not, in terms, require the petition to be verified (see *Sweeney v. Coffin*, [Case No. 13,686;]) and we do not think the cause should, for this reason, be remanded. The plaintiff is not concluded, by the petition for removal, as to the citizenship of the defendant Ryerson, but may contest that matter in this court, by a plea in the nature of a plea in abatement.

2. The substantial controversy, as disclosed in the plaintiff's bill and in the pleadings, is one between him and the defendant Ryerson. The plaintiff is a citizen of Iowa, and Ryerson is a citizen of Illinois. Judging of the case as made by the pleadings, we think there can be a final determination of the

¹[Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

controversy without the presence of the sheriff. If the plaintiff maintains his bill, the decree will restrain the defendant Ryerson, and his agents and attorneys, which will include the sheriff, from further interference with the plaintiff's property; and the court may, if ground of equitable jurisdiction exists, also ascertain and award the plaintiff damages caused by the acts of the sheriff, under Ryerson's direction. If such a decree be satisfied, this will end the case as respects the sheriff. If not satisfied, the plaintiff can proceed, in the state court, against the sheriff, for as to the latter the cause still remains in that court. If Ryerson shall succeed in this court, and the bill be dismissed on the merits, this will dispose of the plaintiff's case against the sheriff in the state court.

3. It is our opinion, that where a case is made for the removal of a cause under the act of July 27, 1866, the petitioner for removal is not obliged to make an affidavit of the existence of prejudice or local prejudice, such as is required in applications under the act of March 2, 1867. Motion denied.

LOVE, J., concurs.

NOTE. [from original report.] Removal by non-resident creditor, who has been substituted for the sheriff. *Beecher v. Gillett*, [Case No. 1,225.] See *Nye v. Nightingale*, 6 R. I. 439, where it was decided, under section 12 of the judiciary act, that the resident officer was a necessary party

Case No. 236.

ALLEN et al. v. SCHUCHARDT et al.

[1 Amer. Law Reg. (N. S.) 13, (1861).]

Circuit Court, S. D. New York.¹

SALE—STATUTE OF FRAUDS—LEX LOCI CONTRACTUS—PLEADING—IMPLIED WARRANTY—AGENCY.

1. S., acting for parties at Amsterdam, put into the hands of a broker in the city of New York a sample bottle of a quantity of madder, to negotiate a sale. The sale was made in Rhode Island, by the broker, in the name of S., the foreign principal not being disclosed, under an oral contract to A., upon the inspection of the sample bottle, which he refused to open on account of the instructions of S. The madder was, at the time of the sale, in barrels, in a vessel at the port of New York. After the contract was made, a bill of goods was furnished to the purchasers, with a clause, that "no claims for deficiencies shall be allowed unless made within seven days from receipt of goods." The madder in the casks proving inferior to its apparent qualities in the bottle, an action on the case was brought against S., by the purchasers, for damages. *Held*, the oral contract made in Rhode Island, where the statute of frauds does not prevail, can be enforced here, although the contract, if made in the same manner in New York, would have been void. The fact that the merchandise was in New York does not affect the question.

[Distinguished in *The Avon*, Case No. 680.]

¹ Affirmed by supreme court in *Schuchardt v. Allen*, 1 Wall. (68 U. S.) 359.]

2. The action on the case is a proper remedy, and it is not necessary to aver a scienter.

[See note at end of case.]

3. The sale was by sample, and there was an implied warranty that the merchandise should correspond with the apparent qualities of the sample.

[See note at end of case.]

4. The clause in the bill of goods respecting deficiencies, is inoperative, as the contract was previously complete.

5. S., not having disclosed his principals, is personally liable.

At law. [Action by Phillip Allen and others against F. Schuchardt and others for damages for breach of warranty. Judgment for plaintiffs.]

The sample of a quantity of madder was put into the hands of a broker in the city of New York, by the defendants, to make sale of it for them. A sale was made accordingly to the plaintiffs, in the state of Rhode Island, upon an inspection of the sample bottle, which the broker refused to open on account of instructions from his principals. The sample bottle had been forwarded from Amsterdam to the defendants, previous to the shipment of the bulk, and was the only sample of the goods, as none accompanied them. The madder was in barrels, in the vessel, which had arrived in New York, about the time of the sale. The sale was made in the name of the defendants, their principals not being disclosed.

Before NELSON, Circuit Justice, and SHIPMAN, District Judge.

NELSON, Circuit Justice. I. The contract of sale in this case was made in Rhode Island, and, though verbal, is there valid, as no sale note is required, as in our statute of frauds. The madder, the subject of the sale, being in New York, or elsewhere, at the time, does not affect this question.

II. The action on the case for a false warranty, is certainly a somewhat antiquated remedy, the action of assumpsit having taken its place; yet we cannot say that it has been abolished or modified on account of the substitution, by the profession, of the new remedy. There are certain advantages to be gained by the adoption of the one or the other, which are not common to both, and, in a count upon a false warranty, the pleader need not aver the scienter any more than in that of assumpsit. 1 *Wheat. Selw. N. P. p. 486*; [*Williamson v. Allison*,] 2 East, 446; 2 Chit. Pl. p. 101, note pp. 276, 277; 1 Chit. Pl. 139.

III. The sale of the madder was a sale by sample, where the purchaser had no opportunity to examine the bulk; and where he was prohibited by the vendors from opening the sample bottle for the purpose of examining the article, by which act we are inclined to think they assumed the responsibility of maintaining that the bulk was equal to the quality of the article as it appeared to the eye in the bottle. The sale was not only

by sample, but was obviously intended to be such by the vendors, as the sample of the madder preceded the arrival of the bulk from abroad, and no sample accompanied it. The sample thus previously forwarded was put into the hands of the broker to sell the one hundred barrels subsequently shipped. This sample thus forwarded was the only one furnished representing this quantity of madder.

IV. The sale being a sale by sample, there was an implied warranty that the bulk was equal to the sample in quality, which, upon the evidence in the case, it clearly was not. All agree that, from an inspection of the sample, the madder appeared to be pure and unadulterated. From a careful analysis of the bulk by chemists, there was an adulteration, by sand and other foreign substances, exceeding thirty per cent. This evidence preponderates over the weight of the testimony abroad, taken on commission. There was no analysis of the article abroad.

V. The note at the head of the bill of goods rendered "no claims for deficiencies or imperfections allowed, unless made within seven days from receipt of goods," was not binding upon the purchasers. The contract was complete and binding upon both parties before this bill was delivered. The case is an unfortunate one, as both parties are innocent, the fraud having been perpetrated abroad before the goods were shipped to the defendants, who were mere consignees. The question is, which of these innocent parties, under the facts disclosed, should suffer the loss? The question turns upon a dry rule of law, and, according to my idea of it, the plaintiffs are entitled to the judgment.

The verdict of \$10,000 was taken by consent, subject to adjustment and the opinion of the court upon a case made. I shall deduct thirty per cent. from the price paid for the madder, as furnishing the amount of damages in the case, and give judgment for plaintiff for that sum.

NOTE, [from original report.] The familiar principle in this class of cases is, "that so much of the law as affects the rights and merits of the contract, is adopted from the foreign country; so much of the law as affects the remedy only, is taken from the local law of the country where the action is brought." Does the statute of frauds affect the contract or the remedy? It has been held in England, after an extended and elaborate discussion, that the fourth section of the statute affects the remedy, and consequently that an oral agreement within that section, made in France, and valid there, cannot be enforced in England. *Leroux v. Brown*, (1852.) 12 C. B. 801, 14 Eng. Law & Eq. 247. The court rests its decision upon the special language of that section: "No action shall be brought upon any agreement which is not to be performed within a year, &c., unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing," &c. The construction placed upon this language was, that the words, "no action shall be brought," evidently regarded the remedy, and the alternative clause showed that the writing was required only for the purposes of evidence. There were dicta to the effect that such a construction would not be given to

the seventeenth section, regarding sales of goods. These dicta were followed in 1855, by the supreme court of Missouri, in *Houghtaling v. Ball*, 20 Mo. 563. The court expressly decides that an oral contract for the sale of goods, made in a state where the statute of frauds does not prevail, can be enforced in Missouri, where the statute exists substantially in the language of the English seventeenth section. *Browne*, in his work on the Statute of Frauds, (2d. 1857,) p. 140, note 5, disapproves of the distinction, citing dicta in *Carrington v. Roots*, 2 Mees. & W. 248; *Reade v. Lamb*, 6 Welsby, H. & G. 130. The Missouri case, however, was not before him, and the principal case is in the same direction. There is no distinction in the present New York statute of frauds, between the two classes of subjects, and the decision would embrace all the sections. In *Dacosta v. Davis*, 4 Zab. [24 N. J. Law,] 319, the authorities are collected in reference to the question whether the absence of the goods affects the law of the place of contract. In this case a contract was made in New Jersey, for the sale of goods at the time in Pennsylvania. The court arrived at the conclusions reached in the present case.

(2.) The old rule was that all actions upon a warranty, whether express or implied, were actions on the case. As to implied warranties, see *Keilw.* 91. Lord *Ellenborough*, in the case of *Williamson v. Allison*, 2 East, 446, (1802,) says, that the form of declaring in assumpsit cases of warranty, had not then prevailed above forty years, and was adopted in order to add the money counts to the declaration. The right to declare in assumpsit on an express warranty, was first discussed and decided in [*Stuart v. Wilkins*,] 1 Doug. 18, (1778.) The distinction as to the necessity of alleging a scienter is that if the action is on a warranty, it is not necessary, but if it be in the nature of an action of deceit, without any warranty, scienter must be alleged and proved. Note to *Williamson v. Allison*, supra; *Stone v. Denny*, 4 Metc. [Mass.] 151; [*Freeman v. Baker*,] 5 Barn. & Adol. 797; *Bayard v. Malcolm*, 1 Johns. 453. The right to bring an action on the case, for breach of warranty, is fully recognised in this country, among other cases, in [*Hillman v. Wilcox*,] 30 Me. 170; [*Beeman v. Buck*,] 3 Vt. 53; [*Bartholomew v. Bushnell*,] 20 Conn. 271; [*House v. Fort*,] 4 Blackf. 293. An important advantage may sometimes be secured in joining a count for fraudulent misrepresentation with the count on an express warranty, and a recovery thus may be had in accordance with the evidence. A judgment will, it seems, be a bar to an action of assumpsit on the warranty. [*Salem India Rubber Co. v. Adams*,] 23 Pick. 256.

(3.) In determining whether a sale is by sample or not, a material inquiry is, whether the article is open for inspection. It is a reasonable rule, where it is not present and a sample is exhibited, that the sale should be treated as being by sample. The correspondence of the sample with the article, is the essence of the contract, and the purchaser may say, if this correspondence does not exist, "non in hæc foedera veni." *Boorman v. Jenkins*, 12 Wend. 576; *Salisbury v. Stainer*, 19 Wend. 159; 1 *Smith, Lead. Cas.* 77; note to *Chandelor v. Lopus*. This principle is in like manner true of a written contract for articles of a particular name not open to inspection: *Wieler v. Schilizzi*, 17 C. B. 619. When the article and sample are both open to the purchaser, the same principle does not necessarily prevail. There must be an agreement to sell by sample, or at least an understanding of the parties that the sale is to be a sale by sample: *Waring v. Mason*, 18 Wend. 434. The question can only be answered by a view of all the circumstances of each case, and the intention of the parties must be gathered from their acts. It is a question of intention, and must be submitted to the jury. The evidence must be sufficient, from which the

jury can find that the sale was intended to be a sale by sample. *Beirne v. Dord*, 1 Seld. [5 N. Y.] 95; *Hargous v. Stone*, Id. 73. An exhibition of a sample in such case, without anything more, is only a representation that it has been taken fairly from the bulk of the commodity: Id. In case of a technical sale by sample, if the article is not equal to the sample, the contract may be rescinded or the merchandise may be retained and an action for damages be brought. 2 Kent, Comm. 481; Story, Cont. § 540; authorities collected by Jewett, J. 1 Seld. [5 N. Y.] 99. The question decided in this case, that the merchandise must, under the facts proved, correspond with the appearance of the sample, and not simply with its real qualities, is of the first impression. The vendor may be regarded as estopped from denying that the apparent and actual qualities of the goods were different.

(4.) The defendants were liable, not having disclosed their correspondents, on well settled principles of law. If they had disclosed their principals, the question would have been raised, whether, as foreign factors, the presumption of law is that the dealing was exclusively with them. This doctrine, which was advanced by Judge Story, (Ag. § 268, and note 290. 423,) was combated, 2 Kent, Comm. 630, 631; [*Kirkpatrick v. Stainer*.] 22 Wend. 244; disapproved and discarded in *Green v. Kopke*, (1856,) 18 C. B. 549, and in *Oelricks v. Ford*, (1859,) 23 How. [64 U. S.] 49, Nelson, J., delivering the opinion of the court. The question is one of intention, to be gathered from surrounding circumstances, such as usage, &c. The fact that the principals were foreigners, might be an element in reaching the conclusion. *Jervis, C. J.*, in *Green v. Kopke*; *Coleridge, J.*, in *Mahony v. Kekule*, [*Lennard v. Robinson*.] 5 El. & Bl. 125, 130. See *Heald v. Kenworthy*, 10 Exch. 739. "The question is one of fact and not of law," Parke, B. The doctrine itself was only extended to goods sold by oral contract. *Bray v. Kettell*, (1861,) 1 Allen, 80, per *Bigelow, C. J.* Where there is a written contract, properly executed by an agent, as if signed "A. B., principal, by C. D., agent," and the language is unambiguous, a foreign factor is no more liable than a domestic factor, S. C.

[NOTE. This judgment was affirmed by the supreme court in *Schuchardt v. Allens*, 1 Wall. (38 U. S.) 359. Mr. Justice Swayne, in delivering the opinion, said: "The ancient remedy for a false warranty was an action on the case sounding in tort. *Stuart v. Wilkins*, 1 Doug. 18; *Williamson v. Allison*, 2 East, 447. The remedy by assumpsit is comparatively of modern introduction. In *Williamson v. Allison*, Lord Ellenborough said it had 'not prevailed generally above forty years.' In *Stuart v. Wilkins*, Lord Mansfield regarded it as a novelty, and hesitated to give it the sanction of his authority. It is now well settled, both in English and American jurisprudence, that either mode of procedure may be adopted. Whether the declaration be in assumpsit or tort, it need not aver a scienter; and, if the averment be made, it need not be approved. * * * One of the considerations which led to the practice of declaring in assumpsit was that the money counts might be added to the special counts upon the warranty. *Williamson v. Allison*, 2 East, 447. If the declaration be in tort, counts for deceit may be added to the special counts, and a recovery may be had for the false warranty or for the deceit, according to the proof. Either will sustain the action. * * * At the time of the sale the agent produced a sample bottle. There was but one for the one hundred casks of madder. It was usual to have one for each cask. The broker was instructed by his principals not to allow the bottle to be opened, because the contact of the atmosphere would injure the appearance of the sample which it contained, and he acted accordingly. The arrival of the sample preceded the arrival of the casks from abroad. The sale was to be made,

and was in fact made, by that sample. The agent says in his testimony: 'The sample was very handsome to look at.' 'The conversation carried the idea that it was very handsome madder.' There was no sand in the bottle. The sale was made at Providence, Rhode Island. The casks were at that time in New York, and, it seems from the evidence, still on shipboard. The plaintiffs had no opportunity to examine their contents. The transaction was a large one. The vendees had no means of forming a judgment of the quality of the madder in the casks but from the appearance of that in the bottle, which they were not allowed to open. From these facts we think the jury were well warranted in drawing the inference that it was the understanding of the vendees that they were buying under a warranty that the quality of the madder in the casks was equal to that of the sample in the bottle, and that the agent of the vendors intended to be understood as giving such a warranty. It is hardly credible, in the presence of such facts, that the understanding and intention of the parties could have been otherwise. But it is not necessary that the state of the evidence should have been such as necessarily to lead to this conclusion. It is enough that there was evidence upon the subject proper to be left to the consideration of the jury. If the jury erred, the remedy was by a motion for a new trial, and not by a writ of error. This part of the case was argued as if such a motion were before us. The rules of law which would be applicable in that event are very different from those which apply as the case is presented. A motion for a new trial in the courts of the United States is addressed to the sound discretion of the tribunal which tried the case, and to grant or refuse it cannot be made the subject of exception. *Brown v. Clarke*, 4 How. (45 U. S.) 15. Here the question is whether the court erred in refusing to make the case from the jury. Upon that subject we concur in the opinion of the learned judge who tried the cause. If a motion for a new trial were before us, we should overrule it. In our opinion, right and justice have been done."]

Case No. 237.

ALLEN et ux. v. SIMONS et al.

[1 Curt. 122.]¹

Circuit Court, D. Rhode Island. June Term, 1852.

EXECUTORS AND ADMINISTRATORS — AGREEMENT NOT TO TAKE ADMINISTRATION — ENFORCEMENT IN EQUITY — PARTIES.

1. An executor, or administrator, is a necessary party to a bill to enforce a trust concerning property of the deceased.

2. An agreement among distributees, that no administration shall be taken, and that one of them, who was the apparent owner of the property at the death of the intestate, should continue to hold and manage it for the joint benefit of all, the intestate being much indebted at the time of his decease, cannot be enforced in equity.

In equity. The opinion of the court contains a full statement of the case.

Before CURTIS, Circuit Justice, and FITMAN, District Judge.

CURTIS, Circuit Justice. This is a bill in equity, wherein Russell W. Allen, and Agatha G., his wife, state, that she is one of the children and heirs at law of William Simons,

¹[Reported by Hon. B. R. Curtis, Circuit Justice.]

late of the city of Providence, deceased, intestate; that at the time of his decease the intestate was lawfully possessed of, and well entitled to, certain personal property, consisting of a newspaper establishment, together with the good-will of the newspaper called the Republican Herald; that since the 27th day of June, 1829, the apparent title to the property in question had stood in the name of William Simons, Jr., the eldest son of the deceased, and the business of the newspaper had also been conducted in his name; but that, in point of fact, he held the property, and transacted the business, during the lifetime of his father, only as an agent, or trustee; that William Simons died intestate, on the 6th of March, 1845, and thereupon William junior, and the other children of the deceased, agreed that the establishment should be conducted as before; and it was so conducted until the death of William junior, in 1849. The bill makes the widow and administrator of William junior parties, and also joins as defendants the three other children of William senior, and prays that the documents, whereby title was conveyed, or pretended to be conveyed, to William junior by his father, may be cancelled; that an account may be taken of the property of William senior, and of the profits of the business while conducted by, or in the name of William junior; that it may be declared that the complainant, Agatha, as one of the children and heirs at law of William senior, is justly entitled to her share of the property and proceeds, according to the statute of distributions of Rhode Island; that a commission of partition may issue to divide the property into five equal parts, and that one of those parts may be allotted to the complainants, and for further or other relief.

The answers of the widow and the administrator of William junior deny the title of the complainants, and of William senior, and assert that William junior held and owned all the property which was in his possession at his decease in his own right, and not as a trustee, and that the business, conducted in his name, was on his own account solely. The answers of the other four children of William senior confess the substance of the bill, but no decree is sought against them, it not being alleged that either of them is in possession of any property of which an account is asked. This statement of the outline of the bill and answers presents the nature of the title made by the complainants. Many allegations are inserted in the bill in support of this title, which are denied by the answers of the widow and administrator of William junior, and much evidence has been taken in reference to these contested facts. The subject in controversy is personal estate.

Whatever may have been the interest of William Simons senior in this property, his children did not acquire that interest by his

decease. The rule of the common law laid down by Lord Coke, (Co. Litt. 8 a,) that a man, by the common law, cannot be heir to goods or chattels, for *haeres dicitur ab haereditate*, is in force in Rhode Island, and upon the decease of any one having personal estate, his children do not become its owners. They acquire only that qualified equitable right to distributive shares of what shall remain after payment of the just debts and funeral charges of the deceased, and the expenses of settling his estate, which is conferred upon them by the statute of distributions. Pub. Laws, p. 239. This qualified equitable right can only be worked out through a settlement of the estate by an administrator, appointed according to the laws of the state, who alone has the title to personalty cast on him by those laws, and who alone is competent to sue, either at law or in equity, to reduce the personal property and rights of the intestate to possession. It is true that, after an administrator has been appointed, if he colludes with a debtor to the estate, a court of equity will allow a distributee, having an interest in the estate, to sue the administrator and the debtor, and compel the latter to pay the debt. Calv. Parties, 157. But these, and similar cases of collusion, do not trench at all on the general rule that the executor, or administrator, being entitled to the personal estate, is the proper party to sue. *Jones v. Goodchild*, 3 P. Wms. 34. In these cases of collusion, the purpose of the suit is to bring the executor, or administrator, and the debtor before the court, and cause the former to assert his title, and thus do his duty as a trustee. And I believe we should look in vain for a case, in which a child of an intestate has been allowed, either at law or in equity, to sustain a suit in the character of heir, or distributee, to recover personal estate of the deceased.

The complainants' counsel has endeavored to overcome this difficulty by the argument that at the decease of William Simons senior, there was a mutual agreement among all his children, that no administration should be taken on his estate, that the property should remain undivided, and that the newspaper should continue to be published for the joint benefit of all the children, and that this constituted William Simons junior a trustee for the others, and so his representatives are estopped to deny the title of the complainant, and this court will decree the execution of the trust. This ground requires a careful examination. It must be observed that the bill asserts the title of William senior, and claims that his children, at his decease, became entitled to this property; that it was then in the possession of William junior, and ostensibly his; that the effect of the agreement with him was, to allow the property to continue in his possession, as if he were its owner, instead of going into the hands of an administrator. If it were true that the children of William senior, at his decease,

became justly entitled to this property, and that only some legal formality was necessary to clothe them effectually with the title, a mutual agreement to dispense with that formality would be enforced, and a court of equity would not allow a party to the agreement, in possession by virtue of it, to set up the want of that legal formality as a bar. His conscience would be bound by the agreement, and the title would be treated substantially as it would have been treated if the legal formality had been complied with. But these complainants do not show themselves justly entitled to any particular part of this property. As has already been stated, the title of a distributee, under the laws of Rhode Island, is only to such surplus as shall remain after the payment of all just debts and charges.

Creditors have the first and best right to the whole extent of their just debts; non constat, therefore, that either of the parties to this agreement would be justly entitled to any thing from this estate, if it had gone into the hands of an administrator; and to hold that the agreement should itself make a title, would put the complainants in a very different situation from what they would have been in if administration had been taken; for it would enable them to call for an account of the property, and take one fifth of the whole to their own use, when they were equitably entitled only to one fifth of what might remain after paying all just debts and charges. It is clear, also, that the whole of this property, if it belonged to William Simons senior, now stands charged with his debts. The statute of Rhode Island, concerning the settlement of intestate estates, (Pub. Laws, p. 239, § 2,) contains an express provision: "When any person shall die possessed of any chattels, or personal estate, the same shall stand chargeable with the payment of all the just debts and funeral charges of the deceased, and the expenses of settling his estate." This charge is one which the agreement among the children, now in question, cannot in any way affect. And I apprehend it is not consistent with the principles upon which a court of equity proceeds, to decree an account among distributees of the property of the deceased, before an administrator has been appointed to represent creditors, when the bill shows that the deceased was indebted, and by law the property is charged with those debts, whatever agreement the distributees may have made among themselves. I am not aware that such a bill was ever maintained, and the reasons against it are very strong. In the first place, the distributees have no right whatever to intermeddle with the personal property of the deceased, for any other purpose than to do such acts as may be necessary to preserve it, until an administrator can be appointed. Any other acts of control, by any person, constitute him an executor de son tort, and subject him, as a penalty,

to the payment of the debts of the deceased. When, therefore, this bill shows that the children of William Simons senior, instead of subjecting this property to the payment of his just debts, in a due course of administration, made an agreement that no administration should be taken, that they would wholly disregard the rights of creditors, and treat the property as their own, it shows an agreement which a court of equity cannot enforce. It is not based on any equitable right of the parties; it is a violation of the common law; it tends to defraud creditors; it is plainly forbidden by public policy; and is inconsistent with that system of statute law providing for the just and orderly settlement of intestate estates, which has been enacted by the legislature.

It is said by Lord Redesdale, (Eq. Pl. 164,) that "it is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation." From this principle most of the rules, concerning parties to suits in equity, spring; and it imperatively demands that an administrator of William Simons senior, as the representative of his creditors, should be a party to this bill. The property in question stands charged with all his just debts. An account and distribution which should disregard this charge would scatter the property into different hands, and thus endanger the rights of creditors, and render it more difficult to enforce them; it would increase litigation; it would take from the possession of William junior's representatives four fifths of the property, without rendering it safe, as against the creditors of William senior, for them to part with that possession; and it would give to each of the children one fifth of the whole property, when their only equitable claim is to one fifth of what may remain after payment of all just debts.

It is urged that it does not appear there are any just debts due from the estate of William senior. But the bill shows that for many years before his death he was greatly embarrassed by debts; that this property was originally placed in the name of his son, "for the sole and only purpose of enabling him to carry on and conduct the business of said establishment, and to publish the said Herald without being subjected to legal process, arising from any liabilities to which he then was, or might become liable, as former partner of the greatly insolvent firm of Jones & Simons;" and no reason, other than his apprehension of legal process by creditors, is suggested, why the property was continued and the business transacted in the name of William Simons junior, down to the time of his father's decease. Upon these allegations in the bill, it is impossi-

ble for the court to assume there are no creditors to be protected. It is true no one of them has taken administration. But this may be because they are ignorant that William senior owned any property, or because they have become satisfied that this property justly belonged to William junior, and that any attempt to disturb his title would be fruitless, or for other reasons, which do not appear. The court cannot, in their absence, act as if they had no rights, or, in face of every reasonable presumption, presume they do not exist.

The complainants' counsel also relies on an agreement, made on the first day of February, 1840, between Aaron Simons and Charles F. Tillinghast, as the administrator of William Simons junior, as dispensing with the necessity of making an administrator of William senior a party. But I find nothing in that agreement which can affect the title of any party to this property. Its purpose was to provide temporarily for the custody and management of the property until the title could be settled, and not to create any new title, or waive any objection to the claims asserted by either party, and I find no language in the instrument inconsistent with this leading purpose, or which can properly aid the complainants in making out their case. There is, however, one mode in which the complainants may place themselves in a position to obtain whatever may be their just rights in this property. Mr. Allen, in right of his wife, can apply for, and I presume obtain, letters of administration on the estate of William Simons senior, and, by a supplemental bill, bring before the court this new title, with proper prayers for relief. I am disposed to grant leave to file such supplemental bill, because I think it just that the expense already incurred in this cause should not be fruitless, and because the evidence already in the cause has been taken by and between the same persons, and upon the same contested facts and in support and denial of the same titles which will be then before the court. But to prevent misapprehension it is necessary for me to state, that I have not thought it proper, in the absence of a necessary party, to examine the merits of this controversy, nor to ascertain whether, if the property was held by William Simons junior, upon a secret trust, it was a trust created for the purpose of defrauding or delaying creditors. In determining whether to take administration, and file a supplemental bill, the complainants must be governed by their own views, and those of their legal advisers, and not by the assumption that the court has formed any opinion respecting the trust asserted in the bill.

ALLEN, (SMITH v.)

[See Smith v. Allen, Case No. 12,999.]

Case No. 238.

ALLEN v. SPRAGUE et al.

[1 Blatchf. 567; 1 Fish. Pat. Rep. 388.]

Circuit Court, S. D. New York. Oct. Term, 1850.

PATENTS FOR INVENTIONS — INFRINGEMENT — INJUNCTION — ORIGINALITY — PROVINCE OF JURY.

1. The re-issued patent to Ethan Allen of the third of August, 1844, for an "improvement in the method of constructing locks for fire-arms," is for the same invention as that described in his original patent of November 11th, 1837.

2. Where, on a motion for a provisional injunction in a patent suit, the originality of the invention was strongly denied by affidavit, and it appeared there had been three trials at law on the question of the originality, in the first of which the jury found against the patent, in the second did not agree, and in the third found in its favor, this court suspended a decision on the motion, and ordered the case to be tried by a jury, directing an account to be kept by the defendant in the meantime, and to be reported monthly under oath to the clerk.

3. The question of infringement was also ordered to be tried by the same jury.

In equity. This was a suit in equity [by Ethan Allen] for the infringement of letters patent. [No. 461. See note at end of case.] The bill prayed for an injunction, an account, &c. The patent was for an "improvement in the method of constructing locks for fire-arms," and was originally granted to the plaintiff on the 11th of November, 1837. It was re-issued on an amended specification on the 3d of August, 1844. The plaintiff now moved for a provisional injunction. The opinion of the court states the points involved in the motion.

Francis B. Cutting, for plaintiff.

Seth P. Staples, for defendants.

NELSON, Circuit Justice. 1: We hold that the patent granted to the plaintiff on the 3d of August, 1844, upon his amended specification, is for the same invention as that described in the patent of the 11th of November, 1837; and that the objection taken that the commissioner of patents had no authority to accept the surrender, and to re-issue the patent, is not well founded.

2. The originality of the improvement is denied, and the denial supported by several affidavits, going to show that it had been known and in public use before the discovery by the plaintiff. There have been, it seems, three trials at law upon this question — one in this circuit in April, 1843; and two in the first circuit, one in May, 1845, and the other in June, 1846. The trial in this circuit was on an issue out of chancery; and one of the questions was, whether the plaintiff was the original inventor of the improvement as set forth in his patent. That trial was under the patent of November 11th, 1837. The jury found for the defendants. In respect to the trials in the first circuit,

¹[Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

it appears that in the first one the jury did not agree, and in the second the verdict was for the plaintiff. Those two trials were under the patent of August 3d, 1844. As the case stands, therefore, we can hardly regard the question as settled at law. There is a verdict in favor of each party, and a divided jury on a third trial. It is true the trial in this circuit was under the first patent, which has since been surrendered. But, both the old and the new patent are for the same improvement, as clearly appears on comparing the two specifications, the only defect in the first being in the claim; and it does not appear that the cause turned upon this defect. The *nisi prius* record is before us, and from that it would appear, that there was a very full trial upon both issues presented. Some sixteen witnesses were examined, and two days were consumed in the examination and the arguments of counsel. If the case turned upon a technical objection, not involving the merits, that should have been made to appear on this motion. Upon the whole, considering the result of the trials heretofore had on this patent, and the strong denial, in the affidavits before us, of the originality of the invention, we feel bound to send it to another jury, and to suspend the decision on this motion, directing an account of the manufacture and sales of the locks by the defendants to be kept in the meantime, and to be reported monthly under oath to the clerk.

3. An issue will also be made up and presented for trial before the jury, on the question of infringement in the manufacture of the defendants' locks. We might not have directed this issue if that question were the only one contested on this motion; but as it is a mixed question of law and fact, and the case is to be sent to a trial at law, it is proper that it should form one of the issues.

[NOTE. Patent No. 461, for gun locks, was granted November 11, 1837, to Ethan Allen; reissued (No. 60) January 15, 1844. For other cases involving this patent and reissue, see *Allen v. Blunt*, Case No. 215; *Id.* 217.]

Case No. 239.

ALLEN v. THOMAS.

[1 Cranch, C. C. 294.]¹

Circuit Court, District of Columbia. March Term, 1806.

EQUITY PRACTICE—ORDERS—DECREE NISI.

Cause may be shown against a decree nisi, at any time during the term, and before any other order is made.

In equity. Bill to foreclose a mortgage. Decree at March, 1805, to be final unless cause should be shown to the contrary by

¹[Reported by Hon. William Cranch, Chief Judge.]

first day of June term, 1805. An answer was offered on the 13th day of the term. The plaintiff's counsel objected that the decree had become final, no cause having been shown by the first day of the term.

But THE COURT said that if a decree is to be final by a certain day in the next term, unless, &c., and cause be shown after the day during the term and before any other order is made, it is well. The answer, however, not being sufficient, the decree was made final.

ALLEN, (UNITED STATES v.)

[See *United States v. Allen*, Case No. 14,430; *Id.* 14,431; and *Id.* 14,432.]

Case No. 240.

ALLEN et al. v. UNITED STATES.

[Taney, 112.]¹

Circuit Court, D. Maryland. Nov. Term, 1840.

JUDGMENTS—OPERATION AND EFFECT—DECREE IN ADMIRALTY—RES JUDICATA.

1. In a suit, instituted by the United States in the district court, upon a bond given by the owners and master of an American vessel, under the seventh section of the act of 31st December 1792, conditioned for the proper use and delivery up of the certificate of registry granted to such vessel under that act, the breach relied upon was, that subsequently to the granting of such certificate, the vessel was sold to a foreigner, at Havana, but that the obligors in the bond did not deliver up said certificate of registry, as required by the act of 1792. The defendants, in rebuttal, offered in evidence the record of a proceeding in rem, instituted by the United States against the vessel, in the district court for the southern district of New York, in which her condemnation was sought, for a violation of the acts of congress in relation to the slave-trade; by this record it appeared that the libel was dismissed, upon the ground, "that it appeared that the said vessel, when arrested, was not employed, or made use of, as a vessel of the United States, in transporting or carrying slaves from one foreign country or place to another, within the meaning or intent of the act of congress of May 10, 1800;" and she was accordingly ordered to be delivered up to the claimant, who, by the record, appeared to be a citizen of the United States, residing at Havana.

2. This record was excluded by the district court, as inadmissible in the suit upon the bond: *held*. 1. That the record of the suit in rem, if admissible at all, for the purposes for which it was offered, must be conclusive; the act of assembly of Maryland of 1813, c. 164, restricts only the conclusive effect of sentences in rem of foreign tribunals, and its application must be confined to them. 2. The record was properly excluded by the district court; the doctrine, that sentences of this kind are evidence against all the world, and binding, even upon those who are not parties, has been confined to civil cases, and even in them it is confined to those parties who have a direct or incidental interest in the suit; it has never been applied to criminal proceedings, or to suits for the recovery of penalties. The present suit, though a civil one in form, sounding in contract, is, in

¹[Reported by James Mason Campbell, Esq., and here reprinted by permission.]

substance, an action for the recovery of a penalty, and has no connection with the proceeding in the admiralty.

[Error to the district court of the United States for the district of Maryland.]

[At law. Action of debt by the United States against Robert W. Allen, John Henderson, and James Swedge on a bond. Judgment in district court for plaintiff. Defendants bring error. Affirmed.]

TANEY, Circuit Justice. This case is brought here by writ of error from the district court. It appears by the record, that an action of debt was brought in the district court, by the United States against the plaintiffs in error, upon a bond for \$1200, dated 20 May 1839, given by them, under the act of December 31, 1792, § 7, for the proper use and delivery up of the certificate of the registry of the schooner Catharine, built in Baltimore in the year 1839, of which Robert W. Allen and John Henderson were the only owners, and James Swedge was, at that time, master. The defendants pleaded, by consent, *nil debent*, upon which issue was joined, with leave to either party to give the special matter in evidence. The breach relied on at the trial, in behalf of the United States, was, that after this certificate of registry was given, the vessel was sold at Havana, in the Island of Cuba, and was there purchased by a foreigner; that the master afterwards returned to the United States, in June or July 1839, but that the certificate of registry had not been delivered up, according to the directions of the act of congress. The suit was instituted on the bond, on the 12th October 1839, and the case was tried in the district court, at March Term, 1840. The verdict was in favor of the plaintiff for the penalty of the bond, and the judgment entered accordingly.

The defendants, in the district court, in order to rebut the evidence offered by the United States, and to show that the Catharine was not purchased, at Havana, by a foreigner, offered in evidence the record of a proceeding in the district court of the United States for the southern district of New York; by which it appeared, that an information had been filed in that court, on the 30th of December 1839, against the Catharine, and her condemnation prayed for by the district attorney of the United States, for a violation of the acts of congress in relation to the slave-trade. The libel charged various offenses under the act of 22 March 1794, and it also charged that the said vessel, being wholly or in part the property of citizens of the United States, or of persons residing in the United States, was, on or about the 1st July 1839, employed by some person residing in the United States, in the transportation and carrying of slaves from some foreign country or place, to some other foreign country or place, contrary to the act of congress of 10 May 1800, which subjects vessels so employed to forfeiture. To this

libel an answer was put in, on the 27th March 1840, by Charles Ting, a citizen of the United States, residing at Havana, claiming the Catharine as his property, under a transaction at Havana, with the agent of the American owners, which he particularly details; and denying that the vessel, at the time of her arrest on the high seas (which he states to have been on the 8th of August 1839, after he had become the owner), was engaged in the transportation of slaves, as charged in the libel. The case was submitted to the court upon this libel and claim, and after hearing counsel on both sides, the court adjudged "that it appearing that the said vessel, when arrested, was not employed or made use of as a vessel of the United States, in transporting or carrying slaves from one foreign country or place to another, within the meaning and intent of the act of congress of 10 May 1800," it was therefore ordered, that the libel be dismissed, and that the vessel be discharged from arrest and delivered to the claimant.

The counsel for the United States objected to the admission of this record in evidence, and the objection was sustained by the court; whereupon the defendants in the court below excepted, and have brought the case to this court by writ of error; and the only question presented here is, whether the district court erred in refusing to admit this record, or any part of it, in evidence. The counsel for the plaintiffs in error contend, that the proceeding in the district court of New York, being a proceeding in rem, the sentence of the court is evidence of the matters decided by it, when the same points arise in other courts; that the court expressly grounds its sentence upon the fact, that the vessel, at the time of her arrest, was not employed in the slave-trade, as a vessel of the United States; and that the sentence, therefore, decides her national character, as well as the nature of her employment. And it is insisted on the part of the plaintiffs in error, that this sentence is admissible, for the purpose of rebutting the evidence offered on the part of the United States; and in order to show that the Catharine had not been sold to a foreigner, at Havana, before she sailed on the voyage in which she was arrested, but was the property of the claimant, Charles Ting.

It is proper here to remark, that if this evidence is admissible at all, to prove the facts above mentioned, it must be conclusive. This principle has been settled by repeated decisions in the supreme court, as the general rule of law in relation to sentences of this description; and the act of assembly of Maryland of 1813, c. 164, (if it could, upon any ground, affect the rule, where two courts of the United States are concerned), is confined to the sentences of foreign tribunals, and restricts their conclusive effect, but does not propose to change the law in relation to the decisions of our domestic courts. Now,

the sentence relied on, as conclusive evidence, to show that the Catharine, when arrested, still retained her American character, is a sentence of acquittal. But yet it is evident, that a sentence of condemnation would have implied her American character far more strongly than a sentence of acquittal; for although it was certainly necessary, in order to condemn her, that the court should have been satisfied that she was owned by an American citizen, or by some person residing in the United States, yet it was by no means necessary to establish such ownership to entitle her to acquittal; and the argument on the part of the plaintiffs in error, if successful, would prove that the sentence of the district court of New York, whether it condemned or acquitted the vessel, necessarily involved and decided her national character, and showed it to be American. There must obviously be some fallacy in an argument which would lead to this result, and which would show that upon such a libel, and such a claim, the sentence of the court (no matter whether it was given the one way or the other) established conclusively, against all the world, that she was a vessel of the United States, so as to preclude inquiry upon that subject in any other court. But the court thinks it very clear, upon the face of the proceedings and sentence, that the court of New York did not acquit the Catharine, because it was satisfied that she was an American vessel; but because, in the judgment of the court, she was not engaged in the transportation of slaves. Indeed, from the language of the sentence, it might, perhaps, be inferred that she was acquitted upon the ground that she was not an American vessel. The language of the sentence is, that she was not employed, or made use of, "as a vessel of the United States," in the transportation of slaves; and this language may be understood to imply that she was made use of for that purpose, but not as a vessel of the United States. The court may have been of opinion that, under the transaction stated by Ting, she had lost her American character, and become Spanish property, and therefore, not liable in our tribunals on account of her employment in the slave-trade. But whether the acquittal was upon the ground that she was not a vessel of the United States, or was not engaged in the slave-trade; yet, if she was not liable to condemnation, she would, of course, be delivered up to Ting, as no other claimant appeared before the court; and it appeared that the vessel, when arrested, was in his possession, and under his control and direction, either as owner or as agent for the owners. The sentence of acquittal, and the delivery to Ting, do not, therefore, affirm the property to be in him, nor the vessel to be American.

But, if the American character of the vessel was necessarily involved in, and expressly affirmed by, the decision, yet, it could not

have been received as evidence in the case before the court. The doctrine that judgments of this description are evidence against all the world, and are binding even upon those who were not parties to them, has always been confined to civil cases; and in civil cases, the rule is not universal, but is confined to those who have a direct or incidental interest in the condemnation or acquittal of the vessel libelled, and who may, therefore, if they choose, make themselves parties. In the case of *The Mary*, 9 Cranch, [13 U. S.] 144, the supreme court (speaking of such sentences) have said: "they bind the subject-matter, as between parties and privies;" and this, it seems, upon principle, must be the true application of the rule in civil suits. But the rule has never been applied to criminal proceedings, nor to suits for penalties; and it has been decided by this court, in the case of *U. S. v. Montell*, [Case No. 15,798,] that a suit upon a bond of this kind, though in form, a civil suit and sounding in contract, is yet, in substance and reality, a suit for a penalty inflicted for an offense against the law; for which penalty surety is taken in advance from those whose misconduct may render them liable to punishment. In the case of *The Mary*, above referred to, the sentence of the court of admiralty would not have been conclusive in a civil case, except between parties and privies to the suit against the vessel. But the case before the court is a suit to recover a penalty against the plaintiffs in error; and if the sentence of the district court of New York had declared that the Catharine, at the time of the arrest, was a Spanish vessel, owned by a subject of the queen of Spain, and therefore, not liable to condemnation under our laws, though actually engaged in the transportation of slaves; would any one suppose that such a sentence would have been conclusive upon the plaintiffs in error, and have compelled them to pay this bond, without an opportunity of proving that the vessel had never been sold to any one after she had obtained her certificate of registry? Such a proposition would hardly be seriously pressed upon the court, yet the rule must be reciprocal; and if the present sentence (supposing it to be a direct affirmation of American ownership) would conclude the United States upon that point, a contrary affirmation would be equally conclusive upon the obligors in the bond. But the suit on the bond has no connection whatever with the proceedings in admiralty, in the district court of New York; nor is the matter in controversy here, in any respect, connected with, or dependent upon, those proceedings. It is a suit for a penalty, and the United States must, by testimony adduced here, prove that the penalty has been incurred; the parties charged have, undoubtedly, the right to adduce testimony, and to be heard in their defence; and are not and cannot be concluded by any decision made elsewhere, to which

they were not parties, and in the issue of which they had no interest. The decision of the district court of New York, upon a proceeding against the vessel, for a violation of the law in relation to the slave-trade, cannot be evidence in a suit between different parties, brought to recover a penalty inflicted by a different act of congress, for the misconduct of the master in not delivering up her certificate of registry, as required by law. The judgment in this case must, therefore, be affirmed.

ALLEN v. VINT.

[See Vint v. King, Case No. 16,950.]

ALLEN. (VOSE v.)

[See Vose v. Allen, Case No. 17,005; and Id. 17,006.]

ALLEN, (WHITE v.)

[See White v. Allen, Case No. 17,535.]

Case No. 241.

ALLEN v. WHITTEMORE.

[8 Ben. 485; 14 N. B. R. 189.]

District Court, D. Vermont. June, 1876.

RESIDENCE OF BANKRUPT—BILL OF SALE RECORDED UNDER STATE LAW.

1. Where a bill of sale of certain property was recorded in the clerk's office in the town where the purchaser, at the time, represented that he resided, according to the law of the state of Vermont, and the purchaser became bankrupt before the conditions of the bill of sale were fulfilled:

Held, That the assignee of the bankrupt cannot set up, as against the holder of the bill of sale, that the bankrupt actually resided in another town, where the bill of sale was not recorded, and therefore the condition is void.

2. That the property having been sold, and the proceeds collected by the assignee, he must pay the balance remaining due on the bill of sale.

[In bankruptcy. Action by Alonzo W. Allen against A. G. Whittemore, assignee, to enforce the collection of a promissory note secured by a conditional bill of sale.]

SMALLEY, District Judge. In this case it appears that J. E. Came & Co. were manufacturers and vendors of billiard tables in the city of Boston, and commonwealth of Massachusetts; and on the 31st day of July, 1873, sold to Adoniram Austin, who set himself up as of Burlington, in the state of Vermont, five billiard tables and their appurtenances, and conveyed them to him by bill of sale thereof dated Boston, July 31, 1873, conditioned that said Austin pay the said Came & Co., or their assigns, five promis-

sory notes, therefor, amounting in all to one thousand and seventy dollars and ten cents. The bill of sale states that Austin lives in Burlington, and that said Austin stipulated that he would keep said billiard tables insured at his own expense and the policy be made payable to said Came & Co. or their assigns, in case of loss. Said bill of sale, with the conditions thereon, was duly recorded in the city clerk's office, in the city of Burlington, on the 3d day of September, 1873. All said notes were paid except the last one; the last one became payable and remained unpaid, and said Came & Co. sold and transferred the same with all their title to the property to the said A. W. Allen, the petitioner. The said Allen then demanded payment thereof or the property, which said Austin refused to make or to deliver the property. Soon after said Austin went into bankruptcy and said Whittemore was duly appointed his assignee. Said Allen then demanded of said Whittemore the amount due on the note or the said property, which Whittemore wholly refused, alleging that said Austin lived in the town of Colchester and not in the city of Burlington, and according to the statute of the state of Vermont passed at the session of 1872 (Laws Vt. 1872, p. 90,) the bill of sale not being recorded in the town of Colchester, according to said Act, the condition was void and the property became absolutely said Austin's. But the court holds, that inasmuch as said Austin represented himself to reside in the city of Burlington, he could not take advantage of his own fraud, and thus deprive the said Came & Co. or their assigns of the title to said property, as at common law the property remained theirs until all the conditions were complied with and the notes fully paid. And it appears that the said Whittemore had sold the said tables and collected the money therefor. It is ordered that the said Whittemore, as assignee, pay the said Allen the amount now due on the said last named note, and the costs of this proceeding; and it be referred to B. B. Smalley, as Master, to ascertain and report to this court the amount thereof.

Case No. 242.

ALLEN'S HEIRS v. ALLEN'S EX'RS.

[3 Wall. Jr. 289; 18 Leg. Int. 109]

Circuit Court, W. D. Pennsylvania. May Sessions, 1860.

MARSHALING OF ASSETS—SUBROGATION.

Where an annuity left by will is charged "on real and personal estate," and legacies are also given, but are not charged on any special fund; equity will, as against heirs who are not at the same time devisees, order the annuity to be paid out of personalty, if there be personalty enough to pay both annuities and legacies; or if there be not enough to pay both, and the annuity has

¹[Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

¹[Reported by John William Wallace, Esq., and here reprinted by permission.]

been already paid out of personalty, will subrogate the legatees to the annuitant: Aliter, as is said, though not decided, if the parties claiming the realty are devisees, and if the personalty has been exhausted by creditors.

In equity. Allen, by his will, ordered that "first and foremost there be secured to my dear wife" on my real and personal estate, an annuity "of \$1,200 a year, to be punctually paid semiannually during her lifetime, and that my executors pay all taxes on the premises occupied by my wife during her lifetime." Then followed numerous legacies to individuals, to corporations, and for pious uses, exceeding in amount the whole personal estate, but not charged, like the annuity, on the realty. The will made no disposition of the realty, and consequently it descended to the heirs, the present complainants. There was enough of personal property, and enough of realty, to answer the annuity, independently of each other. And the questions now before the court were whether the annuity should be paid out of personalty exclusively, or out of realty exclusively, or if out of both jointly, in what proportion, and out of what fund the "taxes" should be paid?

GRIER, Circuit Justice. This annuity being the first and only charge on the whole estate, real and personal, the widow may have it satisfied out of either or both, at her election. But if paid in the first place out of the personalty, will not equity so marshal the assets as to substitute the legatee's to the annuitant's security on the realty?—or, what would amount to the same thing, order that the annuity be paid in the first place from the rents and profits of the realty? We must observe that the complainants claim as heirs, not as devisees; they are not objects of the testator's bounty. In such a case if a creditor, by bond or covenant having a right to satisfaction out of both, be paid out of the personal assets, so as to leave nothing to satisfy the general legacies, equity will not marshal the assets and pay the legacy out of the land devised; nor even, it is said, against a residuary devisee of realty. But the heir is not so favored. As against him the court will so marshal the assets, that the general legatee shall be substituted to the right of bond debtors against the realty, to the extent to which the personal fund has been diminished, by his election of his satisfaction out of it. It is settled, also, that where one legacy is charged both on realty and personalty, and the others are not, if the personal estate be insufficient to pay all the legacies, a court of equity will marshal the assets; and if the legacies charged on the real estate are paid out of the personalty, it will substitute the legacies not so charged to that amount, as against the realty. The courts also have in some instances compelled legatees whose legacies were charged on real estate, to resort to

this estate for payment. *Ram, Assets*, c. 28, § 3, and cases cited. These principles dispose of the case. As against heirs (the complainants in this case), the general legatees have a right to require that the annuity be satisfied out of the rents, or by sale of the realty, and so far as the personalty has been applied to the payment of this annuity, they have a right to be substituted against the realty. The taxes which the executors are ordered to pay for the widow are not made a charge on the realty, and must therefore be charged to the account of the personalty. Decree accordingly.

Case No. 243.

ALLER v. CAMERON.

[3 Dill. 198.]

Circuit Court, W. D. Missouri, 1874.

MUNICIPAL BONDS—MISLOCATION OF MUNICIPAL CORPORATION—ESTOPPED.

The town of Cameron was duly incorporated, but if it were not, the town having, as a corporation, voted and issued the bonds, it would be estopped in favor of a bona fide holder thereof for value to set up that it was not incorporated.

[Cited in *Hill v. City of Kahoka*, 35 Fed. 35.]

[At law. Action by H. M. Allen against the town of Cameron. Judgment for plaintiff.]

Action on negotiable coupons originally attached to bonds issued by the town of Cameron under the corporate seal thereof to the Chicago & Southwestern Railroad Co. or bearer, upon a vote of the people of the town. It appeared on the trial that the town of Cameron was platted on part of section 23, and the plat was so recorded. In 1867, the people living on the ground thus platted presented, under the statutes of Missouri, a petition to the county court to be incorporated as a town, and their prayer was granted; but the order of the county court in incorporating "the town of Cameron," by mistake described it as in section 24, instead of section 23. Section 24 is a farm owned by Mr. Shirts. The town has grown to have 2,000 people; and ever since its incorporation it has maintained a municipal organization, and as such voted, and in February, 1871, issued the bonds in suit. It defended against the bonds, on the ground that it was not incorporated, or rather upon the ground that the legal corporation was in section 24, and that it—i. e., the corporation de jure—did not issue the bonds. There had never been any municipal organization in section 24.

Mr. Merryman and Mr. Hall, for plaintiff.
Mr. Harwood and Mr. Edwards, for town of Cameron.

¹[Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

Before DILLON, Circuit Judge, and KREKEL, District Judge.

DILLON, Circuit Judge. This is certainly a novel case, but we are of the opinion that the defense to the coupons in suit must fail—

1. Because, taking the petition for the incorporation of the town of Cameron in connection with the plat of the town to which it refers, and which correctly describes the location of the town, and the law which authorizes the incorporation of a town, and not of a farm upon which there is no population, the order of the county court should be construed to refer to the town, which was well known by its designation as the town of Cameron, and not to the land upon which there was no population. In other words, as either the congressional description or the reference to the town is erroneous, the court, to effectuate the intention of the petitioners and the county court, and to prevent the mischief which would result from holding invalid all that has been done by the corporation since 1867, should reject as false the congressional description, and adopt the boundaries as given in the plat to which the petition referred—this being the construction which has ever since been put by the people of the town upon the action of the county court, and the construction declared to be correct by the county court in its subsequent order in 1872, correcting the record of its action in 1867.

2. We think, also, that the town, having ever since acted under this incorporation, and as such voted and issued the bonds in suit, by its officers and under its seal, it is estopped in favor of the plaintiff, or holder for value, to set up that it is not a corporation, and that the true corporation is upon the farm of Mr. Shirts, in section 24. Judgment for plaintiff.

KREKEL, District Judge, concurs.

ALLERTON, The ISAAC.

[See The Isaac Allerton, Case No. 7,087.]

ALLIANCE, The.

[See The Gondar, Case No. 5,527.]

Case No. 244.

The ALLIANCE.

[Blatchf. Pr. Cas. 186.]¹

District Court, S. D. New York. July, 1862.

PRIZE—SALE OF PROPERTY PENDING HEARING.

Motion founded on the report of the prize commissioner for an order to sell the cargo, pending the hearing, denied, the proposed sale

being earnestly opposed by the claimants, and there being a strong preponderance in the number of witnesses against the necessity of the sale, and the report not being founded on the personal inspection and judgment of the commissioner.

[In admiralty. Heard on motion for an order to sell the cargo, pending a hearing on the merits. Motion denied.]

BETTS, District Judge. In this suit, application was made to the court, on written notice to the proctor for the claimants, and on the report of the prize commissioners recommending such order, for an interlocutory order directing a sale of the cargo above mentioned, or for such other or further order as to the court may seem just and proper. The motion was further supported by affidavits made by Edward W. Blackwell, a gauger of spirits of turpentine, John Camerden, a merchant and wholesale dealer in resin, turpentine, and other naval stores, and Benjamin Bateman, a broker in turpentine, resin, and other naval stores, who all testify that the condition of the cargo and the state of the market are such as to render an immediate sale of this property needful and proper. In reply to these representations, the claimants file affidavits of Charles W. Blossom, William H. Kerr, Call J. Turner, F. A. Blossom, James B. Barney, and John Van Alen, merchants, and others, of this port, conversant with this property, who dissent directly and pointedly from the opinion and statements in favor of the libellants, and assert that the property is not in a condition demanding an immediate sale, and that a sale at this period of the year will be prejudicial to the interests of all concerned in the cargo.

The vessel and cargo were brought into port on the 13th of May last, and no reason is assigned for not previously proceeding to trial and decision in the suit.

Considering, therefore, that the proposed sale is opposed earnestly by the claimants of the property, and by a strong preponderance in the number of witnesses on the question of its necessity, and that there remains no cause, on the evidence for extraordinary dispatch in making such sale previous to the regular condemnation of the property, I shall decline granting the interlocutory decree called for.

The report of the commissioners, when founded upon their personal inspection and judgment in respect to the propriety of the measure, will generally be conclusive with the court.

That I shall be inclined to regard as meant by the act to guide the discretion of the court. But when the decree asked for rests upon "other evidence" than the official finding of facts by the report itself, I must be governed by the evidence conflicting with it, when that has a reasonable preponderance. Motion denied.

¹[Reported by Samuel Blatchford, Esq.]

Case No. 245.

The ALLIANCE.

[Blatchf. Pr. Cas. 262;¹ 5 Leg. & Ins. Rep. 2.]
District Court, S. D. New York. Dec., 1862.²

PRIZE—VIOLATION OF BLOCKADE—CONTRABAND
GOODS—MILITARY EQUIPMENTS.

1. Vessel and cargo seized in the harbor of Beaufort, N. C., on its capture; condemned for these reasons: 1. For violating the blockade in entering Beaufort. 2. For taking on board there an enemy clearance and a cargo with intent to evade the blockade in coming out, and attempting to come out. 3. For carrying into Beaufort a large supply of military equipments.

[Cited in *The Gondar*, Case No. 5,526.]

2. The illegality of sailing under an enemy license is legal cause for the forfeiture of a neutral vessel.

[In admiralty. The decree in this case was afterwards reversed by the circuit court. See *The Gondar*, Case No. 5,528.]

BETTS, District Judge. The vessel and cargo seized in this case were libelled May 17, 1862. A claim in the name of the registered owners, with a test oath made thereto, was filed on the 17th of June thereafter. The defence set up in the claim is an alleged neutral ownership of the vessel and cargo by the claimants, and a denial that the seizure was a lawful capture.

The facts gathered from the ship's papers and the preparatory proofs show that the vessel was of an American build, and was conveyed to and registered in the names of the claimants, British subjects, at Liverpool, February 11, 1861. The vendors to the British owners were Ferguson & Co., a mercantile firm resident in Charleston, S. C., and the vessel had, previous to this sale, been employed by that house in trade to and from Charleston at different periods. One of the members of the firm of Forbes & Co. was also a member of the firm in Liverpool, who acted as agents of the house in Charleston in making the transfer of the vessel to the claimants, and the claimants had been previously clerks in the employ of the vendors; but the sale of the vessel preceded the existing war so long a time as not to expose it per se to the presumption claimed by the libellants, that it was made colorably, and in fraud of the belligerent rights of the United States.

The voyage on which the Alliance was seized commenced at St. John, New Brunswick, in August, 1861. Her destination was first to Beaufort, North Carolina, and thence to Liverpool, England. The vessel arrived at Beaufort, laden with a miscellaneous cargo, consisting of quantities of tins, various denominations of iron, mackerel, castor oil, two trunks of percussion caps, (about 200,000,) fish, quicksilver, &c., entered that port,

and discharged there in the latter part of August, 1861. She took on board a cargo of cotton, turpentine, and other produce of the country, in return, destined for Liverpool, to the owners of the vessel. The master testifies that nothing contraband was on board on the voyage. The vessel cleared at Beaufort, for Liverpool, in September, 1861, but was arrested before her departure. A person from Nassau joined the ship at St. John, as supercargo, and delivered and disposed of the cargo at Beaufort, and did not rejoin the vessel afterwards. The master says that he believed that the cargo taken on board at Beaufort was destined for the owners of the ship, and would have been their property on its arrival at Liverpool. The ship was seized May 2, 1862, in the harbor of Beaufort, North Carolina, by the United States naval forces, after the capture of the place by the army of the United States. The master knew of the war when he sailed for Beaufort, and that Charleston and the southern coast was under blockade. He says he did not know, until the 6th or 7th of September thereafter, that Beaufort was blockaded. The cargo was taken on board at Beaufort, for Liverpool, on the 14th of September, and the vessel took on board, during the same month, at Beaufort, a clearance, export certificates, and a bill of health, from the authority of the secession government, and was moored in that port, ready to sail, and having attempted to do so, and being detained only by the weather or the blockading squadron. On the 27th of May, 1861, a boarding officer of the United States, off Charleston harbor, had indorsed a warning on the ship's papers, that the port of Charleston was under blockade, and the notice, it is testified, might have included all the ports of the southern states. The notice was left in England.

Various facts transpire on the proofs unmistakably condemnatory of the vessel and cargo. First. Prior to this voyage, she had been warned and turned away from the port of Charleston, May 27, 1861, by a United States ship-of-war. The warning was indorsed on her papers and entered in her log, and gave her notice that the coast south of Maryland was under blockade. Second. Notwithstanding such notice, she entered the port of Beaufort, North Carolina, on the 22d of August, 1861, on a pretended voyage from St. John, New Brunswick, to Havana, with a quantity of articles contraband of war on board. Third. She was reladen, at Beaufort, with a full cargo of the produce of that section of the country, and attempted, unsuccessfully, to get out of port with such cargo; and when she was afterwards captured there, she had on board a letter from the British consul at Charleston, dated September 11, 1861, to the British secretary of foreign affairs, apprising that officer that the vessel and cargo were destined to Liverpool, England, and also enemy

¹[Reported by Samuel Blatchford, Esq.]

²[Reversed by circuit court, in *The Gondar*, Case No. 5,528.]

documents authenticating her right to leave the port, &c. The illegality of sailing under an enemy license is legal cause for the forfeiture of a neutral vessel. The *Julia*, 8 Cranch, [12 U. S.] 181; The *Ariadne*, 2 Wheat. [15 U. S.] 143, and notes in Appendix.

The violation of the blockade of Beaufort, in entering that port, the taking on board therein an enemy clearance and a cargo, with intent therewith to evade the blockade, and the attempting to carry that design into execution, with the higher and more injurious act of positive hostility against the government of the United States, in carrying into port a large supply of military equipments, afford abundant grounds for the condemnation of the vessel and cargo as prize of war, without adverting to various other facts disclosed in the evidence.

Decree of condemnation and forfeiture of vessel and cargo adjudged.

This decree was, on appeal, and on further proofs, reversed by the circuit court, January 8, 1864, see *The Gondar*, [Case No. 5,523.]

Case No. 246.

The ALLIANCE.

[Blatchf. Pr. Cas. 646.]¹

Circuit Court, S. D. New York. July 17, 1863.

PRIZE—CREW AS WITNESSES—NEUTRAL PROPERTY.

1. The examination of witnesses in a prize case should be confined to persons on board of the captured vessel at the time of the capture, unless upon special permission of the court first obtained.

2. In this case none of the crew on board at the time of the capture, eleven in number, were examined; but, instead, two seamen who had been discharged from the vessel before her capture were examined; and no explanation of the reason for this was given. This was a great irregularity, which cannot be overlooked or disregarded in a consideration of the proofs.

3. Vessel and cargo acquitted of a violation of, or of an attempt to violate, the blockade.

4. Vessel held to be neutral property. Further proof ordered as to the neutral ownership of the cargo; and further proof allowed as to the proprietary interests in the vessel, the vessel and cargo being claimed by the same party.

In admiralty.

¹ NELSON, Circuit Justice. The *Alliance* was captured on the 2d of May, 1862, while at anchor at the dock of Morehead City, opposite Beaufort, North Carolina, by United States troops, and was subsequently delivered to Commander Lockwood. She is a vessel of over 600 tons burden, and was built in Portsmouth, Maine, some twelve or more years ago. She was owned by Razer and others, of Charleston, South Carolina, down to February, 1861, when she was

purchased in Liverpool, by J. R. Armstrong and H. Gerard, British merchants of that city. S. De Forest, an American citizen, was master. He was appointed by the owner, at Liverpool, and then took possession of her. Her last voyage was from St. John's, N. B., to Beaufort, North Carolina. She left St. John's in August, 1861, with an assorted cargo, and arrived at Beaufort on the 22d of the same month. There were no blockading vessels at Beaufort when she entered, and none arrived until several days afterwards. Her cargo was there discharged, and another was put on board, consisting of resin, pitch, and spirits of turpentine. She had no arms or ammunition on board, on her voyage to Beaufort, nor any cargo contraband of war. She was laden with a full cargo about the 14th of September, and remained in port, awaiting the removal of the blockade, from that period until the 2d of May, 1862, when she was captured by the troops that took Fort Macon and the town of Beaufort. She was bound from Beaufort to Liverpool, with the cargo that was on board at the time of capture. The above is, I think, the fair weight of the proofs that are entitled to credit.

Some of the facts are sought to be impeached by the testimony of two of the seamen, Stevens and Thompson. One of them is an Italian, and unable to speak or understand English, and both of them were discharged from the *Alliance* while she was lying at Beaufort, one of them as early as February previous to the capture, and were not of the crew or on board of the vessel at the time of the capture. Why these witnesses were selected and examined in preparatorio, in place of some of the crew on board at the time of the capture, who were in number eleven, has not been explained. It was a great irregularity, which cannot be overlooked or disregarded in a consideration of the proofs. The examination should have been confined to persons on board at the time of the capture, unless upon special permission of the court first obtained.

I am satisfied, upon a very full consideration of the proofs, that there was no actual blockade of the port of Beaufort at the time of the entry therein of the *Alliance*; and, further, that no intention existed on the part of the master, after such entry, and the establishment of the blockade, to break it, and that no act was done by him with such intent, while the vessel remained in the harbor previous to her capture. I think, also, that the vessel belonged to British owners bona fide, and even before the breaking out of hostilities. But I am not entirely satisfied that the goods on board of the vessel at the time of capture were the property of British owners, as claimed. Upon this ground, I shall send the case for further proofs on this point, to be presented at the next term of this court; and as the

¹[Reported by Samuel Blatchford, Esq.]

claim of property in the vessel and the cargo is made in behalf of the same party, or one of the same parties, further proofs may be taken as to the proprietary interest in the vessel, as well as the cargo, by either or both of the parties to the suit.

Case No. 246a.

ALLIANCE INS. CO. v. THE MORNING LIGHT.

[Betts' Scr. Bk. 531.]

District Court, S. D. New York, 1862.

ADMIRALTY—PRACTICE—APPRAISEMENT.

[Where the clerk, at the instance of the claimant of an arrested vessel, and without notice to libellant's proctor, nominates an appraiser, and posts notice of the appraisement, the proceedings are irregular, and the appraisement should be set aside.]

[In admiralty. Libel in rem by the Alliance Insurance Company against the brig Morning Light to recover damages suffered by the schooner Jerry Fowler in a collision, and paid by libellant as insurer. Heard on libellant's motion to set aside an appraisement of the brig. Granted.]

Benedict, Scoville & Benedict, for libellant.
Beebe & Donohue, for claimants.

Before BETTS, District Judge.

In this case the brig was arrested, and in the custody of the marshal. Without notice to the libellant's proctor, the clerk, at the instance of the claimants, proceeded to nominate an appraiser; the notice of the appraisement was posted up, and the vessel appraised. The libellants thereupon moved to set aside the proceedings as irregular.

BY THE COURT. The rules in respect to the appraisement of the property under arrest all plainly contemplate a common action of the parties interested, or an opportunity to act together. The 61st rule permits proceedings instant for appraisement in suits by the United States in rem, if the district attorney and claimants are in presence of the court. In individual actions, either party may have an order entered of course for appraisal, or it may be done by mutual consent, and if the parties do not agree in writing upon the appraiser, the clerk shall name him, each party having a right to appeal instant. Rules 62-69. These regulations imply that both parties are made cognizant of the action taken for the discharge of the property arrested. Betts, Adm. Pr. 43. The 40th rule expressly directs notice to be given libellant's proctor of applications for delivering up property on stipulation which is under arrest. The proceedings in this case must therefore be regarded as irregular, and the appraisement be set aside.

Case No. 246b.

ALLIANCE INS. CO. v. THE MORNING LIGHT.

[Betts' Scr. Bk. 586.]

District Court, S. D. New York, April 4, 1862.¹

COLLISION—INEVITABLE ACCIDENT—DARKNESS.

[In admiralty. Libel in rem by the Alliance Insurance Company against the brig Morning Light to recover damages suffered by the schooner Jerry Fowler in a collision, and paid by libellant as insurer. Libellant's motion to set aside an appraisement was granted. Alliance Ins. Co. v. The Morning Light, Case No. 246a. Libel dismissed.]

Benedict, Burr & Benedict, for libellant.
Beebe, Dean & Donohue and Mr. Morton, for claimants.

Before BETTS, District Judge.

This was an action to recover damages occasioned to the schooner Jerry Fowler by a collision with the Morning Light, which occurred on August 5, 1855, just about day-break, near Martha's Vineyard. Both vessels had been going eastward through the night, the brig in the rear but gaining on the schooner, and both were on the starboard tack. The night was dark and rainy, and about 4 A. M. the Jerry Fowler undertook to tack, her master thinking her so near the Cutterhunk Shoals as to render it proper to change her course; and while tacking she was run into by the Morning Light. The libellant, having paid the loss to the owners of the schooner, now sues to recover it back. The testimony as to the darkness was conflicting.

Held by THE COURT, that the evidence shows a case of inevitable accident between the two vessels, or, if there was a fault, it was one common to both, arising from the obscurity of the weather and want of extreme vigilance on both vessels, and the uncertainty, from that cause, as to what was the proper course for either to pursue; that each party must therefore be left to bear his own loss.

Libel dismissed. Question of costs reserved.

Case No. 246c.

ALLIANCE INS. CO. v. THE MORNING LIGHT.

[Betts' Scr. Bk. 709.]

Circuit Court, S. D. New York. 1862.²

COLLISION—INEVITABLE ACCIDENT—DARKNESS.

[Appeal from the district court of the United States for the southern district of New York.]

¹[Affirmed by circuit court in Alliance Ins. Co. v. The Morning Light, Case No. 246c.]

²[Affirming Alliance Ins. Co. v. The Morning Light, Case No. 246b.]

[In admiralty. Libel in rem by the Alliance Insurance Company against the brig Morning Light to recover damages suffered by the schooner Jerry Fowler in collision, and paid by libelant as insurer. Libelant's motion to set aside an appraisal was granted, (Case No. 246a;) and the libel was thereafter dismissed, (Alliance Ins. Co. v. The Morning Light, Case No. 246b.) Libelant appeals. Affirmed.]

Benedict, Burr & Benedict, for appellant.
Beebe, Dean & Donohue, for appellees.

NELSON, Circuit Justice. The collision in this case occurred between the brig Morning Light and the schooner Jerry Fowler, on the morning of the 6th of August, 1855. Both vessels were going eastward, and were in Block Island channel, beating into Vineyard sound, the Fowler in advance; both had their starboard tacks on board, the wind easterly, about north by east. The vessels had been beating into the sound most of the night. Between three and four o'clock in the morning, the Fowler, having run out her tack, called all hands on deck to change her course. For this purpose her head was thrown into the wind, and while in that position, with sails aback, and under no headway, she was struck by the Morning Light on her starboard quarter, a little forward of the main rigging, and sunk. The night was dark and rainy, accompanied with fog, and the weight of the evidence pretty clear that the Fowler could not be seen, even with proper lookouts on the Morning Light, in time to have avoided the disaster. Both vessels appear to have been well manned, and navigated with accustomed care, and had proper lights. Of course, the hands on board the respective vessels, as usual, impute faults to each other, but each maintain the due and skillful navigation of their own vessel.

Mutual admissions of fault also are proved by witnesses from the respective vessels, to which we pay very little credit.

The state of the weather during the night and at the time of the collision is generally agreed by the witnesses on both vessels, though those on the Jerry Fowler attempt to modify somewhat the darkness. The second mate of the Fowler, Weston, says at 12 o'clock it was dark, foggy, and rainy, and at 1 o'clock fog cleared away; rain continued till 3 or 4 o'clock. When he called watch at 4 o'clock, he could see a good distance on the water,—three quarters of a mile, he supposes; could not fix the distance, but a good way off. The master, Lovejoy, says it had been raining the fore part of the night, but was partly cleared up at collision. The concurrent proof on the part of the witnesses from the Morning Light is, that the weather during the night was thick fog and raining; rain came in fog showers. The court below came to the conclusion that the disaster was the result of inevitable accident, and dis-

missed the libel. We concur in this conclusion.

Decree affirmed.

ALLIANCE LIFE INS. CO., (LOVELL v.)
[See Lovell v. Alliance Life Ins. Co., Case No. 8,552.]

Case No. 247.

The ALLIGATOR.

South Carolina.

[Cited in The Josephine, Case No. 7,546. Nowhere reported; opinion not now accessible. The original records of the court prior to 1860 have all been lost or destroyed.]

Case No. 248.

The ALLIGATOR.

[1 Gall. 145.]¹

Circuit Court, D. Massachusetts. May Term, 1812.²

ADMIRALTY — PRACTICE — DELIVERING PROPERTY ON BAIL.—SUMMARY JUDGMENT ON BOND.

1. The district court, by virtue of its general admiralty jurisdiction, may deliver property on bail. Whether the security be taken by bond or stipulation is not material. On such security a summary judgment may be rendered.

[Followed in Nelson v. U. S., Case No. 10,116.]

[Cited in McLellan v. U. S., Case No. 8,895; U. S. v. Four Part Pieces Woolen Cloth, Id. 15,150; The Ann Caroline v. Wells, 2 Wall. (69 U. S.) 549; U. S. v. Three Hundred Barrels Whiskey, Case No. 16,510; The City of Norwich, Id. 11,202; The Lynchburg, Id. 8,638; The Baltic, Id. 826; The Wanata v. Avery, 95 U. S. 616; U. S. v. Ames, 99 U. S. 41; The G. G. King, 16 Fed. 923.]

[2. Cited in Todd v. The Tulchen, 2 Fed. 603, to the proposition that the sureties cannot take advantage of any irregularity in the proceeding, but should be held to the terms of their obligation.]

[3. Cited in The Sydney, 47 Fed. 262, to the proposition that a bond is to all intents and purposes a stipulation in admiralty, and the liability of the parties is the same, whether the instrument is in the form of a bond or stipulation.]

[In admiralty. Libel for forfeiture against the brig Alligator, (Anthony Langford and others, claimants.) Decree in district court for condemnation. Claimants appeal. Decree affirmed, and judgment on bond given by claimants ordered for appraised value and costs.]

G. Blake, for the United States.
S. Hubbard, for claimants.

Before STORY, Circuit Justice and DAVIS, District Judge.

¹[Reported by John Gallison, Esq.]

²[Affirming an unreported decree of the district court.]

STORY, Circuit Justice. The brig Alligator is libelled, 1. for that on the 15th of Feb. 1810, she sailed from Portsmouth in New-Hampshire, bound to a permitted port, to wit, St. Bartholomews in the West-Indies, without giving bonds pursuant to the 3d section of the act of 28th June, 1809, c. 9. There are other counts, which are not now material to consider. The claim admits the facts stated in the information; but denies, that the brig was originally bound to St. Bartholomews; and declares, that the voyage there was occasioned by inevitable necessity. From the depositions in the case it appears, that the vessel sailed from Portsmouth in New-Hampshire, on the 13th of Feb. 1810, with a clearance and ostensible destination to Norfolk in Virginia. The cargo was extremely well adapted, and is admitted to have had a contingent and ultimate destination for the West-India market. A few days after their departure, heavy gales came on, the brig was greatly strained, and finally disabled from pursuing her voyage; and the crew and captain determined for the preservation of their lives and property, to bear away for some port in the West-Indies, and accordingly arrived at Tobago, on the 14th of March, 1810, where she was examined and repaired in her upper works and bends; from thence she proceeded to St. Vincents, leaking very much during the passage; and here all the lumber was taken out and sold, and the vessel repaired. On the 28th of April, 1810, she sailed for St. Bartholomews, where the residue of her cargo was sold; and she returned from thence to Boston, about the 29th of May, 1810. It appears, that during the gales on the coast, some considerable part of the deck load was thrown overboard; and the vessel is stated to have been consigned to Moses Myers & Son of Norfolk. As in this case, the vessel proceeded to St. Bartholomews, which was a permitted port, the presumption is, that such was her original destination. The proof of the contrary, is necessarily thrown on the claimants, who are bound to make out a clear and decisive case of necessity. I admit, that if the original destination was not to the West-Indies, no subsequent irregularity of conduct can affect the brig under the 3d section of the act of 28th June, 1809, c. 9. But unless strong reasons appear to rebut it, the presumption of such original destination must remain. It will be recollected, that at the time of sailing from Portsmouth, the non-intercourse, as to Great Britain and her dependencies, was generally supposed to have been revived by the president's proclamation of the 9th of August, 1809. This accounts for the omission to give bond; for if the vessel had been really bound for a permitted port, and that only in the West Indies, there could have been no reason to withhold the bond required by law.

The case, as made out on the evidence, presents many improbabilities, and some

omissions, which materially affect its purity. I will not say, that these are badges of fraud, but I will say, that they are badges of illegal destination.

1. In the first place, upon examining the log book, as has been stated by an intelligent witness, the brig appears, from the beginning of the voyage, to have held a course for the West-Indies, and not for Norfolk; although, from the winds stated, she might certainly have hugged the coast, and hauled more to the westward.

2. The brig, although in such a forlorn state and utter distress, run down the principal Caribbee islands; yet with her winds and course, she might have reached any of them.

3. No correspondence is produced with Messrs Myers, although in cases of consignments in this country, where the mails pass so rapidly, it is usual in transactions of real business.

4. No particulars of the injuries received by the vessel are given. No survey under the care of intelligent and disinterested men is produced from the West Indies; although this, in ordinary cases, is the invariable custom. Nor is the deficiency supplied by the testimony of respectable merchants at the ports of St. Vincents and Tobago.

5. The testimony comes altogether from interested sources, mingled with the strongest biases of personal interest; and under circumstances which render it impossible to testify with safety, but on one side. This in ordinary cases would throw a shadow over its current. Nevertheless, unless it were combined with evident improbabilities, I should not feel at liberty to act against the force of its uniform direction.

I cannot but notice also, although it does not govern my opinion, that the decision of the court below, connected this case with that of *The Struggle*, [Case No. 13,550,] as belonging to the same owners; and that, with a view to defeat that inference, the claimant has obtained leave to vary his claim in this court, and to show other owners. This is a very extraordinary occurrence; and though, so far as counsel are concerned, it has been explained to my entire satisfaction, the claimant himself does not seem so easily to be justified.

A careful examination would present farther grounds for doubt; but as these are peremptory in my mind, I affirm the decree of the district court with costs. Decree affirmed.

After the decree of condemnation in the district court was affirmed in the circuit court, the property having been delivered to the claimants by order of the district court, upon a bond being given to respond the appraised value, in case of final condemnation,—

G. Blake, attorney for the United States, moved for judgment on the bond, and for

execution for the appraised value and costs, and founded his motion: 1. On the act 2 March, 1799, c. 128, § 89, (4 U. S. Laws 429, [1 Stat. 695.]) 2. On the general course of the admiralty in proceedings where the property had been delivered on bail.

S. Hubbard for the claimant objected, that the prosecution in this case was grounded on the act of 28th June, 1809, c. 9, [1 Stat. 550.] and therefore there was no foundation for the application under the 89th sect. of the act of 1799. And he further contended, that the court had no authority to deliver the property on bond in a case of this nature; and the circumstance, that statute provisions were made in certain specified cases, showed the non-existence of the authority in all others.

STORY, Circuit Justice. I understand, that in all proper cases of seizure, under whatever statute made, the invariable practice in the district court has been, to take bonds for the property, whenever application has been made by the claimant for this purpose. No doubt has hitherto existed, respecting the right of that court to take such bonds, or to grant judgment and award execution in the summary manner stated in the 89th sect. of the act of 1799, and now moved for on behalf of the United States. That practice I understand has been recognised and sanctioned by my predecessors in this court; and I should not now feel at liberty to disturb upon slight grounds a practice so well settled, whatever might be my own impressions as to its regularity. The practice has been of great public convenience, and to claimants in particular, it has been peculiarly beneficial. The present claimant made a voluntary application for a delivery of the property, and obtained it by an order of the court, upon giving a bond to respond the appraised value, according to a practice of the court, of which he could not be ignorant. The effect of that bond he well knew, and he admitted, by his own course of proceeding, that the court might apply its general practice in summary cases to the present. Whether there be any statute existing, which authorized the delivery on bond or not, is not in my judgment material. This cause was a civil cause, of admiralty and maritime jurisdiction, and nothing can be better settled, than that the admiralty may take a fidejussory caution or stipulation in cases in rem, and may in a summary manner award judgment and execution thereon. The district court possessing this jurisdiction, and being fully authorized to adopt the process and modes of proceeding of the admiralty, (*Respublica v. Lacaze*, 2 Dall. [2 U. S.] 118. See, also, [*Brymer v. Atkins*,] 1 H. Bl. 164.) had an undoubted right to deliver the property on bail, and to enforce a conformity to the terms of the bailment. In what manner this security is taken, whether by a sealed

instrument, or by a stipulation in the nature of a recognizance, cannot affect the jurisdiction of the court. Without doubt, unless a different rule were prescribed by statute, the best course would have been to take an admiralty stipulation. But a bond, even supposing it were void, as such, which is not admitted, might yet be good as a stipulation. In all cases of this nature, the security, whatever may be its form, is taken by order of court upon the voluntary application of the party, and therefore is *apud acta*. Having jurisdiction of the principal cause, the court must possess jurisdiction over all the incidents, and may by motion, attachment or execution, enforce its decrees against all who become parties to the proceedings. As the district judge concurs in this opinion, let judgment for the appraised value and costs be entered against the parties to the bond. See [*Smart v. Wolff*,] 3 Term R. 323; [*King v. Perry*,] 3 Salk. 23; [*Brymer v. Atkins*,] 1 H. Bl. 164; 2 Brown, Civil & Adm. Law, 96.

Case No. 249.

ALLIN v. ROBINSON.

[1 Dill. 119.]¹

Circuit Court, D. Missouri. 1871.

REMOVAL OF SUITS—ACT OF JULY 27, 1866, CON-
STRUCTED.

1. Where the plaintiff, being a citizen of the states, brought ejectment in the usual form, in the state court, against the defendant, also a citizen of the state, who pleaded to the merits, and a third person, a citizen of another state, was, on his own application, made a co-defendant, but filed no plea; and both joined in a petition for the removal of the cause to the federal court, stating no facts in relation to the ownership of the land, or their relation to each other, and the court ordered the removal: *Held*, that the cause was improperly transferred; and the same was remanded.

[Cited in *Case v. Douglas*, Case No. 2,491.]

2. Whether the non-resident landlord may, in such case, where the title is in dispute, and the resident defendant is a mere tenant, have the cause removed on proper petition under the act of July 27, 1866, *quere*.

[Motion to remand cause to state court.
Motion sustained.]

Allin commenced in one of the courts in Missouri, and pursuant to the statutes of the state, an action of ejectment against Robinson. In form the action is possessory, the petition alleging that the plaintiff is entitled to the possession of the property (which is described), and that the defendant wrongfully detains the same from him. Robinson was served and filed an answer denying the allegations of the petition, and claiming the property in his own right. Subsequently, one Prince appeared, and stating to the court that he was the legal owner of the land, asked to be made a co-defendant, and the court granted his application. Prince

¹[Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

has no answer or other pleading on file. In this condition of the case Robinson (both he and the plaintiff being citizens of Missouri), and Prince, who is a citizen of Illinois, joined in an application to the state court to have the cause removed to this court. The petition for the removal stated only that the value of the land exceeded \$500, and that Prince was a citizen of the state of Illinois. It contained no statement concerning the ownership of the land nor the relations which Robinson and Prince sustained towards each other in respect thereto. On this petition the state court made an order, removing the whole cause as respects both defendants, to this court; and here the plaintiff now moves that the cause be remanded to the state court, on the ground that it was improperly transferred.

Ewing & Holliday, for plaintiff.

Krum & Decker and Edmund T. Allen, for defendant.

Before DILLON, Circuit Judge, and TREAT and KREKEL, District Judges.

DILLON, Circuit Judge.—The defendant's counsel in argument seeks to support the order of removal on the ground that Prince is the real owner, and Robinson but his tenant, and that the action, though in form possessory, is in reality brought to try the title which is in dispute between the plaintiff and Prince; and he claims that under such circumstances, Prince, as a non-resident, had, under the act of July 27, 1866, (14 Stat. 306,) a right at all events, to have the cause removed as to him, and that if remanded it should be remanded only as respects Robinson. Prior to the act of 1866, just mentioned, it is clear that Prince having been admitted as a co-defendant, and standing on the record as such, could not have the cause removed, since it was not removable as to Robinson, he being a citizen of Missouri. *Torry v. Beardsley*, [Case No. 14,104.] Title may be tried in this form of action as was adjudged by the supreme court of the United States, in *Miles v. Caldwell*, 2 Wall. [69 U. S.] 35; and if in this case Robinson had filed an answer disclaiming all title or right, or claiming under Prince, and the latter had shown in his petition that he was a citizen of Illinois, that he owned the land, that the action involved his title thereto, that its value exceeded the sum of \$500, and asking a removal as to him, we would have then presented for decision the question which the defendants' counsel has argued, but which does not arise upon the record of the proceedings in the state court. On the face of those proceedings the order for the removal was erroneously made, both as respects Robinson and Prince, and the cause as to both must be remanded. Motion sustained.

TREAT and KREKEL, District Judges, concur.

ALLING, (DENVER & R. G. RY. CO. v.)
[See *Denver & R. G. Ry. Co. v. Alling*, Case No. 3,811.]

ALLIS, (DAVIDSON v.)
[See *Davidson v. Allis*, Case No. 3,600.]

Case No. 250.

ALLIS v. STOWELL.

[Cited as an unreported case in *Allis v. Buckstaff*, 13 Fed. 882. Reported in 9 Fed. 304.]

Case No. 251.

ALLISON v. ALEXANDER.

[1 Cranch, C. C. 237.]¹

Circuit Court, District of Columbia. June Term, 1805.

ACTION—ELECTION.

The plaintiff, having proceeded both at law and in equity, must make his election.

On motion by Mr. Simms, for the defendant, THE COURT ordered the plaintiff to make his election, he having proceeded at law and in chancery, for money due from defendant's testator to plaintiff on partnership account.

ALLISON, (HARTSHORN v.)
[See *Hartshorn v. Allison*, Case No. 6,165.]

Case No. 252.

ALLISON v. PHOENIX INS. CO.

[3 Dill. 480; 4 Ins. Law J. 198.]

Circuit Court, D. Iowa. 1873.

DOUBLE INSURANCE—NOTICE — ENTIRETY OF POLICY COVERING DISTINCT PROPERTY SEPARATELY VALUED.

1. A second fire policy invalid by reason of misrepresentation as to prior insurance, does not constitute additional insurance within the meaning of the usual condition against other insurance contained in a prior policy, in another company.

[See *Holbrook v. American Ins. Co.*, Case No. 6,589. *Contra*, see *Turner v. Meridan Fire Ins. Co.*, 16 Fed. 454. For discussion of question of double insurance, see note to latter case.]

2. *Carpenter v. Providence Wash. Ins. Co.*, 16 Pet. (41 U. S.) 495, distinguished.

3. Whether a second valid insurance on furniture not notified to the company issuing the first policy, which covered other property separately valued, as well as furniture, avoids the first policy, in toto, or only as to the furniture, *quaere*. See cases cited.

[At law. Action by B. F. Allison on a policy of fire insurance against the Phoe-

¹[Reported by Hon. William Cranch, Chief Judge.]

²[Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

nix Insurance Company. Judgment for plaintiff.]

This is an action on a fire policy to recover \$2,000, the amount insured by the defendant upon the plaintiff's stock of goods. The written portion of the policy, which was dated February 7, 1870, and expired in one year, is as follows: \$2,000 on his stock of dry goods, boots and shoes, and groceries; \$200 on his household goods and furniture, in a one story wood building, 20x52, on lot 1, blk. 18, town of Ogden, Iowa. On the 13th day of June, 1870, the agent of the defendant indorsed on the policy: "Permission is hereby given by the Phoenix insurance company to B. F. Allison to transfer his stock of goods and furniture to Grand Junction, Iowa, to be kept in a one and a half story wood building, 22x36 feet, detached." The transfer was made accordingly. The defendant's policy contains the following provision: "If any other insurance has been or shall hereafter be made upon the said property and not consented to by this company in writing hereon, this policy shall be null and void." On this provision a special defense was made by the company which set up (4th count of answer) that the plaintiff, without its consent, had procured "other insurance," to-wit: "\$200 in the Hawkeye company," on his household furniture, being part of the property covered by the defendant's policy. The facts in this respect appear in the special verdict, hereafter set forth. The jury found against the company, on the other defenses, and rendered a general verdict for the plaintiff for \$1,500 (the value of the stock of goods consumed), subject to the rights of the parties on the facts found in the special verdict, which is as follows:

Special verdict.—"We find that the foregoing verdict for the plaintiff is subject to the right of the parties upon the following special verdict as to the defense set up in the fourth count of the answer in respect to other insurance, to-wit: After the policy in suit was issued, and before the fire, to-wit, on the 29th of November, 1870, and after the property mentioned in the policy in suit was removed to Grand Junction, under the permission indorsed on the policy, the plaintiff herein applied to the Hawkeye insurance company for insurance, and on November 29, 1870, the said Hawkeye company issued to the plaintiff a policy of Insurance of that date for one year, whereby, in consideration of \$12.50, said Hawkeye insurance company insured the plaintiff against loss or damage by fire, as follows: "\$500 on his frame store and dwelling house in Grand Junction, and \$200 on his household furniture, and \$75 on his general library contained therein," and delivered said policy to the plaintiff and said policy remained in force until after said house and furniture and library were destroyed by fire. The said store and house thus insured by

the Hawkeye company are the same building into which the defendant gave the plaintiff permission to move the goods and household furniture mentioned in the policy in suit. Said store and dwelling house were all under one roof, and so was the "one story wood building," at Ogden, mentioned in the policy in suit. Said policy issued by the defendant, and said policy issued by the Hawkeye company, and the respective applications by the plaintiff for insurance to the said companies are annexed as part of this special verdict. The same fire totally consumed the building, the stock of goods therein, and all the household furniture. When plaintiff removed to Grand Junction he took his stock of goods and most of his household furniture with him, but after such removal and before taking out the said policy in the Hawkeye company, he had made some additions to his household furniture. (In the written application to the Hawkeye company, the plaintiff, in answer to a question, said there was no insurance on the building or household furniture.) The jury submitted to the court, as a question of law under the pleadings, whether the above facts constitute a defense to an action on the policy in suit for the value of the stock of dry-goods insured in said policy? If they do, then the jury find for the defendant, if not, they find a general verdict for the plaintiff, for the amount named therein, to-wit, \$1,500."

The application for insurance in the Hawkeye company stated incorrectly that there was "no other insurance on the household furniture." The Hawkeye policy contained a condition "that any other insurance on the property hereby insured, or any part thereof, not notified to the company, should avoid the policy." The Hawkeye company had no notice of the prior insurance in the defendant company on the furniture; nor did the defendant company have notice of the subsequent policy in the Hawkeye company. The stock of goods and the household furniture, and the house at Grand Junction, were destroyed by a fire having a single origin. The plaintiff, after the fire, compromised his loss under the Hawkeye policy with that company. The defendant now moves to set aside the general verdict, and for judgment in its favor on the special verdict; and, on the other hand, the plaintiff moves for judgment on the verdict of the jury. It is on these motions that the cause is before the court. The action was only for the value of the goods destroyed by the fire.

Phillips & Phillips, for plaintiff.

Gatch, Wright, & Rannels and Austin Adams, for the company.

DILLON, Circuit Judge. There are two questions here. One is whether the subsequent policy on the furniture in the Hawkeye company, supposing it to be a valid

and binding insurance, avoids the policy in suit as respects the stock of goods, which was separately valued, there having been no notice to the defendant of the Hawkeye policy.

The other is whether the subsequent policy in the Hawkeye company was such "other insurance" as contravenes the provision in the defendant's policy in that regard, the Hawkeye company having been informed by the plaintiff's application that there was no other insurance on the furniture, but after the loss, having compromised with the plaintiff in respect to its policy, not having had before the fire any knowledge of the policy issued by the defendant or ratifying its own policy with knowledge of the prior policy. The Hawkeye company insisted that its policy was not binding on it because of the misrepresentation as to prior insurance, but the policy covered other risks and the controversy was closed by the payment to the plaintiff of a sum less than the sum insured.

Under these circumstances it is clear that the second policy, as respects the furniture, at all events, could not have been enforced against the Hawkeye company, and, if not, can it be set up by the defendant as constituting other or additional insurance in violation of the condition in that respect, contained in the policy now in suit?

The general, but not uniform, opinion of the courts is, that to avoid the first policy the second policy must be valid, that it must constitute an effectual insurance; and we are inclined to so hold, if this can be done consistently with *Carpenter v. Providence Wash. Ins. Co.*, 16 Pet. [41 U. S.] 495. The case last cited has been subjected to much criticism (see *Clark v. New England, etc., Ins. Co.*, 6 Cush. 342, 350; *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325; *May, Ins.* § 365, and the authorities there collected;) and, it may be conceded that, though not unsupported, it does not, at least in its reasoning, accord with the prevailing view. But if the case at bar falls within its principle, it is our duty implicitly to apply that principle to it. That case holds that the company which issued the second policy (the Providence company) was entitled to notice of the prior insurance in the American company, though the policy in that company had been "procured by misrepresentation of material facts"—and the reason given (which has been criticised and its soundness denied) is, that such a policy is not "to be treated, in the sense of the law, as utterly void ab initio, but merely voidable, and as one that may be avoided by the underwriters upon the proof of the facts, but until so avoided, to be treated for all practical purposes as a subsisting policy."

The decision would make it the duty of the plaintiff to have disclosed the prior insurance in the defendant company to the Hawkeye company, and if he did not, but stated

that there was no such prior insurance, the policy in the Hawkeye company, if not ratified, would be void. And it does not establish that the policy in the Hawkeye company is to be considered as in all respects a valid policy unless avoided by that company before the loss.

We are therefore of the opinion that the policy in the Hawkeye company, so far at all events, as respects the furniture, was invalid, that it did not in fact and in law constitute any insurance, and therefore the defence based upon the ground that other insurance was procured contrary to the provisions of the policy in suit, fails. This view is, in our opinion, consistent with the real point in judgment in the case of *Carpenter*, though it may not consist with all the reasoning of the learned justice who delivered the opinion of the court.

This makes it unnecessary to decide whether if the Hawkeye policy had been valid as respects the furniture, this would have avoided the defendant's policy as respects the stock of goods. On this point the cases cannot be reconciled. That it would not thus avoid the policy as to the goods, see *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247, affirmed 19 Mo. 628; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9; *Clark v. New England, etc., Ins. Co.*, 6 Cush. 342, explained, *May, Ins.* § 278, note on page 303; *Trench v. Chenango, etc., Ins. Co.*, 7 Hill, 123, (compare *Wilson v. Herkimer Co. Mut. Ins. Co.*, 2 Seld. [6 N. Y.] 53;) *Sloat v. Royal Ins. Co.*, 49 Pa. St. 14; *Davis v. Boardman*, 12 Mass. 79; *Howard Ins. Co. v. Scribner*, 5 Hill, 298.

But on the other hand, that it would avoid the policy entirely, see *Smith v. Empire Ins. Co.*, 25 Barb. 497, 504; *Kimball v. Howard, Ins. Co.*, 8 Gray, 33, 38, compare with *Clark v. New England, etc., Ins. Co.* supra; *Associated Firemen's Ins. Co. v. Assum*, 5 Md. 163; *Barnes v. Union M. F. Ins. Co.*, 51 Me. 110. In this last case, where there was the usual provision against alienation, or material change of title, and an insurance was effected by the plaintiff on an undivided half of a dwelling house, and afterwards on the petition of his co-tenant, a partition was decreed, this was held to be equivalent to an alienation and purchase, and avoided the policy as to the building, and it was further held that the policy being void as to the building, the plaintiff could not recover for the loss of furniture therein insured in the same policy, and separately valued, the ground of decision being the supposed entirety of the contract, as that if it became void in part it was void in toto. I doubt the soundness of this decision, as to the furniture, but as it is not essential, the court gives no opinion as to the point whether a second valid insurance of furniture, there being no fraud, would avoid the first policy, as to the other and distinct property, separately valued.

Judgment for the plaintiff.

ALLISON, (WHITFIELD v.)

[See Whitfield v. Allison, Case No. 17,571.]

ALLWINE, (CAMAC v.)

[See Camac v. Allwine, Case No. 2,328.]

ALLYN, (GOODYEAR v.)

[See Goodyear v. Allyn, Case No. 5,555.]

ALLYN, (SMITH v.)

[See Smith v. Allyn, Case No. 13,000; Id. 13,001.]

Case No. 253.

The ALMA.

[2 Spr. 203; 25 Law Rep. 663.]

District Court, D. Massachusetts. June 20, 1863.

PRIZE—RELOCATION OF BLOCKADE—HOSTILE VESSELS.

1. The president's proclamation of 14 May, 1862, "relaxing the blockade" of Beaufort, N. C., and opening it to trade under regulations of the treasury department, the port being in our military possession, must be construed, so far as neutrals are concerned, as having entirely raised the blockade; and neutral vessels bound there, in violation of the regulations of the treasury department, are not guilty of an attempt to break the blockade.

2. Vessel and cargo condemned for breach of blockade, the evidence showing an actual hostile destination.

In admiralty.

R. H. Dana, Jr., U. S. Atty., for the United States and captors.

SPRAGUE, District Judge.—This vessel was captured on the 2d May last, by the United States brig Perry, off the coast of North Carolina, within four or five miles of the beach, and near New Topsail Inlet. The master, mate, and all the crew were brought here in the prize, and their evidence has been taken. No claim has been put in for either vessel or cargo, although the master and mate both testify that they owned portions of the cargo, and that the vessel and rest of the cargo belonged to one James B. Heyl, a merchant in Bermuda, who appointed and employed the master. There were found on board the vessel a certificate of registry in the name of J. B. Heyl, shipping articles which described the voyage as from Bermuda to Beaufort, N. C. (a port now in our military possession), and back, a certificate of clearance for the same voyage, a manifest representing the same voyage, and a letter from Mr. Heyl to one W. I. Potter, at

Beaufort. The log-book seems to have correctly described the vessel's course, though imperfectly, to the day of the capture.

It appears, from the evidence of the master and crew of the Alma, that she first sailed from Bermuda on the 6th March last, and put back from heavy weather, leaking, repaired damages, made some changes in her cargo, and sailed again on the 22d April. Her capture was eleven days afterwards. It appears, from the same evidence, that the schooner made the land the afternoon before her capture, stood off again to sea, and stood in again the next morning. Her position was then about thirty-five miles to the southward of Beaufort, and about twenty miles to the northward of New Topsail Inlet. The wind was in a northeasterly direction, being ahead for Beaufort. She stood in on the starboard tack, until she was very close to the beach, and then kept off and stood down the coast in a southerly direction, and then hauled up, on the port tack, and stood out to sea. One witness says that their reason for wearing round, instead of tacking, was because the vessel worked badly. No other witness says this, and no attempt seems to have been made to put her in stays. The reason they give for keeping off and running free, when Beaufort was to windward, is, that they saw the United States brig-of-war Perry, and wished to speak her. One witness however, says that the schooner did not keep off for the Perry, but stood out to sea, close hauled on the port tack. No reason is given why they should wish to speak the Perry. It is not clear how long they ran down the coast, but only that they did so. The reason assigned is, that the master did not know precisely where he was. It seems, however, that he got an observation that day at noon. It is a circumstance of suspicion that the register of the vessel, in the name of this owner, bears date the very day that the vessel sailed from Bermuda, when all her cargo was on board, and that the letter to Mr. Potter is of the same day. No bills of lading or invoice, and no documentary evidence whatever of title to the cargo, were found on board, and the master admits there were none. The letter to Mr. Potter is written as to an entire stranger, and would be as useful to one stranger as to another. Mr. Heyl says, "I send you a cargo at random," and gives Mr. Potter free leave to sell as he pleases, and send a return cargo of pitch-pine lumber. It gives no measures or quantities of the cargo, nor could the consignee ascertain these by any papers on board, except by such a manifest as the master might choose to make. The clearance describes the cargo as solely spirituous liquors, and there is no invoice and no bills of lading to ascertain the truth. The outward cargo was salt and rum, not a cargo likely to be sent from Bermuda to Beaufort, a port in our military possession,

¹[Reported by Hon. Richard H. Dana; published under the supervision of John Lathrop, Esq.; and here reprinted by permission.]

where the landing of rum is under strict police control, and where salt is nearly as cheap as in New York, while both these articles would bring extraordinary prices at any port under rebel control. In the captain's venture was some naval clothing, not a profitable investment for Beaufort. Nor is it likely that Beaufort, at this time, would furnish a profitable return cargo of pine lumber. The mate of this vessel is a citizen of North Carolina, well acquainted with that coast, having been long engaged in its coasting-trade, and fitted to act as pilot there, and had been in the rebel army (as appears by evidence to be hereafter alluded to). It is not probable, therefore, that he would desire to go to Beaufort, placing himself within reach of our troops. This is the state of the preparatory proofs. They raise great doubts of this being a bona fide voyage in British ownership, to Beaufort, with a cargo actually consigned and destined to that port; and the conduct of the vessel, on the morning of her capture, is hardly consistent with the notion that she was beating up to Beaufort, but is much more consistent with her having made out her position, and run down for the inlet, until she found herself cut off by the Perry, and then attempting to escape her by standing out to sea.

In this state of evidence, I have admitted further proofs by the captors. This consists of the depositions of the prize master, an acting ensign in the Perry, and two petty officers of the Perry, who came here in the prize. They testify that the Perry saw this schooner in the morning, and that she ran in very close to the shore, at a point about thirty-five miles south of Beaufort, and then kept off, in the direction for New Topsail Inlet; that the Perry stood so as to cut her off, and, when it became evident that she was cut off, she came close on the wind, and stood out to sea, but was outsailed by the Perry, and brought under her guns. The two petty officers testify that the mate and crew of the Alma, on the passage home, freely admitted that they were running for the inlet; and the mate said he got too far to the northward, and tried to run down and get in before the Perry cut her off. It is also testified that the Alma worked well, and was in good trim. I have so far treated the case as if a destination to Beaufort, N. C., was an innocent destination at this time. That port was placed under blockade by the proclamation of April 27, 1861, and was under actual blockade until it was taken by our troops. On 12th May, 1862, the President issued a proclamation declaring that, as to the ports of Beaufort, N

C., Port Royal, S. C., and New Orleans, "the blockade may now be safely relaxed," and declaring the blockade so far to cease as to allow commercial intercourse with those ports, "subject to the laws of the United States, and to the limitations and in pursuance of the regulations which are prescribed by the Secretary of the Treasury in his order of this date." This order gives notice that to vessels clearing from foreign ports to the "ports opened by the proclamation," licenses will be granted by the United States consuls, upon evidence that the vessels will deal in no contraband persons or property, which licenses shall be exhibited to the collectors of the ports, and to the blockading vessels, if required. It then declares that "in all other respects the existing blockade remains in full force and effect as hitherto established and maintained, nor is it relaxed by the proclamation, except in regard to the ports to which the relaxation is, by that instrument, expressly applied." [12 Stat. 1263.]

It is suggested by the United States Attorney, that the proclamation merely relaxes the blockade of these ports so far as to let in vessels so licensed. But although the language is not clear, I think that, on general principles of the laws of war affecting neutrals, I must hold that the proclamation entirely raises the blockade of these ports as to neutrals. The proviso respecting the license is a regulation of trade with a place in our military possession; and whatever might be the effect, in another proceeding, in case a vessel should enter one of these posts without a license, or should violate the license, it would not make her a prize of war for breach of blockade. Otherwise, I should be obliged to hold that the obstacle of a blockade, as to each neutral vessel, depended upon the decision which the several consuls of the United States, at the several neutral ports over the globe, might make in the case of every vessel applying for a license, while our own vessels, sailing coastwise, are to apply for licenses to the Department of the Treasury. But while the absence of any license to this vessel from the American consul at Bermuda does not make Beaufort a prohibited port to her, it is corroborative evidence that she was not bound there. This proclamation and order must have been known in Bermuda for nearly ten months before this vessel sailed; and it can hardly be supposed that a British merchant, sole owner of vessel and cargo, would have sent her to Beaufort without a license. The vessel and cargo are to be condemned for an attempted breach of blockade.

Case No. 254.

The ALMATIA.

[1 Deady, 473; 1 Amer. Law T. Rep. U. S. Cts. 133; 1 Chi. Leg. News, 129.]

District Court, D. Oregon. Nov. 12, 1868.

SEAMEN—WAGES—FORFEITURE FOR MISCONDUCT—SHIPPING ARTICLES IN DEROGATION OF LEGAL RIGHTS.

1. A justifiable discharge of a seaman by the master, for bad conduct, will work a forfeiture of the wages previously earned.

[See *The Magnet*, Case No. 8,955; *The John Martin*, Id. 7,358; *Relf v. The Maria*, Id. 11,692.]

[See note at end of case.]

2. Courts of admiralty will not [wholly] forfeit a seaman's wages for a single act of disobedience, however [if] trivial or provoked.

3. A stipulation in shipping articles in derogation of the general rights of seamen, as established by the maritime law, is void, unless it was fully and fairly explained to them, and additional compensation allowed them, adequate to the restrictions and risks imposed thereby.

[See *The Australia*, Case No. 687.]

In admiralty.

O. P. Mason, for libellants.

W. W. Page and W. W. Thayer, for claimants.

DEADY, District Judge. This is a suit in rem for seaman's wages. The defence set up in the answer is desertion and disobedience of orders, whereby the libellants forfeited their wages. The material facts are as follows: The libellants, George Mills, Albert Miller, Frank Stizleye, Nels. Nelson, William Nelson, Henry Nelson, Howell Lewis and John Lewis, between the fourteenth and twentieth of August, 1868, shipped as seamen on the *Almatia*, then lying at the port of San Francisco, for a voyage to the port of Portland-on-Wallamet, and thence back to the port of departure. The bark sailed from San Francisco on September 1, and made the dock at Portland on the thirtieth of the same month. Upon reaching the latter port, the first mate was immediately paid off and discharged, but for what reason does not appear. The second mate then acted as first officer, and proceeded with the discharge of cargo. The libellants were the only seamen on board. On Sunday morning, October 4, the second mate called the men out about six o'clock, and set them to doing the ordinary work about ship. They washed down the decks, and furled four sails which had been loose since the Tuesday previous. The weather was calm and dry. When this work was done, the second mate ordered the libellants to loose and unfurl the foresail. This sail had been furled the Tuesday previous by the order and under the direction of the first mate. It was then half-past eight o'clock, and the custom was to have breakfast on Sunday morning

at eight. There was no necessity of unfurling the sail at that time. To this order the men replied that it was after eight o'clock and they wanted their breakfasts. The officer immediately reported this answer to the master, who had the men called aft. On coming aft, the master asked the men what was the matter? They answered that they wanted their breakfasts. To this the master replied—You want your breakfasts, do you? The master then asked if they would furl the sail; they replied that it was after eight o'clock, and they wanted their breakfasts. The master then said—You refuse duty then; mind, you got nothing coming to you. The men replied—We don't refuse to do our duty, but we want our breakfasts. The master then ordered the second officer to go ashore and get men to furl the sail. The officer did so, but none were obtained, and the sail was not refurled until the following Monday evening. No more notice was taken of the men.

By the direction of the master, the cook allowed them breakfast, dinner and supper on Sunday. The men slept on board, but were not called to turn out on Monday morning. About half-past seven, they applied to the cook for breakfast, but he refused them, as the master had given him orders not to let them have any. About this time a gang of longshoremen came on board and commenced to discharge cargo. The libellants then went to the master on the wharf, and asked him what he was going to do with them. The master said he didn't know them; that they took charge yesterday morning, and he would have nothing more to do with them. The men said they had not "taken charge." The master replied—You refused to work. Then the men asked if they could go ashore. The master answered—I don't tell you to go ashore. The men then asked him if he would pay them. The master at first said he might, if anything was coming to them; and then said no, get it out of the ship, if you can. Thereupon the libellants left the bark, and brought this suit for wages.

Upon this state of facts, the defence of desertion must fail. The libellants remained on board the vessel for twenty-four hours after their qualified refusal to furl the foresail, ready and willing, so far as appears, to do duty whenever called upon. During all this time no attention was paid to them, or orders given them by the officers; and finally, by direction of the master, they were denied their usual food. On Monday morning, when the libellants finally applied directly to the master for orders, he said that he did not know them, and in effect that he was done with them. This was a discharge by the officers, and not a desertion by the crew. Desertion by the maritime law is a quitting the ship and her service without leave, and against the duty of the party, with no mind to return again. *Cloutman v.*

¹[Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

Tunison, [Case No. 2,907.] These libellants left the vessel with no mind to return, but not until they were in effect bidden to do so, by the language and conduct of the master and mate.

It being ascertained that the libellants did not desert the vessel, but were discharged therefrom at an intermediate port, it remains to be considered whether the discharge was justifiable or not. A justifiable discharge of a seaman by the master, for bad conduct, will work a forfeiture of the wages previously earned. This is a rule of justice and policy which pervades the maritime law. 3 Kent, Comm. 198. But it is not every trivial act of disobedience or neglect of duty that will justify the discharge of a seaman, or work a forfeiture of his wages. In the case of *The Mentor*, [Case No. 9,427,] Mr. Justice Story discusses this question at great length. He says: "There must be a case of high and aggravated neglect or disobedience, importing the most serious mischief, peril or wrong; a case calling for exemplary punishment and admitting of no reasonable mitigation; a case involving a very gross breach of the stipulated contract for hire, and going in its character and consequences to the very essence of its provisions." And again, he says: "I should be very sorry, indeed, to lay it down as a general proposition, that any act of disobedience by a seaman, however slight, is, of course, to be visited with a forfeiture of wages, or will justify a master in dismissing him in the course of the voyage. Such a principle, it seems to me, would be very disastrous to the commercial interests of the country, and would involve so many difficulties in the application, that the denial of wages would soon, from the necessities of the case, with reference to the ordinary habits of seamen, introduce an essentially different contract into maritime employment. My opinion is, that the disobedience must either be an act of very gross nature, involving serious danger, a mischief or malignancy; or it must be habitual and produce such a general diminution of duty as goes to the very essence of the contract." To the same effect is 3 Kent, Comm., supra. The case of *The Mentor*, supra, involved the consideration of the consequences of an attempt to create a revolt on ship board. The learned judge, in the course of his opinion, declared that even the commission of such an offence is not "in all cases, to be visited with a total forfeiture of wages;" and by way of illustration adds, "Cases may easily be conceived, where the seamen have, in a legal sense, committed the offence, and yet under such circumstances of gross provocation and misconduct on the part of the master, as to form a very strong excuse, addressing itself to the conscience and mercy of the court."

Taking these rules and principles as a guide for the decision of this case, it is plain that

the discharge of the libellants was not justifiable, and that they ought [not] to forfeit their wages for the single act of the qualified refusal to refurl the foresail on Sunday morning. The first mate had been discharged and the second mate had taken his place. It is quite probable that the libellants, in feeling at least, in this matter, took part for the first mate and against the second one. It is equally probable and even more so, that the second mate regarded the crew with disfavor and intended to hector them out of the vessel and get rid of them. There was no trouble on board with the libellants, until he became first officer. The libellants have been before the court and four of them were examined as witnesses. They appeared very well for men in their station of life, and those of them who were upon the witness stand gave their testimony intelligently and candidly. One of them had been on the ship for three years continuously. The testimony for the claimants, consists of the depositions of the master and second mate, and a third person who appears to have been idling on the dock at the time of the altercation between the men and the officers on Sunday morning, and overheard and saw a part of what was then said and done. The cook was the only person on board who was not an actor in the scene of Sunday morning. His testimony has not been offered. No reason is given by the claimants for not producing him or his deposition. For aught that appears he is still on board the bark and within their control. The circumstance must have some weight against the claimants upon the questions of fact in dispute between them and the libellants. The mate testifies that it was necessary to the safety of the vessel to refurl the foresail on that Sunday morning. The sail had been furled under the direction of the first mate and had been in that condition since the previous Tuesday, and so remained until the evening of the following Monday. The vessel was fast alongside the dock, one hundred and twenty miles from sea, and the weather was and had been calm and dry. This statement of the mate's is incredible and it cannot be supposed but that he knew better. Its falsity is evident to any one, and is shown by the testimony of the libellants and that of the ship-masters, Smith and Freeman. These circumstances are enough to throw discredit upon the testimony of the mate.

The force of the master's testimony is impaired by the fact that he was intoxicated on Sunday morning, when the affair took place, which was made the occasion for discharging the libellants, without paying their wages. It is altogether probable that the mate took advantage of his condition to bring about a dispute between the crew and him. So soon as the men said they wanted their breakfasts, when ordered to refurl the foresail, the mate immediately, without a word of explanation, hurried off to the master with

a complaint of disobedience of orders, and the result was that the men were called aft and practically discharged. On the other hand, I do not think the libellants are wholly without fault. Although the refurling of the sail was not necessary to the safety of the vessel, it was proper and right that it should be refurled, if the officer in charge thought so. He had a right to have the sails furled to please his eye, and in accordance with his notions of what was professional and seamanlike. Some one must give the law upon these matters, and the general rule is, that the seaman must obey what his superiors command. Of course there is a limit, beyond which a seaman need not endure the caprices and persecutions of his officers, but may leave the ship and demand his wages. But this order was not an extreme one. Fifteen minutes at the farthest would have sufficed to refurl the sail; and although the libellants may have felt (as was probably the fact), that the order was given to punish and annoy them more than any thing else, yet they should have obeyed it after the master required them to do it, before breakfast. It also appears probable that the crew on Sunday morning were disinclined to work under the mate, and held back in the discharge of the morning's work, so that they furnished some excuse if not provocation for keeping them at work after the usual hour without their breakfasts.

In any event the order was not so unreasonable or oppressive as to justify the libellants in refusing to obey it, either absolutely or unqualifiedly. Nor was their qualified refusal, under all the circumstances, sufficient to justify their discharge, or work a forfeiture of their wages; particularly as they remained ready to go to work, until the master discharged them the next morning. I shall deduct one month's wages from the compensation due each of the libellants for his misconduct in this particular.

Counsel for the claimants also insist that the wages of the libellants are forfeited by virtue of a clause in the shipping articles which reads "that if any of the said crew disobey the orders of master or other officer of the said vessel, or absent himself at any time without liberty, his wages due at the time of said disobedience or absence shall be forfeited; and in case such person or persons so forfeiting wages shall be reinstated and permitted to do further duty, it shall not do away such forfeiture." This stipulation or clause is in derogation of the general rights of seamen as established by the maritime law, which does not allow a single act of disobedience, however trivial or provoked to work a total forfeiture of a seaman's wages. Such stipulations are held void by courts of admiralty "unless two things concur: first, that the nature and operation of the clause is fully and fairly explained to the seaman; and secondly, that an additional

compensation is allowed entirely adequate to the new restrictions and risks imposed upon them thereby." *Brown v. Lull*, [Case No. 2,018.] The burden of proof is upon the claimants to show both these things. No attempt has been made to prove either of them. Tried by this test, this stipulation is void. "Courts of admiralty are accustomed to consider seamen as peculiarly entitled to their protection;" and it is against the operation of such unjust and one-sided stipulations as this, obscurely placed among the many long lines of a closely printed formula at the head of the articles, that this protection is most required and given.

It only remains to consider the compensation which the libellants are entitled to receive. The general rule, when a seaman is wrongfully discharged during a voyage, is to allow him wages up to the termination of the voyage. But to this there are exceptions. In some instances the compensation given by this rule would be too great and in others too small. The damages in all cases should be equal to the real loss or injury of the party. *Emerson v. Howland*, [Case No. 4,441.]

The wages agreed upon were \$35 per month for the round voyage. From the evidence it cannot be certainly known what time it will take to complete the voyage. On the argument it was admitted that the vessel was still in this port. The run from San Francisco here occupied just one month. The vessel has been in this port another month discharging and taking on cargo, and how much longer she may remain is not known. From what is known, it may be safely assumed that the return to San Francisco will occupy another month. The libellants shipped on the 14, 17 and 20 of August. This would make the duration of the voyage about three and a half months. If the discharge was wholly wrongful and without fault on the part of the libellants, the latter would be entitled to recover the stipulated rate of wages for this time, and also the sum of twenty dollars each, the price of passage from here to the port of shipment. From this must be deducted as to each of them the sum of one month's wages for misconduct, and also the advanced wages received by two of them. The articles do not specify what kind of money the wages were to be paid in. The usage is to pay in coin, and the money advanced to Nelson and Mills, was coin. In all probability it was the mutual understanding that the wages should be paid in coin. But the contract is for so much money, and it may be satisfied by the payment of any lawful money of the United States. Under these circumstances the court cannot decree that the wages shall be paid in coin, or that a greater sum per month than that agreed upon shall be paid in currency. However, the wages have been allowed for the round voyage. It is probable that the libellants might

have returned to San Francisco, in a month less time, if they had availed themselves of the opportunities that offered, immediately upon their discharge. Supposing that this decree would be paid in currency, I have upon this point, in the absence of testimony, presumed in favor of the libellants, and given them wages for three and a half instead of two and a half months. Decree for the libellants accordingly.

[NOTE. Wages of seamen will not be forfeited for slight faults; the disobedience must be of a very gross nature, involving serious danger, or it must be malignant or habitual, such as goes to the very essence of the contract. The *Mentor*, Case No. 9,427; The *Maria*, Id. 9,074; The *Pioneer*, Id. 11,176. For cases in which a partial forfeiture of wages was decreed because of disobedience, see The *William Cummings*, Id. 17,690; The *Elizabeth Frith*, Id. 4,361; The *Jefferson Borden*, 6 Fed. 301; The *Antioch*, 11 Fed. 165; The *Moslem*, Case No. 9,875. In the following cases it was held that the particular misconduct complained of was not sufficient to warrant a forfeiture or deduction of wages: *Smith v. The J. C. King*, 3 Fed. 302; The *Paul Revere*, 10 Fed. 156; *Marsland v. The Yosemite*, 18 Fed. 331; *Macomber v. Thompson*, Case No. 8,919; *Sprague v. Kain*, Id. 13,250; The *Magnet*, Id. 8,955; The *John Martin*, Id. 7,358; *Hayes v. The J. J. Wickwire*, Id. 6,262; *Snell v. The Independence*, Id. 13,139; *Lang v. Holbrook*, Id. 8,057; The *Mary Ann*, Id. 9,194; The *Olive Chamberlain*, Id. 10,491.]

Case No. 255.

ALMEIDA v. CERTAIN SLAVES.

[5 Hall, Law J. 459; 5 Hughes, 55; 3 Wheeler, Crim. Cas. 538.]

District Court, D. South Carolina. July, 1814.

SLAVES—PRIZE—PRISONERS OF WAR.

1. Slaves captured in time of war, cannot be libelled as prize, nor will the district court of the United States consider them as prisoners of war.

2. The court considers the disposition of them as a matter of state [policy,] in which it is not fit that the judiciary should interfere.

[Libel by Joseph Almeida, captain of the American privateer schooner *Caroline*, against certain slaves. Dismissed.]

DRAYTON, District Judge. The libel in this case alleges, that during the cruise of said privateer, on the high seas, she captured certain slaves, "the property of the king of the United Kingdom of Great Britain and Ireland, and the dependencies thereof; or, of the subjects of the said king." That in and by a certain act of the congress of the United States, passed the 26th June, 1812, entitled "An act concerning letters of marque, prizes, and prize goods," it is among other things enacted, that all captures of vessels, and property, shall be forfeited, and accrue to the owners, officers,

and crew of the vessels, by which such prizes shall be made; reserving to the United States, two per centum, on the net amount of the moneys arising from such captures, and concludes with the regular prayer of condemnation.

In behalf of the United States, a claim was interposed by the district attorney, for the said slaves, as prisoners of war, or otherwise, to them the said United States belonging; denying the right of the said Joseph Almeida, to the said slaves, as prize of war; and concludes with praying, that the said slaves may be adjudged and delivered to them as prisoners of war, or otherwise, and that the costs of their claim be allowed. This is one of the new and important questions, arising from the present war in which the United States of America are engaged with Great Britain. The court has, heretofore, not proceeded to condemnation of slaves, brought in as prize of war; but, has ordered their confinement as prisoners. And in some cases, they have been received as such, by the British authorities resident in this city. The interest of parties, however, require at this time, a formal decision on the point of prize; to obtain which, the libel, in this case has been filed.

It is contended by Hayne, for the libellant, that by a true construction of the rights of war, and particularly in pursuance of the prize act of the United States, specially referred to in the libel, all captures and prizes of vessels and property, shall be forfeited and accrue to the owners, officers and crews of the vessels making such captures. That negroes and persons of color, held in slavery by the British are as much slaves, as those held in slavery by our own citizens. That they are not real, but personal property; considered as assets in sales, and in distribution of estates. And therefore, they come within the meaning of the word property, as mentioned in the fourth section of the said act; (2 Laws U. S. 240, [2 Stat. 759:]) and, consequently, are liable to condemnation as prize. That the law must be so construed, not only as respects the public interests, and the intention of congress in passing the prize act; but, as protecting the rights of all concerned in privateering; and, as encouraging the exertions of our citizens to attack and injure the enemy. And more particularly so, in retributive justice; as the enemy have taken so many slaves belonging to our citizens, and have appropriated them to their own use, as prize of war.

On the part of the United States, it is insisted, by Parker, (district attorney) that the right of condemning the slaves as prize of war, does not attach in favor of libellants; but, that they must be considered as prisoners of war or otherwise, in behalf of the United States. Because other than such a construction would be at variance with the

[Reported by John E. Hall, Esq., from the manuscript communicated by Hon. John Drayton, District Judge.]

act of congress, passed on the 2d of March, 1807, prohibiting importation of slaves. 8 Laws U. S. 262, [2 Stat. 426.] That slaves cannot be considered as property, under that term, in the prize act; because, it could not have been the intention of congress to consider them as prize, springing out of the events of the war. For, were this the meaning of the legislature, the act prohibiting the importation of slaves would have been repealed, so far as it had any collision with the war or the prize acts. I have never had any doubt on this subject. But, as those interested in such captures appear not satisfied, by a non-judicial divestment of what they claim as a right, it is better that the question should be, at length, seriously brought before me.

Did the question turn upon the meaning of the word property, as relating to slaves, something might be said in support of such doctrine; not only, upon the principle of the civil law which considers slaves not as persons but as things (1 Brown, Civil Law, 100, 101, 103,) but also, from the custom, usage and meaning in law, of those of our states, possessing this property. But, as only one portion of our union, permits this property in slaves, it cannot be supposed the other would in a general law, intend it was to be considered as prize. These two different interests are represented in congress; it is the united votes of that body, which have passed the prohibitory act. And it is but reasonable to believe those not permitting slavery, did not, and would not, concur, in such a construction, as is contended for, by libellant. But there are stronger reasons why a condemnation in favor of the captors, should not be decreed. In the first place, the act prohibiting the importation of slaves, was made by congress, with the evident intention of forever thereafter preventing this importation. This act was passed to take effect at the earliest period (1st January, 1808,) at which the constitution of the United States permitted congress to prohibit their importation. For until that time, the states interested in negro importation would not have been controlled but by their own acts. And congress having so early used such prohibitory power evinces their disapprobation of such commerce, and of adding to the number of slaves in the Union; and of course, their determination to maintain such prohibition strictly. It is true, this law was made in time of peace, it is not a war measure. But, it does not thence follow that it is to be superseded or repealed by a declaration of war; or by the passage of a prize act. It does not follow that an act passed as a general and standing municipal law shall be repealed by a prize act, brought into existence for the purposes of a particular war, unless such repeal manifestly appears. It would argue a want of caution in our legislature, which ought not to be supposed. It enacts "That from and after the 1st day of January, 1808,

it shall not be lawful to import or bring into the United States, or the territories thereof, from any foreign kingdom, place, or country, any negro, mulatto, or person of color, with intent to hold, sell, or dispose of such negro, mulatto, or person of color, as a slave, or to be held to service or labor." This section, therefore, is general; it applies to all vessels, whether of war or otherwise. For, "ubi lex non distinguit, nec nos distinguere debemus." It is also imperative, being without any condition, or exception. This further appears by perusing the different sections of the act—as where the public interests required, the general bearing of the first section should be controlled or mitigated, there the act is not silent, but declares in what manner it shall be done. So by the 7th section permitting the capture, and bringing in of any ship or vessel hovering on our coasts, having on board any negro, mulatto, or person of color, for the purpose of selling them as slaves; or with the intent to land the same, in any port or place within the jurisdiction of the United States. 8 Laws U. S. 266, [2 Stat. 428.] But even in this case, those persons are not to be sold; they are to be disposed of otherwise, as therein is directed. The party capturing receives nothing from the proceeds of such negroes, mulattoes, or persons of color; his emoluments arise only from the proceeds of the ship or vessel, her tackle, apparel and furniture, and the goods and effects on board; and this under a special proviso, that to entitle him to such reward, he shall "keep safe every negro, mulatto or person of color, found on board of any ship or vessel, so seized, taken or brought into port for condemnation, and shall deliver every such negro, mulatto or person of color, to such person or persons as shall be appointed by the respective states, to receive them, etc." Hence, as respects the rights and interest vested by the prize act, congress has legislated with caution. When to give energy to that act, that body meant former acts, or parts of acts to be repealed, the same has been expressly enacted; it has not been left to a court, to advance one step farther than was intended by its decreeing a virtual repeal. For, it is only under such a decree, or by such a construction, that the cause of the libellant can be sustained. This is evident, by referring to the 14th and 16th sections of the prize act; which for the purpose of giving free scope to its operations, expressly repeal so much of the non-importation and embargo laws as relate to prize goods, or private armed vessels; but, nothing is said as to the prohibitory slave act. It follows then, that congress did not intend to repeal such act, as relating to prize of war; as "Exceptio probat regulam, in non exceptis." And slaves are not considered therein under the term property, or as goods and effects as is evident by the remunerating clause of the prohibitory slave act, (section 7,) before men-

tioned. Congress has therein clearly expressed its opinion on this point; and it is not then for this court to suppose a different construction. I am, therefore, of opinion, the negroes or persons of color, so libelled, cannot be condemned as prize to the captors.

The only question now remaining for consideration, is whether the claim in behalf of the United States, for the same as prisoners of war or otherwise, shall be sustained, or, if not sustained, whether this court will in any, and what manner, pronounce judgment in the premises? As to the claim of prisoners of war, I do not think it proper to decide thereon. It appears to me, as the laws of the United States are silent on the subject, it becomes a matter of state; respecting which it is not for the judiciary to determine—the right to do so remaining with the government of the United States. Because these persons may have been heretofore informally considered as prisoners, it is no reason this court should now decree them to be prisoners of war. And on this point there is much similarity, with the reasoning and cases in law, respecting head money. In which the court of admiralty pronounces not whether due, but only the number of men taken; leaving the remuneration to the sovereign power. [Le Francha.] 1 C. Rob. Adm. 157.

Under these impressions, I do adjudge and decree, that the libel be dismissed with costs. And that the claim of the United States be sustained, so far as to detain the said negroes, mulattoes or persons of color, in the possession and custody of the marshal; subject to such disposition and uses, in favor of the United States, whether as prisoners of war, as prize to the United States, or otherwise, as shall lawfully be declared, and directed in the premises. And lastly, I adjudge and decree that the libellant pay also the costs of the claim in this case.

ALMEIDA, (UNITED STATES v.)

[See United States v. Almeida, Case No. 14,433.]

ALMY, (HARTSHORN v.)

[See Hartshorn v. Almy, Case No. 6,166.]

ALMY, (JAY v.)

[See Jay v. Almy, Case No. 7,236.]

ALMY, (KENDALL v.)

[See Kendall v. Almy, Case No. 7,690.]

ALMY, (WALCOTT v.)

[See Walcott v. Almy, Case No. 17,052.]

Case No. 256.

ALMY v. WILBUR.

SAME v. SAME.

[2 Woodb. & M. 371.]¹

Circuit Court, D. Rhode Island. Nov. Term, 1846.²

EQUITABLE MORTGAGES — FRAUDULENT TRANSFER OF PROPERTY BY MORTGAGOR — CONVERSION — RUNNING OF STATUTE OF LIMITATIONS.

1. Where A. promises B. to buy machinery of C., and let B. have it to use at an agreed price per yard for cloth made by it at B.'s factory, A. to furnish the raw cotton, and credit B. towards payment for the machinery, with what the cloth sells for beyond that price and expenses; it is not at law a mortgage of the machinery by B. to A., because the title did not come from A. to B., and their agreement was not made at the time A. got his title; but if an absolute debt from B. to A. existed, to be secured by a mortgage, and a memorandum at the bottom of the contract called the machinery collateral security for the money paid for it by A., and in the contract it was said to be security for the advance made, it may be deemed in equity a debt, though B. was said to be "at liberty" to pay the money advanced.

[Cited in Tufts v. Tufts, Case No. 14,233; Carr v. Gale, Id. 2,435.]

2. This contract may be deemed a mortgage of the machinery to B. in equity, and A. afterwards could not sell it legally to D. until he had paid B. all the debt; so that D., knowing the circumstances, or knowing enough to put him on inquiry, could not hold the machinery without paying B. the balance due.

[Cited in Bentley v. Phelps, Case No. 1,331; Tufts v. Tufts, Id. 14,233; Carr v. Gale, Id. 2,435.]

3. Such a contract, though a mortgage, need not be recorded in order to be valid between the parties to it, or those having notice of it. Possession by A. of such property, which had not been his before the mortgage, is not within the policy of the law as to its being evidence of fraud, either if a mortgage or not. Nor is the machinery under such a contract in the control and disposition of A. so as to render it liable for his debts to others, like property of third persons, in the power and disposal of bankrupts under the special provisions of bankrupt acts.

[Cited in Carr v. Gale, Case No. 2,435.]

4. A bill in chancery, asking D. to account for such machinery, and its rents and profits, may not be sustained on that ground, though it may be, when asking also, as here, a discovery also, which succeeded in developing facts important, and requested that D. should redeem the property mortgaged, or restore it, and the rent from it.

[Cited in Tufts v. Tufts, Case No. 14,233.]

5. The statute of limitations pleaded to it was held not to run till the demand by B. on D. and a refusal to return the machinery; the possession having been given to D. by one having the right to it, and no tort or conversion was elected to be considered as committed by D. till the demand and refusal.

6. A. or D. have a remedy against B. to perform his contract on tendering the balance due, and B. may have relief in chancery from his contract to convey, unless A. or D. will, within a reasonable time, pay the balance due to him.

7. If the statute of limitations run long

¹Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

²[Reversed under title of Wilbur v. Almy, 12 How. (53 U. S.) 180.]

enough to bar a debt secured by a mortgage, and has not barred a bill or suit as to the property, the debt is protected by the mortgaged property, and will not be barred till a suit for that is.

In equity. The first case was a bill in equity, [by Samson Almy against Peleg Wilbur,] filed, and notice served on the respondent, 17th October, 1842. It alleged, that, March 7, 1828, Rowland G. Hazard & Co. entered into an agreement with Christopher Lippitt to assume the payment of five hundred spindles, then purchased or contracted for by Lippitt, and to buy three hundred more, receiving from the vendors bills of sale for all of them, as security for the amount loaned, not to exceed \$10,000; that Lippitt, on his part, agreed to use said machinery in his factory, at Jewett City, Conn., in making 4-4 brown sheeting, from thread 16 to 18 in numbers; receiving the cotton and delivering the goods at Providence, R. I., at three and a half cents per yard. It was further agreed that Hazard & Co. should perform all the services on their part, in purchases and sales, &c. without any charge of commissions, except in case of special guarantees; that the profits arising from this business should be equally divided between them and Lippitt; that it should begin immediately, and continue till 25th March, 1830; that if Lippitt's part of the profits and interest thereon should not be sufficient at any time to pay the money advanced by Hazard & Co., and to which it was to be applied, Lippitt was to be at liberty to continue the business in this way till it did pay the amount, or to have the privilege to pay the balance in two years, with interest; that on all moneys advanced by either party, except for the original purchase of the machinery, six per cent. interest was to be allowed, and settlements made semi-annually; that the machinery was to be held by Hazard & Co. only as collateral security for the money advanced and given up to Lippitt, on payment thereof, and till then to be kept insured by Lippitt for Hazard & Co. The bill next averred, that Hazard & Co. did assume the payments for the machinery, and for it and for what they purchased did advance \$9,567.48, and took bills of sale of it in their own names; and immediately, viz. 7th March, 1828, began to supply Lippitt with cotton under the agreement, and to receive manufactured goods; that they failed in business 30th May, 1829, and assigned to T. B. Hazard and Charles Low, for the benefit of creditors, all their property in trust, including this machinery and contract. It was next averred, that, in the year 1829, the complainant agreed with R. G. Hazard, as agent of the assignees, that he, the complainant, would supply Lippitt with cotton, under and on the terms of said contract, and that he supplied it accordingly, and made sales, &c. until the 9th March, 1830, when he pur-

chased of the assignees of R. G. Hazard & Co. all their interest in said machinery and contract; but Low and Fenner, named in the assignment or bill of sale, never re-deemed their half of the contract, as provided, or paid any part of the expense, or furnished any cotton from 1829 to 1832; and thus, by their neglect and refusal, made the complainant, or acquiesced in his being solely interested in said contract and machinery. The bill further averred, that the complainant continued to furnish cotton and make sales under this contract till Sept. 11, 1832, from which time Lippitt refused and neglected to apply for any more cotton and to go on further under the contract, though he, the said Lippitt, had agreed to the assignment of the machinery and contract to the complainant, and had gone on with him under it since the assignment. The bill further averred, that the complainant, on the 18th of August, 1831, at the request of Lippitt, bought a double speeder, at the price of \$550, for use in Lippitt's mill, being necessary for its successful operation; and on the 11th of September, 1832, there was due to the complainant \$5,405.87 under the contract, and for which the machinery was pledged; yet Lippitt has paid no part thereof, nor delivered the machinery to the complainant, but transferred the same to the respondent, Peleg Wilbur, who now professes to hold it exonerated from any lien or claim by the complainant. It next averred, that Wilbur knew at the time of the transfer that the machinery was pledged to the plaintiff, and ought to pay him the balance due, and account for the use of the machinery and speeder, but refuses to do either; that on the 26th of November, 1836, he the plaintiff, demanded the machinery of Wilbur, who refused to deliver it up; and states that Lippitt would be made a party to this bill, but residing in the state of Connecticut, this court would have no jurisdiction over him in such case. Several special interrogatories were then propounded to Wilbur, and the bill concluded with a prayer that Wilbur be made to account for the value of the machinery and interest, and for the use of the machinery since Sept. 1832; or pay the balance due the plaintiff, including the \$550 advanced for the double speeder, with interest; or restore the machinery and speeder, and pay reasonable rent since Sept. 1832.

The answer of Wilbur admits several of the allegations in the bill, such as the failure of Hazard & Co.; their agreement, as set out, with Lippitt; the furnishing of cotton and the double speeder by the plaintiff; and the demand made on him by the plaintiff's agent about Nov. 25, 1836, to return the machinery. But it denies any knowledge of the original agreement and its terms, till after a mortgage of the machinery, which he avers was made by Lippitt, to himself and others, Dec. 8, 1835. He further denies

that he then knew of any assignment to the plaintiff, or any refusal by Lippitt to go on with the contract, or any assent by Lippitt to the above named assignment, or to the complainant's holding said machinery pledged to pay his claims, or any interest by the plaintiff in the machinery itself, except on account of the double speeder. The answer further alleges, that Dec. 1, 1837, the respondent, for himself, and as attorney to the rest, conveyed all his interest thus acquired in said machinery to Morgan & Fanning; that the complainant stated to him, while furnishing cotton to Lippitt, that only a small sum remained due to him; that the mortgage to Wilbur conveyed other estate, and the debt thereby secured to him was bona fide; that from September, 1832, till the mortgage to Wilbur, Lippitt held and used the machinery as his own; and the respondent believed, and had reason to believe, that all the complainant's claims had been satisfied. That after the mortgage to him, he understood that claims existed by Hazard & Co. and the plaintiff on said machinery; but Lippitt denied their validity on the ground they were mortgages, and had never been recorded, and hence were invalid as against the defendant; and that the defendant received for his own interest in said mortgage only \$407.54, but as attorney for others and himself received, in all, 1726.25, after deducting rent, \$10.40.

An amended answer was filed by Wilbur, which did not differ materially, except setting out some points more in detail, and pleading that no cause of action had accrued to the plaintiff within six years. The evidence in the case will be stated in the opinion of the court so far as material, except the original contract, a copy of which is annexed, marked (A.)

"(A.) This agreement made and entered into, between Christopher Lippitt, of Jewett City, Connecticut, of the one part, and R. G. Hazard & Co., of Providence, Rhode Island, on the other part, witnesseth,—that the said Hazard & Co. do hereby agree to assume the payments of certain parcels of machinery, amounting to five hundred spindles and preparation, now purchased or contracted for, by said Lippitt, and also for three hundred spindles and preparation, to be hereafter contracted for by him, the said Lippitt, they receiving bills of sale of the same, as security for the amount advanced, the amount not exceeding ten thousand dollars. And the said Lippitt, on his part, agrees to run the said machinery in his factory at Jewett City, for the benefit of the contracting parties, in manufacturing cotton into 44 brown sheetings, the yarn to be spun from No. 16 to No. 18, well woven and well manufactured in all respects, and pay all proper and necessary attention to the business of said mill, to receive the cotton in Providence, and deliver the goods there;

for and in consideration of which he is to receive three and one half cents, cash, per yard, which is to be in full for the manufacturing of said goods. The said Hazard & Co. further agree to pay all proper and necessary attention to purchasing the stock, disposing of the goods, negotiating drafts, and any and all other business which it may be requisite for them to attend to in Providence, and charge nothing for the same, unless they guarantee sales; in that case, the usual guarantee commissions to be allowed them. It is further agreed, that the profits arising from said business shall be equally divided between the contracting parties. This agreement to commence immediately, and continue until the 25th day of March, 1830; and if, at that time, the said Lippitt's part, or one half of the profits with the interest thereon, which are to be applied to the payment of the money advanced, should not be sufficient to pay said advance, he is to be at liberty to continue until it shall be paid for in this way, or to have the privilege of paying the deficit with the interest, from that time in two years from the termination of this contract. It is also understood, that interest, at the rate of six per cent. per annum, is to be allowed on all amounts received or paid by either of the contracting parties, (except the advance, on account of purchase of machinery,) from the time at which it was received, or paid, to the time of settlement, which is to be semi-annual, and balances then due, to the time of final settlement. The account with the factory, in consequence of this agreement, is to be kept with the Griswold factory, and all just charges against said factory, to be as binding on the contracting parties, as if entered in their names.

Charles P. Huntingdon,
James Steadman, Lawyer,
Comm.

"Providence, 3d Month, March 7, 1828.

"Signed, R. G. Hazard & Co.
Christopher Lippitt.

"Witness to the agreement of the contracting parties,

T. C. Carpenter,
Asa Steadman.

"It is understood that the machinery, mentioned in the foregoing instrument, is only to be holden by the said Hazard & Co. as collateral security for the money advanced, and that it is to be given up to said Lippitt, on his refunding the said advance, until which time the said Lippitt hereby agrees to keep it insured. C. Lippitt,

R. G. Hazard & Co.

"Providence, March 7, 1828."

In the written arguments by counsel it is stated, that an action at law of trover is also pending for this machinery in this court between these parties; and that if the complainant on the facts in this case should appear to be entitled to recover either in this

bill, or that action, judgment is to be rendered for the plaintiff. The action of trover is the second one at the head of this report.

Rivers and J. Whipple, for plaintiff.

Potter, A. Greene, and R. Greene, for respondent.

WOODBURY, Circuit Justice. This case has some features rather novel. No fraud or mistake is charged in the bill; no papers are asked to be given up or cancelled; nor any request made of an account of profits and receipts, which grow out of any general copartnership, or which are very intricate and difficult either to estimate or ascertain; nor is any specific performance desired of a contract made between these parties, that has been fulfilled on the part of the plaintiff, and not on the part of the respondent. But the complainant asks us to compel the respondent to pay for machinery, which is alleged to belong to the plaintiff with interest for the use of it since Sept. 11, 1832. Had the bill stopped here, our jurisdiction over it in chancery could not probably be maintained. But it goes farther, and, averring that said machinery had been pledged to R. G. Hazard & Co. by Lippitt, and by them assigned to Almy, the complainant, and having afterwards by Lippitt been transferred to the respondent, the bill asks that he be made to pay the balance of the sum advanced for said machinery, and for a double speeder since, with interest on the same; or to deliver up the machinery and speeder in good order, and pay rent and account for profits for them since Sept. 11, 1832.

This, though rather inartificially set out, as an application to compel the holder of mortgaged property to redeem or surrender the possession and account for profits, is probably the object contemplated, and is within the power of a court of chancery. Nor does any objection seem to be taken to this, as a proceeding in chancery, by the respondent; and this perhaps arises from the circumstance, that a suit at law in trover is pending for the machinery, and is to be considered by agreement in connection with this, and that the plaintiff is to have judgment. If, in the opinion of the court, entitled to recover in either.

It would have been better that this agreement about those suits had been printed with the record, and some particulars presented as to what is claimed in the suit at law, whether including the speeder or not, the time when the action was brought, the damages demanded, &c. But I now am informed that it embraces all the machinery, and was brought at the same term, and is for \$10,000 damages. On the aspect of the whole case as now exhibited in the bill, answer and evidence. It must be confessed that not much reason is seen why ample redress may not be had at law; and when

it can be, this court will not usually sustain proceedings in chancery to obtain relief. See *Carpenter v. Providence Wash. Ins. Co.*, 4 How. [45 U. S.] 185. But on proper averments, giving to this court jurisdiction in equity, it can, in proper cases, and will sustain proceedings once duly begun there, though a good remedy exists at law. Much more will it be done if the relief here is more full or appropriate. See *Foster v. Swasey*, [Case No. 4,984;] *Pierpont v. Fowle*, [Id. 11,152.]

A discovery here was first asked of facts useful in a trial at law or equity, and the bill may have been necessary to compel it. After having failed to elicit any thing material, or having succeeded, a court of chancery frequently dismisses the bill, and lets the party use the evidence at law which he has thus obtained; but this will not always be done where the discovery has succeeded in material respects. Especially will it not be, if the lapse of time, or some other circumstance, would now render relief at law impracticable or defective, or so difficult as to justify this court in continuing its jurisdiction in equity over the case, having once legitimately got possession of it. It may be for a disclosure as well as for the payment of a mortgage of personal property by the holder of it; or it may be for a restoration of it specifically; and if not doing that, by being compelled to pay its value.

A bill in equity lies to get possession of a pledge, so as to sell it and pay the debt, or foreclose redemption, unless payment is soon made. 2 Story, Eq. Jur. § 1008. Equity alone at first allowed redemption after the day of payment had passed, and thus got jurisdiction over mortgages, (Id. § 1014;) and sometimes perhaps on the ground that accident prevented payment, or a mistake, or that a trust existed. A pledgee may force payment in equity, or get the article, and has a right to sell. Id. § 1032. Sometimes without suit, if the pledgee is in possession, a pledgor cannot regain possession unless tendering the balance due. Id. § 1033. As to mortgages and pledges, the suits are usually between the original parties; but here the plaintiff, as a good assignee, may enforce the contract, and the defendant, as a second mortgagee in possession, may well be held liable to pay the first mortgage, or surrender the property, to be sold and applied first to discharge the first lien. 1 Story, Eq. Jur. §§ 484, 486.

I say nothing farther, as to the accounting here, or a special partnership giving jurisdiction, as this bill is not to settle the quasi partnership concern or its accounts, but rather in that view the title to some of the property one of the partners put in. There may have been some idea here that chancery had jurisdiction of the matter, because, if not a mortgage, there was a trust connected with the delivery of the machinery to Lippitt under the contract, that

he might have a conveyance of the same, on paying the amount advanced; or that, in such an event, Lippitt might be entitled to a specific performance of the contract, and have a written transfer to himself of the machinery. And there is little doubt there was such a trust, if not a mortgage, evidenced in some degree by the possession of the machinery, and making part payments towards the money advanced; and such a contract as this could be enforced so as to compel the holder of the property to convey to Lippitt on a tender of the amount, if the want of mutuality should not appear and defeat it,—that is, the want of a mutual imperative obligation on Lippitt to pay and buy. But, notwithstanding such a trust or contract here, they were in favor of Lippitt, and not the complainant, and are not, and could not be set out by the latter as any ground for his recovery of the property. The only use he can make of such a trust or contract is by way of evidence; furnishing some reason or excuse why Lippitt was allowed under them so long to have possession of the machinery, and thus rebutting the inference from that possession, that any absolute title existed in Lippitt.

But one prayer in this bill may be deemed a request to enforce the payment of a mortgage of personal property; and though not against the mortgagor, yet it is against his assignee, claiming a right and title to the mortgaged property, and hence in equity bound to pay the balance due or surrender the mortgaged property, or, if that is destroyed and lost, to pay its value. This, and the material disclosures asked, do, in my view, give to us jurisdiction in equity. This is more important to the defendant than the plaintiff, as the latter has a suit at law, in which he can recover, if not in equity and with less embarrassment than in equity; and the jurisdiction is therefore retained on this side of the court, rather than the other alone, because it gives the defendant certain equitable benefits he would not enjoy at law in converting his contract into a mortgage, and also in obtaining allowances as to the debt of the plaintiff, and his own responsibilities for the machinery, which could not be given to him in the suit at law. Having jurisdiction then in this way, I shall proceed to submit some views on the further merits of the case, as they strike my mind after a careful examination; and shall grant redress to the plaintiff, if he seems entitled to any, on all the facts and equities of the case.

It is the better view of the facts at law, that the interest in the machinery, originally purchased by Lippitt and that purchased by Hazard & Co. became, by the bills of sale of it from the makers or former owners to Hazard & Co., and by their payment of all the consideration, vested absolutely in them. Their interest also became, by the transfer of their assignees, duly vest-

ed in the plaintiff, as likewise was vested the interest in the double speeder, which the plaintiff alone bought, and never conveyed to any one. They both stood as his in Sept. 1832, when Lippitt stopped taking cotton of the plaintiff. The objections to this view arise from two sources, and will be considered before examining the transactions subsequent to 1832.

The first source of exception is in the original contract, under which Hazard & Co. advanced the consideration, and took a conveyance of the title from third persons. That is a written contract with Lippitt, and is a part of the evidence in the case. But in considering the objection resting on a part of this contract, it is to be remembered, in the outset, that the title of Hazard & Co. to the machinery was not conveyed to them in it by Lippitt, though it is singular that this important fact is not distinctly set out in the bill; nor is it pretended that the consideration of that conveyance came from Lippitt at first. Theirs was then a perfect and absolute title at law from a third person, and obtained by acts and writings and payments, sufficient to vest and complete it in Hazard & Co. entirely, without any aid from the contract with Lippitt. But that contract led to it, and was connected with it, and therefore must be considered. It could, however, hardly change that conveyance at law to a conditional title or a mortgage, as the parties to it were not the same.

In the next place, it was not made at the time of the bills of sale to Hazard & Co. Now at law a defeasance, to make an absolute deed of land a mortgage, must generally run to the grantor, and be of the same date. See *Shapley v. Rangeley*, [Case No. 12,707.] But such a contract might create duties and obligations between the parties to it, in trust or otherwise, which at law as well as in equity courts would go far to protect by damages or enforce specifically, whenever an equitable ground for interference was established. How is that here? The contract stipulated, that after Hazard & Co. should take conveyances of the machinery and pay for it, limiting their advance to \$10,000, Lippitt might run it in his factory on the terms which are detailed in the statement of the case from the bill. The parties seem to have expected, that in about two years, i. e. by March 25, 1830, half the profits might enable Lippitt to pay for the machinery. But if they did not, he was at liberty to pay for it from other sources in two years more, or proceed further with this arrangement. Interest was not to be paid on this advance; but probably the half profits were allowed to Hazard & Co. instead of that and their commissions for sales. Here the body of the agreement closes, and standing alone, except for one expression as to the bill of sale to H. Hazard & Co., being "security for the amount advanced," would

leave little doubt that the matter was a mere special contract by Hazard & Co. to buy the machinery of others, and lease it to Lippitt on certain terms. By those terms Lippitt might earn money and pay Hazard & Co. for it, or might abandon that interest and never pay for it, at his option, but be liable for rent or interest, unless these were compensated by the rate at which Lippitt let Hazard & Co. have the cloth, while Lippitt continued to carry it to them. But unfortunately, after the body of the contract closes, and after the signatures and attestation of witnesses, a memorandum is made and signed, which has created much of the difficulty as to the true construction of it. It is in these words:—"It is understood, that the machinery, mentioned in the foregoing instrument, is only to be holden by the said Hazard & Co. as collateral security for the money advanced, and that it is to be given up to said Lippitt on his refunding said advance, until which time the said Lippitt hereby agrees to keep it insured." Now the impression, that this made the bills of sale from third persons to Hazard & Co. a mortgage, or that it converted the title of Hazard & Co. into that of mere pawnees, is probably not tenable at law, however it might be in equity. I entertain no doubt, that the parties regarded it in effect as a mortgage or pledge, though flung into the form of a mere special contract, either for greater security to those advancing the money, or to save writing two instruments. Both parties seem at times to have talked of the machinery as pledged or mortgaged to secure the original sum paid. In another view it might not be a mortgage at law, as it is doubtful whether any debt existed in favor of Hazard & Co. against Lippitt which he was bound to pay, and to recover which they could bring against him a separate suit. Such is not the express language of the contract. But a debt must exist in order to sustain the position, that this was a mortgage, there being generally no mortgage without a debt, if connected with money. Here Lippitt was "at liberty" to buy the machinery on paying the original price. But he was not expressly bound in any clause for that purpose, to buy and to pay. He seems rather to have been left at liberty to do as he pleased. *Conway's Ex'rs v. Alexander*, 7 Cranch, [11 U. S.] 218, 237; [*Porter v. Nelson*,] 4 N. H. 130.

Even in equity there must generally be mutuality to constitute a mortgage, or trust, or any thing tantamount to either; that is, there must be an imperative obligation to pay, on the one hand, or have been an actual payment or good consideration passed from the cestui que trust, or no good foundation exists for a promise or obligation to convey on the part of the trustee. See cases collected in *Tufts v. Tufts*, [Case No. 14,223;] *Brashier v. Gratz*, 6 Wheat. [19 U. S.] 528, 539; *Delane v. Delane*, 7 Brown, Parl. Cas. 279; [*Guest v. Homfray*,] 5 Ves. 818; [*Shaftesbury v. Ar-*

rowsmith,] 4 Ves. 66. But going to the other words used, as to the machinery being held as "security for the amount advanced," and in the memorandum, being promised "to be given up" on Lippitt's paying the advance, a debt is perhaps sufficiently recognized and implied in the contract itself, and could be enforced as a debt in equity, if not at law; and it seems to me, that I should not do justice between these parties, unless I held this to be a mortgage at least in equity, and took jurisdiction in the case in equity on the grounds before named, in order to enforce what is legal and moral as to all. The cases in equity have gone so far as to consider that a mortgage, which is in form absolute, but where the relation of lender and borrower had existed, or great inequality of consideration was paid, or possession long left in the mortgagor, or a defeasance promised, and a variety of other circumstances, detailed in *Hunter v. Marlboro'*, [Case No. 6,908,] and *Bentley v. Phelps*, [Id. 1,331,] and cases there cited. See, also, *Porter v. Nelson*, 4 N. H. 130. But still the idea of a debt due runs through most of the cases, deemed to be mortgages there; and it probably existed here, a debt to be paid in a peculiar manner, but still a debt.

The whole object in the purchase, and all the relations of the parties to the subject, show the advances made by R. Hazard & Co. were to be considered by them in substance as a debt,—a debt to be paid in a special way, if the debtor pleased, till 1832; but a debt in the outset as well as afterward, and secured by letting the lenders take the original title from the vendors, rather than the latter conveying to the debtor, and he to the lenders. So the memorandum manifestly intended to compel Hazard & Co. to give up the machinery to Lippitt, if he paid for it, and in that way to hold it only as security for the sums advanced, as is mentioned in the body of the instrument. And if Lippitt had at any time paid the amount advanced, a court of law in an action against R. Hazard & Co. would give ample damages for a refusal to release the title to Lippitt, and a court of chancery would, in that event, probably compel a specific performance of this branch of the agreement. *Burnham v. Rangeley*, [Case No. 2,176;] *Bentley v. Phelps*, [Id. 1,331.] Surely they would, unless it was void for the want of a mutual obligation on the part of Lippitt to pay for and buy this machinery. The question, whether this was a mortgage or not at law, is very important; as the party has a suit at law, and may yet abandon this bill, and rely on that suit. And if not a mortgage at law, the contract, as a mere agreement about personal property, need not be recorded probably in any state. *Swift v. Thompson*, 9 Conn. 63; *Talcott v. Wilcox*, Id. 134. Every one knows that such contracts, when not mortgages, are never required either to be recorded or brought to the knowledge of sub-

sequent purchasers, as mere contracts about personal estate.

There would be no harm to Lippitt in viewing this contract as a mortgage, and hence as a debt by Lippitt, except it would extend the original liability of Lippitt to pay for the machinery otherwise than by profits on the contract. That is of no consequence in this suit, unless being deemed a mortgage in equity, as it must then be, it need not, under the Connecticut statute, be recorded in order to be valid. Transactions are deemed mortgages in equity, which are not always in law. *Flagg v. Mann*, [Case No. 4,847;] [Lupton v. Cornell,] 4 Johns. Ch. 189. The statute of Connecticut appears to relate to mortgages in law, and must be so construed of course, where not otherwise reasonable. But more of this hereafter, and on it I shall give no decisive opinion, none being found to be necessary; and though recording, or a change of possession, or notice of a mortgage, may usually be proper, yet it may not be so necessary to prevent frauds on purchasers and creditors of the mortgagor in cases like this, as in others, where he had before the mortgage owned and controlled the property. First, then, was a change of possession necessary? and next, was recording? It was not necessary, under 13 Eliz., made to protect creditors, or 27 Eliz., made to protect purchasers, unless the vendor was the debtor, or the prior seller was. Where A. is a debtor, and sells property or mortgages it, then the possession ought to accompany the title, as a general principle; but if it does not, that circumstance alone does not vitiate the sale. *Cadogan v. Kennett, Cowp.* 434; *Portland Bank v. Stacey*, 4 Mass. 662. I am aware that some cases hold, if the possession be not then changed, it is conclusive evidence of fraud, or per se fraud. *Swift v. Thompson*, 9 Conn. 63; *Talcott v. Wilcox*, Id. 134. While others consider it so as against subsequently attaching creditors, but not against purchasers. But the better doctrine seems to be as to a case like this, even if it be a mortgage, that, at common law, ([*Bissell v. Hopkins*,] 3 Cow. 166; [*Badlam v. Tucker*,] 1 Pick. 389; [*Homes v. Crane*,] 2 Pick. 607,) in case of a mortgage of personal property, if possession be not changed, it is not even prima facie of fraud. *Ash v. Savage*, 5 N. H. 547; 4 Masson, 534, [*De Wolf v. Harris*, Case No. 4,221;] [*Conard v. Atlantic Ins. Co.*,] 1 Pet. [26 U. S.] 449; [*Holbrook v. Baker*,] 5 Greenl. 309. See *Leland v. The Medora*, [Case No. 8,237;] [*Bucklin v. Thompson*,] 1 J. J. Marsh. 223; *Lewis v. Stevenson*, 2 Hall, 82. Certainly possession retained by the mortgagor is not per se fraudulent, but may be honest, and so explained satisfactorily. *De Wolf v. Harris*, [Case No. 4,221;] 4 Masson, 537, [*Phettplace v. Sayles*, Case No. 11,083;] *Bissell v. Hopkins*, 3 Cow. 166, 189, note; [*Bartlett v. Williams*,] 1

Pick. 288; [*Badlam v. Tucker*,] Id. 389; [*Dawes v. Cope*,] 4 Bin. 258. It is some evidence of fraud, but not conclusive. 1 Baldw. 533, 534, [*Merrill v. Rinker*, Case No. 9,471;] *Smith v. Acker*, 23 Wend. 653; 1 Gall. 419, [*Mecker v. Wilson*, Case No. 9,392.] In the present case the conveyance was from a third person, while in [*Swift v. Thompson*,] 9 Conn. 63, it was from a former owner and possessor still retaining it. *Colby v. Cressey*, 5 N. H. 238. In these cases of an absolute sale, possession so retained is, as in *Twyne's Case*, [3 Coke, 80; 1 *Smith*, Lead. Cas. (Amer. Ed.) 33,] a badge of fraud, but not conclusive upon it, unless it be admitted there is a trust, or it cannot be explained without a trust. *Coburn v. Pickering*, 3 N. H. 424; *Parker v. Pattee*, 4 N. H. 178; *Trask v. Bowers*, Id. 309; *Haven v. Low*, 2 N. H. 13; [*Worseley v. Demattos*,] 1 Burrows, 474, 477. In all these cases, the true inquiry is, where no statute exists, what was the intent in not changing the possession? If it was to benefit the vendor, to give him a secret trust or advantage or interest not parted with, and not appearing on the face of the contract, the jury should hold it satisfactory evidence of fraud. But if it was a part of the contract, as it usually is in mortgages, and more especially so in those of real estate, if it was consistent with the situation and rights of the parties, was open, public and honest, it should not be satisfactory evidence of fraud. See *Leland v. The Medora*, [Case No. 8,237.] It is not evidence of fraud if a mortgagor retains possession by the terms of the contract. *U. S. v. Hooe*, 3 Cranch, [7 U. S.] 75; [*Conard v. Atlantic Ins. Co.*,] 1 Pet. [26 U. S.] 449.

By the principle of the civil law the mortgagor retains the use of the thing pledged, unless there is a special agreement to have it go to the mortgagee to be used for the interest. *Kaufman's Mack*, 383. The mortgagor may then alienate the article mortgaged, but it passes subject to the prior mortgage, and if aliened without the consent of the prior mortgagee, it is by the civil law regarded as a species of theft. Id. The first mortgagee may enforce his right against every subsequent possessor. Id. 384. He who is prior in tempore is potior in jure in all these cases, unless the subsequent mortgage or lien is of a higher grade, or made to preserve the thing mortgaged. Id. 392. Such as the prior lien of the government for debts or taxes, and the bottomry subsequently made of a vessel in order to repair her. Id. 388, 389. See *Leland v. The Medora*, [Case No. 8,237.] Several of the decisions, which are supposed to conflict with these views, have been caused by an inadvertent conformity to the words and principles of the English bankrupt laws and the adjudications under them, when they are not at all in force here.

Here no conveyance having been made by

Lippitt to the plaintiff, nor any previous title having been in him, none of these cases are in point, which arise at common law, or under the statute of Elizabeth; and the only question is, whether Hazard & Co., by merely allowing him to have possession of the machinery under the contract till Sept. 1832, were per se guilty of a fraud; not whether buying of him and leaving him in possession would be evidence of a fraud. The act of 21 Jac. I., as to bankrupts, makes any property left in their possession and control, by the true owner, or with his consent, liable to be retained and go to the creditors of bankrupts as a part of their assets, on the ground that they were enabled thereby to obtain new and additional credit. [Gordon v. East India Co.,] 7 Term R. 228; [Darby v. Smith,] 8 Term R. 82; [Lingham v. Biggs,] 1 Bos. & P. 82; [Walker v. Burnell,] 1 Doug. 317; [Ryall v. Rowles,] 1 Ves. Sr. 348, 369; [Ryall v. Rolle,] 1 Atk. 166; [Francis v. Wyatt,] 3 Burrows, 1502; [Read v. Burley,] Cro. Eliz. 550, 596; 1 Hals. 260. But a power to dispose of or sell must be allowed or given by the true owner to bring a case within this statute. Jarman v. Woolloton, 3 Term R. 622; Collins v. Forbes, Id. 322. The language of 21 Jac. I., is: "If any person shall become bankrupt, and at such time shall by the consent of the true owner have in his possession, order and disposition any goods whereof he shall be the reputed owner, and take upon him the sale, alteration or disposition as owner," the commissioners on his estate may sell the same, &c. [Jarman v. Woolloton,] 3 Term R. 622. In this case there is no pretence, that the true owner consented or gave authority that Lippitt should dispose of or sell this machinery. So, if the bankrupt is in possession for a specific purpose of goods of another, his assignees cannot hold them. Cooke, Bankr. Laws, 320, 321; [Flynn v. Mathews,] 1 Atk. 185; [Walker v. Burnell,] 1 Doug. 317; [Collins v. Forbes,] 3 Term R. 316; [Salte v. Field,] 5 Term R. 212. Such as to manufacture or use for a particular object, as here; for he then has not the right to sell as in case of goods, and the bankrupt law applies to merchants and selling and buying, and not to other claims. Not if possessed as debtor, or in right of a wife, her separate estate, or as factor. This was also a peculiar provision of the bankrupt system, not existing at common law, and of course was not applicable under that system even in England, except to merchants and others coming within its provisions. Nor is a mere temporary possession for a special purpose considered there within this principle as the taking possession is not then an act done to appear as owner. [Copeman v. Gallant,] 1 P. Wms. 318; [Godfrey v. Furzo,] 3 P. Wms. 185. So in Cadogan v. Kennett, Cowp. 434, though that was not the case of a bankrupt. Collins v. Forbes, 3 Term R. 316, was like the present case.

I am not aware, that the statute of James can be considered as in force, without the express enactments of the bankrupt system, which do not now exist here. Nor is there any analogy, which justifies their adoption, unless in point of fact the evidence shows that a person, becoming an insolvent, was allowed by the true owner to have possession and control of property, which he had not bought, and have it for the purpose of getting credit and to mislead others. Portland Bank v. Stacy, 4 Mass. 663; [Craig v. Ward,] 9 Johns. 197; Bac. Abr. "Bankrupt," F. There is no pretence that this was the design here. Most of the cases reported in England are under this special bankrupt act; and even that never could apply where the possession was given not to dispose of the article but for honest purposes and conformed to them, as to a written contract or deed. J. Buller, in [Haselinton v. Gill,] 3 Term R. 621, note. As if, on a quasi lease, or a contract to apply half the profits of its use towards the purchase; or wool to be manufactured, &c. Otherwise the principle would be, that every possessor of property could pass the title, whether he had any or not beyond mere naked possession, which has never been the law in this or perhaps any other country. Spring v. Coffin, 10 Mass. 33; Jarman v. Woolloton, per Ld. Kenyon, 3 Term R. 620. And though in such case, as in many others, the public might mistake where the real title was, and the possession for a length of years might induce the world to think the title had gone with it, yet every purchaser, if not every creditor, must run some risk as to title when he buys, beyond mere possession, and must inquire at his peril into the real truth as to ownership. "Caveat emptor" is the common law-maxim.

The original insurance showed, also, that Lippitt admitted the title to be in Hazard & Co.; and it was continued for them by Lippitt from 1828 to 1830, the year after their failure. After that Lippitt seems to have insured in his own name, though it is not pretended he got any new title or power till 1832 or 1835. It is possible, that in some cases the possession of property may be such by a bailee, or conditional owner or mortgagor or consignee, as to get credit on them, and bind them for the debts of the holder of the property in possession. Hussey v. Thornton, 4 Mass. 407. Such as the case of a sale and actual delivery under it, but void for fraud practised, yet till avoided, a purchaser from the occupant without notice of any original fraud will hold; for the former owner has allowed him not only to appear as owner, but to act so, and sell if he pleases. So in Rhode Island by statute, the consignor is deemed owner, to be liable for advances in case of consignments of goods to sell, (Rev. St. 1844, p. 279,) if the consignee be not aware he was not owner. So of an agent to sell in possession of them, he is deemed owner to cover new advances, not for old debts. But here

It is hardly possible to suppose there was not notice enough to put Wilbur on inquiry, and even to be satisfied of the main facts. Or that Lippitt had any right, as agent, to sell this machinery like merchandise, or as a consignee, when he merely had it to use as a mechanic till paid for or returned.

A change of possession not being required by law in this case, or that possession should accompany the title of the mortgagee, how is the law as to the necessity of recording the mortgage? The requirement as to that is by statute alone. By the statute of Connecticut, (Ed. 1839,) tit. 2, mortgages of chattels or machinery, if recorded as mortgages of real estate, are good, though possession be not taken by the mortgagee. And page 391, tit. 57, deeds of real estate are not good, except against the grantor and his heirs, unless recorded. It is by no means certain, that the not recording of a mortgage of machinery renders it void, if the possession be not changed, when by the terms of the mortgage the possession was to be retained for use. *Id.* But if it was, the mortgage here was known by Wilbur to exist, and this both in law and equity has long been deemed equivalent, or a substitute for recording. For where by statute a mortgage must be recorded, notice of a prior mortgage to put a party on inquiry, is sufficient, though the mortgage be not recorded. [Porter v. Cole,] 4 Greenl. 27; [Rogers v. Jones,] 8 N. H. 264; [Kendall v. Lawrence,] 22 Pick. 544; Stow v. Meserve, 13 N. H. 50. A second mortgagee with notice of a prior one is barred by it. [Jackson v. Van Valkenburgh,] 8 Cow. 260. So an assignee. [Lewis v. Stevenson,] 2 Hall, 63; [Stroud v. Lockart,] 4 Dall. [4 U. S.] 153. There is no reason why this principle should not apply to mortgages of personal property as well as of real. Again, whether an equitable mortgage like this need be recorded or not, I do not find it necessary to decide; but the following cases throw some light on the question: [Le Neve v. Le Neve,] 1 Ves. Sr. 64; [Berry v. Mutual Ins. Co.,] 2 Johns. Ch. 603; [Jackson v. Sharp,] 9 Johns. 163; [Dunham v. Dey,] 15 Johns. 555; [Jackson v. Burgott,] 10 Johns. 457; [Wiseman v. Westland,] 1 Younge & J. 121; [Davis v. Earl of Strathmore,] 16 Ves. 430; [Le Neve v. Le Neve,] 3 Atk. 650; [Bushell v. Bushell,] 1 Schoales & L. 100; [Doe v. Allsop,] 5 Barn. & Ald. 147. It is very doubtful, whether equitable mortgages, as liens, unless maritime ones, can be allowed to prevail against third persons, unless recorded, or notice of them otherwise exists. [Hodgson v. Dean,] 2 Sim. & S. 224; 2 Story, Eq. Jur. § 1020; 2 Eq. Cas. Abr. 615.

Having disposed of these questions, it is next contended, that other grounds should defeat a recovery by the plaintiff. Some arguments and authorities have been submitted to show, that the business between Haz-

ard & Co. and Lippitt was that of a copartnership business, and is to be governed by the rules applicable to such transactions. It may have been a quasi partnership under the contract, so far as regards what was to be done in making and selling cloth, and dividing and applying the profits. But that arrangement was a matter distinct from the title and interests of the parties in the capital and machinery which was to be furnished and employed. As to this, which is the main question here, Lippitt was to furnish the building, water power, and labor in manufacturing, &c.; and Hazard & Co. to furnish the machinery, not costing over \$10,000, and buy the cotton, and sell the cloth without commissions, except paying three and a half cents per yard for making, and keeping half the profits, and applying the other half in Lippitt's behalf, towards paying Hazard & Co. for the machinery. But all this, it will be seen, does not change the title of Hazard & Co. to the machinery till paid for by Lippitt, any more than it changes Lippitt's title to the mill he was to furnish. If, however, either party afterwards neglected to fulfill his portion of the special contract or partnership, if any one pleases to call it so, that would give a remedy for redress on the contract. But it would not affect the title to what was owned by each, and would furnish no set-off as to either party in actions between either of them and other persons, to enforce their rights and titles in their own property. Hence if Lippitt suffered, as he pretends, by cotton not being furnished longer to him by the assignees of Hazard & Co., Lippitt had his remedy against them in an action if they violated the agreement; but he did not thereby become entitled to mortgage or sell their machinery, or convert it to his own use, until he had paid all they had advanced on account of it for him. So in respect to the possession being calculated to mislead, the point that it was held under a quasi partnership might be important to rebut any inference of fraud from such a possession, but would not otherwise bear on the title. It would explain the possession as honest and necessary to carry out the partnership, and would repel any intention to give credit, or enable Lippitt to get credit by possessing and using as his own what was not his own. In that view, this idea of a partnership in the use of the machinery might be very important, if the case otherwise looked like one fraudulent and deceptive, so as otherwise to be void. But this view would not subject the machinery to be taken for a private debt of one of the partners, much less subject it to be sold or mortgaged by one for his separate debt, when it was not, like merchandise, possessed even for partnership purposes, with a view of being sold at all. Rogers v. Batchelor, 12 Pet. [37 U. S.] 221; [Ex parte Hamper,] 17 Ves. 403, 404; Story,

Partn. 41. The other source of objection, that the title of the plaintiff is not clear and perfect, exists in the claims set up by Low & Fenner to some interest in the machinery, in conjunction with Hazard & Co., or as a portion of their assignees.

Low & Fenner seem to claim an interest in the original contract, by some arrangement other than the assignment, to them and others, of Hazard & Co.'s estate. But it is proved so imperfectly, and was repudiated by them so absolutely at first, and is so clearly shown to have been never fulfilled by them, that I find judgment has once been rendered in this court against their claim under any such contract. *Kendall v. Almy*, [Case No. 7,690.] In respect to the claim of Low & Fenner, merely as being one of the assignees of Hazard & Co., it is to be presumed they declined to act under that assignment, and acquiesced in the other assignees taking the control of all Hazard & Co.'s interest and conveying it to Almy. They assented to Almy's holding the whole, 2 Sum. 294. [*Kendall v. Almy*, supra.] It was an assent or ratification of what had been done by Almy. Such seem to be the facts as now developed; and it cannot be permitted to them, or their assigns, to blow hot and cold as to the same transaction; and at one time disclaim all interest, and refuse to go on; and at another to insist on an interest, when it is likely to prove advantageous. In answer to another objection, that the assignment to Almy, the plaintiff, is not proved to have been made at all, and hence that his right to recover fails, it is sufficient to say, that the bill affirms it was made before the mortgage to the defendant; and the answer does not deny this averment, but merely denies any knowledge of it before the mortgage.

Another objection still is, that the assignment to the plaintiff, though produced, is not proved to have been, in fact, executed at its date.

But the execution of it being established, it must be presumed to have taken place at its date, until the contrary appears. See *Best*, Pres. 116; *U. S. v. Libby*, [Case No. 15,597.] The date was four or five years previous to the mortgage. Besides this, all the evidence shows that Almy proceeded to furnish cotton under it, as if owner of the machinery, and even to purchase more machinery at Lippitt's request before the mortgage to the defendant. It appears, further, that Lippitt was informed by Almy and Hazard the day after the assignment, that Almy had become the owner, and Lippitt so treated him afterwards. Whether the defendant had notice of this or not, is of no consequence in respect to the title having thus become actually vested in the plaintiff. I should not be surprised if Almy took the conveyance to oblige Lippitt, as well as secure his own claim, and that R. G. Hazard, as he swears, was to render future assist-

ance in prosecuting the business. This will account for much in the case, otherwise extraordinary, e. g. the continued interest and future active part taken by R. G. Hazard; also the willingness of Almy to consult the Hazards before buying more machinery, and his anxiety to have Lippitt buy the machinery and pay the balance; and Almy's reluctance to go on longer, when Low began, in 1832, to set up claims to the property, which he had before repudiated, and to speak of his (Almy's) own interest, (that is, probably independent of what had been assigned,) as small, it being only the cost of the double speeder. The real beneficial interest seems chiefly to have been in R. G. Hazard, the original advancer of the money for the machinery, and then in Almy only as his assignee, except for the double speeder. R. G. Hazard, wishing to pay his own debts, would be most anxious naturally for Lippitt to go on and pay this money; and when Lippitt suspended or stopped doing it, R. G. Hazard, had his interest not been assigned and in other hands, would probably himself never have permitted matters to sleep as these did; and had Almy owned all the machinery in his own right, and not felt bound to consult R. G. Hazard, as being chiefly interested, and he often absent, would himself probably have taken earlier and more decisive steps about it.

Thus matters stood, when in September, 1832, Lippitt, ceasing to apply to the plaintiff for cotton, or to insure the property for him, or to bring cloth to him for sale under the contract, a condition of things new in some respects began; the time for paying for the machinery otherwise than with cloth had just expired. But there is no pretence in any of the evidence, that Lippitt had then paid the original advance by means of half the profits, or in any other way, except some confessions of the plaintiff sworn to by C. L. Lippitt, the son of Lippitt; nor is there any pretence from any quarter that the title was then released to him, or was asked to be released, or in any way became invested in Lippitt, except as inferred from other acts. It happens that their intercourse then ceased, and that Lippitt continued to use the machinery alone and independent of the contract, and insured it for himself. Almy ought then, for any thing which appears, to have instituted proceedings to recover his machinery, or enforce a collection of the balance of the debt still due to him. But that this change of conduct by Lippitt did not happen, in consequence of the advances having been all paid by Lippitt to Almy, is very clear from the account now exhibited by Almy and annexed to his bill, and the balance not pretended by Lippitt, who is a witness, ever to have been paid. In March, 1830, he seems in a letter to concede that something like \$8000 was still due; so in 1830 and 1831 that a considerable debt still existed. Indeed, he annexes a correspondence with

Low, in 1832 and 1833, after the breaking off with Almy, from which it seems that Low, though before denying he was interested, then set up to Lippitt some rights under the contract, but did not comply with the terms of the assignment by paying half of the advance. In that correspondence he speaks of Lippitt's paying the balance to him in February, 1832; then more in detail in October, 1832, and November of the same year; and April 20, 1833, it seems to be still unsettled, and a balance recognized by Lippitt as due. In 1835, also, it is testified by T. R. Hazard, that Lippitt and the defendant both admitted money to be due for the original advance. But the difficulty as to the part interest, set up by Low, probably was one cause, beside others before adverted to, which prevented the going on longer with Almy, and delayed a settlement of the balance, till the conflicting rights of Almy and Low were adjusted. It seems that, in 1835, a suit was instituted by T. C. Kendall, as assignee of Low & Fenner, v. Thomas R. Hazard et al., which brought in question the title of Low to half the profits received by Almy, and it turned out to be defective, and he could not recover them. The cotton, in the mean time, was bought by himself, (Lippitt,) the defendant being his indorser.

Another reason for not going on under the contract, though the machinery remained not paid for, as stated in another affidavit by Lippitt, was the advice of Almy, not to do it, as Almy probably had got nearly enough to pay his own advance for the double speeder, (and that may be what he referred to in talking with Lippitt's son) and advised Lippitt that the other parties being bankrupt, he (Lippitt) might lose the cloth or the profits on what he let them have. But Lippitt did not pretend, then, that any more of the original advance had been paid, than is now admitted by the plaintiff. Perhaps Lippitt could have sued R. G. Hazard or his assignees, had he wished them to go on and furnish cotton and he furnish cloth on the terms of the contract; and possibly they might have been able to have compelled Lippitt to work up their cotton on those terms; or if not, to exonerate them from liability longer, to convey to him the machinery, and to let them retake it, and therefore lose the use of it, or the interest or its value. Neither, however, seemed to move in that direction, and hence some countenance is given to the idea that the payment had been completed; and, without the counter admissions and confessions concerning this, the rest might be sufficient to show it after so long a lapse of time. The defendant avers in his answer, also,—but it is supported only by the general facts just named, and C. Lippitt's evidence,—that little remained due to the plaintiff, and that C. Lippitt therefore informed the defendant, in Dec. 1835, when the mortgage was executed to him,

that the original advance had been paid, and the title became good in Lippitt. But from other averments in his answer it would seem, that he and the other mortgagees rather supposed that the plaintiff had forfeited or lost any title he otherwise might have had, by not recording what was regarded by them as a mortgage to him by Lippitt. That is the chief reliance in the argument as well as answer; and, from other facts in the case, it would be probable that they knew the claim of Hazard & Co. still to be due, and found, from the abrupt departure of one of the firm, who came to see about it, that a suit would be commenced for the machinery. Hence they had executed the mortgage of this and other estate in haste to the defendant, a brother-in-law, and to others, in order to give them preferences in his expected failure, and secure the property from the assignees of Hazard & Co., if they could, on the ground of so long possession undisturbed, or the invalidity of what they were advised was in law a prior mortgage, unrecorded. However the real truth may be as to the motives, that prompted to the mortgage to the defendant and others, by Lippitt, it is certain that, for any evidence which appears in the case, the plaintiff, as assignee of Hazard & Co. still had the legal title to the machinery, and that Lippitt's interest at law was merely an executory right, under a contract to have the machinery conveyed to him after paying the balance due for the original consideration advanced for it; or, in equity, the rights of a mortgagor—a balance still unpaid. He or Wilbur, his assignee, must prove such a payment or tender of it before having any right, even in equity, to the title. In law, Lippitt could have no real title till an actual conveyance from Almy; and, instead of the weight of evidence on this point being in favor of the defendant, even if his answer on it be responsive to the bill, which is questionable, it is the other way; and the presumption, as just shown, from several leading facts conceded, as well as positive evidence, is, that the debt had never been fully paid. As this then is deemed to be a mortgage in equity, and mortgages must be recorded in Connecticut if the mortgagee be not in possession, it becomes material whether Wilbur then knew of these facts as to the title or not. His knowledge is controverted in the evidence, and denied in his answer. I have before suggested that he had notice of it. All the circumstances of the relationship, which existed between Wilbur and Lippitt, the consulting with him at first and throughout in respect to his business; Wilbur being his indorser and taking this mortgage soon after Hazard claimed the machinery, and urged a settlement; and the reasons set up at first for avoiding Hazard's title; that his was a mortgage, but had not been recorded; all turn the scales in favor

of the probability of knowledge, sufficient at least to put him on inquiry, and bind him by any lien or title then outstanding.

We have before shown that such a mortgage is good against all having notice of it. In all cases in England and in this country, where there is a general provision, that a conveyance not recorded is void, it is either by a settled construction or express words, made void only as to third persons, i. e. subsequent purchasers or creditors, without notice of the first conveyance. [Berry v. Mutual Ins. Co.,] 2 Johns. Ch. 603; [Bumpus v. Platner,] 1 Johns. Ch. 216; Colby v. Keniston, 4 N. H. 262. In France it was otherwise. Co. Litt. 290b, Hargrave's note; Wyatt v. Barwell, 19 Ves. 439. Having such knowledge, then, as to the existence of a mortgage, Wilbur cannot then, in law or equity, object to its not being recorded, and is bound by it and all its incidents and consequences, as if it was recorded. Hence he has only Lippitt's rights or interests, if he had this knowledge; or if he had not, and notice or knowledge was not necessary, he obtained merely Lippitt's interests.

Next, what was that interest? It was a right under the contract to use the machinery in conformity to the contract, and to have it conveyed to him on payment of any balance due on the advances made for it by Hazard & Co., and the plaintiff. In December, 1837, without any evidence of any increased title or power over the machinery, except an increased lapse of time from three years to five since the machinery had been run under the contract towards paying the advances by half the profits, and which had conferred no additional title, nor created any bar or estoppel, the defendant undertook to sell the machinery outright to Morgan & Fanning. And he did this though notified in November, 1836, by R. G. Hazard, of the plaintiff's claims from him by assignment to the machinery, and refused to deliver it up on this notice. This sale was a tort or wrong, which would render him liable to an action of trover for the value, as did the refusal, on a demand made by the agent of the plaintiff, to deliver up the property in November, 1836.

The rule of damages in trover would be the true value of the machinery when sold, and interest thereon given in the nature of damages, whether the value was more or less than the machinery sold for, or the interest more or less than any rents or use. But in equity the rule is, treating the matter as a mortgage, to require Wilbur to pay only the balance due; and hence, if less than the value of the machinery and interest since 1835, to let him have the benefit of it; but if not less, to return the machinery itself; and if destroyed, then to pay its value and interest, unless Wilbur did not own the whole, or have the beneficial interest in the whole. In the supplemental answer in this case

the statute of limitations is pleaded, and must be considered. It could properly begin to run only from the demand and refusal or from the time of the sale, if the plaintiff choose to and legally could treat that as a tort. But the plaintiff does not choose to regard any prior act as a conversion, without any removal of the machinery, or refusal to deliver it; and there is no evidence of any prior tort; the possession taken by Wilbur under the mortgage of Lippitt's interests not being necessarily a tort, but rightful, if meaning to use and account for it under the contract, or pay the balance and keep it, and which was not rebutted to a certainty till the demand in 1836. The demand and refusal, therefore, are the first clear evidence of a conversion. *St. John v. Standing*, 2 Johns. 470; [Vincent v. Cornell,] 13 Pick. 294; [Strickland v. Barrett,] 20 Pick. 415; [Oriental Bank v. Tremont Ins. Co.,] 4 Metc. (Mass.) 6; [Vasse v. Smith,] 6 Cranch, [10 U. S.] 226; [Dench v. Walker,] 14 Mass. 499; [Melville v. Brown,] 15 Mass. 82; Ang. Lim. 327, 328; [Callis v. Tolson,] 6 Gill & J. 81; [Slaymaker v. Wilson,] 1 Pen. & W. 216. It was not six years from this demand till the service of notice of the filing of the bill, and hence the plea of the statute fails. It is very extraordinary that such delay should have occurred after the demand and refusal, there having been four years previous, and then nearly six following it before suit; and no intimation transpired of any intervening claim, except a letter by the plaintiff in 1840, stating he was advised to sue. Persons who sleep over their rights in this way must expect embarrassment and doubts; and if they succeed at all, it will be only because the law and the evidence seem to require it, though always clouded and uncertain by such unusual procrastination. One may hold possession of mortgaged property so long, being the mortgagor, as to raise a presumption that the debt has been paid; but in case of real estate, it must be twenty years. Ang. Lim. 490; [Trash v. White,] 3 Brown, Ch. 291; [Marquis Cholmondeley v. Lord Clinton,] 2 Jac. & W. 179; [Christophers v. Sparke,] Id. 234; [Jackson v. Wood,] 12 Johns. 242; [Hughes v. Edwards,] 9 Wheat. [22 U. S.] 497; [Monell v. Monell,] 5 Johns. Ch. 283; [Giles v. Baremore,] Id. 545. So if a mortgagee is in possession twenty years, the mortgagor cannot redeem, unless a clear admission is proved that it is held for a debt still, and is not foreclosed. [Elmendorf v. Taylor,] 10 Wheat. [23 U. S.] 152; Ang. Lim. 448, 449; [Marks v. Pell,] 1 Johns. Ch. 594; [Jackson v. Shearman,] 6 Johns. 21; [Barron v. Martin,] 19 Ves. 327. So if a debt be barred by the statute of limitations, it is still in existence to uphold a pledge, if the claim be not barred as to that. [Belknap v. Gleason,] 11 Conn. 160; [Thayer v. Mann,] 19 Pick. 535; [Vice v. Thomas,] 2 Cox, Ch. 123; [Colby v.

Everett,] 10 N. H. 429; Ang. Lim. 77; [Spears v. Hartly,] 3 Esp. 81. So a debt may be barred by the statute of limitations, though secured by a pledge, so as not to sue for that debt, and be still good for the pledge. Slaymaker v. Wilson, 1 Pen. & W. 219. (Semb.) The better view perhaps is, that the debt itself is not barred if the mortgage is not. Heyer v. Pruyn, 7 Paige, 470; [Jackson v. Sackett,] 7 Wend. 94. Where tort will not lie on account of a shorter statute of limitations, assumpsit will, if the sale of the article was within six years, or an account has been rendered within that time; as the last takes it out of the statute. Ang. Lim. 76; [Hony v. Hony,] 1 Sim. & S. 568; [Willet v. Willet,] 3 Watts, 277; [Lamb v. Clark,] 5 Pick. 193, 285; [Martin v. Mayor, etc., of Brooklyn,] 1 Hill, 545.

I have spoken of Wilbur's being liable in trover at law, for converting this property, and of the rule of damages. But whether he could be adjudged in chancery to pay the balance of the debt due to the complainant from Lippitt, or restore the property, might in one view be questionable, if the debt is barred, as it would seem to be, independent of the mortgage, by the statute of limitations. The general rule however is, as just stated, that a debt secured by mortgage is not barred by the statute of limitations, if the remedy on or for the article mortgaged be not barred. See Ang. Lim. 490, 500, 501. Here the remedy for the machinery is not barred, though it would clearly be for the debt, except for the circumstance just named, and on that see cases already cited. There doubtless are cases where in equity, if the circumstances and responsibilities of parties have changed essentially by delay, though not long enough to bar a recovery under the statute of limitations, it might show any relief in chancery to be inequitable, even if jurisdiction was otherwise clear in it over the case; and if inequitable, that the case should be left as at law where we find it. Mason v. Crosby, [Case No. 9,234;] Tufts v. Tufts, [Id. 14,233;] Ang. Lim. 170. A court of chancery, or the court acting on its chancery side, would say in such a case, it declined to interfere with extraordinary equity powers, in behalf of one who had slept over his rights so long as to render the enforcement of them in equity not equitable. 2 Story, Eq. Jur. §§ 771, 776; [Heaphy v. Hill,] 2 Sim. & S. 29; Newl. Cont. 242. But, declining here to dispose of this case in chancery would have been injurious to the defendant, in having his question considered and decided for him, that the contract between Lippitt and R. G. Hazard & Co. was a mortgage, and would have made him liable at law absolutely for the whole value of the machinery and interest since the conversion. Whereas now if going on in chancery, and if held liable there, as seems on the whole case proper,

it subjects him to pay only the balance of the debt, which may be less than the value of the machinery; and, if not less, subjects him only to return the machinery, and if that cannot be done, to pay only its value when converted, and interest since. Let a master then be appointed to ascertain the amount of debt due, and the value of the machinery when sold.

The balance due to the plaintiff is to be ascertained first, casting interest only after Sept. 1832, when Lippitt refused longer to go on under the contract. The repairs devolved on Lippitt and Wilbur, and the surplus of rents over what is allowed the plaintiff as interest, till 1836, belong to the respondent. In a bill in equity to compel the redemption of a mortgage on personal property against one who held possession of and claimed it, I see no objection to his being required to pay in damages the value of the property, if it has been destroyed, and he does not prefer to pay the balance of the debt charged upon it. [Wills v. Stradling,] 3 Ves. 378; [Clinan v. Cooke,] 1 Schoales & L. 41; Warner v. Daniels, [Case No. 17,181.]

But I do not propose now to settle the form of the final decree. Let one be entered on the points decided; and, after the report of the master, the rest of the remedy can be given in the shape of a specific performance of the original agreement required of Wilbur as assignee of Lippitt with knowledge, or to restore the property held in trust, which belongs to the plaintiff; or to account for its value, if not choosing to discharge the balance of the debt which is an incumbrance upon it.

[NOTE. This case was reversed, under title of Wilbur v. Almy, 12 How. (53 U. S.) 180, on the following grounds: (1) The assignment under which complainant claims was executed for the assignees of Hazard & Co. by R. G. Hazard, and was ratified by only one of the assignees, and there was nothing to show that Hazard had authority to act for the assignees, who must unite to pass any title to the property jointly held by them. (2) The evidence tended to show that the assignment to Almy was as collateral security for a debt due him by Hazard & Co., which debt had been fully paid by the profits on the contract before the commencement of this action.]

ALONSO. The, (BUSH v.)

[See Bush v. The Alonso, Case No. 2,223.]

Case No. 257.

The ALONZO.

[1 Hask. 184.]¹

District Court, D. Maine. Jan. 1869.²

SHIPPING — CARRIAGE OF GOODS — UNCERTAIN AMOUNT — BURDEN OF PROOF — BILL OF LADING — DEMURRAGE.

1. Upon the charter of a vessel to carry a cargo of coal at a stipulated price per ton, the bur-

¹[Reported by Thomas Haves Haskell, Esq., and here reprinted by permission.]

²[Affirmed by circuit court. Opinion not reported, and not now accessible.]

den rests upon the carrier to prove the quantity carried, and for that amount he is entitled to freight.

2. The master should tender the shipper customary bills of lading when the cargo is on board.

3. The master is not bound to sign bills of lading stipulating freight on a fixed number of tons where the quantity is uncertain.

4. He should tender the shipper the usual bills of lading specifying the quantity of cargo when uncertain, as more or less.

5. If the shipper refuses to take such bill, the master may deposit the same for him and sail, and upon arrival at the port of destination, after reporting to the consignees, may recover freight and damages, as demurrage, for any delay caused in discharging cargo for want of proper bills of lading to enter the same at the custom-house.

In admiralty. Libel in personam by the owner of the vessel [the Alonzo] against [the Montreal Ocean Steamship Company,] shipper of the cargo, to recover freight and demurrage. The respondent by answer disputed the amount of freight demanded, and denied all liability for demurrage.

Almon A. Strout and George F. Shepley, for libellant.

Edward M. Rand and John Rand, for respondent.

FOX, District Judge. This is a libel instituted by the owner of the barque Alonzo of Halifax, to recover from the Montreal Ocean Steamship Co. the freight on 1,034 tons of coal, brought for said respondent from Pictou to Portland, in Oct. last, at the rate of three dollars per ton, and also for ten days' illegal detention of the vessel at Portland, at the rate of fifty dollars per day. The answer admits the delivery of 955 tons of coal and the price per ton for the freight as set forth in the libel, but alleges that the quantity was to be estimated by the weight as shipped from the mines at Pictou, and that only 955 tons were so delivered, according to the mines' weight, and that they paid for no greater quantity. The evidence, as to the agreement made at Pictou for the transportation of the cargo, is nearly all in depositions, and having carefully read the same, I do not find that any such agreement was made as is stated in the answer, and the owners are not by any contract restricted to the quantity as estimated at the mines. The broker, who effected the charter of the barque on the part of the respondent, states that at the time of the contract nothing was said about the mines' weight. The general rule is, that the carrier is entitled to pay for the quantity received on board and delivered, and that rule must govern in the present case.

It does appear that the coal company at Pictou charged the steamship company for only 955 tons as put on board the Alonzo, but there is no positive testimony from any witness as to the exact quantity in fact shipped. No account is produced of the quantity delivered from day to day to the

ship, nor has any one testified positively of his own knowledge of the quantity so put on board, but admitting that the agents of the coal company charged the respondents with only 955 tons, the manner, in which the quantity was arrived at, is not very certain and satisfactory. The agent of the coal company says, there were no large scales for weighing coals at the mines, but that the government furnished the cars for transportation of the coal from the mines to Pictou over the government road, receiving a certain rate per ton for transportation, and also a royalty for the coal per ton. The cars were estimated to contain each five gross tons of coal, when loaded even with the top, and as a test of their capacity, the agent states that he once weighed out on a small scale five tons of coal at the mines, which just filled one of the cars level with the top; that the company is now building a scale for the purpose of weighing coal and other matters; that he saw a large number of the cars loaded with the coal, which was part of the Alonzo's cargo, and that the same were only filled even with the top of the car, and not heaped. There were sixty-one cars employed in transporting the coal from the mines to Pictou. The libellant states in his testimony, that he saw many of the cars so loaded, and that the same were heaped up with coal above the top of the car. It appears that the price of coal was only \$2.25 per ton, and that one of the owners of the steamship company is a director in the coal company. Under these circumstances I do not apprehend the agents of the coal company would be very particular and exact in their loading of the cars. At best, this mode of ascertaining the quantity is a mere approximation, and should not be conclusive upon the libellant, but must be weighed in connection with the other evidence in the case, and it is in testimony, that before the barque left Pictou, this estimate was not satisfactory to the libellant, but was disputed by him, he claiming that there was a larger quantity on board, and this claim was admitted to be correct by some of those acting there in behalf of the respondents. The vessel, when she left Pictou, drew 18 1-12 feet of water. On a previous voyage, as testified by the master, he had carried a cargo of this same coal to Boston, the vessel being in the same condition and then drawing only 17 9-12 feet. That cargo, he swears, was all weighed out in Boston, and the vessel delivered 1,050 tons, and there is no contradiction of this testimony.

The Alonzo arrived in Portland on the 25th of October, but did not commence discharging until the 4th of November. The customs officers took an account of the coal as it was delivered, weighing every day sixteen tubs. The whole number of tubs according to the inspector's returns was 7,389, of which 160 were weighed, giving an average of 313½ pounds per tub, making an aggregate of 1,034

tons; and for this amount the libellant claims to recover the freight at \$3.00 per ton.

It is claimed by the respondents that this mode of determining the quantity is alike uncertain, and but a mere approximation to the truth. To a certain extent this is so, but after all, it is the mode the government has adopted for ascertaining its duties on articles such as coal, salt, &c. The whole of such cargoes are never weighed by the government officers, but from time to time, tubs full of these articles are weighed, and an average taken, a sufficient number being weighed to insure substantial accuracy. In the present case double the usual number of tubs was weighed. It is well understood, that by this course the importer at least is not defrauded. The customs weigher in this case states, that he always makes a liberal allowance to the importer, deducting from five to ten pounds from the actual weight per tub as indicated by the scale, on account of what may adhere to the tub. The government favors the importer, and does not receive the entire duty on any single pound. I believe no one in purchasing foreign coal would for a moment hesitate to take it at the government weight, rather than have it weighed over by a city weigher.

The minute book kept by the weigher of this and other cargoes of coal received that season by the respondent from Pictou is in evidence; and although the tubs vary in weight, as some tubs were in themselves heavier than others, yet, on the whole, there is not a greater difference than was to be expected, and on looking at the returns of various other cargoes of this coal in this book, I find that the average weight per tub of nine cargoes was 312 1-5 pounds, and of the present cargo was 313½, showing that the weight and account must have been extremely accurate. This mode of determining the quantity of such cargoes, having been thus adopted by the government without any complaint from importers, so far as appears, is to my mind much more satisfactory than that resorted to at Pictou, and when considered in connection with the amount of the other cargo weighed out at Boston, and also the offer proved to have been made by the libellant to the agents of the respondent, to have this cargo of coal all weighed by a city weigher, the respondent to pay the expense if the quantity overrun 955 tons, and the libellant if it fell short, which was declined by the respondent. I can have no doubt that the quantity was in excess of that amount, and well-known to be so by the agent of the respondent. The burden of proof is on the libellant to establish the quantity, and upon a careful examination of all the evidence, I am satisfied that at least 1,034 tons of 2,240 lbs. were delivered to the respondent.

After the vessel was loaded at Pictou, the

agents of the respondent proposed bills of lading and presented them to the master for his signature, and he declined to sign them, for the reason that the quantity of coal on board was stated at 955 tons, the words "more or less," which immediately followed in the printed form, being erased. The master under direction of the owner of the vessel, who was present, declined to sign them, they supposing that they were concluded by the recital of the quantity in the bill of lading, and that they could not recover for any greater quantity, even if delivered by them at the port of destination. The agent after this, presented to the master another set of bills of lading, describing the quantity on board as "955 tons more or less," but with a marginal note, "that the coal was to be weighed at Portland at ship's expense." This set, the master also refused to sign, as such a condition as that in the margin was not customary at Pictou. It was the duty of the master to ascertain the quantity of coal he delivered at Portland, but I think a clause of this kind is not usual, especially in a bill of lading of coal subject to duty, and of which the government without expense to the importer ascertains the quantity, and I do not think that the company had a right to require any such condition to be inserted in the bill of lading.

A bill of lading is not conclusive as to the quantity of goods on board; it is a simple receipt, open to explanation as between the master and the consignee, if owner. The master may, as against such consignee, ordinarily show any mistake as respects the quantity shipped, but in the present case, if the master had executed the first set of bills, which were presented to him, I apprehend he would not have been at liberty to have shown on his arrival, that there were more than 955 tons on board, and he could not have received freight for all he should deliver.

Having decided that there were more than 955 tons on board, I think the master had a right to have his bills of lading so drawn, that they should not be evidence against him, that he had not any more on board, and I therefore think that the more correct bill of lading under all the circumstances was one in the form adopted by the master, and which was executed by him and left at Pictou before the ship sailed, with the agents of the respondent, describing the cargo as "955 tons more or less." That amount was the quantity which respondents' agent claimed to be on board. On the other hand, the master claimed a greater quantity, and as it has turned out, his claim was well founded. A bill of lading reciting that quantity, but so qualified as not to throw the burden of that amount, on the respondent, but leaving it to be determined by the result, was all that the respondents had a right to require, unless it should turn out there

was exactly that precise amount on board, or the master had agreed to be bound by the mines' weight; and I am of the opinion that the master, in executing the bills of lading as he has testified, did all that could be fairly required of him. He thereby furnished the respondents with as accurate a document as he well could, and one which was in accordance with the contract of affreightment. He was entitled to demand freight on all he carried and delivered, and the respondents' agents had no right to insist on a bill of lading evidencing any different agreement. If the master had been truly informed of the precise quantity on board, it would have been his duty to have so stated, but he was not; on the contrary the respondents insisted on there being a much smaller quantity, and that he should so certify by his bill of lading, and that it should be so worded as to conclude him on this question of quantity. They demanded of him a written contract entirely different in its legal effect from that which the original contract justified; they were in my view clearly in the wrong, endeavoring to bind the master to carry 1,042 tons, as and for 955, and to receive pay only on the smaller quantity, which he had never agreed to do.

The bills of lading, executed by the master and left by him with the respondents' agents at Pictou, were all they had a right to require, and it was their duty to have received them and forwarded them to the respondents at Portland. They were the true evidence of the contract as made, allowing the master to receive, and binding the respondents to pay for all the coal shipped and delivered; and they were in such a form, as would at once have been received at the custom house in this city, as the proper ship's document to accompany an entry of the merchandise. The bills of lading, so executed by the master, were not forwarded to Portland, but the two, which the master had declined to execute were forwarded to the respondents' agent here, and when he was notified by the master of his arrival and readiness to deliver the cargo, they were presented to him for signature, and he was required to execute one of them, which he again declined. I think he was fully justified in so doing, and that this demand was quite unreasonable. The cargo was not entered at the custom house until the 4th of Nov., and of course no permit for its discharge could be obtained until that time. The excuse is, that the respondents had not the proper documents with which to enter the cargo, not having any bill of lading executed by the master. If so, whose fault was it? The master, before he sailed, had executed bills in such a form as they had a right to require of him, and they should have been sent to Portland instead of those which were not executed. The master is under no obligation to execute more than one set of bills of lading. It is

not only unusual for him to do so, but is quite improper on account of their negotiable character, and danger attending their transfer. The master, notwithstanding the neglect of the respondents to be provided with one part of the bill of lading which he had executed, offered to furnish the respondents' agent with the master's part of the set which he had retained, that they might use it in entering the cargo; but this was unreasonably refused. The difficulty in this case has partly originated from a phrase which has been frequently used in this trial, "the shipper's bill of lading," and which is in a legal point of view quite incorrect. There is in law no such document as a "shipper's bill of lading." No doubt the shipper frequently fills up the blank bill of lading for the master, but it is the master's bill, and not the shipper's, and in law it is presumed to be the act of the master; if accepted by the shipper, then it is of course evidence of the contract as against him; but it is never signed by the shipper, and he had nothing to do with its preparation. It is a document which is required of the master as evidence of his contract, and if it is in accordance with the contract, the shipper is bound to receive it. It is no part of the shipper's duty to prepare it for the master.

The delay in this case from Oct. 25th to Nov. 4th was unreasonable, and without excuse, and I think the respondents are answerable for damages. They, however, should be allowed a reasonable time for entry and payment of duties after the vessel was reported to them. The master made report on Monday, Oct. 26th. I think that they should have been in readiness for discharging the vessel on the morning of Thursday, and I shall allow damages from that time. The permit was obtained the next Wednesday. I allow five days' detention at \$50 per day, \$250, and balance of freight on 79 tons at \$3 per ton, \$237; the respondent having brought into court the freight due on 955 tons, which was received by the libellant without prejudice. Decree accordingly.

Case No. 258.

The ALONZO.

[3 Ware, 318.]

District Court, D. Maine. July, 1865.²

SEAMEN—WAGES—INCAPACITY—LEAVING VESSEL.

1. The master has a right to disrate a seaman for incapacity, and in proper cases he will be justified in doing it.

[Cited in *The Topsy*, 44 Fed. 634.]

2. But the seaman does not forfeit, necessarily, all claim for wages, but if he continues

¹[Reported by Edward H. Daveis, Esq.]

²[Affirmed by circuit court in *Bush v. The Alonzo*, Case No. 2,223.]

in the ship and is put to other duties, he shall be paid reasonable wages.

[See *Wheatley v. Hotchkiss*, Case No. 17,483; *The Blohm*, Id. 1,556; *Knee v. American Steamship Co.*, Id. 7,877.]

3. A seaman is justified in leaving a vessel for just fears for his personal safety.

[In admiralty. Libel by William Bush against the schooner *Alonzo*, (Thomas Haggert, claimant,) for wages. Decree for libellant. This cause was afterwards taken to the circuit court by the claimant, and the judgment was affirmed, under title of *Bush v. The Alonzo*, Case No. 2,223.]

G. F. Talbot, for libellant.

J. H. Drummond, for respondent.

WARE, District Judge. The schooner *Alonzo*, of about 295 tons burthen, sailed from Cardiff, in Wales, in the early part of December, 1864, with a crew of ten men all told, that is, a master, two mates, a steward and cook, and six men before the mast, for Nassau in the West Indies (to any port in the West Indies), or any port of America, and to his final port of discharge in any part of the British Provinces in North America, the whole term not to exceed twelve months. Bush sailed in her as cook and steward at four pounds per month, wages, and joined the vessel on the 7th of December. On her passage out to the West Indies, the vessel had an unusually rough time. There was a constant succession of heavy winds, amounting often to gales and squalls. This kept the sea exceedingly rough, and the vessel being of small size, she of course partook of the motion of the water and was continually tossed in every direction, keeping everything on board in constant agitation, and sometimes shipping water to an inconvenient extent. Her sails were some of them rent and her hull strained so that she leaked considerably, and she was at this time short of provision, so that on the 5th of February, being then near Havana, and that port more accessible, she bore away for it and finally succeeded in reaching it in safety. After she had discharged her cargo and repaired damage, she went to Tampico, back to the West Indies, and finally to Portland, where Bush left the vessel, and now sues for his wages. On the 7th of January, about one month after she left Cardiff, Bush was disrated from the office of cook and steward for which he shipped, put out of the galley, and another person appointed in his place, and it appears from the master's account, that at Havana he applied to the British consul, at that port, to dismiss him from the ship; but was informed that he must carry him on the voyage and not dismiss him but within the British provinces. During the whole voyage to Havana, after he was disrated, to Tampico, back to the West Indies and to

Portland, where he finally left the vessel, Bush did, and was required to do, duty as a common seaman on board the vessel. He did not ship as a seaman and did not pretend to understand the duty of a seaman. Personally he was under size, weak, partially deformed, and incapable of the hard duties of a seaman. Accordingly he was put to various service. Sometimes he did duty as a seaman, sometimes worked in the galley and performed such service as he was put to, nor was there any complaint made that he did not usually do willingly what he was ordered to.

On the arrival of the vessel near Portland, he was told by the master that he must run away. The master, by his own account, was told by the British consul, that he could not legally discharge him but in the British provinces. And this information was accompanied by threats of personal ill usage, even to that of taking his life if he continued in the vessel. This was done when two of the seamen were near enough to hear him, and their testimony fully confirms Bush's statement, and Bush solemnly declares that he was afraid to remain from an apprehension of what the master might do. Taking this order, with the threats with which it was accompanied, and the master's severity during the voyage, for he had been particularly severe to this man, and, on one occasion, was punished for a slight fault or, according to Bush, for none at all, with such severity that he did not get over it for two or three weeks; with his habitual strictness, and great strength compared with the feebleness of Bush, it cannot be said that his fears were altogether groundless. The master says that this order to abandon the vessel was revoked, but he admits that it was given, and adds that he offered to pay his passage to St. John. Admitting it to be so, this would not diminish the fears of Bush, and the master well knew that, by deserting the ship, Bush would forfeit all claim to wages during the voyage. Under all the circumstances, I think Bush had just cause for leaving the vessel and demanding his wages at this place. For one month, when he served as cook, I shall allow him, at the contract price, four pounds and for the residue of the time when he served as a seaman at three pounds. The master has an undoubted power of disrating a seaman. Every man engages for his own ability to do the duties for which he contracts. The master of the vessel is necessarily the judge of his competency in the first instance, but he decides, subject to have his decision reviewed by the proper authorities on shore. The master, without doubt, was dissatisfied with the cooking; at the same time it is true, according to all the proof, that while Bush was cook the weather was extremely tempestuous. The vessel being small had

much motion, and the cook had hardly a fair opportunity of doing his business satisfactorily. But, allowing him to be disrated reasonably, there is no reason that he should not be paid for the actual service he performed in the ship during the residue of the voyage, while he remained in the vessel. Decree for libellant accordingly.

ALPHONSO, The, (WILLIAMSON v.)
[See Williamson v. The Alphonso, Case No. 17,749.]

Case No. 259.

ALRICKS v. SLATER et al.

[1 Cranch, C. C. 72.]¹

Circuit Court, District of Columbia. March Term, 1802.

PLEADINGS — DEMURRER — WITHDRAWAL OF PLEA.

The court will not permit a plea to the merits to be withdrawn to enable the defendant to demur specially.

[See Deakins v. Lee, Case No. 3,697.]

Debt; plea, payment; replication and issue. The defendant Slater only was taken. The penal bill upon which the action was brought, was signed "David Slater & Co." and a seal.

Gantt, for defendant, moved for leave to withdraw his plea of payment, and demur to the declaration; because a seal affixed for David Slater & Co., by one only of the partners, is the seal of him only who affixed it.

THE COURT refused.

Case No. 260.

In re ALSBERG et al.

[9 Ben. 17.]²

District Court, S. D. New York. Jan. 1877.

VOLUNTARY BANKRUPTCY — ADJUDICATION — COMPOSITION.

Where a petition in voluntary bankruptcy was filed, and the debtor thereafter, before an adjudication, began proceedings for a composition under the Act of June 22d, 1874, an adjudication ought not to be made merely because certain creditors ask for it, if the debtor does not ask for it.

In bankruptcy. Albert Alsberg and Joseph Jordan had filed a petition in voluntary bankruptcy. Before an adjudication of bankruptcy was made, they commenced proceedings for a composition under the act of June 22d, 1874, [18 Stat. 178, c. 390; repealed June 7, 1878, 20 Stat. 99.] Certain creditors applied to the register to make such ad-

judication. The debtors opposed it. The register decided that he had the right to make such adjudication and that it was his duty to do so, if the proof before him was sufficient. Before he did so, the question was certified to the court.

W. B. Hornblower, for creditors.

A. Blumenstiel, for debtors.

BLATCHFORD, District Judge. While there is no want of power, perhaps, to make the adjudication, I do not think it ought to be made unless the debtors ask to have it made, this being a voluntary case, if proceedings for a composition have been commenced by the debtors, under the act of 1874.

Case No. 261.

In re ALSBERG.

[16 N. B. R. 116.]

District Court, D. Delaware. Jan. 6, 1877.

Circuit Court, D. Delaware. June 29, 1877.

BANKRUPTCY — NONDISCHARGEABLE DEBTS — ARREST OF BANKRUPTS — CONFLICTS WITH STATE COURTS — EVIDENCE

[1. Where A. purchases a stock of goods, intending not to pay for them either in whole or in part, he "creates a debt by fraud," within Act Cong. 1867, providing that, as to debts so created, a bankrupt shall not be entitled to a discharge.]

[2. Where, pending bankruptcy proceedings, the bankrupt is arrested on process in an action at law in a state court, on a debt from which the bankrupt is not entitled to a discharge, (Rev. St. § 5107,) because contracted in fraud, (section 5117,) he will not be entitled to a release on habeas corpus, on the ground that the debt in question was provable in the proceedings in bankruptcy.]

[3. In such case, in determining whether the debt was so contracted in fraud, the court is not bound by the case made in the state court, but may consider all legal evidence brought before it from any quarter bearing on the question.]

[Approved in Re Van Buren, Case No. 16, 833.]

[Petition by Martin Alsberg, a bankrupt, for writ of habeas corpus. Denied on January 6, 1877. Bankrupt petitioned for a rehearing on May 8, 1877. Denied on June 15, 1877. Petition of the bankrupt to set aside orders of district court denied by circuit court on June 29, 1877.]

[The bankrupt, who had failed as a dry-goods merchant in 1873, settled with his creditors, and resumed business in September, 1875, when he purchased about \$9,000 worth of goods. In January, 1875, he sold a house for \$1,500; and in June, 1875, he sold another, and took \$3,000 cash, and a mortgage for \$500, which mortgage he subsequently sold. March 4, 1875, he sold another house to one Rehuss, and took \$2,500 cash, and a mortgage for \$2,000; and on March 25, 1876, he sold his last house for \$1,242 cash. When purchasing in July and September,

¹[Reported by Hon. William Cranch, Chief Judge.]

²[Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted, by permission.]

1875, and in April, 1876, he made certain representations. By making large sales, paying all bills in 10 days, and obtaining discounts, he re-established his credit, and purchased closely till April 24, 1876, when he began to purchase freely and even recklessly. He failed July 12, 1876, and a meeting of his creditors was called for July 18th, at 3 P. M. In September, 1875, the bankrupt gave his mother-in-law, Rosa Buxbaum, a judgment bond for \$4,200, which was entered the day of his failure, and on which execution was issued, and placed in the hands of the sheriff, at 10 A. M. on July 18, 1876. The report of the bankrupt to his creditors showed his liabilities to consist of book debts, \$13,094.90; and Buxbaum judgment, \$4,200. His assets consisted of accounts due, \$4,000; the Reffuss mortgage, \$2,000; and stock on hand, \$8,000 or \$9,000. No arrangement having been made at the creditors' meeting, the bankrupt continued to sell until the sheriff took possession, in October. The goods were sold in bulk by the sheriff on October 20th to Albert Alsberg, for \$3,500; and he resold them the same day to the bankrupt's wife for the same price, and took seven promissory notes from her in payment.]

Charles B. Lore, Sam'l M. Harrington, and J. H. Hoeffcker, for creditors.

William G. Whiteley and Anthony Higgins, for bankrupt.

BRADFORD, District Judge. The petitioner, Martin Alsberg, in this habeas corpus case, has been imprisoned in the common jail of New Castle county, on certain writs of *capias ad respondendum* issued out of the superior court of the state of Delaware, at the instance of creditors of the said Alsberg in Philadelphia, Pa. Under a late act of assembly of the state of Delaware, abolishing the use of these writs in civil actions generally, the exception is made when the plaintiffs file written affidavits of fraud, stating, in the language of the act, "that to the best of his or their belief the defendant had absconded, or is about to abscond, from the place of his usual abode, or that the defendant is justly indebted to the plaintiff in a sum exceeding fifty dollars, and that he verily believes the said defendant has secreted, conveyed away, assigned, or disposed of either money, goods, chattels, stock securities for money, or other personal estate or real estate of the value of more than one hundred dollars, with intent to defraud his creditors, and shall moreover in such affidavit specify and set forth the supposed fraudulent transactions." After Martin Alsberg (the petitioner for discharge under the writ of *habeas corpus*) had filed his voluntary petition as a bankrupt, and the jurisdiction of the United States district court for this district had attached to all persons, matters, and things having any relation to

the estate of the bankrupt, he was taken on these writs, issued under the authority aforesaid, and grounded on the affidavits required by law which justified their issuance. Under these circumstances, the petitioner has invoked the aid of this court to release him from imprisonment, on the ground that he would have a right to be discharged from these debts under his certificate of discharge in a court of bankruptcy, and that to permit his imprisonment, after the jurisdiction of the bankrupt court had attached, would be unjust to the petitioner, and defeat the purpose for which the bankrupt law was enacted, and in violation of the following, viz.:

Section 5107, tit. 61, Bankruptcy Revised Statute of the United States: "No bankrupt shall be liable, during the pendency of the proceedings in bankruptcy, to arrest in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him." We turn to another part of the act, and we find the character of the debt which will not be discharged, in these words: In section 5117, tit. 61, c. 5, Rev. St., it is provided: "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy, but the debt may be proved and the dividend thereon shall be a payment on account of said debt." So that we are brought directly to the question, Were these debts on which these *capiases* have been issued "created by the fraud of the bankrupt," or not? There is no proof going to show embezzlement or abuse of a fiduciary trust, either public or private, and as these are all the delinquencies enumerated in the statute which give the debt such a character as to forbid its discharge, we must confine ourselves to that simple investigation—fraud in the bankrupt in creating the debt. If there was such fraud, then a certificate of discharge will not free him from the debt, and by the terms of the bankrupt act (section 5107, above quoted) he is not freed from arrest by the state courts in civil suits. If there was not such fraud, then he will be discharged, for it is then such a debt as would be discharged by the certificate of discharge granted finally to the bankrupt.

Were these debts created by the fraud of the bankrupt? There is no principle of law or equity more universally acceded to than "that fraud is never to be presumed." It must always be proved, and when the matter of a man's personal liberty is in issue, it ought to be convincingly proven. And yet fraud is of such a character, lies so buried up in a man's secret intentions, as to be inaccessible to ordinary observations. It would defeat its own purposes were it outspoken, and hence secrecy is its favorite hiding-place. Fraud is a deceit practiced to another man's disadvantage; there must be

an intent to mislead, carried into operation by some act, on which the deceived party rests to his own detriment. Human courts do not attempt to punish men for wicked intentions which have never been acted on. Such sins of intent are reserved for punishment by a High Tribunal, of greater justice and penetration than earth can furnish. There is no distinction between a fraud proven in a court of law and a fraud proven in equity. For while courts of equity furnish greater facilities for discovering and uprooting fraud than courts of law, yet when once proven in a court of law, it is equally damaging to the perpetrator. Now in proof of fraud, as its essence is in the "scintilla," the "animus," the "evil intentions," things that cannot be seen or heard and are not cognizable by the senses, we are to take into consideration the declarations and conduct before, at the time, and after the alleged fraudulent act (and a wide latitude of investigation is to be allowed), and from these declarations and this conduct we are to draw our inference as to the existent or non-existent fraud at the time of the purchase of the goods in question. Slight evidences of fraud will not suffice. They must be convincing.

It is contended by the creditors that the bankrupt contracted these debts by practicing two distinct forms of fraud: 1. By false representation of his available means to pay any indebtedness he might incur, which operated on the vendors as inducement to make the sales, and without which they would not have made them, and 2. By fraudulently intending, at the time of these purchases, not to pay them in whole or in part.

It is not pretended that false representation of means for the payment of debts were made to more than three creditors, viz.: Hood, Bonbright & Co., Langfeld, Lichten & Co., J. T. Way & Co. And were this the only form of fraud practiced, I should discharge the petitioner, from arrest in all cases except in those above named. Now, how far have false representations of available means made to these creditors induced them to sell the goods for the price of which they have brought suits in the superior court? The first statement of this kind was made to Mr. Crow, between the 1st of April and May, of the year 1876, in the railroad cars, between this place and Philadelphia. Mr. Crow was the traveling and selling agent of this firm. Alsberg said "he could pay two dollars to every one he then owed." In July, 1875, Alsberg said to Benj. H. Cregor, who had charge of the credit department of this firm, that "he held real estate worth near twenty thousand dollars." Mr. Cregor said that his credit was based on this representation then made. About two months before the failure, Alsberg said to Robert Mills, salesman for Langfeld, Lichten & Co.: "You ought to sell me cheap, for I (referring to the failure of Mr. Wainright) am worth two dollars for every one

I owe." About this time, as it appears, he stated to Henry M. Rosenbaum, the financial manager of the last-mentioned firm, that he was worth twenty-five thousand dollars, "you need have no fear of me" (commenting on Wainright's failure), and stating that he had a couple of properties in Wilmington. Witness then stated that he would have sold if he had stated nothing about his property. Witness afterwards modified this statement and said: "The effect of this statement as to property then made prevented me from making future inquiry, which if I had made and had found his statements false I would not have given him the subsequent credit I did." He further said: "I cannot say that I mentioned this conversation as to the property to any member of the firm. I understood the two properties to be part of the twenty-five thousand dollars." He said on one occasion that he had a property on King street worth twelve thousand dollars. The exact date of this conversation is not on my notes—he said this to William Marter, salesman for J. T. Way & Co. Marter says his line of credits was due altogether to his statements—he did not after modify them.

These by my notes constitute all the cases of false representations as to the value of his property. It is true that these statements are materially untrue. They doubtless assisted the vendors in making up their minds to give the credit they did, in cases where the information had before been communicated to them. But when the purchaser had for a considerable period of time bought freely, and commended himself to their confidence by extraordinary promptness of payment (as is testified to on all sides), would they have refused these last credits, if they had heard nothing of Alsberg's property? The fact is, Alsberg had gained the trust of these creditors by his prompt payments, and they solicited his purchases (as was most natural and legitimate). Mr. Rosenbaum said he would have sold if he had heard nothing of Alsberg's property, and this is inconsistent with the attempted modification of that answer, to wit: that without this statement he would have started an inquiry as to Alsberg's means. This could not be, for if he had sold, he would have given the credit, and it would have been too late. Nevertheless, whatever may be our opinion as to the desire of these firms to sell to Alsberg, two of these witnesses for the two firms of Hood, Bonbright & Co., and J. T. Way & Co., viz.: Cregor and Marter, explicitly say that the line of credit of these firms was due to, and based on Alsberg's statements as to his property—and on this testimony we must rest as true and say that fraud in the shape of false representations in these cases has been proven—false representations to the financial member in the one instance and to the salesman in the other—and were this the only

fraud the petitioner would be discharged from arrest in all but these two suits. But on a careful examination of the testimony, I am compelled to decide as a fact proven convincingly, that the petitioner for discharge intended at the time he purchased these goods, for the price of which the arresting creditors have brought suit, not to pay for the same, either in whole or in part, it is immaterial which.

I shall not enter into the testimony in detail, but shall speak of the prominent facts, which, taken altogether and in their natural relation to each other, have produced this conviction.

1st. The greatly increased later purchases in the months of April, May, and June, 1876, by which he stocked his store to repletion, which cannot be accounted for by any ordinary hypothesis of the necessities and demands of the trade. It is in evidence that business was materially falling off; ordinary prudence and commercial integrity should have induced diminished instead of increased purchaser's obligations.

2d. The whole manner, demeanor, and conduct of Alsberg to his creditors was indicative of fraud perpetrated and fraud intended.

It is true, by the proof in this cause and Alsberg's own confession, that he was much more than solvent when he offered the forty per cent. to his creditors. He stated that his stock was worth eighteen thousand dollars to one witness. He stated to another that it was worth fifteen hundred dollars. Mr. Albertson, an exceedingly careful and reliable witness, said that on the 18th of July, at the meeting of creditors, the stock in store was worth fifteen thousand. Freeman, Alsberg's clerk, placed it from thirteen to fifteen thousand. Mr. Crow also placed it about fifteen thousand shortly before the creditors' meeting. Now place this stock at the lowest figure, two thousand lower than the estimate of Albertson, say . . . \$13,000
 Then add 2,000 bond.
 (Returned as assets) due him
 per J. Buxbaum 2,500 bond.

And we have the total 17,500
 The creditors' debts were but . . . 13,000

Leaving a balance of \$4,500
 in Alsberg's favor. No wonder the creditors would not accept an offer made under such an exhibit.

3d. There is a manifest disappearance of a large mass of valuable merchandise, between the failure, 18th July, 1876, and the day of sale, 20th October, which is utterly unaccounted for. Now there is just the difference between fifteen thousand, as estimated by Albertson and others as its value at 18th July, and two thousand, as valued on the day of sale by Mr. Meehan, an experienced and skillful merchant, viz.: the sum of thirteen thousand—a difference of sixteen thousand, if estimated at eighteen thousand—the

value admitted by Alsberg on one occasion. Now, it must be remembered that, from the time of this failure, none of these many creditors ever received one cent on their claims. He then owed no other debts, except two or three hundred dollars, which he paid off. What has become of these goods; and, if sold, what has become of the money—where is it, who has it? Mr. Alsberg can explain, and he does not offer to do so. He sits by, day by day, and hears himself denounced for vile fraud, and he opens not his mouth in his own defense. He has a right to demand to be sworn to vindicate his character. The United States, with liberal policy, in furtherance of justice, permits all persons to be witnesses in their own favor except in criminal cases. What would a man, conscious of rectitude, do in defiance of a battery of sharp cross-examining and torturing lawyers? There is only one inference to be drawn from this silence, and that is fraud.

4th. The circumstances connected with the execution of the judgment bond to Rosa Buxbaum, and the consideration therefor, are, to say the least, suspicious. The levy on the goods before petition in bankruptcy, and without making a trust for the benefit of his creditors, shows shrewd management to defeat the rights of creditors, in which Alsberg was certainly engaged as a party. From these and other considerations which might be mentioned, I believe that Alsberg, when he bought these goods, did not intend, either in whole or in part, to pay for them. And if such be the fact, what is the law arising on that fact? The conclusion to which I arrive, from reason and the slight examination of authorities I have been enabled to make, is that when A, at the time he purchases a stock of goods of B, intends either in whole or in part not to pay for them, he commits a fraud, and in the language of the act of congress has "created" a "debt" by "fraud." B certainly understands that A means to pay for his goods. He promises to do so. This promise is of the essence of every such contract. B would not think of selling if he supposed that A had not made a bona fide promise to pay, and he parts with his goods on the strength of this promise. He acts on a promise made. It is not false representation by words, but it is deception by concealing an intention he entertains, which, if communicated to the seller, would at once determine him not to part with his goods. The law on this subject is laid down by the supreme court of New Hampshire, from which I will quote. *Stewart v. Emerson*, 8 N. B. R. 462. Under this impression of the facts of this case and the law arising thereon, I must remand the petitioner to the custody of the sheriff of New Castle county.

BRADFORD, District Judge, [on petition for rehearing.] I have given attentive consid-

eration to the arguments on a rehearing of the habeas corpus case hitherto decided by me. The grounds urged by the petitioner's counsel for the discharge of the prisoner, and an injunction against all proceedings against him until the question of his discharge in bankruptcy shall have been determined, were twofold.

1st. That the court could inquire into no other question than the provability of the debt, that there was no doubt of that fact, and therefore that the court erred in refusing to discharge the prisoner.

2d. That if the prisoner was liable to arrest under § 5107, Rev. St., there was no such legal proof of that fact adduced before the court as to justify it in remanding him. This is the substance of the objection to the act of the court expressed in a few words.

In *Re Robinson*, [Case No. 11,930,] Judge Nelson decided that the various sections of the Bankrupt Law must be construed together; that by the 21st section of the bankrupt law, (corresponding to 5105, Rev. St.) standing alone, one who had proved a debt was denied the right of maintaining a suit at law or equity for the same against the bankrupt, and waived all right of action and suit against him, and all proceedings and judgments begun should be deemed discharged. But, says he, this section must be construed in connection with the 33d section, (section 5117, Rev. St.) making all debts contracted in fraud binding on and unreleased against the bankrupt, notwithstanding his discharge. Under the one section, if the creditor has proven his debt, his debt is discharged and any judgment obtained thereon. Under the other, the debt being provable, and, in the case reported, actually proved, it having been contracted in fraud, is not discharged; and where bankrupt was in prison on an arrest for such a debt, the court refused to discharge him or to release the bail. Says Judge Nelson: "The 33d section (section 5117, Rev. St.) must be regarded at least as taking a debt of this character out of the 1st clause of the 21st section (i. e., section 5105, Rev. St.), and hence that the judgment in question is not discharged or surrendered, nor is the bankrupt entitled to be released from the arrest or his bail from the bail bond, if the debt was one created by fraud." Now, this reasoning will apply a fortiori to creditors not having proved their debts (though provable); for they shall only be "stayed" to await the determination of the court in bankruptcy on the question of the discharge, and are not held to have waived all rights from suits and unsatisfied judgments. I consider this as high authority, 1st, on the point: that a debt contracted in such fraud as is mentioned in section 5117, Rev. St., is taken out of the scope and operation of section 5106, Id., so far as to prevent the discharge of a bankrupt from imprisonment under the state laws on such debt. This court also approves the

position taken in the court below—that where the record disclosed a case of fraud, the court would not inquire beyond the record to call in question its verity in a bankrupt court.

Martin Alsberg was arrested by virtue of the state law, which authorized *capiases ad respondendum* in certain cases, that is, under circumstances of fraudulent and improper conduct on the part of the debtor mentioned in the act, and sworn to by the plaintiff. The affidavit required by the law to be made as the foundation of the right to arrest is as follows: "That to the best of the plaintiff's belief, the defendant has absconded, or is about to abscond, from the place of his usual abode," or "that the defendant is justly indebted to the plaintiff in a sum exceeding fifty dollars, and that he verily believes the said defendant has secreted, conveyed away, assigned, settled or disposed of either money, goods, chattels, stock, securities for money for other personal estate, or real estate, of the value of more than one hundred dollars, with intent to defraud his creditors." The plaintiff is moreover to specify and set forth in his affidavit the supposed fraudulent transactions. It is provided that this act shall not apply to cases for libel, slander, or injury to the person or property, accompanied by violence, if any affidavit of the cause of action be filed with the *praecepe*. This act was passed at Dover, 1875, and was a modification of the law as it formerly stood, allowing a *capias ad respondendum* in all actions at law upon contracts, without any affidavit of fraud. The *capiases* in these suits against the bankrupt were in due form. They did not allege and swear to debts contracted in fraud, or under any of the circumstances of fraud mentioned in section 5117, Rev. St. They could not do so, for the grounds of arrest under the state law were not for such fraud as discharged the debts, yet in point of fact the debts may have been of that character. The arrests in these cases, then, supposing there had been no act of congress granting immunity to certain persons from such arrests, would have been in all respects legal and regular.

Section 5107, Rev. St., on bankruptcy, is in these words: "No bankrupt shall be liable, during the pendency of the proceedings in bankruptcy, to arrest in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him." His privilege, or immunity, or exemption from arrest depends upon the fact of the debt being released by his discharge. If it is unreleased he is without the immunity from arrest as provided for in this section as completely as if there had been no such provision in the Bankrupt Law. It must be kept in mind that the power of arrest is a state power, a power not conferred by act of congress, and that the bankrupt act has conferred no such power, but has only interposed its shield to protect the bankrupt from arrest by state authority for

a dischargeable debt, no matter how many fraudulent circumstances otherwise may surround it.

When the bankrupt is thus arrested by the authority of the state law and claims the immunity and privilege aforesaid, he must make it appear to the satisfaction of the court that his case comes within the exemption or privilege granted. If he does, he is discharged from arrest. If he does not, he is remanded to prison. If he makes it appear that his debt is dischargeable, that is, that it is not tainted with any of the kinds of frauds enumerated in section 5117, Rev. St., which prevent its being released by the discharge of the bankrupt, he is within the exemption or privilege extended by section 5107, Rev. St. If he cannot do this, he is not within the privilege or exemption aforesaid, and must be remanded.

In connection with this fraud the counsel for the petitioner who has been heard on this reargument has cited the following cases: In re Rosenberg, [Case No. 12,054;] In re Migel, [Id. 9,538;] In re Duncan, [Id. 4,131;] In re Schwartz, [Id. 12,502.] In Re Rosenberg, the bankrupt had been arrested, but was out on bail, and it was no part of the proceedings to have the bankrupt discharged from arrest, or his bail discharged; but it was to have the other proceedings of the suit, looking to the obtaining of a fraudulent judgment, stayed until the question of discharge in bankruptcy was settled. Hitherto it had been thought by some, among whom was Judge Blatchford himself, that the provisions to stay suits on provable claims did not apply to claims which were not released by discharge. Now this decision simply reverses that opinion, and permits a stay of proceedings. But the judge, in the close of his opinion, says: "I think it proper to say that this construction of the 21st section has no application to the last clause of the 26th section in regard to the liabilities of a bankrupt to arrest. By the specific provision of that clause (section 5107, Rev. St.) the bankrupt is entitled to be relieved from arrest if the arrest is founded on a debt from which his discharge, if granted, would release him, and this court is required, so long as the question of a discharge is undetermined, to inquire if the arrest is founded on such debt." So that this case is a clear authority against discharging the prisoner when arrested under section 5107, and the fact of the inability to be released from the debt is proven. It is also authority as to the duty of the court to inquire into the latter fact "so long as the question of a discharge is undetermined." In re Migel sustains precisely the same legal positions, with the exception that there was an express refusal to discharge the prisoner bankrupt. It is direct authority against the discharge of prisoner when arrested under section 5107, and proof of the character of debt which prevents his release. In re

Duncan [Case No. 4,131] has no bearing whatever on the right of the prisoner to immunity from arrest during proceedings in bankruptcy. In re Schwartz [Id. 12,502] has no application to this case, touching the right of arrest.

In fact, no case has been adduced, and I doubt whether any case can be, restraining from arrest under section 5107, Rev. St., where it is proved that the debt was not released by the discharge of the bankrupt. But repeatedly such bankrupts have been remanded to prison. The general order of the supreme court of the United States, prescribed for the government of proceedings in bankruptcy, has been cited as settling this question of immunity from arrest in favor of the prisoner. It is claimed that it amounts to an authoritative construction of the supreme court of the disputed provisions of the bankrupt act. I do not think so. Judge Blatchford and Judge Nelson did not think so, and they decided that the rule was not intended to apply to cases where a bankrupt was arrested for a debt not discharged under section 5107, Rev. St. Indeed, this is the only rational construction which I think can be given to these apparently conflicting provisions. The result is that all parts of the act have efficacy given to them. The result of the authorities is that, when a debt is provable, all actions against the debtor, pending proceedings in bankruptcy, shall be stayed, including arrests, with the exception that if the bankrupt has been arrested on a debt not dischargeable, he shall not be released from arrest by the bankrupt court. We consider then that it is established beyond a doubt, that a bankrupt prisoner who has been arrested, pending proceedings in bankruptcy, for a debt contracted in fraud, cannot on a habeas corpus be released from such imprisonment.

The next question to be settled (and it was the second point made by the counsel for the petitioner) is: How is the court to determine the question of fact on which the petitioner's right to discharge, or the creditor's right to continue the imprisonment, depends? What is the evidence by which he is to be governed? It will be seen that section 5107, Rev. St., prescribes no rule of evidence by which the court of bankruptcy shall be guided in determining the fact of the release of the debt on which the arrest is made. Upon some reflection, I have come to the conclusion clearly in my own mind, that it is the duty of the court to examine diligently all legal evidence brought before it from any quarter whatever, tending to show that a debt not dischargeable by the discharge of the bankrupt has or has not been contracted.

There is an apparent conflict of authority on this point. For limiting the scope of inquiry may be cited Judge Blatchford and Judge Nelson, in Re Robinson, [Case No.

11:30,] already cited; Blatchford, in Re Vaik, [Id. 16,814.] In Re Kimball, [Id. 7,768,] Judge Blatchford goes so far as to say: "This court only passes on the question whether the state court has founded its arrest on a claim, which, on the face of the papers which were filed before it as the foundation for the arrest, is a claim from which the debtor would not be discharged in bankruptcy." Lowell, in Re Devoe, [Id. 3,843,] is for confining the evidence. In Re Migel, [Id. 9,538,] Judge Blatchford takes the same view, and also in Re Kimball, [Id. 7,767.] In Re Glaser, [Id. 5,474,] Judge Blatchford thinks the case should be investigated by the court. He says, "It is a disputed case, which cannot be decided on ex parte affidavits," and offers, "if the bankrupt desires it, to take testimony before a referee." In Re Williams, [Id. 17,700,] Judge Drummond, circuit judge for the western district of Wisconsin, says: "This objection seems to proceed on the theory that the complaint and facts stated therein, i. e., in state proceedings, bound the bankrupt court. This is not correct, though it is true that the bankrupt law declares that the proceedings in bankruptcy shall not affect debts of a certain character, and among others those which have their origin in fraud, and further, the discharge of the bankrupt shall not operate as a release. It is to be observed that this is a question which the bankrupt court has a right to determine, and that a statement in a declaration or complaint made by a party in a state court does not bind the bankrupt court." So that I consider this question an open one, to be decided on those principles which shall be in harmony with the intent and purpose of the bankrupt law. The bankrupt law was meant to be uniform in its operation. Privileges are not to be accorded to either creditors or bankrupts in one district which are not equally extended to creditors and bankrupts in other districts.

The liability to imprisonment, or immunity from the same, depends on a fact. That fact is whether the debt for which he was arrested by state authority was dischargeable, or not, by the discharge in bankruptcy. I think it has nothing to do with the reasons or grounds of the arrest given in the affidavits upon which it was granted. It is manifest that congress intended to punish this fraud where in fact it existed, and to prevent an arrest of the bankrupt for such debt not created in such fraud. If the position be correct, that the liability to arrest or discharge depends on the reasons given by the state authorities for the arrest, then there is no mode by which the creditors of the bankrupt can claim the benefit of the arrest granted by the act of congress, unless the reasons filed for the arrest consist of such acts of fraud as would, under the act of congress, prevent a discharge of the debt, and as in this state no such reason can be

filed (as may also be the case in many other states), it follows that here (and in other states having like civil process) a bankrupt may not be imprisoned during proceedings in bankruptcy for a debt which is not discharged in bankruptcy, in defiance of section 5117, Rev. St., which permits it. Creditors over the district border, where reasons for arrest such as will discharge the debt can be filed, can have a hearing and continue the arrest if they prove their debt not dischargeable; while no such privilege can belong to the creditors in this district, because by the law of the state no such reasons or grounds of arrest can be sworn to, as will discharge the debt. So, too, if this theory be correct, bankrupt prisoners in different districts may enjoy exemption from arrest, not as they prove their debts, on which they are imprisoned, are dischargeable in bankruptcy, but as their creditors may or may not be able to file reasons for their arrest which would, if true, make their debts undischARGEABLE in bankruptcy.

I think no such inequitable and partial results could have been contemplated by the framers of the bankrupt act, and hence conclude that when the liberty of the bankrupt is at stake, or the right of the creditor to arrest for a debt contracted in fraud, the question of discharge from arrest depends upon the determination of the act of fraud, and not upon the reasons which may have been filed in the state courts for the arrest. Where the liberty of the prisoner depends upon the fact that his debt is dischargeable by his discharge in bankruptcy, and he tenders proof to maintain the allegation, is it not a strange proposition that he shall be denied the right to prove his right to release from imprisonment because an ex parte affidavit had been made in the state courts that he had contracted the debt under such circumstances of fraud as that his debt would not be released by his discharge in bankruptcy? This appears strange, because it affects the personal liberty of the bankrupt. But the rights of the creditors to arrest for debts not dischargeable in bankruptcy are equally sacred, and the proposition to me is equally strange that they should be denied the power to hold under arrest one legally arrested for other reasons filed than those which will release the debt, when they make the allegation, and offer to sustain it by proof, that the petitioner cannot bring himself within the exemption from arrest granted by congress, by reason of the fact that the debt on which he was arrested was contracted in fraud. And I think this view of the law is made apparent by the provisions of sections 760, 761, Rev. St., in relation to the writ of habeas corpus.

Now, in the absence of directions as to the specific evidence required in the provisions of the bankrupt law, these sections appear to me to be conclusive on all ques-

tions of prima facie evidence made out by state proceedings—or the absence of evidence as to the sufficient grounds of arrest in the state proceedings. "The petitioner may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case." Surely he may deny that he has been arrested for a debt contracted in fraud, no matter what affidavits may have been made by state authority to the contrary, and surely he may allege that he has been arrested for a dischargeable or releaseable debt, though it does not appear from the state proceedings that he was arrested by reason of the debt being contracted in fraud. These sections render clear the duty of the court to hear all legal testimony in the cause, and go further; they permit "the return and all suggestions made against it" to be amended by the leave of the court, so that thereby the material facts may be ascertained. The question of fact as to the creation of a debt not dischargeable by the discharge of the bankrupt, having been already passed on, it only remains for the court to say that the motions to discharge and enjoin against any further proceedings are refused. As a stay of proceedings is not desired unless in connection with the discharge of the prisoner, no order is made in reference to that matter.

Thereupon the bankrupt applied to the United States circuit court for the district of Delaware, to have said proceedings and orders supervised and set aside, and the bankrupt discharged from imprisonment, and for injunctions to restrain the plaintiffs in said writs from prosecuting their actions until the final determination of proceedings in bankruptcy. The case was argued before Hon. William Strong, Justice of the supreme court of the United States, who rendered his decision, June 29, 1877, as follows:

STRONG, Circuit Justice. After argument and consideration, it is ordered that the action of the district court be approved, and this petition is dismissed.

Case No 262.

ALSOP v. COMMERCIAL INS. CO.

[1 Sumn. 451.]¹

Circuit Court, D. Massachusetts. Oct. Term, 1833.

MARINE INSURANCE—WAGER POLICY—OVER-VALUATION—NEW TRIAL—CUMULATIVE EVIDENCE—CROSS-EXAMINATION

1. A policy of insurance underwritten for \$10,000 on profits on merchandise on board the brig Leonora at and from Callao to Baltimore, free of average and salvage, and the policy to be the only proof of interest required, is not in our law to be deemed a wager policy, where the assured had property on board, and neither he nor the underwriters intended to insure up-

on a wager policy, but intended it as a policy on interest.

[Cited in Merrill v. Arey, Case No. 9,468.]

2. There cannot, strictly speaking, be a gaming policy under our law, unless both parties intend to game or wager.

[Cited in Merrill v. Arey, Case No. 9,468.]

3. If one party intending a gaming or wager policy, procures it to be underwritten by the other, as a policy substantially on interest, and thus designedly misleads the latter, the policy is void for fraud.

4. But, if both parties intend a policy on interest, and the assured has a substantial interest in the property on board, and there is an over-valuation of the property made bona fide, and not with an intention to mislead or defraud the underwriter, the policy is good.

[Cited in Clark v. Manufacturers' Ins. Co., Case No. 2,829.]

5. If an over-valuation of the property insured be made with an intent to defraud or mislead the underwriter, the policy is void. But if it be bona fide made, and without any intention to defraud or mislead the underwriter, and the party has a substantial interest, the policy is good. In the latter case, if the underwriter agrees to the valuation, he is estopped to go into the consideration of the actual value.

[Cited in Clark v. Manufacturers' Ins. Co., Case No. 2,829.]

6. If a party insures property, expected to be on board a ship to a large amount, upon a valued policy, and much less is in fact shipped, he is entitled to recover in case of a loss a proportion pro rata only, notwithstanding the valuation.

[Cited in Clark v. Manufacturers' Ins. Co., Case No. 2,829.]

7. In what cases the court will interfere with a verdict upon matters of fact, and especially where fraud in fact is in issue, by granting a new trial.

[Cited in Fearing v. De Wolf, Case No. 4,711; Whetmore v. Murdock, Id. 17,509; Macy v. De Wolf, Id. 8,933; Aiken v. Bemis, Id. 109; Blanchard's Factory v. Jacobs, Id. 1,520. Followed in Fuller v. Fletcher, 6 Fed. 129. Approved in Hunt v. Pooke, Case No. 6,895.]

8. A new trial will not be allowed merely to let in new cumulative evidence to points made at the trial.

[Cited in Ames v. Howard, Case No. 326; Fearing v. De Wolf, Id. 4,711; Whetmore v. Murdock, Id. 17,509; Macy v. De Wolf, Id. 8,933; Aiken v. Bemis, Id. 109; Blanchard's Factory v. Jacobs, Id. 1,520; Vose v. Mayo, Id. 17,009. Followed in Fuller v. Fletcher, 6 Fed. 129. Approved in Hunt v. Pooke, Case No. 6,895.]

9. An objection was taken to a direct interrogatory, and the answer to it, at the time of taking the deposition, which was supported by the court at the trial, and the answer ruled out; *held*, that the answers to the cross interrogatories, which did not on their face purport to be asked in consequence of the direct interrogatory, and were not made dependent upon it, are admissible as evidence.

At law. Action upon a policy of insurance, underwritten by the defendants, dated the 19th of August, 1831, whereby the plaintiff by his agent, Zebedee Cook, Jr., was insured "ten thousand dollars on profits on merchandise on board the brig Leonora, at and from Callao to Baltimore, free of aver-

¹[Reported by Hon. Charles Sumner.]

age and salvage, and the policy to be the only proof of interest required," at a premium of one and a half per cent., the profits being valued at \$20,000. There were shipped on board the Leonora at Callao, for the account of the plaintiff, bullion of the invoice value of \$11,821, and California hides of the invoice value of \$7,765. The Leonora is admitted to have sailed on the voyage and to have been lost by the perils of the seas, she never having been heard of since her departure from Callao. At the trial there was a verdict for the plaintiff for the whole amount insured. A motion for a new trial was made for several reasons stated in a written application to the court. Those that were finally insisted on will appear in the opinion of the court.

Aylwin & Webster for plaintiff.

Charles G. Loring and J. Mason for defendants.

STORY, Circuit Justice. This case has been argued upon a motion for a new trial, for reasons stated in the written application to the court, upon which I have no more to observe, than that it is not to be taken for granted, that they present a full and accurate view of the whole case, or of the principles of law involved in the charge of the court. They are to be taken merely as suggestions, which, according to the practice of this court, counsel are authorized to make for the purpose of bringing the matter in review before the court. If there has been any material mistake in point of law, prejudicial to the defendants, they are entitled to a new trial to correct it. If, on the other hand, there has been a failure to try the cause upon its fair merits in point of fact, and there has been a clear miscarriage by the jury, the same result will follow.

The first point now insisted upon for a new trial, (for several of those which are stated in the written motion have been waived,) is, that the court permitted certain parts of the deposition of Edwin Bartlett, which were objected to by the defendants, to be read in evidence to the jury. In the direct examination of Bartlett the plaintiff put the following interrogatory: "Did, or did not, the house of Alsop & Co., in the month of March, 1831, inform said Richard Alsop, that they intended to make shipments to him on account of those funds? If so, by what opportunity or vessel?" Upon an objection taken by the defendants to this interrogatory, and the answer to it, at the time of taking the deposition, and now insisted on, upon the ground, that the one asked, and the other stated the contents of written correspondence, which ought to have been produced, as the best evidence, the court sustained the objection, and overruled the interrogatory and answer. In the cross examination the defendants put the following interrogatories: (1.) "What was the nature of the orders of Mr. Alsop to remit funds

in your hands? Annex such orders, or state their contents." (2.) "Had the said Richard Alsop given any orders or instructions for the purchase and shipment of said hides? or were they purchased by the house to be sent to him in payment of the balance due him?" (3.) "Were any letters written by you, or any members of the firm of Alsop & Co., to Mr. Alsop concerning the proposed shipment by the Leonora? If yea, annex copies thereof, or state the contents, as accurately as possible." These cross interrogatories were fully answered by the witness; and the plaintiff proposed to read these answers to the jury, to which the defendants objected, upon the ground, that they were asked de bene esse only, upon the supposition, that the direct interrogatory and answer might be ruled in as evidence by the court. The court overruled the objection, and admitted these answers in evidence. And this ruling now constitutes the material point of this exception of the defendants.

The argument now is, that the objection was well taken at the trial; that the defendants had a right to ask the questions conditionally; and that the answers could not be admissible evidence against them, unless the objection to the direct interrogatory had been overruled. And it is urgently pressed, that otherwise the defendants would be put in peril, by being compelled to make an election at the time, when the deposition is taken, whether to rely upon their original objection, or to insist upon the cross interrogatories being answered. This exception is confessedly new in its form and presentation. No authority is adduced in support of it; and it must, therefore, be decided upon principle. I have reflected much upon it, and am perfectly clear, that it has no solid foundation in the law of evidence, as administered in this country or in England. In the first place, there can be no doubt, that generally the answers to cross interrogatories are admissible evidence in favor of the other side. If a party chooses to ask questions, and the answers are unfavorable to him, he cannot insist upon removing them out of the cause; and, if they are in his favor, insist upon them, as evidence. The law knows of no such principle of evidence, and it would, if adopted, be most pernicious in the administration of justice. There is no more reason, that the answer should be excluded, if asked upon the cross examination, than there would be to exclude it upon the direct examination. The plaintiff might with quite as much justice insist, that an answer to a direct interrogatory should not be evidence, because it was to meet some expected evidence on the other side, and happened to be unfavorable to him, as the defendants might insist, that the answers to their cross interrogatories should, under like circumstances, be suppressed. The law recognises no such principle. Each party asks all questions at his peril; and he must take the answers, if

they respond to the question, for good or for evil. They are in the cause; and it is not for the party, who brought them there, to insist upon their incompetence.

But, in the present case, the foundation, on which the argument rests, does not sustain it. Suppose the direct interrogatory had been originally suppressed, and never answered; could there be a doubt, that the answers to the cross interrogatories would be good evidence, if these interrogatories had been retained in the cause? I think there could be no doubt in such a case, without disturbing the first elements of evidence. Now, in point of fact, the present cross interrogatories were never withdrawn, before the answers were given, or afterwards. They do not on their face purport to be asked in consequence of the direct interrogatory, or the answer to it. They have no reference whatever to that interrogatory or the answer. They are not in their form put *de bene esse*, or hypothetically. They are not (as they ought to have been, if intended to be so put,) drawn in a form, which would exclude them from the deposition, if the direct interrogatory should be suppressed. They are not, directly or by consequence, attached to or dependent upon it. On the contrary, they are independent, substantive interrogatories, which the defendants had a right to put, whether the direct interrogatory were in or out of the deposition. Suppose the answers had been favorable to the defendants, I should be glad to know, upon what plausible ground the court could now exclude them. Could the court have said; You probably intended to put these cross interrogatories, only because the plaintiff had asked the direct interrogatory; and as that is excluded, you shall not have the benefit of your cross examination? Certainly not. The defendants, not having in terms so limited the application of their interrogatories, and not having in terms made them dependent upon the direct interrogatory, could not have been shut out from the evidence of the answers elicited upon their cross examination. And if the defendants could not, how can the court, consistently with any principle, shut them out from the plaintiff? If the answers would be evidence for either party, they must be for both. The competency of the evidence depends upon its nature, and not upon the side, in whose favor it makes, after it is introduced. Judicially, it is impossible for me to say, that the defendants did ask these interrogatories solely on account of the direct interrogatory. They are perfectly pertinent to the cause, if that be struck out; and indeed, in my humble judgment, of just such a nature, as ought to have been asked, not *de bene esse*, but absolutely, to eviscerate the very truth upon a point important to the defence. But it is sufficient for me to say, that the cross interrogatories, not being in fact made

in the record dependent upon the direct interrogatory, they stand, like all other cross interrogatories, upon the general principles of evidence. There is no peril or mischief to the party in this result. If he chooses, he may make his cross interrogatories dependent; and then, whether favorable or unfavorable, the answers follow the fate of the direct interrogatory. And I cannot but think, that a different decision in this case would exceedingly perplex and impair the due administration of justice. It would enable a party to ask all sorts of questions in a general shape, relative to any matters in any antecedent objectionable interrogatory, and then to use them as evidence, if in his favor; and if otherwise, to exclude them from the use of his adversary. It would compel the court to search out the motives of all the cross interrogatories, and conjecture their object, instead of acting upon their terms and import. If a party, by cross examination of an incompetent witness on the general merits, after his incompetency is known, makes him a good witness, a fortiori a party asking a competent witness a general independent question, makes him a witness to that point.²

The next point is, that the court instructed the jury, that the representation made by the plaintiff to the defendants was sufficient to put them upon inquiry as to the time of the arrival of the *Benezet*, and that having other means to inform themselves, they were bound to make use of those means, if they thought the fact material; and that by omitting to do so, and underwriting the policy, they waived the right to receive information. Now, in order to understand the proper bearing of this exception, which does not fully and correctly state the charge of the court, it will be necessary to state some of the facts and proceedings at the trial, and the charge of the court upon this particular point. The policy was procured to be underwritten through the instrumentality of Mr. Cook, an insurance broker, who at the time of procuring it showed the underwriters a copy of his letter of instructions, and said he knew nothing more. It was in these words: "Zebedee Cook, Jr., Richard Alsop of Philadelphia. \$10,000 on profits on merchandise on board the brig *Leonora*, (Weighmar master,) at and from Callao to Baltimore, free of average and salvage; and the policy, in the case of loss, to be the only proof of interest required. The *Leonora* sailed about the 12th of April, supposed direct for Baltimore. The ship *Alfred* sailed, ostensibly for New York direct, some days before the *Leonora*, and has not yet arrived.

² *Sutton Coldfield Corp. v. Wilson*, 1 Vern. 254; *Charitable Corp. v. Sutton*, 2 Atk. 402, 403; *Jackson v. Son*, 2 Caines, 178. But see *Moorehouse v. De Passou*, 19 Ves. 433, 434, *Coop. 300*; *Vaughan v. Worrall*, 2 Madd. Ch. 322; *Bland v. Archbishop of Armagh*, 3 Brown, Parl. Cas. 620.

The Benezet arrived at New Bedford, and sailed after the Leonora. The Leonora is a small brig, and not old,—I believe not five years,—and is considered in excellent order." In point of fact, the Leonora sailed on the 15th of April, three days later than was here supposed; and the Benezet arrived at New Bedford on the 15th of July, 1831; and her arrival was reported in the Boston Commercial Gazette, a newspaper taken at the insurance office, on the 18th of the same month, as follows: "Arrived at New Bedford, 15th, the brig Benezet, Sherman master, Callao, April 20th. Brig Leonora, &c., sailed about a week previous." Now, upon this posture of the facts, it was contended by the defendants, first, that there was a misrepresentation of a material fact, namely, the arrival of the Benezet, which was represented by the letter as having recently arrived, whereas she had been in port thirty-three days; secondly, that if not so, there was a concealment of a material fact, namely, the time of arrival of the Benezet. Upon these points the court directed the jury as follows: That a misrepresentation or a concealment, to avoid the policy, must be of some fact, material to the risk, and important to guide the underwriter, not only as to the premium he should ask, but also whether he should underwrite at all. In regard to a concealment, there was this additional ingredient, that the fact must be of such a nature, as that the underwriters must be presumed to trust to the assured for information respecting it; and the concealment must be of facts not equally open to the knowledge of both parties, but peculiarly or exclusively within the knowledge of the assured. Facts of a public nature, such as the length of voyages, the course of trade and navigation, the chances of peace and war, the different effects of different seasons of the year on the risk, and other circumstances of a political or general nature, however material they might be to the risk, were supposed to be equally within the reach of both parties; and therefore the assured, even if he had superior skill, was not bound to disclose any thing respecting them. The underwriters are not presumed to trust him in such matters, but to rely on their own means of information and judgment.

Then, as to the first inquiry; Was there any misrepresentation, as to the fact of the Benezet's arrival? The words of the paper of instruction are: "The Benezet arrived at New Bedford, sailed after the Leonora." The argument insists, that the meaning is, that the Benezet has recently arrived; and it is this recency of arrival, that constitutes the very gist of the misrepresentation; for unless it is contained in the instructions, directly or by implication, so as to lead the underwriters to that conclusion, as a matter of affirmation by the plaintiff, the objection is gone. Now, it is most material to state, that there is no such word as "re-

cently" in the paper of instructions. The words are not, "The Benezet, recently arrived at New Bedford, sailed," &c.; but "The Benezet arrived at New Bedford, sailed," &c. So that there is no pretence of an express averment of the recency of her arrival. Is it implied in the language? I cannot say, that it is. She had actually arrived; and it is quite consistent with the other parts of the paper, that it should intend no more than to refer to the fact of her arrival, as one either actually or presumptively within the knowledge of the underwriters; and that it was introduced, not for the purpose of referring to the true time of her arrival, but for another fact, which might not be as well known to the underwriters, namely, that she sailed after the Leonora. It ought to be a very strong case, which should induce either a court or a jury to interpolate a word in a sentence, which is not necessary to make it sensible, or which is not fairly and clearly implied by the nature of the terms used. It should also be considered, that the plaintiff is resident in Philadelphia; and New Bedford is in the immediate neighborhood of Boston, and there is a daily mail between these latter places, and a daily report in the newspapers of both places (as the evidence shows) of all arrivals at the respective ports; and that it is usual for the presidents of insurance offices to examine the newspapers for this purpose. And in point of fact, the daily newspaper, taken by the defendants, did contain the very information, as to the time of the arrival of the Benezet. What could be more natural, then, for a person desirous of procuring insurance in Boston, than to presume the underwriters acquainted with arrivals at Boston, and the neighboring ports, it being usual to publish such facts, and for the underwriters to take notice of them? Under such circumstances, I put it to the jury to say, whether the plaintiff did intend to affirm any thing by implication as to the arrival of the Benezet being recent, or whether he only referred to the fact of her arrival, as being within the knowledge or means of knowledge of the underwriters, as well as of himself, for the purpose of stating that the Benezet sailed after the Leonora. If they should think that there was an averment, that the Benezet had recently arrived, and that the fact thus stated was material to the risk, then their verdict should be for the defendants; if otherwise, then there had been no misrepresentation affecting the policy.

Then, as to the concealment, the charge was to this effect: The concealment, as had been already stated, must be of a material fact, peculiarly within the knowledge of the party, and in respect to which the other party may be presumed to trust him; and not of such public facts as may be presumed to be equally open to both parties. Now, there was clearly no concealment of

the fact, that the Benezet had arrived, or of the port (New Bedford) at which she had arrived, which is in the neighborhood of Boston, and much nearer to that place than to the plaintiff's residence. And in this part of the case, then, there is no room for any argument about recency of arrival. The concealment is argued to be of the fact of her having arrived thirty-three days before. In the first place, was not this a fact, under the circumstances, equally open to the inquiry and ascertainment of both parties? Was it not a fact of general notoriety, and capable by the slightest diligence of being as easily ascertained by the underwriters, as by the plaintiff? The information given was sufficient to put the defendants upon inquiry, if they had chosen to do so. They asked no farther information of the fact, and they made no farther search. If the time of arrival was at all material, was it not their duty then to make it? I think it was. The notice to them was sufficient to put them upon inquiry; and they must be presumed to have notice of all facts, which under such circumstances they might reasonably know. In the next place, was the fact of such a nature, as that the defendants could be presumed to trust the plaintiff in regard to the fact? Or could he fairly be presumed to believe, that they trusted him in regard to it? Did the plaintiff intend to put them upon inquiry, or to give them notice to rely upon their own knowledge of the time of arrival of the Benezet, by the ordinary means, by which such arrivals are usually known? If so, it does not seem to me, that the defendants can now fairly turn round, and accuse him of a material concealment of a fact open to both parties, and as to which they did not trust to his knowledge, but relied upon themselves. But was the fact itself material? And if material, how far was it material? The representation was, that the Leonora sailed on the 12th of April, which was three days earlier than the time of her actual sailing. So that at the time of insurance she was represented as being out 129 days, whereas she was out only 126 days. Now, the time of the arrival of the Benezet could be no otherwise material, than with reference to the fact, whether the Leonora was out of time or not. This was a matter upon the facts so disclosed perfectly open for both parties to consider and decide upon. The underwriters are bound to know the ordinary length of passages and voyages, the seasons of the year, and the common causes, which may retard or accelerate a voyage. When the facts are given, they are bound to know, and decide for themselves, whether the vessel is out of time or not. The assured is not bound to disclose to them his opinion upon that matter. Mr. Cook stated at the trial, that he did not think the Leonora out of time, and that the ordinary passage is

from 120 to 130 days; other witnesses think the ordinary passages somewhat less; and one in particular says, that it is from 110 to 120 days. The only bearing of the time of the arrival of the Benezet was, as a collateral fact aiding or repelling the conclusion, as to the length of common voyages, and as to the Leonora being or not being out of time. For, as she sailed after, and not with, the Leonora, there was no necessary connexion in regard to winds, and weather, and passages, between them. Under such circumstances, it seems to me, that there was no concealment on the part of the plaintiff, which could affect the policy. The defendants were fairly put upon inquiry and the exercise of their own judgment; and they cannot now complain, that they did not examine or inquire farther. Their conduct amounted to a waiver of it.

Such was the substance of the charge on this point; and upon mature deliberation, I adhere to it. No case has been cited, which propounds a different doctrine; and it seems to me, that it stands confirmed by the general principles of the adjudged cases on the subject of notice, and especially by those, which have been decided in regard to concealment in cases of policies. The doctrine in *Fort v. Lee*, 3 Taunt. 381, is far more strong; for there it was held, that it was not necessary for the assured to discover to the underwriter, whether a vessel, sought to be insured at and from a port, had sailed or not. The court said: If the underwriter had wanted to know the fact, he ought to have inquired. I am, therefore, of opinion, that this exception ought to be overruled.

The next exception is, that the court instructed the jury, that there could not be a gaming policy within the meaning of the law of Massachusetts, unless both parties intended it as such. The charge of the court upon this point was to the following effect:—There cannot, strictly and abstractly speaking, be a gaming policy or other gaming contract under our law, unless both parties concur in the object. For if one intends to game, and the other does not, they do not, strictly speaking, come ad idem; and to form any contract, there must be a deliberate assent by both parties to the same thing. In the present case it is agreed on both sides, that the defendants never intended to enter into a gaming policy; and therefore it seems to me, that in a strict sense it cannot be treated as a gaming contract. But I do not think this is of any real importance in the cause, because if, as is conceded, the defendants did intend only to underwrite a policy substantially on interest, and they have been misled by the plaintiff to underwrite one not upon interest, it is in construction of law a fraud upon them, and the policy is void. On the other hand, if both parties intended bona fide a policy on interest, and the plaintiff had a substantial interest on board, and the overvaluation was bona fide made, and not with

an intention to defraud or mislead the defendants, then the policy is good, and the plaintiff is entitled to recover. The question, then, in this aspect, resolves itself into two points; first, whether there has been a great over-valuation of the profits upon the property on board; and if so, secondly, whether it was bona fide made, or for the purpose of fraud or deception. If the plaintiff intended it to be a gaming policy, and concealed it from the defendants, it is void, not as a gaming policy, but as a fraud. Such was the charge.

Was the court wrong, then, in saying, that the policy was not a gaming policy, in a strict sense, under the law of Massachusetts? It is clear, that the law of this state must govern in this case; and I confess, that I am unable to perceive any error in this part of the charge. To form a contract, both parties must concur in the same purpose. A gaming contract *ex vi terminorum* is a contract, in which both parties agree to game. And here both parties never intended to game. This is admitted. How, then, could the court hold a different language, without overturning the first element of all contracts, mutual consent in the same thing? But let us see, what contracts are deemed by the law of Massachusetts gaming contracts. The statute of March 4, 1786, (St. 1785, c. 58,) declares, "that all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration shall be for any money or other valuable thing whatever, won by gaming, or playing at cards, dice, or any other game or games whatsoever, or by betting on the side or hands of any person gaming, or for the reimbursing or repaying any money, knowingly lent or advanced at the time and place of such play to any person or persons so gaming or betting, or that shall during such play so play or bet, shall be void, and of no effect." It afterwards provides for the recovery back of money lost at play; and also inflicts penalties on the winner or person taking such security. Now, it is most manifest, that a policy of insurance entered into without interest is not a gaming contract or security within the purview of this act. It is neither within the words nor within the intent. And there is no statute of Massachusetts, which does prohibit gaming policies in terms. If prohibited at all, they are prohibited solely by the common law. And so was the doctrine of the supreme court of the state, in *Amory v. Gilman*, 2 Mass. 1.

It is true, that, in a loose sense, a policy underwritten knowingly by both parties without interest, is among us sometimes spoken of, both at the bar and on the bench,

as a gaming contract. But this is not perfectly correct in legal language. It is more properly called a wager policy, at least in the sense of our law, where the word "gaming" has a limited and distinctive sense in the statute book.⁴ And accordingly in *Amory v. Gilman*, 2 Mass. 1, the court uniformly treat a policy without interest, as a wager policy, and give it that appropriate appellation. Nor is this a mere criticism upon language; for no one could pretend, upon sound reasoning, that a wager did not purport a unison of opinion and agreement of both parties to the same thing. A wager on one side would be a novelty in jurisprudence. The very form of a declaration on a wager demonstrates the truth, that the contract must involve a mutuality of consent, as to the wager and the risk run.⁵

If we pass to the jurisprudence of England, we shall find the same distinctive appellation applied by elementary writers, by the bar, and by the bench, to characterize policies without interest.⁶ Gaming is a species of wager; but in a strict sense all wagers are not gaming contracts, though they are often figuratively so called. Marshall and Park entitle their chapters on policies without interest, as *wager policies*.⁷ The statute of 19 Geo. II. c. 37, after reciting, that policies without interest have been productive of pernicious practices, and have introduced "a mischievous kind of gaming," proceeds to declare, "that no insurance shall be made on any ship, &c., or any goods, &c., interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the insurer; and that every such insurance shall be void."⁸ But the statute does not apply to insurances for foreigners. It is doubtless with reference to the very language, as well as the objects of this statute, that the bar and bench sometimes speak of policies without interest, as gaming policies. But (as I have said) the general and more exact appellation is *wager policies*. Thus, in the case of *Kulen Kemp v. Vigne*, 1 Term R. 304, where the policy was without interest, Lord Mansfield said: "This is a wagering policy." Mr. Justice Ashurst used similar language. And Mr. Justice Buller said: "Policies are of two sorts, either upon interest, or by way of wager." "This is a wagering policy." And again in *Da Costa v. Firth*, 4 Burrows, 1966, 1969, which was a policy not within the statute, Lord Mansfield said: "It is a mixed policy, partly a wager policy, partly an open one; and it is a valued policy, and fairly so, without fraud or misrepresentation. There-

⁴ See 3 Kent, Comm. (2d Ed.) Lect. 48, p. 275.

⁵ See *Kent v. Bird*, Cowp. 583.

⁶ 1 Marsh. Ins. bk. 1, c. 4, § 2; *Park, Ins. c. 14*.

⁷ Marsh. Ins. bk. 1, c. 4.

⁸ Id. (2d Ed.) p. 127, § 2.

¹ See *Wolcott v. Eagle Ins. Co.*, 4 Pick. 429, 437.

fore, the loss having happened, the insured is entitled to recover, as for a total loss. The insurer agreed to the value, and is concluded to dispute it."⁹

I do not mean to deny, that policies not on interest are sometimes called gaming policies, though they are more generally called wagering policies.¹⁰ But what I do mean to assert is, that, whether the one phrase or the other is used, it imports the same thing, that is to say, that the parties mutually and knowingly consent to the gaming or wager; and that there cannot be a gaming or a wagering policy without such mutual consent. In all the cases in England on the subject of wager policies it will be found, that the contract either included in its terms the prohibited stipulations of the statute of Geo. II. c. 37, as to interest, or no interest, &c.; or that other equivalent words were used in the policy. The principle of law in England is, that every policy is to be deemed a policy on interest, unless it appear otherwise on the face of it. Lord Chief Justice Mansfield, in delivering the opinion of the court of exchequer chamber, in the case of *Cousins v. Nantes*, 3 Taunt. 513, 523, said: "Every policy must be taken to be a policy on interest, unless something be stated showing the contrary." There is this difference between policies in America and policies in England, containing stipulations, like those in the present policy, "interest or no interest," or "without farther proof of interest than the policy," that in the latter country, such policies being prohibited as wager policies, the insertion of the prohibited words in the policy is proof de facto, that they are mere wagers; whereas in America such policies are not treated as necessarily purporting to be wager policies; but they are deemed policies on interest, if the parties so understood, and agreed. So it was held in *Amory v. Gillman*, 2 Mass. 1, and in *Clendinning v. Church*, 3 Caines, 141. Prima facie they so import; but the implication may be rebutted by proofs or admissions.

Now, in the present case, it is (as I have already stated) admitted, that the defendants meant to enter into a policy on interest, and not into a wager policy. They did not intend to wager or game, but to insure substantive interests. Whatever, then, the terms used are, the policy is to be deemed in point of law an interest policy. The plaintiff insists, that he meant it to be an interest policy; and if he had a substantive interest on board the ship, capable of being insured, I cannot perceive upon what principle the defendants can now treat it as a gaming policy. The policy was a wager policy, as to both parties, or as to neither party. It has not a double character, as a

policy on interest as to one, and not as to the other. If it be a policy on interest, then undoubtedly the plaintiff cannot recover, unless he shows an interest; for, in Massachusetts, at least, the doctrine of *Goddart v. Garrett*, 2 Vern. 269, is in full force. But, whether the court were in a strict and technical sense right in this view of the matter or not, I still think, that the court did put the law applicable to a case of this sort correctly to the jury. The court said, that if the defendants meant to insure on interest, and the plaintiff meant a gaming policy, it was void; so that the point as to the gaming was put as favorably for the defendants, and as directly to the jury, as it could be.

The next exception is, that the court instructed the jury, on the point of valuation, that the plaintiff was entitled to a verdict, unless there was an over-valuation made by the plaintiff fraudulently, and with a design to deceive the defendants. To understand this exception fully, it is proper to state, that the line of argument of the counsel for the defendants on this point was, that if there was a designed gross over-valuation of the profits by the plaintiff, (whatever might be the moral character of the transaction,) it was in point of law a constructive fraud upon the defendants, which avoided the policy; and that a trivial interest would not save the policy. And the court expressly gave the same opinion to the jury. No point was made or argued, as to any over-valuation by mistake. But after the close of the argument, the counsel for the defendants requested the court to instruct the jury, that if the plaintiff expected a larger shipment of goods than was actually shipped, and made his valuation of profits upon that basis accordingly, then, that he was entitled to recover only pro rata, as the actual shipments bore to the expected shipment. And to this doctrine the court assented; and instructed the jury accordingly.

The charge of the court is now complained of, because it put the case of gross over-valuation, as a question of fraud, solely to the jury. Now, in so doing, it did no more than repeat the very doctrine asserted by the defendants' counsel; and it was no part of its duty to suggest any other points, which in certain postures of the case might possibly have been urged by counsel. But I am yet to learn, that the law is otherwise than it was stated by the court. By the law of Massachusetts valued policies are valid in general; and certainly valued policies on profits fall within the same rule.¹¹ What then is the effect of the valuation in point of law? It is, that it shall, in all cases of

⁹ See *Lucena v. Craufurd*, 2 Bos. & P. (N. R.) 269, 321-323; *Cousins v. Nantes*, 3 Taunt. 513, 515, 523.

¹⁰ See *Lowry v. Bourdieu*, Doug. 469, 470.

¹¹ See *Grant v. Parkinson*; *Marsh. Ins. c. 3, § 3, p. 97*; *Barclay v. Cousins*, 2 East, 544; *Henricksen v. Margetson*, Id. 549, note; *Abbott v. Sebor*, 3 Johns. Cas. 39; *Phil. Ins. c. 3, § 3, p. 46*; *Patapoco Ins. Co. v. Coulter*, 3 Pet. [28 U. S.] 222, 238.

total losses, where there is a substantial interest, and bona fides, be conclusive in respect to the value. It is true, and it was so stated by the court, that a trivial interest will not save the policy. Neither will a substantial interest, if there is an intent to deceive or mislead the underwriters. And a gross over-valuation affords a presumption of fraud. But if the policy is procured in entire good faith; if there is no intent to deceive; and if there is a substantial interest; then the over-valuation, whatever it may be, is unimportant. The assured is entitled to recover upon general principles of law. And, indeed, under such circumstances, the underwriters are estopped to press the inquiry.¹² And in the very policy before the court, the defendants not only agreed to the valuation, and received the premium for it; but they expressly stipulated, that the policy should be the only proof of interest required. Upon what ground, other than fraud, are they entitled to escape from such a stipulation? If the policy is upon interest, and the valuation fairly made, and they agreed to be bound by it, and they have not been deceived; what right can they have to insist, that they ought not to perform their agreement?

No case has been cited, which affirms a different doctrine; and there are many, which inculcate this doctrine in cogent terms. In *Lewis v. Rucker*, 2 Burrows, 1171, Lord Mansfield said: "It is settled, that upon valued policies the merchant only need prove some interest to take it out of the statute of 19 Geo. II., because the adverse party has admitted the value; and if more was required, the agreed valuation would signify nothing. But if it should come out in proof, that a man had insured £2,000, and had an interest on board to the value of a cable only, there never has been, and I believe there never will be a determination, that by such an evasion the act of parliament may be evaded. There are many conveniences from allowing valued policies. But where they are used merely as a cover to a wager, they would be considered as an evasion." Lord Mansfield, in the case of *Da Costa v. Firth*, 4 Burrows, 1969, in the passage already cited, held the same doctrine. I am not aware, that a different doctrine has been anywhere established.¹³ If the over-valuation be bona fide and innocent, the policy is good; if fraudulent, it is void.

Then, as to the other point, in which the defendants' counsel prayed the instruction of the court on the effect of an expected shipment and an actual shipment, complaint

is made, that it was not made sufficiently intelligible to the jury. How that matter was, I cannot say. But I am bound to presume, that they understood the point. Certainly, if it had been deemed very material in the actual posture of the case, it might have been commented upon by the counsel for the defendants; and the court would have made any further explanations, which they should have requested. But the truth is, that in the actual state of the evidence there were no facts to raise the point; and so the evidence was stated to the jury at the suggestion of the defendants' counsel. At the time of the insurance, the plaintiff had a perfect knowledge of all the shipments addressed to him by the *Leonora*; and if so, there was no ground to say, that he then expected none.

The next exception is, that the verdict is against evidence, or at least against the weight of evidence. The argument is, that the evidence in the cause established, that the over-valuation was so gross, that it was necessarily presumptive of fraud; that it could not enter into the reasonable expectations of any man to make such profits on such a voyage; and that the jury have been wholly mistaken in their verdict. In considering questions of this nature, I confess myself among those judges, who are very reluctant to intermeddle with the verdicts of juries in mere matters of fact. There was a time, when courts were disposed to go an extravagant length on this subject, and to set aside the verdict of the jury, merely because, in the opinion of the court, the weight of evidence was on the other side. This was, indeed, substituting the court for the jury in trying the credibility of testimony, and the weight of evidence. For one, I am not disposed to proceed far upon this dangerous ground; and in matters of fact, I hold it to be my duty to abstain from interposing with the verdict of a jury, unless the verdict is clearly against the undoubted general current of the evidence, so that the court can clearly see, that they have acted under some mistake, or from some improper motive, or bias, or feeling.¹⁴ I adopt the language of Lord Ellenborough, in *Carstairs v. Stein*, 4 Maule & S. 192, 199: "The question before us is not, whether the verdict given in this case is such, as we should ourselves have given; but whether, having been given by a jury, to whom the whole case was fully left in point of fact, and to whom the law upon the subject was distinctly stated, it ought to be set aside, upon the grounds of the argument now suggested to us, namely, that they have drawn an erroneous conclusion." And upon a question of fraud in fact, which is made up of so many ingredients, and is so peculiarly within the province of a jury, I do not hesitate to say, that I should

¹² See 2 Kent. Comm. (2d Ed.) Lect. 38, pp. 272, 273, and *Id.*, note (d.)

¹³ See *Phil. Ins. c. 14, § 1*, pp. 305, 306; *Marine Ins. Co. v. Hodgson*, 6 Cranch. [10 U. S.] 206; *Feise v. Aguilar*, 3 Taunt. 506; *Coolidge v. Gloucester Ins. Co.*, 15 Mass. 341, 344.

¹⁴ See *Thurston v. Martin*, [Case No. 14,018;] *Blunt v. Little*, [*Id.* 1,578.]

be more reluctant to interfere, than in many other cases.

Now, upon the evidence, it was clear, that there could not be any profit upon bullion; for it was said, that none is ever made or expected. Upon the hides, according to the calculations, variously made by the plaintiff, there might be a profit from \$1700 to \$2500. On the other hand, by the calculations offered by the defendants, and supported in a good measure by the evidence, there might under some aspects be even a loss, and at all events there could not be a profit exceeding \$100 or \$200. These calculations were submitted to the jury; and the question was left to them in this way, whether the over-valuation of the profits was designed to mislead the defendants into underwriting a policy not in fact on interest. If they thought it was, then, the policy was void. Their verdict in effect was, that the over-valuation was not fraudulent, but bona fide. And if the court now sets aside their verdict, it must be, because the court now clearly sees, that the jury ought upon the evidence to have found the over-valuation fraudulent. If it was a measuring cast, then, as the onus probandi was on the defendants, the verdict ought not to be disturbed. Now, certainly, I have a good deal of difficulty upon the evidence in seeing, how such an over-valuation could have been reasonably made. But, on the other hand, I have a good deal of difficulty in imputing fraud to the plaintiff. I do not know, that any over-valuation, however great, if it steers wide of a wager and a fraud, can be otherwise impeached. There is something, too, in the nature of an insurance on profits, which distinguishes it from any other insurance, whether on ships, or on goods, or on freight. The latter are generally susceptible of an exact valuation. But profits are not. In their very nature they are contingent and speculative; and upon them men's judgments, as well as their imaginations, run wide from each other. It has been truly said at the argument, that there can be no standard of valuation of profits. They are matters of expectation. A policy on profits is not an insurance upon results, but upon expectations. The party insures, not what profits he would actually make, but what he expected to make. It is difficult to measure men's expectations. There are complexional differences of mind on such subjects. There are vast distances between the moderated views of the timid and cautious, and the high-colored views of the sanguine and enterprising.

It is not sufficient to justify the court in setting aside the present verdict upon this ground, that it should doubt whether the over-valuation was innocent. It must clearly see, that it was fraudulent. Suppose the verdict should be set aside, and upon a new trial the jury were to find for the defendants, would that be entirely satisfactory? Might not the plaintiff fairly contend, that

it was only verdict against verdict on a question of fact; and, therefore, that there should be a third trial to settle the controversy? I am not insensible of the force of the defendants' argument on this point. But after all, it turns upon this, that the court must find the fraud, which the jury refused to find. In *Coolidge v. Gloucester Ins. Co.*, 15 Mass. 341, 344, the freight was valued at three times its real value; and yet the court refused to open the policy. In the case of *Patapsco Ins. Co. v. Coulter*, 3 Pet. [28 U. S.] 222, which was upon a policy on profits, valued at \$20,000, the supreme court held, that it was not necessary to show, that any profits would have been made. Now, this must have proceeded upon the ground, that, if the valuation was bona fide, however great, it was of no consequence, whether it could or could not be shown, that profits would have resulted from the voyage. The court asked, what human calculation or human imagination could have furnished testimony on a fact so speculative and fortuitous? Upon the whole, upon this point, whatever might be the scruples of my own mind upon the evidence, if I were sitting in the jury-box, I cannot say, that it clearly appears to me, that the jury were wrong in finding, that the over-valuation was not fraudulent. I am not bold enough to disregard their judgment in a case fairly before them, upon a matter of fact purely and fitly within their province.

I come, then, in the last place, to the new evidence, discovered since the trial; and that is, that a prior policy was underwritten at New York on profits valued at \$10,000, on the same voyage and risk, which has been paid. This is perfectly consistent with the plaintiff's case, and furnishes no new matter of defence; since in the present policy the profits are valued at \$20,000; so that the amount is sufficient to cover both policies. It is, therefore, at most, the case of newly discovered evidence to an old point of defence. Now, the objections taken to it, as a ground for a new trial, are, in the first place, that the defendants at the trial made the point, that there was in all probability another policy on profits, and yet that they used no diligence, though they were thus put upon inquiry, to ascertain the fact. And what is still more strong, that having a clear right in this court upon motion to have compelled the plaintiff in this very cause to disclose the fact, whether there was any prior policy or not, they chose to go to trial without making the inquiry, though it is plain, that ordinary diligence would have brought it out. There is great force in this reasoning; and no answer was given to it at the argument, which entirely satisfied my mind. To set aside a verdict under such circumstances, on account of such newly discovered evidence, would be to encourage laches, and want of diligence, in regard to matters manifestly

open to inquiry, under the common priority clause in our policies. It would enable the party to take a double chance for a verdict. But what is the nature of the new evidence? It is said, that it is not merely cumulative, because it shows that the plaintiff had already received \$10,000 profits on the same voyage. But what has that to do with his title to recover \$10,000 more, if the profits are bona fide valued in the second policy at \$20,000? It is, therefore, merely as it bears upon the point of over-valuation, that it has any relevancy to the cause. And I cannot say, that I see much in it, in a legal sense, even under this aspect; for, the valuation being \$20,000, the argument as to the over-valuation is precisely the same in form and pressure, in point of law, (whatever it may be as matter of remark to a jury,) whether the plaintiff stood underwriter for the remaining \$10,000 or procured it to be insured. In either view, the valuation must stand or fall, as a valuation for \$20,000 and not for \$10,000. If, indeed, there had been expected shipments not actually put on board, and so an apportionment might have been required, then it might have become more material. But this, as I have already said, was excluded by the state of the facts. I can contemplate this evidence, then, in no other light, than as cumulative evidence. Now, it has been long established, as a just and reasonable practice, not to grant a new trial to introduce new witnesses, or new evidence, to points before in controversy. And there would be no safety in trials upon any other doctrine. *Steinbach v. Columbian Ins. Co.*, 2 Caines, 129; *Smith v. Brush*, 8 Johns. 84, and *Williams v. Baldwin*, 18 Johns. 489, are directly in point. The cases of *Gardner v. Mitchell*, 6 Pick. 114; *Inhabitants of Yarmouth v. Inhabitants of Dennis*, Id. 116, note; *Chatfield v. Lathrop*, Id. 417, and *Baker v. Briggs*, 8 Pick. 122, adopt the same principle.¹³ And it seems also to prevail in England.¹⁴

I have thus gone over all the grounds urged with so much earnestness and ability in favor of a new trial. The conclusion, to which my mind has arrived, is, that the jury have not been misdirected in any matter of law; and that as to the matter of fact, it was fairly open before them, and peculiarly within their province; and I cannot judicially say, that the conclusion, to which they have come, is clearly erroneous, and must have arisen from some unquestionable mistake, or some improper motive or bias. In my judgment, therefore, the motion for a new trial ought to be overruled.

New trial denied.

¹³ See, also, cases in *Bigelow, Dig. Review & New Trial*, C. k., p. 681; *Astor v. Union Ins. Co.*, 7 Cow. 202; *Ackley v. Kellogg*, 8 Cow. 223; *Douglass v. Touzey*, 2 Wenu. 352; *Smith v. Hicks*, 5 Wend. 48.

¹⁴ See *Dickenson v. Blake*, 7 Brown. Parl. Cas. 177; *Carstairs v. Stein*, 4 Maulé & S. 192, 199; *Sprague v. Mitchell*, 2 Chit. 271.

Case No. 263.

ALSOP et al. v. MAXWELL.

[2 Blatchf. 557.]

Circuit Court, S. D. New York. Feb. 1853.

CUSTOMS DUTIES—ENTRY AND APPRAISAL—VALUE FOREIGN COIN.

The doctrine of the case of *Dutilh v. Maxwell*, [Case No. 4,207,] applied to importations from Chili, Peru, and Bolivia.

[See, also, *Alsop v. Maxwell*, Case No. 264; *Grant v. Maxwell*, Id. 5,699; *Fiedler v. Maxwell*, Id. 4,760.]

At law. This was an action [by Joseph W. Alsop, Jr., and Henry Chauncey] against [Hugh Maxwell,] collector of the port of New York, to recover back an alleged excess of duties paid him. A verdict was taken for the plaintiffs, subject to the opinion of the court. The facts are stated in the opinion of the court.

John S. McCulloh, for plaintiffs.

J. Prescott Hall, Dist. Atty., for defendant.

BETTS, District Judge. The plaintiffs, in May, September and November, 1851, made four several entries, at the custom-house in New-York, of merchandize imported from Valparaiso and Coquimbo, in Chili, and invoiced at those ports in the months of January, February, May and June, 1851, made up in the paper currency of the country. Each invoice was accompanied by a consular certificate stating the specie value of the currency in which the invoice prices were exhibited. The collector exacted duties upon the nominal value of the merchandize, which was paid by the plaintiffs under written protests against the legality of the demand. The plaintiffs also proved, on the trial before the jury, that the currency was debased or depreciated to the amount of the reduction demanded on the entries. It is unnecessary to detail the reasoning in support of the justness of this claim. It is sufficiently set forth in several cases recently decided by this court. I find, also, that the circuit court in Massachusetts coincides with these principles. I have been furnished with an opinion given by Mr. Justice Curtis, in that court, in October last, in which he holds the collector responsible to an importer for an excess of duties exacted on goods imported from Chili, on facts very analogous to those proved in the present case. Judgment is, therefore, rendered for the plaintiffs, with costs.

NOTE, [from original report.] In the case of *Riley v. Maxwell*, [Case No. 11,838,] decided at the same time, the same doctrine was applied to importations from Peru and Bolivia, and to invoices made up in the depreciated paper currency of those countries.

¹[Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

Case No. 264.

ALSOP et al. v. MAXWELL.

[3 Blatchf. 399.]¹Circuit Court, S. D. New York. Jan. 23, 1856.
CUSTOMS DUTIES—ENTRY AND APPRAISAL—VALUE
OF FOREIGN COIN—CONSULAR CERTIFICATE.

Where, on an importation of copper from Chili, the invoice and entry were made out in dollars, in the currency of Chili, and were accompanied by a consular certificate, which showed that the Chili dollar was worth but ninety cents in United States currency, but the collector assessed duties on the invoice as made out, without allowing for the depreciation: *Held*, that the depreciation should have been allowed for, and that the excess of duties paid could be recovered back.

The case of *Craig v. Maxwell*, [Case No. 3,334,] cited and approved.

[See, also, *Alsop v. Maxwell*, Case No. 263; *Grant v. Maxwell*, Id. 5,699; *Piedler v. Maxwell*, Id. 4,760.]

At law. This was an action [by Joseph W. Alsop, Jr., and another] against [Hugh Maxwell] the collector of the port of New York, to recover back an excess of duties paid by the plaintiffs on a quantity of copper imported by them from Chili, in January, 1851.

John S. McCulloch, for plaintiffs.
Benjamin F. Dunning, for defendant.

INGERSOLL, District Judge. The original invoice of the copper in this case, was made out in the currency of Chili, which was depreciated about 10 per cent.; and a consular certificate, which accompanied the invoice, showed that the currency in which the invoice was made out, was so depreciated. The invoice, with the consular certificate attached, was presented at the custom-house, upon the importation of the copper. The entry was made out in conformity with the invoice. In Chili the doubloon, worth in fineness and weight, in the United States, only about sixteen dollars, is a legal tender at seventeen dollars and one quarter; and accounts and purchases in Chili are settled and paid for in doubloons, and are stated in dollars at the rates at which doubloons there pass current in commercial transactions, which is about 10 per cent. depreciation from the value fixed by law. The consular certificate shows that, in Chili, the true value of eight reals, or one dollar, of the currency of Chili, is ninety cents, estimated in Spanish or American dollars. The value of the copper, as set down in the invoice, was \$21,957 07, as made out in Chili currency. The plaintiffs claimed that the duties to be paid in American or Spanish milled dollars, should be paid on the value of the invoice in American or Spanish dollars, and not on the value of the invoice in the currency of Chili. This claim of the plaintiffs the collector disregarded, and

¹[Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

charged and collected the duties in American dollars, upon the invoice as made out in the currency of Chili.

It was decided by this court, in the case of *Craig v. Maxwell*, [Case No. 3,334,] that, upon a state of facts such as exists in this case, the plaintiffs could recover. The object of the tariff law was, that upon goods of the kind imported by the plaintiffs, a certain ad valorem duty should be paid upon their value in the country from which they were imported. The collector disregarded the consular certificate, and, by the rule adopted by him, a greater ad valorem duty has been exacted than was authorized by law. Judgment must be rendered in favor of the plaintiffs, for the excess, with interest, to be adjusted at the custom-house.

Case No. 265.

ALSTON v. COHEN.

[1 Woods, 487.]¹

Circuit Court, S. D. Georgia. Nov. Term, 1872.

EXECUTORS AND ADMINISTRATORS—POWERS—TITLE
TO THE ESTATE—ACTIONS—PARTIES.

1. An executor or administrator is the trustee and proper representative of all persons interested in the personal estate, and until the final distribution of the estate, holds both the legal and equitable title thereto.

2. Consequently, when he is made a party to a bill filed by a distributee to sell the personal property of an estate and divide its proceeds, the other distributees are not necessary parties.

In equity. Submitted on demurrer to the bill for want of equity.

Jos. P. Carr, for complainant.
W. H. Hull, for defendant.

WOODS, Circuit Judge. The bill alleges in substance that complainant is the widow of Joseph Alston, Jr., formerly a citizen of South Carolina, but at his death a resident of New York, who died in April, 1861, intestate, seized and possessed of a large real and personal estate, and leaving his aunt Sarah, wife of John Izard Middleton, his aunts Charlotte M. Alston, Anna L. Alston, Mary Ashe, wife of Leaman Deas and the complainant, as his next of kin and distributees. That by the law of South Carolina, upon the death of said Joseph Alston, two-thirds of his real and personal estate descended to complainant and the remaining one-third was divisible among the said aunts of the deceased. That said John Izard Middleton took out letters of administration on the estate of Alston in Georgetown district, South Carolina, took possession of the same and paid all the debts. That in the spring of 1863, Leaman Deas and Mary Ashe, his wife, brought their bill in equity in the Charleston district against John Izard Mid-

¹[Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

dleton and Sarah his wife and the other distributees, except complainant, praying an account, sale, partition and distribution of the said estate. That the court made an order in 1863 directing a sale of all the personal estate of said Joseph Alston. That James Tupper, one of the masters of the court, in pursuance of said order, on November 25, 1863, sold certain bonds and shares of capital stock particularly described in the bill. That defendant became the purchaser thereof for the price named in the bill, and took possession of and appropriated the same to his own use.

The proceeds of this sale were divided among the other heirs and distributees to the exclusion of the complainant, or invested in bonds of the Confederate States which have become wholly valueless, and are now in possession of said master or his successor in office.

Complainant claims that as she was in no way a party to the said bill, her right to a share of the bonds and stocks can in no way be affected by the decree, that the master could only by the sale transfer the right, title and interest of the parties before the court, and that the purchaser became a tenant in common with complainant, or by taking possession of the bonds, has become a trustee for complainant, and is bound to account to her therefor.

The bill prays that defendant may be required to transfer to complainant two-thirds of the bonds and stocks so purchased by him, or to account for two-thirds of their value. The defendant has filed a demurrer to the bill for want of equity. I think the demurrer is well taken.

The question to be solved is this: Was the complainant bound by the proceedings and decree in the case in equity in the Charleston district? If she were a proper and necessary party she is not bound, but if otherwise, if her interests were represented by a party before the court, she is.

The general rule is, that inasmuch as the executor or administrator is the trustee and proper representative of all persons interested in the personal estate, and has a duty cast upon him of protecting it against improper demands, it is not necessary or proper to join either a pecuniary or residuary legatee or the next of kin as a party to a bill against an executor or administrator for an account of the personal estate, however interested such person may be to contest the demand which has occasioned the suit. 2 Williams, Ex'rs, 1729; Brown v. Dowthwaite, 1 Madd. 446. Until the final distribution of an estate, the administrator has both the legal and equitable title to the personalty. If therefore, the administrator is a party to a bill asking a sale and distribution which is ordered, the purchaser at the sale takes the title of the administrator.

The administrator of Alston was a party to the bill before the Charleston chancery

court. He held the title to the personal estate, and was the proper representative of all persons interested therein. A decree to which he was a party ordering a sale, and a sale made in pursuance of such decree therefore, conveyed his title to Cohen, the purchaser. If Cohen acquired title the complainant has no claim upon him, either as tenant in common with her or as trustee.

Case No. 266.

ALSTON v. MANNING.

[Chase, 460.]¹

Circuit Court, D. South Carolina. June Term, 1869.

COURTS—FOLLOWING STATE PRACTICE — SUMMONING JURY.

1. The practice of the state courts in relation to summoning juries, whether statutory or otherwise, does not become the practice of the United States courts until expressly adopted by the latter.

[Cited in U. S. v. Richardson, 28 Fed. 69.]

2. A jury was summoned according to what had for a long time been the practice of the courts, and the statutory requirements of the state of South Carolina. But before the summoning of the jury, those statutory requirements and the practice of the state courts had been materially modified. The jury is properly summoned.

Motion for continuance. Under the laws of South Carolina prior to 1861, the juries in the state courts were required to be white persons owning a certain amount of property.

The circuit court of the district of South Carolina made a rule regulating the summoning of juries in conformity with that law. This rule was modified subsequent to 1866, so as to strike out all distinctions on account of race or color, but retained the property qualification for jurors after the modification of the rule of court. The state of South Carolina passed an act in 1868, abolishing all distinctions on account of race, color, or property qualifications, as to jurors in the state courts, and provided a method of selecting them in each county, whites and blacks to be summoned in proportion to the population of the races in the respective counties.

The venire for the jury to this term of the circuit court ran in accordance with the modified rule of 1866, directing the sheriff to summon persons having the stated property qualifications, without regard to color. On the return of the writ executed, and the assembling of the jury summoned under it, the defendant moved the court to continue the cause until the next term. 1. Because the rule of court under which the jury was summoned did not conform to the law of the state in existence at the time the rule was made, in that the law required white

¹[Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

persons alone to be summoned, while the rule required them to be summoned without distinction on account of race or color. 2. Because the said rule did not conform to the law of the state in existence at the time the rule was executed. The state law having abolished property qualifications, while the rule maintained it.

CHASE, Circuit Justice. The answer to the application for continuance, made in behalf of the defendant, must depend on the construction of the acts of congress relating to juries. If the proposition maintained by him is correct, that the jury now in attendance upon the court is not constituted in conformity with those laws, he can not be required to submit his cause to its determination.

The only act which it is now necessary to consider is that of July 20, 1840. This act provides that the qualifications and exemptions of jurors in the courts of the United States shall be the same as in the highest courts of the state in which trials by jury are held, and that they "shall be designated by ballot, lot or otherwise, in the mode practiced in such courts, as far as practicable, by the courts of the United States and their officers." The act of the state, in accordance with which was the mode of designating jurors practiced in the state courts when the jury now here was selected, was passed in 1859. The rule of this court conformed to that act as far as practicable. It had been modified only so far as to strike out distinction on account of color. It retained as the law of the state and the practice of the state courts, a property qualification.

It is not denied that the jury was constituted according to the law and practice of the state until last year. Then the property qualification was abolished; and later, within the last two or three months, a rule has been prescribed for the selection of juries in the several counties, from the white and colored voters in the proportion of their respective numbers. And the question is, did these late laws become at once the rule of this court so far as to make void the designation of the jury selected in conformity with the prior law and the existing rule? It is only necessary to look at the act of congress to determine this question. That act does not make the acts of the state legislature alone, but those and the practice of the state courts the guides of the United States courts in this matter. That practice, of course, is presumed to be in conformity with these acts, and is most readily ascertained by reference to them. But neither the state law nor the state practice has instantaneous operation in the courts of the Union. The state practice can only be introduced as far as practicable, and rules are necessary to determine how far it is practicable, and to introduce it to that extent. Accordingly the act provides that "the courts

of the United States shall have power to make all necessary rules and regulations for conforming the designation and impanelling of juries, in substance, to the laws and usages now in force in such state." This was done by the rule in conformity with which this jury was designated and impanelled. In order that future changes in state law and practice might be incorporated into the practice of the national courts, the act proceeds to provide: "And further shall have power, by rule, or order, from time to time, to conform the same to any change in these respects which may be hereafter adopted by the legislatures of the respective states for the state courts." Under this provision, this court has power to provide, and will doubtless recognize the duty of providing, by rule, for the future designation of juries in substantial conformity with the recent legislation. But, until some rule or order has been made to that effect, that legislation has, and under the act of congress can have, no operation here. It follows that the present jury was lawfully designated and impanelled, and is not affected by the legislation referred to.

The existing rule rejects distinction on account of color. The law now rejects, also, distinction on account of property. It will be the duty of the court to provide, by rule, for the selection of impartial, intelligent and upright—in one word, competent—jurors without regard to either of these adventitious distinctions. The motion for continuance must be denied.

Subsequently, the following rules were adopted by the court, CHASE, Circuit Justice, presiding:

To conform the manner of designating the juries, in substance, to the laws and usages now in force in the state of South Carolina, ordered,

1. That the clerk of the circuit court, and the marshal of the United States for the district of South Carolina, do make up a jury list from the state at large, of three hundred names of citizens, qualified under laws of the state of South Carolina to serve in the highest courts of the state, in which juries are used, in the following manner, to wit: they shall call upon the several collectors of internal revenue of the several collection districts in the state of South Carolina to furnish each, from the several counties in their respective districts, the names of one hundred citizens, to be selected by them, and such as they think well qualified to serve as jurors, being persons of good moral character, sound judgment, and free from all legal exceptions. Provided, if any one of the said collectors of internal revenue shall, after thirty days' notice in writing from the clerk and marshal, neglect or refuse to furnish the list of names as hereinbefore provided, then the clerk and marshal shall proceed to select a list of jurors from the

several counties in the collection district of the collector neglecting or refusing to furnish a list as aforesaid.

2. Of the lists made up as aforesaid, the clerk and marshal shall cause the names to be written, each one, on a separate paper or ballot, and shall roll up or fold the ballots, so as to resemble each other as much as possible, and so that the names written therein shall not be visible on the outside, and they shall place the ballots in a box to be kept by the clerk for that purpose. This box shall be securely locked and sealed, and only opened at the time and for the purpose of drawing jurors. The list of jurors and the box as thus made up shall be the list and box out of which jurors shall be drawn for the year ensuing.

3. When jurors are to be drawn, the clerk and marshal shall attend at the clerk's office or some other public place appointed for the purpose by a judge of the court. The ballots in the jury-box shall be shaken and mixed together, and the clerk or the marshal, in the presence of a judge of the court, unless necessarily absent, without seeing the names written thereon, shall openly draw therefrom the number of jurors required. If a person so drawn is exempt by law, or is unable by reason of sickness or absence from home to attend as a juror, his name shall be returned into the box and another drawn in his stead.

4. A jury-list shall be made up in the manner herein indicated, during the months of April and May, annually; provided, that the jury-list for the present year shall be made up as soon as practicable after the passage of this order.

5. Grand jurors shall be drawn and summoned in the same manner as jurors for trials; and when drawn at the same time as jurors for trials, the persons whose names are first drawn, to the number required, shall be returned as grand jurors, and those afterwards drawn shall be jurors for trials.

6. Grand and petit jurors to serve at any stated term of the court, whether at Charleston or at Columbia, shall be drawn, and summons therefor issued, at least fifteen days before the commencement thereof.

7. No more than thirty-one persons to serve as petit jurors, or nineteen to serve as grand jurors, shall be drawn and summoned to attend, at one and the same time, any court, unless the court shall otherwise order.

8. When by reason of challenge or otherwise, a sufficient number of jurors duly drawn and summoned can not be obtained for the trial of any cause, civil or criminal, the court shall forthwith cause jurors to be returned from the bystanders to complete the panel. The jurors so returned from the bystanders shall be returned by the marshal or his deputies, and shall be such as are qualified and liable to be drawn as jurors according to the provisions of law.

9. No person shall be liable to be drawn and serve as a juror oftener than once in two years; but he shall not be so exempt unless he attends and serves as a juror in pursuance of the draft.

10. The jurors in attendance at any term of the court shall be empanelled in the same manner as provided by the laws of the state of South Carolina.

11. The rules heretofore passed relative to designating, drawing, and empanelling jurors, are hereby rescinded.

Case No 267.

ALSTON et al. v. MUNFORD et al.

[1 Brock. 266.]

Circuit Court, D. Virginia. May Term, 1814.

JUDGMENT AGAINST DECEDENT — SCIRE FACIAS AGAINST HEIRS—ERROR OF CLERK — RES JUDICATA—GUARDIAN AND WARD—SPECIFIC LEGACY —MARSHALING ASSETS.

1. It seems, that the fifth section of the act of Virginia of 1792, which limits the right of reviving judgments by scire facias, or action of debt, to the period of ten years, applies as well to those judgments which had been rendered at the time of the passage of the act, as to those rendered afterwards; but if a creditor, who had obtained a judgment against his debtor, in the life-time of the latter, has been employed in pursuing the personal estate in the hands of the executor, or if a court of equity has enjoined him from exhausting the personal estate, and so the delay has been produced, the act ought not to be so construed as to bar a scire facias against the heir, after the lapse of ten years.

2. An action of debt is brought on a bond; the verdict, as rendered by the jury, is for the penalty to be discharged by the sum expressed in the condition, with interest till paid; but by the misprision of the clerk, the verdict is entered for the smaller sum as damages, without interest, and the judgment is entered for the penalty to be discharged by those damages without interest. It seems, that for this misprision, the judgment might have been reversed by writ of error, coram vobis.

3. In such case, if the misprision occurred in a suit against the executor, and a subsequent suit be brought against the heir, he cannot avail himself of the error in the judgment, (even if it is not amendable,) but is liable for the whole amount due. As the judgment could not be given in evidence against the heir, so neither can it be given in evidence in his favour.

4. If a suit in chancery is brought against an heir, to subject him to the payment of an old bond, and the defence of the heir is the length of time, the court will, if the heir require it, direct an issue, to ascertain whether it has been paid or not.

5. A foreign bill of exchange, protested, does not bind the heir of the drawer.

6. If A be the executor of B, and testamentary guardian of C, the daughter of B, and the testator give a bond as a specific legacy to his daughter, and A receives the bond, and charges himself, in his executor's account, with the amount thereof, "to be paid to his ward," and writes to the obligor, in the bond, that he shall make himself debtor to his ward for the legacy, and hold the obligor as bound to himself. *Held*: 1st. That this is an assent of the executor to the legacy, and a payment of it to the

[Reported by John W. Brockenbrough, Esq.]

guardian, as much as if the two characters were not united in one person. 2d. That the sureties of A, in the executor's bond, (as well as the executor,) are discharged from liability for the legacy under the executor's bond. 3d. That A was chargeable, as guardian, but as he gave no bond in that character, his heirs, on his death, are not bound, though the debt remains one of the first dignity against his personal estate.

[Cited in *McLaughlin v. Bank of Potomac*, 7 How. (48 U. S.) 229.]

7. If there be four testamentary guardians, one of the four has a right to receive a legacy for the ward, from the executor, and to give a receipt to him for the same, and the acquittance to him is good, without requiring the joint receipt of all. And on the same principle, if the characters of executor, and of receiving guardian, be united in the same person, the guardian who charges himself, discharges himself as executor.

8. The principle of marshalling assets, is this. A creditor having the choice of two funds, ought to exercise his right of election in such a manner as not to injure other creditors, who can resort to one only of those funds; but if he, in the exercise of his legal rights, exhausts that to which alone other creditors can resort, equity will place them in his situation, so far as he has applied their funds to his claim.

9. In the application of this principle, simple contract creditors will be substituted for specialty creditors, but not for judgment creditors: that is, the simple contract creditors cannot charge the lands for so much of the personal fund as has been applied to the payment of debts due by judgments obtained against the ancestor. The reason is, that the writ of *elegit*, by virtue of which the land is charged by judgment against the ancestor, does not issue singly against the land, but against all the chattels, (save oxen, and beasts of the plough,) and if the chattels be sufficient, the land ought not to be extended. The judgment creditor, therefore, has not the election between two funds, (as the specialty creditor has,) and the principle on which assets are marshalled, does not apply to the case.

10. Upon this principle of marshalling assets, where payments have been made by an executor, to the vendor of land purchased by the ancestor, and not conveyed to him, the lien of the vendor will be marshalled.

[11. Cited in *Backhouse's Adm'r v. Jett's Adm'r*, Case No. 710, to the point that chancery does not make an heir responsible for profits accrued before the filing of his bill.]

In equity. George Alston and others, of the state of North Carolina, executors of Thomas Mutter, late of the said state, exhibited their bill in this court, against William Munford, heir at law, and devisee of Robert Munford, deceased, Anne Munford, his widow, and Anne Byrd, widow of Otway Byrd, and Richard Kennon, and Elizabeth, his wife, which Anne Byrd and Elizabeth Kennon were children of the said Robert Munford, and all of the state of Virginia.

The bill sets forth, that Robert Munford was, in his lifetime, indebted to Thomas Mutter, in a certain sum, by a writing, (a copy of which is filed among the exhibits, and appears to have been a note, without seal,) on which writing a suit was instituted in North Carolina, by the said Mutter, against the executors of the said Robert Munford, and judgment obtained against

them: that Robert Munford, by his will, appointed Otway Byrd, and Richard Kennon, his executors, of whom the former only, qualified, and after possessing himself of the testator's property to a very great amount, died intestate, and Anne Byrd, his widow, administered on his estate: that no person has taken administration on the estate of Robert Munford, since the death of Otway Byrd: that the said Robert Munford died seized in his own right, of large tracts of land in North Carolina and Virginia, and the plaintiff calls on William Munford, his eldest son and heir at law, to discover where those tracts are situated, and to what amount: that the said widow and children are next of kin to the said Robert Munford, and will be entitled, under his will, to any surplus which may remain of his personal estate, after debts paid: that they have frequently demanded payment of the judgment aforesaid, from Otway Byrd, the executor, and from the defendants, but have never obtained it. The bill, therefore, prays, that the above mentioned parties may be made defendants; that an account of the real and personal estate of the testator, Robert Munford, may be taken, as well as the administration of it by Otway Byrd; that the assets may be marshalled; that if the personal estate is insufficient to pay all the debts, the testator's lands may be sold to satisfy them; that the plaintiffs may, if necessary, be substituted in the room of any creditor, or creditors, who may have already received satisfaction; and for general relief. This suit was commenced in July 1803. At the May term of the court 1804, the court ordered one of the commissioners of the court to examine, state, and settle all matters and accounts between the parties in this cause, and to report to the court, what estate the said Robert Munford died seized and possessed of, real and personal, and in what manner the said personal estate has been administered, stating such special matters as either party may require, or he think fit. At the same time, William & Peter Murdock, surviving partners of W. Cunningham & Co.; and James Jameson & Richard Cameron, surviving partners of Buchanans, Hastie & Co.; were respectively, on their bills filed, made parties plaintiffs in this cause. The claim of the first was founded on a bill of exchange drawn by Robert Munford, in February 1776, on William Cunningham of Glasgow, in favour of William Cunningham & Co., which was protested for non-acceptance; and judgment when assets on this protested bill was rendered in favour of the said Cunningham & Co., against Otway Byrd, the executor of Munford in this court, in December 1798. The other claim was founded on a bond, in the usual form, binding his heirs, executed by the said Munford, to Buchanans, Hastie & Co., dated 22d May, 1772, in the penalty of £1166 7s., current money

of Virginia, conditioned to pay in October following, the sum of £566 3s. 6d. On this bond, suit had been brought, and a verdict was rendered in this court, in December 1798. In the verdict, as recorded, the jury assessed the plaintiff's damages to \$1220 58 cents, thus giving no interest on those damages, and that the defendant had fully administered. The verdict, as actually rendered, was for the debt in the declaration mentioned, to be discharged by \$1220 58 cents, with interest from the last day of October 1780, till paid. The judgment was for the penalty as a sterling debt, but to be discharged by the damages aforesaid assessed, (that is by \$1220 58) without interest; and was rendered of the assets, *quando acciderint*. In May 1805, William Munford, the heir, filed his answer, in which he states, *inter alia*, that he is the son and residuary devisee of Robert Munford, who died in January 1784; that he is willing to render a just account of the lands which were devised to him, and that a commissioner may make a fair statement of the sales which he made of the said lands, and of the payments which he made to the creditors; that part of the Oconeechee tract is yet unsold, and that the Richland tract, which was devised to the widow for life, is now held by the defendant, the widow being dead: that these tracts lie in Mecklenburg, on Roanoke River. He states, that Otway Byrd, the executor, placed in his hands as attorney, sundry bonds belonging to the estate, for which he will be ready to account, as soon as an administrator, with will annexed of said estate, shall be appointed: that as to the administration of the personal assets, however, the claims of the plaintiffs are of inferior dignity to that of Conway Whittle, in whose favour a decree of the high court of chancery of Virginia has been rendered, and which will absorb all the money in the defendant's hands: that claim, he alleges to be of the first dignity, it being due for a legacy bequeathed by a certain Theodorick Munford, of whom Robert Munford was executor, to Frances, the wife of the said Conway Whittle.

The defendant admits, that as devisee of Robert Munford, he is bound to pay the bonds in which the said Robert bound himself and his heirs, to the value of the real estate devised to him, but he alleges that the claims exhibited by the surviving partners of W. Cunningham & Co., and by the executors of Thomas Mutter, are founded on writings, in which Robert Munford did not bind himself and his heirs, and, therefore, they are not entitled to recover against him as heir, or devisee, except by marshalling the real and personal assets, which cannot be done, until the account of Otway Byrd, the executor of Robert Munford, shall have been settled: that the defendant is not responsible for the transactions of the execu-

tor, nor can he be required to settle the account current; that when an administrator, with the will annexed, shall have been appointed, the account may be legally settled between such administrator, and the administratrix of Otway Byrd, the executor. The defendant also demurred, to so much of the bills as prayed, that the lands left by the said Robert Munford, may be sold for the payment of their claims, on the ground, that the law does not direct lands under no mortgage, or other incumbrances, to be sold for the payment of debts. The defendant, Anne Byrd, administratrix of Otway Byrd, also filed a plea, and answer, and Richard Kennon, also answered. It is deemed unnecessary, to make a statement of their respective defences.

The commissioner made a report of the several matters referred to him, in November 1806, to which both Mutter's executors, and Munford's heir excepted; and in December 1807, the court made an interlocutory order, recommitting the report to the commissioner, with further instructions. It is unnecessary to state the substance of that report, of the exceptions, or of the decree. On the 11th June, 1808, John Peirce, surviving executor, and trustee of Samuel Beall, deceased, was made a party plaintiff in this cause, and filed his bill, which alleges, that the estate of the said Robert Munford, is indebted to that of his testator, by judgment of the general court of Virginia, bearing date on the 20th day of October, 1783, rendered against the said Robert Munford, in his lifetime, for 66,883 lbs. tobacco, with lawful interest, from the 14th day of May, 1782, till payment, on which judgment, a large balance is still due; that the said plaintiff had been enjoined by the chancellor of Virginia, from proceeding on the said judgment by a bill of conformity, filed by Otway Byrd, the executor, who alleged that by paying creditors without an account, he might be subjected to a *devastavit*. The plaintiff prayed, that satisfaction of his said judgment-debt might be secured to him.

The defendant, William Munford, to this bill, filed his plea and answer. He pleaded, 1st. That the judgment is now no lien on the land of which Robert Munford died seized, if there was ever a lien, being lost through length of time, the said judgment bearing date in October 1783, and no writ of *elegit* or *scire facias* having ever been issued, for the purpose of subjecting the said lands to satisfy the same; he, therefore, prayed the benefit of the act for limitations of proceedings upon judgments: 2d. For further plea, he said, that if the said plaintiff hath at this time, any lien on the said lands, by virtue of the judgment, his remedy is at common law, and not in chancery, and he, therefore, pleaded to the jurisdiction of the court. In his answer the defendant says, that Samuel Beall, in his lifetime, revived his judgment, either by

scire facias, or action of debt, in the court of Charles City county, against Otway Byrd as executor of Robert Munford; that he, together with other creditors, was enjoined from proceeding on his judgment, until the nature and dignity of their various claims could be ascertained; that on the 2d of October, 1797, a decree was entered directing the executor to go on, and pay the creditors of Robert Munford in the manner therein directed, which decree the defendant conceives to be equivalent to a dissolution of the injunction: that other creditors (such as Buchanan, Hastie, & Co.) proceeded to enforce their claims at law by obtaining judgments: that the plaintiff has been guilty of neglect in not moving to dissolve the injunction, if it was still tied up by injunction: that Otway Byrd died in September 1800, and that the said suit was entered, abated by his death in September 1802. By reference to the decree of October 1797, mentioned in the above answer, it appears that the injunction was not dissolved. It was abated by the death of Otway Byrd on the day mentioned. The claim of Conway Whittle is sufficiently set forth in the opinion of the court, without making any farther statement.

The chief justice delivered the following opinion:

MARSHALL, Circuit Justice. So far as these suits affect the heir, it becomes material to distinguish those claims which may at this time be asserted against the real estate, and then to inquire what claims may be supported upon the principle of marshalling assets. The first claim which has been discussed, is that of the executors of Samuel Beall, deceased. This was a judgment obtained by Samuel Beall in his lifetime, against Robert Munford in his lifetime, which was revived after the death of Munford, to wit, in 1784 or 1785, against his executors. The great objection to this debt is, that the judgment as against the real assets, is barred by the act of limitations.

By an act passed in 1792,² it is declared that judgments in any court within this commonwealth may be revived within ten years next after the date of such judgment, and not after. The words of this act taken in their strict literal sense, certainly extend to this case; but it is contended that this strict construction must yield to one more favourable to the creditor, and *Eppes v. Randolph*, 2 Call, 125, has been cited in support of this position. In *Eppes v. Randolph*, the obligation of a judgment of much older date was unquestionably admitted without controversy, but in that case, the point was not made at the bar nor decided by the bench, and the claim was asserted within less than ten years after the passage of the act. In the construction of this act, some difficulty

is produced by the circumstance, that the draftsman has omitted to change the phraseology where a new provision was introduced, so as to adapt the language of the act to the subject. Actions had been previously limited, and this act of 1792, does, in general, only re-enact what was law before, and therefore it would have been improper, in most of its provisions, to give time for the institution of a suit subsequent to the passage of the act. For example: the first section gives a right to sue forth a writ of *formedon*, within twenty years after the cause of action accrued, and not after. If the whole twenty years had elapsed before the passage of the act, the action would be barred; or if nineteen years had elapsed the action must be brought within one year, or the action would be barred. This is very proper, and was undoubtedly within the intention of the legislature. Previous acts of limitation, which were repealed by this, had created the same bar to this action, and if a time for bringing it had been given after the passage of this act, it would have exempted from the operation of former acts, claims which had already been barred by them, or might have given to the claimants a much longer time to assert those claims than they would otherwise have been entitled to. It was the intention of the legislature merely to bring all former acts into one, and not to change the rights or situation of parties so far as former statutes had provided for the case.³ But no former act of limitations had extended to judgments. Had the legislature adverted to this circumstance, it is probable that a certain time would have been given, after the passage of the act, for the revival of judgments previously rendered. Not advertent to this circumstance, they have employed terms which, strictly interpreted, must bar immediately any action on judgments of more than ten years standing, unless they be so construed as to exclude those judgments entirely from their operation. There is a peculiar degree of carelessness in the phraseology of the two sections on this subject. The first, which is the fifth section of the act, uses the appropriate terms for those judgments only, which had been actually rendered when the act passed, and would, therefore, justify the idea that the act speaks as at the point of time when the *scire facias* issues; but the succeeding section applies itself expressly, both to judgments which had been rendered before the passage of the act, and to those which might thereafter be rendered. This produces the necessity of applying the preceding section to the same judgments.⁴

² The first section of the act of 1792, c. 76, for the limitation of action, referred to by the chief justice, was re-enacted from the act of 1748, c. 1, (5 Hen. Stat. 415.)

⁴ The following are the sections of the act of 1792: "5. Judgments in any court of record within this commonwealth, where execution hath not issued, may be revived by *scire facias*,

² Rev. Code 1792, c. 76, § 5. The same provision re-enacted, 1 Rev. Code 1819, c. 128, § 5.

Whether the state courts would, in the construction of this law, supply words which would give those entitled to judgments before its passage, time to revive those judgments by *scire facias*, is rendered, by the length of time which has already elapsed, a question of not much consequence. The same principle may, however, arise in the case of a judgment on which an execution has issued, or which has been enjoined, where, after the lapse of ten years from its rendition, one of the parties dies. I shall not inquire what would be the law in such a case, but think, that in general, where, after the passage of the act, ten years have passed away without a *scire facias*, it is too late to sue out that writ.⁵ If, then, in this case, there had been no *scire facias* against the executor, nor injunction on that judgment, I should think it too late to proceed against the heir. But those circumstances change the nature of the case, as will, hereafter, be more particularly noticed.

The next claim to be considered, is that of Buchanan, Hastie & Co. In this case, judgment was rendered in this court, on a bond carrying interest, for a specific sum, although the verdict on which that judgment was rendered, found the penalty of the bond to

or an action of debt brought thereon, within ten years next after the date of such judgment, and not after; or where execution hath issued, and no return is made thereon, the party in whose favour the same was issued, shall and may obtain other executions, or move against any sheriff or other officer, or his or their security or securities, for not returning the same for the term of ten years from the date of such judgment, and not after." "6. Provided, That if any person or persons, entitled to such judgment, where execution hath not issued, or where execution hath issued and no return made, (in either case,) shall be or were under the age of twenty-one years, feme covert, non compos mentis, imprisoned, or not, within this Commonwealth, at the time of such judgment being awarded, whether execution hath issued thereon or not, every such person, his or her heirs, executors, or administrators, shall and may, notwithstanding the said ten years are or shall be expired, have the benefit, where no execution hath issued, by reviving the same by *scire facias*, or by action of debt; and where execution hath issued, and no return made, every such person or persons, his or her heirs, executors, or administrators, may have the benefit of other executions, or may move against any sheriff or other officer, or his or their security or securities for the same, within five years after such disabilities removed, and not after." Rev. Code 1792, c. 76, §§ 5, 6, re-enacted 1 Rev. Code 1819, c. 188, §§ 5, 6. The court of appeals of Virginia have decided, that this fifth section was prospective only, and did not apply to judgments existing when it took effect. *Lyons v. Gregory*, 3 Hen. & M. 237; *Day v. Pickett*, 4 Munf. 104.

⁵ In *Gee v. Hamilton*, 6 Munf. 32, where an execution was issued within the year, and returned *nulla bona*, it was conceded by the appellant's counsel, that the lapse of ten years was no bar to a *scire facias*: and it seems that where a party is delayed by injunction, he is not put to his *scire facias*, but he may sue out his execution within a year after the injunction is dissolved. *Noland v. Seekright*, Id. 185. And so where there is a stay of execution. *Eppes v. Randolph*, 2 Call, 186.

be discharged by a less sum, with interest. It is apparent, that the entry of the judgment, which appears to have been the act of the clerk, deriving no sanction from any act of the court, is a clerical misprision, and such a judgment must have been reversed on writ of error. But without inquiring whether it is not amendable, and whether, in making out a record of the cause, it ought or ought not to be considered as the real judgment,⁶ I think it perfectly clear, that the heir cannot take advantage of it. A verdict can never be given in evidence in favour of a party, if it might not be given in evidence against him. The heir cannot, therefore, avail himself of this judgment.

The claim of John M'Rae, is on a bond, dated in April 1776. The objection to this is the length of time which has elapsed since its date. If it be the wish of the heir, I shall direct an issue to be tried at this bar, to ascertain whether the bond has been paid or not.

The claim of William Cunningham & Co., being on a bill of exchange, does not bind the heir.

The claim of Conway Whittle, is for a legacy given to his wife by Theodorick Munford, one of whose executors Robert Munford was. The principal objection to this claim is, that Robert Munford, as executor of Theodorick Munford, paid this money to himself as the guardian of his ward, and that, as testamentary guardian, he gave no bond, and, consequently, his heirs are not bound. The legacy is a specific legacy to Frances Munford, the wife of Conway Whittle, of a bond of John Bannister, amounting to £1809. This bond was delivered to Robert Munford, on the 2d of January, 1777, by Archibald Carlos.

On the same day, Robert Munford, in his account with the estate of Theodorick Munford, charges himself with this bond. On the credit side of that account is the following entry: "To John Bannister's bond, to be paid to Frances Munford, £1809." This last entry is under date of the 12th of July, 1778. A letter appears to have been written by Robert Munford to John Bannister, on the 13th of June, 1780, in which he speaks of having received from Mr. Bannister, a payment of £1000, in paper money, intrinsically worth only £200; and after ex-

⁶ As to the uses of the writ of error, *coram vobis*, see 1 Rob. Pr. 644, 645, citing *Sess. Acts*, 1819-20, p. 24, ch. 28, § 1; also *Gordon v. Frasier*, 2 Wash. [Va.] 130; *Cole v. Pennell*, 2 Rand. [Va.] 174. Where the object is to correct clerical misprisions, this writ has been superseded by the practice of giving notice to the adverse party, and amending upon motion. 1 Rev. Code, 1819, p. 508, § 77, (passed originally in 1792,) and 1 Rev. Code, 1819, p. 512, § 88; [*Coghill v. Coghill*], 2 Hen. & M. 477; *Halley v. Faird*, 1 Hen. & M. 25; *Beatty v. Smith*, 5 Munf. 41; [*Bent v. Patten*], 1 Rand. [Va.] 25; [*Burch v. White*], 3 Rand. [Va.] 104; [*Com. v. Winstons*], 5 Rand. [Va.] 546; [*Christian v. Miller*], 3 Leigh, 78.

pressing his confidence that Mr. Bannister would not avail himself of that payment, adds: "Agreeable to your request, I shall make myself debtor to my niece, for the amount of her pecuniary legacy from her father, and consider you as debtor to me for the bond and interest enclosed in your letter." I do not know what other construction to put upon this entry, than to consider it as the consent of the executor to the legacy, and a payment of that legacy to the guardian. The terms of the entry show that the bond was no longer to be considered as a subject on which the executor was to act. It was to be paid to Frances Munford, and in his executor's account, he takes credit for it. This credit is entered among his payments, and bears date more than twelve months after the executor debits himself with the bond.⁷ It has been contended, that this transaction, were it even unequivocal, could not discharge the executor, because there were four testamentary guardians, and they must act conjointly. Whatever force might be allowed to this argument, as applicable to the commutation of the bond, which seems to be alluded to in the letter of the 13th of June, 1780, I cannot admit its validity, when applied to the payment made by the executor to the guardian. When there is more than one testamentary guardian, it may be necessary that they should unite in any act which disposes of the property of the ward; but I cannot conceive that the absence of one, disables the other from collecting a debt due to the ward. I cannot conceive that a joint receipt is necessary to the discharge of the debtor. This would be extremely inconvenient, and I should require an express authority to the point, before I could admit the principle. Whether the principle, laid down in 3 Ba. 407, [3 Bac. Abr. (1st Amer. Ed. Phila. 1811) *407, tit. "Guardian by Statute," par. 9.] that, from the nature of the thing, the authority of guardians must be joint and several, be true, in all cases, or not, I think it must be true in the case of receiving the money of a ward. To me, then, it appears that Robert Munford was chargeable with this bond in his character of guardian, and as he gave no bond in that character, his heir is not bound. The debt remains a debt of the first dignity against the personal estate. 1 Rev. Code 1819, p. 389; Id. p. 408, § 12.

⁷ The principle seems to be well settled, that where an executor, or administrator, having assets in his hands, is also guardian of a legatee, or distributee, he can elect to hold the share of that legatee, or distributee, in his character of guardian, and thus, exonerate the sureties in the administration bond, and charge the sureties in the guardian's bond. But there must be some act, from which the election to hold the property in a different character from that in which it was received may fairly be inferred, before the responsibility can be shifted from one class of sureties to another. Taylor v. Deblois, [Case No. 13,790;] Pratt v. Northan, [Id. 11,376;] Myers v. Wade, 6 Rand. [Va.] 444.

The extent to which the heir is directly liable, being stated, with the exception of Beall's judgment, it remains to inquire how far he is to be made liable, on the principle of marshalling assets. The principle on which the court proceeds in marshalling assets, is discussed very much at large in a case reported in 8 Ves. 382, (Aldrich v. Cooper.) The principle is, that a creditor having his choice of two funds, ought to exercise his right of election in such a manner as not to injure other creditors, who can resort to only one of these funds. But if, contrary to equity, he should so exercise his legal rights as to exhaust the fund, to which alone other creditors can resort, then those other creditors will be placed by a court of equity in his situation, so far as he has applied their fund to the satisfaction of his claim.⁸ In the application of this principle, no doubt can exist, so far as respects creditors by specialty, in which the heir is bound. Such a case is precisely within the principle, and is the case to which the principle has been most frequently applied.⁹ It has been contended by the heir, that moneys applied by the executor in payment for lands purchased by the ancestor, and not conveyed to him, are not to be considered as being now chargeable on the real estate. But, in such case, the creditor had his election to proceed by way of ejectment, and if the heir should enjoin, and call on the executor to satisfy the debt out of the personal estate, a court of equity would certainly not decree such satisfaction to the injury of simple contract creditors: such a case, therefore, seems to come precisely within the general principle, for the creditor had his election of two funds at law. But this question came on to be considered in Trimmer v. Bayne, reported in 9 Ves. 209, where the decision was against the heir.¹⁰

The question, about which I have felt most difficulty, is, that which relates to the claims

⁸ The same general principle on which equity marshals assets, is also laid down in Lanoy v. Duke and Dutchess of Athol, 2 Atk. 446; Lacam v. Mertins, 1 Ves. Sr. 312; Mogg v. Hodges, 2 Ves. Sr. 52; Trent v. Trent's Ex'x, Gilmer, 188; Cheeseborough v. Millard, 1 Johns. Ch. 409.

⁹ Galton v. Hancock, 2 Atk. 436; Powell v. Robins, 7 Ves. 209; Haydon v. Goode, 4 Hen. & M. 460.

¹⁰ In conformity with this opinion, and with that in Trimmer v. Bayne, is the modern case of Selby v. Selby, 4 Russ. 336, 3 Cond. Eng. Ch. 694, reviewing the cases of Pollexsen v. Moore, 3 Atk. 272; Coppin v. Coppin, 2 P. Wms. 291; Trimmer v. Bayne, above cited; Mackreth v. Symmons, 15 Ves. 344; Headley v. Readhead, Coop. 50; Austen v. Halsey, 6 Ves. 475. In Selby v. Selby, the master of the rolls (Sir John Leach) said: "In Pollexsen v. Moore, Lord Hardwicke is reported to have stated, that the lien of a vendor does not prevail for the benefit of a third person: yet his decree was, that a legatee in that case was entitled to the benefit of the lien or the vendor. In that case, as in this, the purchased estate

of simple contract creditors, founded on payments made on judgments obtained against the testator in his lifetime. On this subject, I have searched every book of chancery reports to which I have access, and can find nothing completely satisfactory respecting it. In the case of *Finch v. Earl of Winchelsea*, reported in a note in 3 Peere Williams, 399, it was contended by counsel at the bar, that simple contract creditors were entitled to take the place of judgment creditors, so far as the latter had exhausted the personal fund, and the court did not negative the doctrine; but the case was decided on another point, and the reporter adds a quaere.

In 4 Vesey, 538, (*Sharpe v. Earl of Scarborough*.) it is stated in the index, and in the marginal note, to have been expressly determined, that assets could not be marshalled in consequence of payments made out of the personal fund to judgment creditors; but on examining the case itself, the decision of the chancellor is not found to be so express as it is stated to be in the index and marginal note. The implication, however, is in favour of the opinion, that simple contract creditors are not permitted to take the place of judgment creditors, as against the real fund. It has considerable weight with me, that there is not a case in the books, nor a dictum from the bench, in which it is said, that simple contract creditors may stand in the place of judgment creditors who have exhausted the personal fund, although the principle of marshalling assets has been discussed, perhaps, as frequently as any other on which a court of equity acts. That principle is continually stated, as applicable to payments made out

was devised. Many observations have, in subsequent cases, been made with a view to reconcile the dictum and decree of Lord Hardwicke; but I must admit, without success. In the case of *Coppin v. Coppin* the purchased estate was not devised by the purchaser, but descended to his heir, and the question there was between the heir and legatees; and the court refused to marshal the assets in their favour. In the case of *Trimmer v. Bayne*, Sir William Grant, after referring to the dictum of Lord Hardwicke in *Pollexsen v. Moore*, and stating that he had been much perplexed by that case, comes to a conclusion directly opposed to that dictum, and expressly states that the lien of a purchaser is within the common principle of marshalling assets; that a person having power, to resort to two funds, shall not, by his election, disappoint another having one fund only. The purchased estate had in that case descended to the heir; but it does not appear by the report with what class of claimants the heir was contending—whether with simple contract creditors, or with legatees." In *Selby v. Selby* the contest was between the devisees of the purchased estate and simple contract creditors, and the master of the rolls said, that the established rule being that simple contract creditors are, as against a devisee, to stand in the place of specialty creditors who have exhausted the personal assets, because the specialty creditors had the two funds to resort to, so in that case the simple contract creditors were entitled to stand in the place of the vendor against the devisees, because the vendor had equally a charge upon the double fund of real and personal estate.

of the personal fund to specialty creditors and mortgages, but never to judgment creditors. There being no express authority which is satisfactory, the question was to be considered on principle. In taking this view of the subject, it became necessary to inquire, whether the judgment creditor possessed, at law, his election of two-funds, or was under the necessity of pursuing the personal fund in the first instance. The oldest case that I have seen on this point, is that in 2 Dyer, (*Bricknold v. Owen*, 208 a.) which was cited by the counsel for the plaintiff. In that case, an elegit appears to have been awarded against the terre-tenants, and it is to be presumed, that no previous scire facias issued against the executor. But the question was not made, and the reporter adds a quaere, whether there ought not to be first a scire facias against the executor, and on nihil returned, then a scire facias against the terre-tenant, as was decided in 7 Hen. IV. But as such a scire facias on a recognizance is given in the judicial register, he doubts if the law be not the same as to judgments. In a note to the same report, it is said to have been afterwards stated in another case, to have been the course of the exchequer, not to charge the lands in the hands of the heir for the debt of the king, until the personal estate be exhausted. In [*Panton v. Hall*.] *Carthew*, 107, it is stated expressly by counsel, to be admitted law, that a scire facias cannot issue against the heir until the personal estate shall have been exhausted. In support of this position, many decisions from the year-books are cited, and it is not contradicted by the court, or by the counsel. This position is introduced into Bacon, and stands in the new edition as law, nor is any opposing principle laid down, or any contrary authority cited. In 14 Vin. Abr. tit. "Heir," letter R, § 2, it is stated, that an application was made to the king's bench, for a scire facias against the heir before process against the executor, which was refused. The weight of authority, therefore, appears to be decidedly in favour of the opinion, that the judgment creditor cannot proceed against the heir until he has exhausted the personal estate. I am the more satisfied with these authorities, because they appear to me to lay down the positive rule in strict conformity with principle.

The writ of elegit, in virtue of which the land is charged by a judgment against the ancestor, does not issue singly against the land, but orders the sheriff to deliver all the chattels, (oxen and beasts of the plough excepted,) and a moiety of the lands, to the creditor. In his commentary on this statute, 2 Inst. 95, Lord Coke says, that if the chattels be sufficient to satisfy the debt, the land ought not to be extended. Upon viewing the writ of elegit, given by our act of assembly, I have no doubt but that the same rule would regulate the conduct of the shea-

iff.¹¹ Since then, upon an *elegit* issued on the judgment against the ancestor, the personal estate is first liable, it would seem to be reasonable that the same judgment would, after his decease, affect his estate in the same order, and that the personal fund should be applied first to its discharge. If this be the law, then the judgment creditor has no election. He is under the necessity of proceeding, in the first instance, against the personal estate, and the principle on which assets are marshalled, would not apply to the case.

If there be two mortgagees, A, the prior mortgagee, upon two tracts, and B, the subsequent mortgagee, on one only of those tracts; if A should appropriate to his debt the land mortgaged to B, then B would be permitted to take the place of A, with respect to the other tract. But if, by the terms of A's mortgage, he was bound first to apply the tract mortgaged to B, then B would not be allowed to take the place of A. The reason on which he could, in the case first put, be permitted so to do, would cease. I am, therefore, of opinion, that in marshalling assets, simple contract creditors cannot charge the lands for so much of the personal fund as has been applied to the payment of debts, due by judgments obtained against the ancestor. It is very possible that this decision may, in this case, be extremely unfavourable to the heir.

If the personal estate must be exhausted before the judgment creditor can proceed against the real estate, so that the proceeding against the heir is dependent on the proceeding against the executor, it would seem to follow, that the act respecting the renewal of judgments, ought not to be so construed as to bar a *scire facias* against the heir, provided the creditor has been employed in pursuing the personal estate; and, especially, if a court of equity has prevented him from exhausting the personal estate. It is with regret I give gentlemen of the bar additional trouble. But I was, at the argument of this case, so satisfied that the judgment could not be revived against the heir, as ten years had elapsed since its rendition, and since the passage of the act, that I did not sufficiently advert to those other arguments which respected the claim of Beall's representatives. This opinion was not shaken until I considered that question in connexion with the right of the creditor to proceed immediately against the heir. It was then out of my power to recall the other points, on which the liability of the heir, for the balance of Beall's judgment, depends.

The arguments which have been urged at the bar, to show that the heir is not liable, on account of the payments made to the

creditors of Theodorick Munford, are, in my opinion, conclusive. I do not think the *devastavit* fixed; nor do I think him bound by the report in chancery, as by an exhibit produced, and relied on, by him. That report is to be considered as an exhibit admitted by both parties, to be substantiated in the place of a report made to this court by one of its commissioners. It is, consequently, open to all the exceptions which might have been made to it, if returned directly to this court.

The objections made to the jurisdiction of this court, are not deemed sufficient to prevent a decree on the interests of all the parties. In addition to other considerations urged in favour of a decision of the whole subject, the argument founded on the bill for marshalling assets, is conclusive. The creditors, who have a direct charge on the lands, must come in on that fund before it can be touched by the simple contract creditors, and, consequently, the court must direct them to be satisfied, before it can apply the surplus to creditors by simple contract. The case, then, is like that of a subsequent mortgagee wishing to foreclose. All prior incumbrances must be brought before the court and satisfied, before he can obtain a decree.

NOTE BY THE CHIEF JUSTICE. This cause came on afterwards to be argued, on the question, whether the heir was liable for profits received before the filing of the bill: and the court determined that he was not: but that opinion is lost.

ALTEMUS, (HARDING v.)

[See *Harding v. Altemus*, Case No. 6,049.]

Case No. 268.

In re *ALTENHEIM*.

[1 Ben. 431; 1 N. B. R. 85; *Bankr. Reg. Supp.* 19; 6 *Int. Rev. Rec.* 117.]

District Court, S. D. New York. Sept. 25, 1867.

APPEARANCE—PROTEST.

A person named as a creditor in a bankrupt's schedule, but who does not appear in person or by attorney duly constituted, and has not proved any debt, cannot put on file a protest against being named as a creditor.

In bankruptcy. In this case, at the first meeting of creditors, an attorney appeared on behalf of a party named in the bankrupt's schedule as a creditor by virtue of a mortgage on certain real estate of the bankrupt, executed by a former owner thereof, and asked leave to put on file a protest on his part against being named as a creditor. The bankrupt objected, and the register held that, as the party did not appear in person or by attorney duly constituted, and had not

¹¹ The writ of *elegit* given by the Virginia statute, is the same as that given by the English statute of 13 Edw. I. c. 18. For the form of the writ, see 1 *Rev. Code* 1819, p. 525.

¹[Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

proved any debt, the paper could not be filed.

The question was certified to the Judge, [BLATCHFORD, District Judge,] who sustained the decision of the register.

ALTER, (WEAVER v.)

[See Weaver v. Alter, Case No. 17,308.]

ALTON, (STURTEVANTS v.)

[See Sturtevants v. Alton, Case No. 13,580.]

ALTONS, (TURNER v.)

[See Turner v. Altons, Case No. 14,250.]

ALVARADO, The, (PHELAN v.)

[See Phelan v. The Alvarado, Case No. 11,067.]

ALVISO, (UNITED STATES v.)

[See United States v. Alviso, Case No. 14,434.]

ALVISU, (UNITED STATES v.)

[See United States v. Alvisu, Case No. 14,435; Id. 14,436.]

Case No. 269.

ALVORD et al. v. UNITED STATES.

[13 Blatchf. 279.]¹

Circuit Court, N. D. New York. March 21, 1876.²

BOND—NEW BOND — PRESUMPTION OF INNOCENCE
—RELEASE OF SURETY.

A. was surety for one S., as postmaster, on his official bond. On the 14th of September, 1861, a new bond, with other sureties, was accepted, whereby A. was, by statute, released from responsibility for all acts or defaults of S. committed subsequently. S. was afterwards removed from office, and at that time was a debtor to the United States. In a suit brought against A. on his bond, to recover such debt, it was not shown by the United States that S. had not in his hands, on the 14th of September, 1861, ready to be paid or applied, all the moneys of the United States with which he was justly chargeable: *Held*, that it must be presumed he had such moneys in his hands when the new bond was given; and that A. was not liable therefor.

At law.

John C. Hunt, for plaintiffs in error.

Richard Crowley, Dist. Atty., for the United States.

JOHNSON, Circuit Judge. The surviving defendants, with others, were sureties for one Sedgwick, as postmaster, upon his official bond. On the 14th of September, 1861,

¹[Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

²[Reversing an unreported decree of the district court.]

a new bond, with other sureties, which, in compliance with the requirement of the department, had been given, was accepted, and thereupon, according to the statute, (Act July 2, 1836; 5 Stat. 88, § 37,) and by force of its provisions, the sureties in the prior bond became released from responsibility for all acts or defaults of the postmaster which might be done or committed subsequently. Sedgwick was removed from office October 21st, 1861, at which time, by his own testimony, he was indebted to the government in \$3,969 45. A treasury transcript showed, that, between September 30th and October 21st, 1861, Sedgwick had paid, in excess of the amount debited to him during that period, and was entitled to be credited with, \$1,010 14. There also was given in evidence the quarterly return made by Sedgwick, covering the period from July 1st to October 1st, 1861, by which he appeared, at the latter date, to be indebted to the United States in the sum of \$2,933 21. It was further shown, that the amount received at the Syracuse post office, from September 14th to October 1st, 1861, was \$954 09. But, it was not shown that, on the 14th of September, he had not in his possession, ready to be paid or applied as might be lawfully required, all the moneys of the United States with which he was justly chargeable. No demand upon him at this period was proved, no failure to pay or apply any such money as he was lawfully directed was shown, nor did the period for rendering his regular account arrive until the 1st of October. Now, assuming that sufficient data are contained in the proof, to enable the exact amount to be ascertained which he had, or ought to have had, in his hands, belonging to the United States, on the 14th of September, the precise difficulty is, that no light is thrown on the question, whether, in point of fact, he had then this money in his hands, as his duty required, or whether, before that time, he had, by its misapplication, become a defaulter. If he was then a defaulter, the present defendants are liable. If, on the other hand, he then had the money, and subsequently misapplied it, these sureties are not liable, for, the default, in that case, did not occur in their day. In the absence of evidence from which an inference can be directly drawn, the presumption of fact which the law raises must control. That presumption is, that an officer has done his duty, until the contrary appears. It was Sedgwick's duty, under the law and the bond, to keep the money which should come to his hands safely, without loaning, using, depositing in the banks, or exchanging for other funds than as allowed by law, till it should be ordered by the postmaster-general to be transferred or paid out. This duty he is presumed to have performed, until proof is made to the contrary. If the present action had been against the sureties

on the bond accepted September 14th, 1861, on the same proof, they would have been held liable, by reason of the same presumption. This was decided in *Bruce v. U. S.*, 17 How. [58 U. S.] 437, 443. That was a case both of a new commission and a new bond. It was held, that, if a balance was due from an officer when reappointed, the presumption is, that it was then in his hands, and, if so, his sureties, on his re-appointment, are responsible for its due application. But they may relieve themselves, by showing that he was in fact a defaulter when they became his sureties; and Ch. J. Taney said, giving the opinion of the court: "No officer, without proof, will be presumed to have violated his duty; and, if Bruce had done so, Steele had a right, under the opinion of the circuit court, to show it, and exonerate himself to that amount; but it could not be presumed merely because there appears, by the accounts, to have been a balance in his hands at the expiration of his first term." According to the rule declared in this case, the presumption is, that Sedgwick, on the 14th of September, 1861, was not a defaulter, but that he then had in his hands, in accordance with his duty, whatever sum he was chargeable with in favor of the government. As the court says: "If it was not wasted or misapplied during his first official term, but still remained in his hands, to be applied according to his official duty, the sureties in his first bond would not be liable." A reversal must be adjudged on the ground thus far considered.

In respect to the other questions presented, and especially in respect to the claim for a set-off, I agree with the decision of the district judge, and substantially for the reasons assigned by him. The judgment of the district court² must be reversed, and a new trial ordered, with costs to abide the event.

AMADO, The, (ROGERS v.)

[See *Rogers v. The Amado*, Case No. 12,005.]

AMADOR, (UNITED STATES v.)

[See *United States v. Amador*, Case No. 14,437.]

AMANDA F. MYRICK, The, (HERBERT v.)

[See *Herbert v. The Amanda F. Myrick*, Case No. 6,395.]

AMANDA FRANCES MYRACK, The, (COHEN v.)

[See *Cohen v. The Amanda Frances Myrick*, Case No. 2,962.]

²[Nowhere reported.]

AMARANTH, The (REGAN v.)

[See *Regan v. The Amaranth*, Case No. 11,664.]

AMAZON, The, (PEACON v.)

[See *Peacon v. The Amazon*, Case No. 10,871.]

Case No. 270.

AMAZON INS. CO. v. The IRON MOUNTAIN.

[1 Flip. 616;¹ 6 Ins. Law J. 155; 23 Int. Rev. Rec. 49; 4 N. Y. Wkly. Dig. 95; 4 Cent. Law J. 103; 9 Chi. Leg. News, 157.]

Circuit Court, S. D. Ohio. Dec. 23, 1876.

ADMIRALTY — PLEADING — INSURER AGAINST CARRIER—LIBEL PROPERLY FILED IN NAME OF CARRIER.

1. Libel by insurer who has paid the loss, against carrier whose wrongful act has caused the loss. Respondent is not permitted to set up as a defense that he (the insurer) was not bound in law to indemnify the assured for the loss so occasioned.

[Cited in *Standard Sugar Refinery v. The Centennial*, 2 Fed. 412.]

2. It is proper to bring such libel in the name of the insurer, and not in the name of the assured, for the use of the insurer. This is the admiralty practice.

[See *The Planter*, Case No. 11,207a; *Mutual Ins. Co. v. Cargo of The George*, Id. 9,931.]

[In admiralty. Libel by the Amazon Insurance Company against the steamboat Iron Mountain and the barge Ironsides. Heard on exceptions to the libel. Exceptions overruled.]

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

Moulton, Johnson & Levy, for libellant.

Hoadly, Johnson & Colston, for respondents.

SWING, District Judge. The libel filed in this case seeks to recover for the value of one hundred and twenty-five barrels of flour alleged to have been lost through the negligence or wrongful act of respondents, as owners of the steamboat Iron Mountain and barge Ironsides No. 3, on which flour libellant had insured the owner, to whom it paid the insurance; he having abandoned to it the property upon the happening of the accident entailing the loss. The bill of lading contracted to carry the flour from the port of Mt. Vernon, Ind., at which port it was shipped, to the port of New Orleans, La., and the insurance by libellant was upon the flour in transit between these points, to be transported by the boat and barge named, against the usual risks of river navigation, excepting, however, such losses for which the carrier would be liable to the owner of the insured property. The respondents—owners of the boat and barge—file exceptions to the libel, claiming, first, that the action

¹[Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

should have been brought in the name of the owner of the flour; and, second, that the libel cannot be maintained by the insurance company in its own name.

The exceptions cannot be sustained. In *The Monticello v. Mollison*, 17 How. [58 U. S.] 152, the supreme court say: "It is true that in courts of common law the injured party alone can sue for a trespass, as the damages are not legally assignable, and if there be an equitable claimant, he can sue only in the name of the injured party, whereas in admiralty, the person equitably entitled may sue in his own name." In the case of *The Manistee*, [Case No. 9,027,] the libel was filed by the insurance company in its own name in an action similar to the present, and it seems to have been conceded that it was properly brought. To the same effect, see *Insurance Co. v. The C. D. Jr.*, [Id. 7,051.]

The second exception to the libel is, that, inasmuch as the loss happened during an unlawful deviation on the part of the carrier, or was caused by improper conduct of the master, the insurance company was not legally liable to the insured for the loss, and the payment by it of the insurance was but voluntary; hence, subrogation to his rights to recover from the carrier did not arise, and consequently libellant has no remedy over against the owners of the boat and barge for the loss. The same objection was made, and the question expressly raised, in the case of *The C. D. Jr.*, above cited, where Judge Woods summarily disposed of it in the following brief sentences: "Respondents further claim, that, having shown by the testimony, as they allege, that the insurance company was not legally bound to indemnify the insured for the loss the latter sustained by the collision, therefore the libellants have no cause of action against the respondents, although they have paid the loss. But I am of opinion that the authorities are adverse to this claim, and adopt the conclusion of the district judge, and refer to the case of *The Monticello v. Mollison*, 17 How. [58 U. S.] 152."

Respondents' solicitors, however, suggest that perhaps the point was not fully considered by Judge Woods; but it appears to me that the contrary inference can only be drawn from the report, as the learned judge states his opinion as the "result of the authorities," which must have been cited pro and con. by the counsel for the respective parties. Besides, it is evident that the question had been fully argued before the district judge, who had decided it in the same way, and the counsel for the respondents, in the case before me, have failed to cite any authority to sustain the opposite view, and I have not been able to find any which gives it support. In *The Monticello v. Mollison*, ubi supra, it was held that, while in courts of admiralty, in contradistinction to those at common law, "the person equitably entitled may sue in his own name, yet that the

same reasons why the wrong doer cannot be allowed to set up as a defense the equities between the insurer and the insured, equally apply to both courts." "The respondent," the court proceed to say, "is not presumed to know or bound to inquire as to the relative equities of parties claiming the damages. He is bound to make satisfaction for the injury he has done. When he has once made it to the injured party, he cannot be made liable to another suit at the instance of any merely equitable claimant. If notified of such a claim before payment, he may compel the claimants to interplead; otherwise, in making reparation for a wrong done, he need look no further than to the party injured." Again, the same court, in *Hall v. Railroad Co.*, 13 Wall. [80 U. S.] 367, pertinently say: "It is too well settled by the authorities to admit of question, that, as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered as one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract, or for non-performance of his legal duty. Standing thus, as the insurer does, practically in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner." In the case of *The Manistee*, [Case No. 9,027,] it was contended on behalf of the carrier, "that the insurance policy was void, because it was issued in disregard of the requirements of the laws of the state." But the learned judge held that, "in his opinion, the carrier should not be permitted to make that defense," adding, "that the shipper might have brought a libel for the use of the company (the underwriter), and if the use were not expressed in the record, the court would protect the company even after a decree in favor of the libellant." The result from these principles and authorities seems plainly to be that the carrier in this class of cases cannot set up any different defense against the underwriter than he could have against the owner of the goods lost, were the action brought by the latter. Substantially the action is to be considered and treated as though prosecuted by and in the name of the insured owner or shipper for the use of the

underwriter, to be defended on the same grounds, and determined by the observance of the same rules, and the application of the same legal principles. It would be an anomaly indeed, if, in a case where it was admitted, the owner could recover against the carrier for the use of the underwriter, the latter having paid the loss, and suing directly in his own name in admiralty, as he may, thus standing, as we have seen, substantially in the place of the owner, could not recover. Such a result would be extremely inconsistent and illogical. The carrier has all the privileges and immunities to which he is justly entitled when he is allowed to interpose the same defenses against the underwriter which he could against the owner, no more nor less, however. No privity of contract existing, as has been shown, he cannot be permitted to inquire into the equities which may have existed between the underwriter and the owner, and thus divert the issue to be tried from the question of his unlawful acts or negligence to that of the liability or non-liability of the underwriter to the owner. What he must negate, is his liability to the owner, not that of the insurer to the owner. The exceptions will be overruled.

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AMBASSADOR, The, (KEYS v.)

[See *Keys v. The Ambassador*, Case No. 7,747.]

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Case No. 271.

In re **AMBLER.**

[8 Ben. 176.]

District Court, S. D. New York. June, 1875.

PREFERENCE—TAXES—DEBT DUE TO A STATE.

A debt due from a bankrupt to a state other than the state in which the bankruptcy proceedings are pending, for taxes, is not entitled to a preference under the fifth subdivision of section 5101, Rev. St.

In bankruptcy. The register in this case certified to the court that, at a third general meeting of the creditors [of Andrew F. Ambler] herein, a deposition for proof of debt was presented in behalf of the state of Texas, amounting to \$700.59, for taxes levied and assessed against the firm of Ambler & Mason, in accordance with the laws of the state of Texas; and that it was demanded that, in the order for a dividend, this claim should be admitted to a preference and be first paid in full, as a claim entitled to such preference under the fifth subdivision of section 5101, Rev. St. And the register certified the question to the court, with the following opinion:

"It is on the strength of the judgment of the court in *U. S. v. Herron*, [20 Wall. (S7 U. S.)

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251,] that it is contended that this claim is entitled to priority. The question in that case was, whether a debt due to the United States from the bankrupt on a bond executed by the bankrupt, as surety for a defaulting revenue officer of the United States, was discharged by a certificate of discharge of the bankrupt under the bankrupt act. The court holds that, the United States being the sovereign authority and not being named in any of the provisions of the act providing for the discharge of the bankrupt from his debts, nor in any of the required proceedings which lead to that result, a debt due to the United States is not within the operation of the act, and is not discharged by the discharge of the bankrupt in proceedings in bankruptcy. And the court, in discussing the question in the case, makes use of the following expressions: 'Attempt is made in argument to show that the preference given to debts of the United States does not exclude such debts from the operation of the certificate of discharge, because such debts are not named in the proviso annexed to the description of the fifth class of claims entitled to priority and full payment in preference to general creditors; but the court is not able to concur in the proposition, as it is quite clear that the proceedings in bankruptcy would very much embarrass tax-collectors without a saving clause in that behalf, and to that end it was provided that "nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any state." Consequently taxes, whether federal or state, may be collected in the ordinary mode; but if not collected, and the property of the bankrupt passes to and is administered by the assignee, the taxes are then entitled to the priority and preference provided in the same section of the bankrupt act. Nothing, therefore, can be inferred from that proviso inconsistent with the proposition that the sovereign authority is not bound by the provisions of the bankrupt act, unless therein named.'

It is on these expressions, that, on behalf of the state of Texas, reliance is placed that this claim for taxes is entitled to priority.

The register does not understand the language of the court as declaring, in the case where the state other than that in which the proceedings in bankruptcy are pending has failed to collect taxes due to the state from the bankrupt, that the proviso to the fifth sub-division of the section regulating these preferences, that nothing contained in the Act shall interfere with the assessment and collection of taxes by the authority of the United States, or of any state, creates a preference in favor of the state to which such taxes may be due. To go beyond giving a preference to taxes due to the state in which the proceedings in bankruptcy are pending, might open the door to very numer-

ous claims for preferences. The Act does not prevent the state to which the taxes are due from enforcing the claim of the state for taxes by levy or distraint, or by such other means or process as the laws of the state may provide; and this notwithstanding the debtor may have obtained his discharge in bankruptcy. To refuse to give the claim a preference is not to interfere with the collection of the tax. The debt may be proved in the proceedings in bankruptcy, but within the jurisdiction of the state it is not discharged by the certificate of discharge. But the only priority and preference in the distribution of the assets of the estate in bankruptcy of the bankrupt, given by the section in question of the statute, to taxes due to a state, is the priority and preference given by the third sub-division of the section, to taxes and assessments made under the laws of the state in which the proceedings in bankruptcy are pending.

BLATCHFORD, District Judge. I concur in the conclusion of the register, that the claim in question is not entitled to a preference or priority in payment.

Case No. 272.

AMBLER v. CHOUTEAU et al.

[3 Cent. Law. J. (1876) 333.]

Circuit Court, E. D. Missouri.¹

EQUITY PLEADING—MULTIFARIOUSNESS—JOINDER OF PARTIES—PARTNERSHIP.

[1. A bill by an inventor, alleging a fraudulent sale of his patent rights, which does not clearly show whether the relief prayed for is that the sale be canceled, and the patent restored, or that the sale be confirmed, and the buyer forced to account for the profits, is bad on demurrer.]

[See note at end of case.]

[2. Where a patent is issued to a partnership, one partner cannot maintain a bill against an alleged fraudulent purchaser of the invention without making the other partner a party to the record, although such other partner shared in the alleged fraud. *Ambler v. Whipple*, 20 Wall. (87 U. S.) 546, distinguished.]

[See note at end of case.]

[In equity. Bill by Augustine I. Ambler against Charles P. Chouteau, the Missouri Liquid Fuel & Illuminating Company, and others, alleging a fraudulent sale of complainant's invention to respondents. Heard on demurrer to the bill. Demurrer sustained. An appeal was subsequently taken to the supreme court, where this decision was affirmed. 107 U. S. 586, 1 Sup. Ct. 556.]

Before DILLON, Circuit Judge, and TREAT, District Judge.

DILLON, Circuit Judge, delivered an oral opinion, as follows, (TREAT, District Judge, concurring:)

¹[Affirmed by supreme court in 107 U. S. 586, 1 Sup. Ct. 556.]

In this case there is a demurrer to the bill of complaint. The case is a very important one, if it is ever brought to a hearing on all the charges made in the bill. There is a demurrer on various grounds. One is, that the individual corporators, or certain individual corporators, have been joined as defendants, with the corporation, the "Missouri Liquid Fuel & Illuminating Co." Another is that it appears from the bill, that there was an agreement between the plaintiff, Ambler, and one Whipple, giving the latter the entire control of the patent, the complete, *jus disponendi*, and that what is charged as a fraud here, is simply acts that Whipple, by virtue of this contract, had authority to do, namely, to control and sell the patent in which the plaintiff claims an interest. Another ground is that, although the bill is based upon fraud, and is profuse in general charges of fraud, nevertheless the facts stated do not show fraud in the defendants. Another ground is that Whipple & Dickerson are necessary parties to the relief sought in this bill, and are not made parties, either complainant or respondents.

In 1869 the government of the United States, on the 13th of July, granted a patent, known as 92,687, jointly to the complainant, Ambler, and to one Whipple. It seems that Ambler, the complainant here, is the inventor, or claims to be the inventor, of the process mentioned in the patent, which is claimed to be very valuable, and that Whipple was to be the business manager of the concern. They formed a partnership, and their contract provides that Ambler shall go on and perfect his invention; shall get a patent; that all the improvements shall inure to their joint benefit; that Ambler shall keep his hands off when they get a patent, in the way of disposing of it to make it valuable; and, finally, that he shall confine himself to the work of invention, and that Whipple shall do the work of selling, to make it realize money gains. Accordingly that arrangement was made. That is the substance of the contract. Whipple had authority to sell and dispose of it, and was to account to Ambler for one-half the gains. According to the judgment of the supreme court of the United States, which has had before them a controversy between Ambler and Whipple, this man Whipple, believing this to be a very valuable patent, immediately conceived the idea of swindling Ambler out of it; and it does not stand alone in the history of inventions, that the man whose cunning, whose days and nights, are given to the perfecting of the patent, is often swindled out of the proceeds of it, by those more cunning than himself in the ways of the world. According to the opinion of the supreme court of the United States, Whipple, as I have said, conceiving this to be a very valuable patent, immediately set to work by a confederacy with

one Dickerson to swindle Ambler out of it. They pirated from him an improvement on this invention, went to the patent office, made due application, and caused two patents to be issued, one 95,665, the other 102,662, although they were improvements simply, on Ambler's original patent. They caused those patents to be issued to Whipple and Dickerson, and not to Ambler, who was ignored in this transaction. Afterwards other proceedings were had—but not until after the transactions here in question took place—whereby another patent was issued to the plaintiff, as the sole and first inventor of the same improvements, which were embraced in the patent surreptitiously obtained by Whipple and Dickerson. Now, while Whipple and Dickerson hold the patents, which were procured, undoubtedly in fraud of the plaintiff's rights here, but while the original contract between Whipple and Ambler was in force, by which these patents were to have been turned into that partnership arrangement, Whipple and Dickerson come out west, and make a sale of this patent-right to Blunt and Insley, for thirty-five or seventy thousand dollars. Blunt and Insley come here and organize a company, on a grand scale of a quarter of a million, half a million, or a million dollars; sell out this patent to a company here, which is incorporated under the laws of Missouri, and commence operations. The supreme court of the United States, in the case between Ambler and Whipple, which was brought in January, 1870, and resulted in a decree in the supreme court of the United States in November, 1874, [Ambler v. Whipple, 20 Wall. (87 U. S.) 546; 23 Wall. (90 U. S.) 278,] this litigation drawing its slow length along in the District of Columbia for four years, or nearly five, decided, that this was a co-partnership arrangement, originally between Ambler and Whipple; that all improvements made, and all subsequent patents issued, fell into this partnership arrangement; that the patents issued to Whipple and Dickerson were issued in fraud of the rights of the plaintiff; and that to one-half of all the gains under those patents Ambler was entitled.

That was not a bill, as the supreme court remarked, to dissolve the partnership between Ambler and Whipple, but a bill to account; and the supreme court held that there should be an accounting, between Ambler and Whipple, as to all gains which had been made under all these patents, one-half of which belonged to the Whipple side; it did not make any difference to the plaintiff whether to Whipple alone or to him and Dickerson. The supreme court, in deciding that, although they did not say anything about it, must have held, that a bill between partners for an account, would lie pending a partnership, for they say the partnership is not dissolved; they, therefore, must have

held, if their attention was called to it, that a bill would lie pending the existence of a partnership, by one partner against another, for an accounting, and to restrain improper conduct, notwithstanding there was no dissolution, and no prayer for dissolution; in regard to which there has been a great deal of controversy. Lord Eldon, according to my recollection, has stated, several times, that such a bill would not lie, but the American courts have sometimes held otherwise, and perhaps with very good reason. Ordinarily if partners can not agree and there is a loss of confidence between them, the partnership had better be dissolved; but we can imagine a case where it would be, perhaps, to the interest of the parties to have an accounting, notwithstanding they do not want a dissolution. But no matter about that; the supreme court decided that there should be an accounting under all these patents and that Mr. Ambler was entitled to one-half of the gains, which had been made out of all of them, ordered an accounting accordingly, and remanded the case to the lower court. Such proceedings have been had; there has been an accounting between them, and Whipple has been found indebted to Ambler in some six or seven hundred thousand dollars, so stated.

Now, in this state of the case, Ambler comes into this court, exhibits his bill in his own name, not joining Whipple, not alleging that this partnership between him and Whipple is dissolved, but rather alleging that it is not dissolved; not alleging any fact showing that he has succeeded to the general rights of the firm composed of himself and Whipple; not alleging any dissolution; not alleging any succession to the rights of the two; not making Mr. Whipple a party either complainant or defendant, and exhibits this bill against the Missouri Liquid Fuel and Illuminating Co., which was organized here, and against certain of its stockholders or directors, and wants relief.

The bill is defective for two reasons. It is multifarious, but that is easily amended. It undertakes to join various matters which, in any event, this corporation has no concern in. It is defective, for instance, in this: that it is difficult to ascertain from it whether it is a bill on the part of Mr. Ambler, seeking to obtain those rights which were sold to Insley and Blunt, who are alleged to be mere men—Friday, stool-pigeons, or tools, for the company here; whether Ambler wants back his franchises, his rights which have been sold to them, on the ground of a fraudulent sale, and wants his patent to be restored and have that sale by Whipple cancelled; or whether he wants to confirm it and get the proceeds. He must do one thing or the other. He can not blow hot and cold. He can not say, "There is fraud here, and therefore I want my patent back," and at the same time say, "I waive the fraud and want the proceeds." He has to elect what he will do

in this matter. I make these suggestions so that in case the bill is amended, it may state specifically what he wants. But the chief difficulty that the court perceives in the bill is this: that unless it can be alleged here that this partnership it at an end, and that Ambler has succeeded to the rights of the partners, certainly, in a proceeding in which his co-partner is not made a party, either complainant with him, or a party on the record as defendant, there can be no relief. Suppose he wants to have this arrangement set aside on the ground of fraud—a fraud committed by his co-partner, Mr. Whipple; to such a bill Mr. Whipple is a necessary party. Suppose he is willing to waive the fraud, and say, "I want to compel this company to account;" if, as it is said, they have not paid up fully for it, then if that partnership is still existing he can not bring his individual action himself; he must say that he has succeeded in some way to the rights of the two. That he has not done, and for that reason we must sustain this demurrer.

An argument was made here to sustain the right of Mr. Ambler to bring this bill in his own name, based on certain observations of the supreme court. In this suit of Ambler against Whipple and Dickerson, the supreme court held that, in this partnership arrangement, Ambler was entitled to one-half as against Whipple, and, they said, also as against Dickerson, because he had knowingly connected himself with Whipple, in the perpetration of the fraud. That has misled, as I think, the counsel for the plaintiff, into thinking that everybody against whom they can charge fraud, can be sued by Ambler in the same way that Ambler could sue, and did sue, his co-partner for an accounting; besides that, Dickerson in that suit, was one of the necessary parties, because two of the patents, which were issued, were issued to him and Whipple. To apply that observation of the court in respect to Dickerson, in that case would be to virtually overthrow all of the law applicable to partnership in this land.

The entry will be, "Demurrer sustained." The plaintiff can consider whether he can make a case, in view of my observations, so as to avoid these objections. He will have leave to amend, if he desires it, by June rules.

TREAT, District Judge, concurs in what I have said, and in the conclusion reached.

Ordered accordingly.

[NOTE. On appeal to the supreme court, this decision was affirmed. Mr. Chief Justice Waite, in delivering the opinion of the court, said: "The prayer is that the defendants may be enjoined from proceeding further with any dealings with the said partnership and trust property aforesaid," and "that the damages to your orator for the wrong and injury done in this behalf may be duly considered, and that an account be taken thereof before the master, * * * and that your orator, upon the final hearing, be allowed, adjudged, and decreed damages therefor." This is the substance of all

there is material in the mass of irrelevant matter that incumbers the record, and fills the voluminous argument filed by the appellant in his own behalf. Upon full consideration, we have no hesitation in saying that it presents no case for such relief in equity as is asked. If, as is more than once distinctly alleged, the object of the suit is to recover damages for an unlawful and fraudulent conspiracy to cheat Ambler out of his interest in the original invention which is the subject-matter of the controversy, the remedy is clearly at law, and not in equity. If an account of profits is wanted, and an injunction against the further use of the patented inventions, under the transfers from Whipple & Dickerson, then the suit should have been against the Missouri corporation in its corporate capacity, and not against a part only of its stockholders and directors individually. If the object is to charge these defendants for the profits made by Whipple through his breach of trust, then he is a necessary party, and nothing can be done in his absence. In any event, these defendants are but purchasers from Whipple of specific interests in the property which he held in trust for himself and Ambler. While the allegations of fraud in their general terms are as broad as language can make them, specifically they are confined by other allegations to the use of the patented invention in Missouri by the Missouri corporation, of which the defendants are stockholders and directors. It is not in any manner alleged or claimed that the defendants have profited by what Whipple has done, except through the title acquired by the conveyance to Blunt & Insley, and from them, with the consent of Whipple & Dickerson, the faithless trustees, to the corporation. No effort is made to set aside these conveyances. It is conceded that Blunt & Insley actually paid Whipple & Dickerson \$70,000 for the assignments which were made, and it is fairly to be inferred that in the accounting had under the decree of this court in *Ambler v. Whipple*, 20 Wall. (37 U. S.) 559. Whipple has been charged with the proceeds of this sale. But, whether that be so or not, no case has been made by the loose and general allegations in the bill for relief against these defendants." *Ambler v. Choteau*, 107 U. S. 586, 1 Sup. Ct. 556.]

Case No. 273.

AMBLER v. McMECHLEN.

[1 Cranch, C. C. 320.]

Circuit Court, District of Columbia. July Term, 1806.

BONDS—FORTHCOMING BOND—MARSHAL'S FEES.

1. It is not necessary that a forthcoming bond should recite the return of the execution, nor the certificate of the service, nor the name of the person by whom it was served; but it must state that the execution was served.

2. A mistake in calculating the marshal's fees may be cured by a release; and judgment may be rendered for the true sum.

Mr. Swann, for plaintiff.

Mr. Youngs, for defendant.

CRANCH, Chief Judge, delivered the opinion of the court.

This is a motion for an execution on a forthcoming bond, dated November 18th, 1799, which recites the amount of the execution on the judgment to be four hundred and sixteen dollars and sixty cents, including all

[Reported by Hon. William Cranch, Chief Judge.]

legal costs attending the execution. The defendant opposes the award of execution on this bond. 1. Because it does not recite the service of the former execution, and, 2. Because it does not recite the amount due thereon. The words of the act of assembly (page 298, § 13,) are "a bond from such debtor and securities, payable to the creditor, reciting the service of such execution, and the amount of the money or tobacco due thereon, and with condition to have the goods and chattels forthcoming at the day of sale appointed by such sheriff or officer." And such a bond, when returned, is to have the force of a judgment; and thereupon the court, on motion, may award execution for the money and tobacco therein mentioned, with interest from the date of the bond, and costs.

The defendant produces the execution upon which the bond was taken, which appears to be for—

				\$372.05
				18.06
		Costs,		8.20
				398.51
Marshal's com's 5 per cent. on	\$300.00	\$15.00		
2 per cent. on	98.51	1.97		
Service,			16.97	
			.63	
				\$416.11

The error of 49 cents, is the difference between 2 and 2½ per cent. on 98.51. The bond recites the service of the execution to have been made by James Campbell, deputy town-sergeant, whereas the execution appears to have been returned by C. Turner, the town-sergeant himself. In consequence of this variance, it is contended by the defendant's counsel, that the service of the execution is not recited in the bond. Upon this point, the court is of opinion, that the return by the principal sergeant is not conclusive evidence that the service was not made by Campbell, his deputy, as alleged in the bond.

The act of assembly which has been cited, (page 123, § 26,) and which requires the deputy to indorse his name as well as that of his principal, on the writ which he has served, does not make void the service if the deputy should fail to indorse his name on the writ. It only subjects him to a penalty; and the object of the law was to prevent disputes between sheriffs and their deputies. The act respecting the forthcoming bond, does not require that it should recite the return of the execution, nor the certificate of the service, nor the name of the person by whom the service was made; but it must recite the service of the execution; that is, as the court understands it, the bond shall aver that the execution has been served. This has been done, and therefore the court thinks the bond has satisfied the words and spirit of the act in this respect.

As to the other objection, that the amount due on the execution is not recited, because the sum stated in the bond includes the marshal's commissions, which are mis-

calculated, and are stated to be forty-nine cents too much, the court, at a former argument of the case, intimated to the counsel for the defendant, that the point was probably settled in the cases of *Scott v. Hornsby*, 1 Call, 41, and the three following: *Bell v. Marr*, Id. 47; *Worsham v. Egleston*, Id. 48, and *Wilkinson v. McLochlin*, Id. 49; and that, unless a distinction could be taken between this case and the principle on which those cases were decided, their authority was decisive. An attempt has been made to point out a difference. It is said that in the cases in Call's Reports, the amount due upon the execution was in every instance truly stated, but the bond contained an additional sum separate from the amount due on the execution; that the error existed in this separate sum; and that the bond contained in itself the data by which the amount really due upon the execution might be ascertained and the bond itself corrected. But upon an examination of those cases the court does not find the fact to be so.

In the case of *Scott v. Hornsby*, the sheriff took the bond, including his commissions. It does not appear that the amount of the commissions was stated in the bond. It rather seems, from the report of the case, that the principal, costs, and commissions were stated in an aggregate sum. Yet, the plaintiff having released those commissions, the court awarded execution for the residue. In the case of *Bell v. Marr*, 1 Call, 47, the forthcoming bond exceeded the amount of the execution by the sum of £23. 6s. 7½d. Execution was awarded on the bond for the whole sum, and three days afterwards the plaintiff released the excess on record, and the judgment was affirmed on writ of error. Here it is not stated whether the £23. 6s. 7½d. was part of a whole sum, or whether it formed a separate item in the execution; but the former seems the most probable conjecture. In *Worsham v. Egleston*, Id. 48, the bond recited the amount of the execution to be 7342 pounds of tobacco, including interest, costs, and the sheriff's commissions. The execution was only for 6940 lbs. tobacco. The court of appeals, reversed the judgment on account of the commissions being included, but gave judgment in favor of the plaintiff for the residue. Here the sum clearly was aggregate, and the commissions not specially stated in the bond. It was exactly the present case in that respect. So in *Wilkinson v. McLochlin*, Id. 49, the bond recited that the execution amounted to £195. 12s. 6d., including interest, sheriff's commissions, and all legal costs. But the execution was only for £187. 13s. 7d. The same judgment was entered by the court of appeals as in the last case, and yet there was nothing in the bond itself by which the error could be corrected. These two last cases are exactly in principle the same as that now before us, and are decisive that the plaintiff is entitled to his execution for

the whole amount of the condition of the bond, excepting the 49 cents error in calculating the commissions.

The plaintiff had better release the 49 cents before the award of execution is entered. Execution to be awarded.

Case No. 274.

The A. M. BLISS.

[2 Lowell, 103.]

District Court, D. Massachusetts. March, 1872.

ADMIRALTY—JURISDICTION—CHARTER-PARTY—MARITIME LIENS—PLEDGE OF FREIGHT AS SECURITY.

1. The district court has full jurisdiction of all contracts of affreightment and of claims for indirect as well as direct damages for the violation of them.

[Cited in *Paterson v. Dakin*, 31 Fed. 684.]

[See *Insurance Co. v. Dunham*, 11 Wall. (78 U. S.) 1; *The Alberto*, 24 Fed. 379; *The Volunteer*, Case No. 16,991; *The Pauline*, Id. 10,843; *The Dick Keys*, Id. 3,898; *Lowry v. Canal Boat*, Id. 8,580.]

2. There is no lien upon a vessel for loans made on a pledge of the freight as security.

3. Where agents of a vessel, who were part owners, chartered the vessel to a creditor of their own, to enable him to repay himself out of the earnings.—*Held*, the charter-party was void as against the vessel and the other owners.

In admiralty. Affreightment.—Libel by A. S. Lewis and others, composing the mercantile firm of A. S. & W. G. Lewis & Co., against the schooner A. M. Bliss, alleging that they hired the vessel of Patton, Ginn, & Folger, of Boston, agents and owners, for six voyages to Hayti or other parts of the West Indies, or the Salt Islands, at \$1,200 for each voyage, and that the vessel had performed only two of the voyages, and that her master and said agents refused to send her on the third voyage; that the libellants had advanced, on account of the freight, \$2,200 more than had been already earned, which sum, with other damages, they sought to recover. An amendment was filed, by consent, averring that the libellants had settled the two voyages, and had, besides, advanced \$3,000, by their acceptance drawn on account of the charter, which they were liable to pay at any time, and that other charges to the amount of \$350 had accrued on the same account. The master appeared and claimed the vessel, and in his answer denied the authority of the supposed agents to make the charter, and set up that it was a fraud on the other owners, and that the libellants participated in the fraud; denied that he had absolutely refused to make the third voyage, but said that he offered to make it if the libellants would settle for the former voyages, and would pay the future freight to the owners. There was much conflict of evidence con-

cerning the master's knowledge of the charter-party, the authority of the agents, and the good faith of the transaction; and there was some discrepancy and contradiction concerning the amounts, dates, &c., of advances said to have been made. The dealings were between Patton of the one part, and W. G. Lewis of the other; and there was some testimony from both of them that a considerable part of the charter-money was to be applied to liquidate old debts of Patton, or of his former firm of Patton & Ginn, to the libellants themselves, or to one of them. Patton & Ginn were now bankrupts. The charter-party contained several clauses that were commented on as unusual, and as showing fraud; among others, that a commission of five per cent should be payable to the charterers, and two and a half per cent to the agents "on the signing lost or not lost on any voyage," and that the agents agreed to sign charter-parties at the beginning of each voyage for such terms as Lewis & Co. might direct, without prejudice to any clause of the original charter-party; and that the charterers might cancel the charter-party at the end of any voyage. On the other hand, there was evidence that the right to cancel was not unusual in the Haytian trade, and was reasonable, owing to the peculiar vicissitudes of that business. The right to insert a different rate of freight in the voyage charters was said to be intended to enable the charterers to charge their correspondents abroad more than they really paid for the schooner, if the market rate of freights should advance.

J. W. Hudson, for libellants.

J. C. Dodge, for claimant.

LOWELL, District Judge. The arguments of counsel have turned so much upon the important matters of fact involved in the controversy, that they have almost overlooked the point raised by the answer, whether, upon the libellants' own case, they have a lien on the ship. The district court has full jurisdiction of contracts of affreightment, whether evidenced by charter-party or bill of lading; and though the damages may, in any case, be somewhat indirect, as, for instance, if they arise out of a jettison which requires contribution, or out of a fraudulent payment of salvage by the master, yet the mode in which the claim for compensation arises will not oust the jurisdiction: *Dupont de Nemours v. Vance*, 19 How. [60 U. S.] 162; *Church v. Shelton*, [Case No. 2,714;] *The Panama*, [Id. No. 10,703.] If, then, the fact were as is alleged in the libel, that an advance of the freight had been made by the charterers in accordance with the terms of the contract, the advance would, in the absence of an express agreement to the contrary, be recoverable of the owners, if the ship should, for any reason, fail to perform the voyage;

¹[Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

and this right might be enforced against the ship: The Panama, *ubi supra*; The Pacific, [Case No. 10,643.] But I understand that the advances, so called, in this case, were not advances of freight, but loans on a pledge of the freight, which is a very different thing. In the one case, there could be no recovery, unless the voyage failed; and, in the other, the borrowers would be bound to repay the money in any event, and the lenders would have merely a right to security on the freight. Such a loan does not purport to pledge the ship, but only the freight; and there is no lien on the ship for its repayment, because the failure to pay is no breach, express or implied, of the charter-party, but only of a distinct contract of loan, in which the promise of the borrower is the principal obligation. In this respect the charterers are on no different footing from any other person who should lend money to the ship-owner on a pledge of freight. The ship is bound to the due performance of the contract of hiring, including, perhaps, the repayment of freight advanced on the charter; but it is not bound to the performance of a collateral agreement to repay money lent on the faith that all the covenants of the charter will be kept. The distinction may seem a nice one, but it appears to me to be plain and indisputable.

My duty, however, requires me to go further, and examine the legality of the contract itself; because I may have misunderstood the facts on which I decide that no privilege is held against the vessel, but more especially because some damages are testified to which do undoubtedly have such a privilege, if the charter be a binding contract. It is said, indeed, that the master never refused to perform his part of the charter, excepting upon terms, which he had a right to insist on, of a settlement of each voyage when it was ended; but his right to a settlement, or, at least, to any thing more than a mere statement of the account, depends on whether the charterers had already lawfully paid or lent to the authorized agents of the vessel much more than had been earned at the time of the dispute, which involves the whole merits of the case. I cannot understand the libellants' witnesses otherwise than that a great part of the very large sum which was to be lent or advanced was to go to pay the old debts of Patton & Ginn to the charterers, or one of them. Indeed, it is scarcely credible that so large an advance as is mentioned in the memorandum—more than twice what the libel alleges—could be made under any ordinary circumstances, especially on a charter which the lenders might wish to cancel at the end of some one of the voyages. That the amount was so large; that the agreement for it, which really preceded the charter, was not embodied in it; that some indefinite part of the money was appropriated to the old debts, and no definite

part was testified to as having been applied to any thing else,—all lead me to the conclusion that this was the true intent of the transaction. The evidence certainly tends somewhat strongly to throw a doubt on any advances having been made at all, excepting of one sum of \$350, which, perhaps, had been earned before it was paid, and was not truly an advance. But this is consistent with the other theory, for it shows that the parties intended to settle every thing by an adjustment of accounts; which, if Patton & Ginn had been the only owners of the schooner, would have been a very proper arrangement, but actually involved an abuse of the agency, which the libellants must be held to have known, for they were bound to inquire into the ownership of the vessel before undertaking to pay themselves out of the earnings. I have no hesitation in saying that the charter-party was void as against the vessel and all the owners excepting Patton & Ginn. Libel dismissed with costs.

AMBRAMOVIC, (DEMARTINI v.)

[See Demartini v. Ambramovic, Case No. 3,779.]

Case No. 275.

The AMELIA.

[23 Fed. 406, note.]

Circuit Court, S. D. New York. July 19, 1877.¹

ADMIRALTY—JURISDICTION—EQUITABLE TITLE—POSSESSION.

T. built the yacht A. for D., and thereafter accepted part of the purchase money, and was present when D. sold her to one H. by bill of sale, and performed other acts which indicated that he considered himself no longer the owner of the yacht; but the title had never passed from him by any instrument of transfer, or by absolute delivery, and he subsequently claimed the ownership. On suit brought by H. to recover possession, *held*, that the legal title had never passed from T., and, as against a legal title, an admiralty court will not undertake to enforce an equitable title.

[Cited in The G. Reusens, 23 Fed. 406.]

[See Kynock v. The S. C. Ives, Case No. 7,958; Davis v. Child, *Id.* 3,628.]

[In admiralty. Libel by Abraham Hill to recover possession of the yacht Amelia from J. N. Towns. Libel dismissed, with costs. Reported as Hill v. The Amelia, Case No. 6,487. Decree affirmed.]

JOHNSON, Circuit Judge. The facts found in this case appear in the findings placed on file, and, so far as the material question is concerned, do not differ in substance from those which appeared in the district court. The legal title to the vessel did not pass from Towns, the builder, to Doncomb by any instrument of transfer, nor was there any

¹[Affirming decree of district court in Hill v. The Amelia, Case No. 6,487.]

absolute delivery of the yacht. It was part of the agreement that a bill of sale should be executed when the agreement on the part of Doncomb was fully performed, and this time never arrived. The case, therefore, is substantially, as it is stated in the opinion of the district court, an attempt to enforce an equitable interest as against a legal title. This the court of admiralty does not undertake. When it proceeds in a petitory suit, it proceeds upon legal title. *Kellum v. Emerson*, [Case No. 7,669;] the *S. C. Ives*, [Id. 7,958;] *The John Jay*, [Id. 7,352;] 2 Pars. Shipp. & Adm. 237, note 2. I do not find, and have not been referred to, any case which has been decided in this circuit, or in the supreme court of the United States, which holds a different doctrine; and I should be very unwilling to undertake to introduce a new and, at the least, a doubtful rule, in a case where my decision could not be reviewed, and would be a controlling precedent. If such a rule existed there could not fail to be numerous cases in which it must have been acted on. In *Ward v. Peck*, 18 How. [59 U. S.] 267, the claimant's case depended on matters clearly within the admiralty jurisdiction,—the power of a master to sell the ship,—and the libelants had the legal title unless it had been divested by the master's sale; and their legal title was sustained. There are other cases of this class, but they are not thought to conflict with the views expressed in this case by the district court, and which I have adopted. The decree must be affirmed, with costs.

Case No. 276.

The AMELIA.

[18 Leg. Int. 357; 4 Phila. 412.]

District Court, E. D. Pennsylvania. July 1, 1861.

PRIZE—DISPOSITION OF CAPTIVES—NAVAL AND JUDICIAL COGNIZANCE.

[A prize master reported to the court that he had delivered the prize to the marshal of the district, and had permitted the persons found on board to go ashore, for their greater comfort, they "remaining willingly subject to the orders of the judge of this court." *Held*, that such persons were not subject to the order of the court, but were in custody of the naval captors, and that their detention or discharge was purely a matter of naval, and not judicial, cognizance.]

In admiralty. The following proceeding was had in the case of the Amelia:

Eastern District of Penn'a.

In the U. S. District Court.

To the Hon. John Cadwalader,

Judge of said Court:

The undersigned begs leave to report, that about one o'clock, P. M. of Saturday, 29th June, 1861, he gave the possession of the ship Amelia, of which he has been prize master, to the marshal of this district, and has since that time aided him in the custody and safe keeping of the said ship and her

cargo; and that he has allowed all the persons sent with him on the ship to this port, viz., the captain, his wife, the cook and his wife and daughter, to go ashore, for their greater comfort, there being no conveniences for them on board the vessel; and each and all of them remaining willingly, subject to the orders of the judge of this court.

(Signed)

Acting Master, John W. Bentley,
U. S. Navy, and Prize Master of
Ship Amelia.

Phila., 1st July, 1861.

BY THE COURT. The prize master is mistaken in supposing that the persons mentioned in the above statement are subject to the order of the court. On the contrary, they are in custody of the naval captors, unless they have been duly discharged. The court cannot interfere to direct their discharge. But if the commissioner of the court and the prize master concur in opinion that there is no reason for their longer detention, the court cannot perceive that their discharge would be censurable. This, however, is a matter for naval, and not for judicial regulation. The prize master, stating that his duties may require him to leave Philadelphia, the court add, that so soon as the persons in his custody shall have been discharged, or their custody otherwise regulated by the proper naval authority, the court perceive no necessity for his remaining here longer. But so far as naval duties may be concerned, the prize master will, in this respect, judge for himself what should be his course of conduct.

Case No. 277.

The AMELIA.

[18 Leg. Int. 388; 4 Phila. 417.]

District Court, D. Pennsylvania. Nov. 26, 1861.

PRIZE—LAWFUL PRIZE—BOOKS FOR PUBLIC LIBRARY.

Books intended for a public library will not be confiscated in a prize court.

In admiralty.

And now, 26th November, 1861, this case was heard upon the claim of Mitchell King, of Charleston, South Carolina, for two cases of books, marked "The University of North Carolina, Chapel Hill, North Carolina, care of Mitchell King, Esq., Charleston, South Carolina, Nos. 1 and 2," received and filed on the 14th instant, with the written consent of the District Attorney of the United States. And the affidavit of John Pennington, taken on the 16th instant, and this day filed, being read by consent, and the letter of the said claimant therein mentioned being put in evidence, and it appearing to the court that other parts of the said letter than are extracted in the said affidavit should be considered in forming an opinion as to the sufficiency of the authority

conferred upon Mr. Pennington to receive the said two cases of books, the said letter is filed of record. And the said claim having been considered upon the above mentioned papers, and upon the documents on board of the captured vessel, the court said: Though this claimant, as the resident of a hostile district, would not be entitled to restitution of the subject of a commercial adventure in books, the purpose of the shipment in question, gives to it a different character. The United States, in prosecuting hostilities for the restoration of their constitutional authority, are compelled incidentally to confiscate property captured at sea, of which the proceeds would otherwise increase the wealth of that district. But the United States are not at war with literature in that part of their territory. The case of the pictures of the Philadelphia Academy of Fine Arts, liberated by a British colonial prize court in the war of 1812, the prior proceedings in France mentioned in the report of that case, and the French and other decisions upon cases of fishing vessels, are precedents for the decree which I am about to pronounce. Without any such precedents, I would have had no difficulty in liberating these books. Whereupon, it is ordered, adjudged and decreed, that the said two cases of books be liberated from the custody of the marshal, and delivered to the said John Pennington.

Case No. 278.

AMELIA v. CALDWELL.

[2 Cranch, C. C. 418.]¹

Circuit Court, District of Columbia. October Term, 1823.

SLAVERY—RESIDENCE ABROAD—FREEDOM.

A slave carried from Washington, in the District of Columbia, to Virginia, by her owner, for a temporary residence only, and brought back to Washington, and there sold to a resident of Washington, does not thereby become entitled to freedom under the Maryland act of 1796, c. 67.

[See note at end of case.]

This cause was submitted to the decision of the court by Mr. Key, for the petitioner, and Mr. Jones, for the defendant, upon the following case agreed: "In this case it is admitted that the petitioner was born in the state of Maryland, and became, by marriage, the property of one Henry O. Middleton, who resided in Washington county, in this district, until May, 1820, there keeping the said petitioner in his possession, as his slave. That the said Middleton then removed into the state of Virginia, to reside, and left the said slave in Maryland, with her former master. That on the 7th of December, 1820, the said petitioner was carried by the said Henry O. Middleton, to Fredericksburg, in

Virginia, where he then resided and hath resided ever since, with an agreement and understanding between the said Middleton and the said petitioner, that if she did not like to continue in Fredericksburg, she should return and get a master, either in Maryland or the district, as she might choose. That after staying some time in Fredericksburg, the said petitioner became dissatisfied, and expressed her desire to return; in consequence of which, the said Middleton, on the 7th of December, 1821, gave her a pass authorizing her to proceed from Fredericksburg to Washington. That in some few weeks afterwards, the said Middleton came to Washington, where the petitioner then was, and sold her to the defendant. It is submitted to the court to determine, upon this statement, whether, by the law of Maryland, A. D. 1796, c. 67, the petitioner is or is not entitled to her freedom; with the privilege to either party to except to the judgment of the court.

F. S. Key, for petitioner.

W. Jones, for defendant.

THE COURT were of opinion that, upon the facts, as admitted above, the petitioner is not entitled, by law, to her freedom, and therefore give judgment for the defendant, "from which the petitioner prays an appeal to the supreme court of the United States."

[NOTE. Act Md. 1796, c. 67, (2 Maxcy's Laws, p. 351.) prohibits the importation of slaves for sale or to reside, and provides that it may be lawful for any citizen, "who shall come into this state with a bona fide intention of settling therein, to import or bring into this state, or within one year thereafter, any slave or slaves the property of such citizen at the time of his or her said removal." Further provisions are made in favor of owners of slaves traveling or temporarily sojourning abroad.]

AMELIE, The, (FITZ v.)

[See Fitz v. The Amelie, Case No. 4,838.]

AMELIA, The, (HILL v.)

[See Hill v. The Amelie, Case No. 6,487.]

Case No. 279.

The AMERICA.

[1 Adm. Rec. 449.]

Superior Court, S. D. Florida. Dec. 5, 1836.

SALVAGE—AMOUNT OF AWARD.

[In admiralty. The decree awarded 25 per cent. on the cargo saved uninjured, 50 per cent. on that saved in a damaged condition without diving, and 60 per cent. on the damaged portion recovered by diving. Nowhere reported; opinion not now accessible.]

¹[Reported by Hon. William Cranch, Chief Judge.]

[Cited in Baker v. The Slobodna, 35 Fed. 541.]

Case No. 280.

The AMERICA.

[2 Ben. 475.]¹

District Court, S. D. New York. June, 1868.

COLLISION IN HUDSON RIVER—TOWBOAT—KEEPING TO THE RIGHT.

1. Where a steamboat was coming down the Hudson river, having boats in tow on each side, and having lights properly set, and kept close to the west bank of the channel, and, seeing the lights of an approaching tow, slowed and stopped, and the tug-boat coming up was also on the west side of the channel, and, seeing the other's lights, hauled out to the eastward, and then straightened up the river, and a collision occurred between one of the boats which she was towing astern, and the boat on the port side of the steamboat coming down: *Held*, That there was no fault on the part of the boat that was injured.

[Cited in *McCoy v. The Carrituck*, Case No. 8,730.]

2. That the steamboat going up was in default in not keeping to the east side of the channel, and that she either did not sheer far enough to the eastward, or straightened up the river too soon.

[Cited in *McCoy v. The Currituck*, Case No. 8,730.]

[See *Waring v. Clarke*, 5 How. (46 U. S.) 441.]

3. That the steamboat coming down was not shown to be in fault.

In admiralty. This was a libel for a collision which occurred about 6 o'clock P. M., on the 25th of October, 1865, after dark, on the Hudson river, about seven miles below Albany, between the lake boat or barge *Contest* and a boat in tow of the steamboat *America*, whereby the *Contest* was badly damaged. The amount of damages claimed was \$10,000. The *Contest* was one of seventeen boats, all of which were in tow astern of the steamboat *New Haven*, fastened in tiers by hawsers, there being five tiers, the boats in each tier being abreast of each other, and the *Contest* being the extreme port boat in the third or the fourth tier of boats, there being four boats in that tier. The *New Haven* was bound, with her tows, from New York to West Troy. The *America* was on her way down the river from Albany, with two boats lashed side by side to her starboard side, and two to her port side, and some others astern, all in tow. The port bow of the extreme port boat, on the port side of the *America*, struck the port side of the *Contest* about amidships, tearing off her chime plank, and cutting through her timbers, and causing her to leak badly, and injuring her cargo. The libel charged negligence on the part of both the *America* and the *New Haven*.

The answer of the *America* set up, that when the lights of the *New Haven* were seen from the *America*, at the distance of from a mile to a mile and a half, the *America*, with her tows, hauled close in to the west-

ward, and near to a stone dike which forms the western bank of the river for a considerable distance; that the *New Haven*, still coming on pretty well in to the westward, the *America* was slowed; that the *New Haven* then sheered out to the eastward, far enough to herself clear the most easterly boat on the port side of the *America*, and in so doing, disclosed to the view of the *America* the boats towed astern of the *New Haven*; that the engine of the *America* was then stopped, and was shortly after backed, as soon as there appeared to be danger of a collision, and was backing, when a boat or boats astern of the *New Haven*, on the port side, were dragged across the bow of the extreme boat on the port side of the *America*, by the *New Haven*, which, after sheering out to the eastward, straightened up the river so close to the extreme boat on the port side of the *America*, as herself to pass within ten or fifteen feet, or nearer, off the port side of said boat; that, at the time of the collision, the extreme boat on the starboard side of the *America* was within about twenty feet of the dike on the west side of the river, and as far to the westward as it was safe for her to be, and the *America* had backed so that the boats towed astern of her were close upon her; that there was abundant time and room for the *New Haven*, with her tow, to have passed to the eastward of the *America* and her tow, and she ought to have passed so far to the eastward with her tow as to avoid all danger of a collision; that she did not do this, nor did she slow or stop before the collision; that the tide was flood, but not running strong; and that the collision was not the fault of the *America*.

The answer of the *New Haven* contained no statement of the particulars of the collision, or of the grounds assumed by the *New Haven* in defence. It consisted of a denial of all the material allegations of the libel, and of an averment that the *New Haven* was carefully navigated, and that the collision took place in consequence of the individual fault, or combined fault, of the *Contest* and the *America*, and was the fault of the agents and servants of the libellants, and not of the claimant.

Spencer, Hoes & Metcalf, for libellants.

C. Van Santvoord, for The *America*.

Beebe, Dean & Donohue, for The *New Haven*.

BLATCHFORD, District Judge. There is no evidence showing any fault on the part of the *Contest*. The testimony is, however, satisfactory to show that the *New Haven* was in fault. She was violating the statute law of New York (1 Rev. St. pt. 1, c. 20, tit. 10, § 1) which required her to keep to the right or easterly side of the channel. Her pilot, Kane, who was at the wheel at the time of the collision, states that he was going along the dike till he got above the dam,

¹[Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

and that he then sheered to the eastward, on seeing the America approach, till he got clear of the America's tow, and then straightened up the river. But either he did not soon enough sheer to the eastward, or else he straightened up too soon, after sheering. That the New Haven dragged the Contest into contact with, and across the bow of the boat lashed to the America, is shown by the fact, that the boats in front of the Contest, as well as she herself, and the boat behind her, struck against the boat lashed to the America, although none of them were injured to the extent that the Contest was. The theory on the part of the New Haven, that the America took a sheer to the eastward when the two steamboats were abreast of each other, is not supported by the evidence. The America came down as near to the dike as it was safe for her to go, and, if any thing, she sheered to the westward rather than the eastward, when she saw the near approach of the New Haven. She had a right to suppose that the New Haven would keep to the right of the channel, and would sheer out to the eastward in season, the lights of the America being plainly visible. Her speed was moderate, and she was slowed and stopped and backed promptly, and her forward motion was stopped at the time of the collision, whereas the New Haven and her tows were under headway at that time. No fault is shown on the part of the America.

The libel must be dismissed as to the America, with costs, and the New Haven must be condemned in damages and costs, with a reference to a commissioner, to ascertain the damages caused to the libellants by the collision.

Case No. 281.

The AMERICA.

[3 Ben. 424.]¹

District Court, S. D. New York. Oct., 1869.²

COLLISION IN EAST RIVER—VESSELS CROSSING—PORTING HELM—WHISTLES.

1. A steam vessel has no right to select for herself a particular course, and, by the use of her whistle, prescribe to another steam vessel a particular course, without regard to the act for preventing collisions.

[Cited in The Free State, Case No. 5,090.]

2. Article 13 of that act only applies when each vessel, by day, sees the masts or the line of the keel of the other in a line, or nearly in a line, with her own masts or the line of her own keel, and when, by night, each vessel is in such a position as to see both of the side-lights of the other.

[Cited in The Manitoba, Case No. 9,029.]

3. The steamboat F. was going down the East river, with the ebb tide, and the ferry-

boat A. was crossing from New York to Brooklyn, and heading up against the tide, so as to swing into her slip, in such a position that, if both vessels had kept on, the F. would have passed ahead of the A., and between her and the Brooklyn shore. The F. blew one whistle, and ported, whereupon the pilot of the A., seeing that, if both vessels kept on, the A. would be struck on her starboard side, also ported, and the two vessels came together nearly head on: *Held*, that the F. was in fault, in porting, and attempting to cross the course of the A., and that the A. was not in fault.

[Cited in The Free State, Case No. 5,090.]

[See note to The America, Case No. 284.]

[In admiralty. Libel by the Camden & Amboy Railroad Transportation Company, owners of the steam tug Fairfield, against the steam ferry boat America, owned by the Union Ferry Company. Libel dismissed. This decree was reversed by the circuit court in The America, Case No. 284. The decree of the circuit court was reversed by the supreme court. 92 U. S. 432. See note to The America, Case No. 284. For the decree of the circuit court on the question of damages, see The America, Case No. 285.]

Beebe, Donohue & Cooke, for libellants.
B. D. Silliman, for claimants.

BLATCHFORD, District Judge. This is a libel, filed by the owners of the steamboat Fairfield, against the steam ferry-boat America, to recover for the damages caused to the Fairfield by a collision, which took place between her and the America, on the 13th of December, 1867, [1868,] at about five o'clock in the afternoon, in the East river, between New York and Brooklyn, a short distance below the Brooklyn slip of the Fulton ferry. The Fairfield was going down the East river, having come from the Navy Yard at Brooklyn, and being bound into the North river, around the Battery. The America was a boat running on the Fulton ferry, from the slip at the foot of Fulton street, New York, to the slip at the foot of Fulton street, Brooklyn, and was at the time on a trip from New York to Brooklyn. The tide was strong ebb. The case made by the libel is, that the Fairfield was going down, at about the middle of the river, when the America left her slip on the New York side; that, as the vessels neared each other, a single whistle was blown by the Fairfield, to indicate her intention to go to the right, and the wheel of the Fairfield was put to port, and her head sheered angling towards the New York shore; that the America paid no attention to the whistle of the Fairfield, but continued to haul more up the river, and on to the Fairfield; that, as it was found that the America was rapidly hauling on to the Fairfield, and still continuing to head more and more up the river, and that a collision, if the America kept on, would probably happen, the bells of the Fairfield were rung to slow, stop, and back; that these orders were promptly obeyed, and the headway of the Fairfield was nearly, if not quite, stopped

¹[Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

²[Reversed by circuit court, in the America, Case No. 284, and that decree was subsequently reversed by the supreme court in 92 U. S. 432.]

in the water; that, while the Fairfield was in that condition, the America blew two whistles, indicating her intention to go to the left; that, at that time, the America was so close to the Fairfield, that the Fairfield, her engine and way being stopped, could do nothing except continue to back her engine; that the America kept on, at nearly, if not quite, full speed, and struck the stem of the Fairfield, a little on the larboard side, crushing in her planks and timbers, and opening her forward; and that the Fairfield commenced to take in water rapidly, and was backed into a slip below the Brooklyn terminus of the Fulton ferry, and there sank in a few moments. The libel alleges, that the collision happened through the carelessness, negligence, and want of skill and management of those navigating the America, and, among other things, in not having good and sufficient lookouts, in not promptly answering the single whistle of the Fairfield, in hauling up the river in such a manner as to bring her upon the Fairfield, in not keeping to the right, in blowing two whistles, and attempting to go to the left of the Fairfield, when the Fairfield was lying dead in the water, and when she was so near to the Fairfield that a collision could not be avoided, in passing outside of the Fairfield, and then steering up the river and towards the Fairfield, and in not slowing, stopping, and backing before the collision was inevitable. The libel also avers, that the management and navigation of the Fairfield were correct and proper, as it was her duty to keep to the right, and to indicate her intention by a single whistle, and, when she found that the America disregarded her signals, and continued to sheer on to her, to slow, stop, and back. The answer alleges, that, when the America was within about 200 yards of the Brooklyn shore, and about 250 or 300 yards of her slip on the Brooklyn side of the river, and was heading up the East river, against a strong ebb tide, for the purpose of getting room to swing into said slip, her pilot discovered the Fairfield, under full headway, heading down the river, and towards the Brooklyn shore, on a course which, if continued, would have carried her in front of and past the America, on the side towards the Brooklyn shore; that thereupon the America kept steadily on her course up the river, in order that the Fairfield might keep her course, and pass in front of the America, as she could easily have done, without any collision; but the Fairfield, after continuing said course until within a short distance of the America, and when the Fairfield was under full headway, and when it was impossible for the boats to so change their course as to pass each other on the right without colliding with each other, blew one whistle, indicating her intention to pass on the right, and outside of the America, and simultaneously put her helm hard to port, and in that way steered directly towards the

America; that, as soon as the Fairfield so sheered and blew her whistle, it was obvious that she would strike the America on the starboard side, unless the America could be so sheered as to receive the blow upon her bow, or as to admit of the Fairfield's passing on the opposite side of the America, or of striking her a quartering instead of a full blow on her side; that the only course which the pilot of the America could thereupon properly adopt, to prevent the America from being struck on her starboard side, and being cut through, was to give one whistle as a signal, so that the Fairfield might put her helm as hard a-port as possible, and to put the helm of the America hard a-port at the same time; that all this was immediately done by the pilot of the America, and she was immediately stopped, and her engines were backed, and she had stopped her headway by the land, when the Fairfield, continuing her course directly towards the America, struck her, the two vessels colliding head and head; and that the collision was caused wholly by the carelessness, negligence, and want of skill and management of the persons navigating the Fairfield, and, among other things, in not having a good and sufficient lookout, or a competent pilot, in blowing one whistle, and putting her helm to port, and attempting to pass the America on the right, when she had sufficient room to pass the America on the left, and when her course, if continued, would have taken her past the America on the left, and when it was plain that an attempt to pass on the right would probably bring about a collision, and in not slowing, stopping and backing before the collision became inevitable, or so as to lessen the force of the same.

In looking into the libel, the first thing that arrests attention is the fact, that it does not state how the two vessels bore from each other, or how they were approaching each other, when the Fairfield blew a single whistle, and put her helm to port. It only states, that, as the vessels neared each other, the whistle was blown by the Fairfield, and her helm was put to port, and her head was sheered angling towards the New York shore. This averment is entirely consistent with the statement in the answer, that the blowing of the whistle by the Fairfield, and the putting of her helm to port, and the sheering that followed, took place when the Fairfield was on a course heading towards the Brooklyn shore, which, if continued, would have carried her in front of and past the America, on the side towards the Brooklyn shore, without any collision. It is not pretended in the libel, that there was any risk of collision, when the Fairfield blew her whistle and ported, or that the vessels were then meeting end on, or nearly end on, so as to involve risk of collision, nor have the libellants attempted to show by proof any such state of things. The whole case made by the libel is, that, inasmuch as the

Fairfield blew a single whistle, and ported, it was the duty of the America to do the same; that the America failed to do so; and that, therefore, the America is solely responsible for the collision. The theory of the libel is based on the too prevalent and erroneous notion, that a steam vessel has a right, by the use of her steam whistle, to select for herself a particular course, and prescribe to another steam vessel a particular course, without regard to the provisions of the act of congress of April 29, 1864, (13 Stat. 58,) for preventing collisions on the water. If there was no risk of collision the moment before the Fairfield blew her whistle and ported, it was not her duty to port, and it was not incumbent on the America to port, and the Fairfield could not, by making a signal, impose any such obligation on the America. The libel makes out no case requiring the America to port her helm, under article 13 of the said act. That article provides as follows: "If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each shall pass on the port side of the other." This rule applies only to steamers meeting, and only to steamers meeting end on, or nearly end on, and only when there is risk of collision. It does not apply when the courses of the two steamers are such that there is no risk of collision. It does not apply to two steamers which must, if both kept on their respective courses, pass clear of each other. The only cases in which it applies are when each of the two vessels is end on, or nearly end on, to the other—that is, cases in which, by day, each vessel sees the masts, or the line of the keel, of the other, in a line, or nearly in a line, with her own masts, or the line of her own keel, and cases in which, by night, each vessel is in such a position as to see both of the sidelights of the other vessel. It does not apply to cases in which, by day, a steamer sees another steamer ahead, crossing her own course; nor, by night, to cases where the red light of one steamer is opposed to the red light of the other, or where the green light of one steamer is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both the green and the red lights are seen anywhere but ahead. No case is made by the libel, authorizing the Fairfield to port, or requiring the America to port. Nor does the testimony on the part of the Fairfield make out a case of meeting end on, or nearly end on, at the time the Fairfield blew her single whistle and ported. On the other hand, the answer, and the testimony on the part of the claimants, make out a case where the Fairfield was on a course that would have carried her between the America and the Brooklyn shore, and the America was on a course that would have carried her to

the New York side of the Fairfield, and the courses of the two vessels were such, when the Fairfield blew her single whistle and ported, that there would have been no collision, if both vessels had kept such courses. I think that the weight of the evidence is decidedly in favor of the statement contained in the answer as to the positions and courses of the two vessels at the time the Fairfield blew her single whistle and ported. If so, it follows, that the Fairfield, by porting, and attempting to cross the bows of the America, from the starboard side of the latter to her port side, left a course where there was no risk of collision, and threw herself in the way of the America, so as to make a collision inevitable. Unless the story in the answer is true, the collision could not have happened as it did, and the two vessels could not have struck each other in the way they did. For, as the Fairfield ported, and sheered towards the New York shore, the America, which was farther towards the New York shore than the Fairfield was, ported and sheered towards the Brooklyn shore, so as to avoid being struck on her starboard side by the Fairfield, and so as to receive the blow nearly on her bow, which was done. On the testimony of the pilot of the Fairfield, the collision could never have happened as it did. The Fairfield could not have been as far over towards the New York shore as is claimed for her by him. For, if she had been, inasmuch as the tide was ebb, and the America had rounded up the river, and could not have done so, on an ebb tide, until she was well over towards the Brooklyn shore, the vessels could not have come together bow on, as they did, after the Fairfield had ported. On the whole evidence, the collision took place through the fault of the Fairfield, in porting and attempting to cross the bows of the America, when she had no right to do so. I see no fault in the navigation of the America. Her pilot heard the single whistle of the Fairfield when it was blown, and noticed her porting as soon as it took place, and he immediately stopped and reversed his engine, and ported his helm, to change the direction of the coming blow.

The libel is dismissed, with costs.

Case No. 282.

The AMERICA.

[6 Ben. 122.]¹

District Court, E. D. New York. May, 1872.

TOW-BOAT AND TOW — UNKNOWN OBSTRUCTIONS—
BURDEN OF PROOF.

1. A canal-boat, properly placed in a tow, was being towed up the Hudson river. While

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going at a proper speed, where the channel was wide and deep, she was struck under her bottom by something which made a hole in her, and caused her to sink. A libel to recover the damages was filed against the tow-boat: *Held*, That, on the evidence, it appeared that while being towed in the ordinary and proper channel, the boat was struck by something under water, whose presence could not be known by any care exercised by those in charge of the tow-boat.

2. That, when it was shown by the tow-boat, that all care was taken to avoid obstructions, and that this obstruction was unknown, the burden of proof was shifted to the libellants, and that, in order to recover, they must prove that the sinking was caused by negligence, on the part of the tow-boat.

[Cited in *Powell v. The Willie*, 2 Fed. 97.]

[See *The Angelina Corning*, Case No. 384.]

3. That, as they had failed in proving this, the tow-boat was not liable.

[Cited in *Powell v. The Willie*, 2 Fed. 97.]

[In admiralty. Libel by James McKeag, owner of the canal-boat A. W. Humphreys, against the steamer America, for damages suffered by the A. W. Humphreys while in the America's tow. Libel dismissed.]

Wilcox & Hobbs, for libellants.

C. Van Santvoord, for respondent.

BENEDICT, District Judge. This is an action brought by James McKeag, owner of the canal-boat A. W. Humphreys, to recover of the steamer America, the damages sustained by the canal-boat, while being towed by the America, from New York to Albany, on the night of the twenty-third day of August last. The evidence shows, that the canal-boat was properly placed in the tow, and that, soon after the tow was fully made up, and while proceeding up the river by New York, at a proper speed, this canal-boat was struck under her bottom by some hard substance, which, although it did not break her loose, or strike any other boat in the tow, made a hole in the bottom of this boat, which caused her to sink in a very short time. No one is called who knows what struck the boat. The channel was there very deep, and nothing was seen to cause danger. But it appears that off 59th street, in the river there was at this time an old sunken crib, which was well known, and on which the boat might have struck in passing over it, and much evidence has been taken, as bearing on the question whether the boat was off 59th street, or above that point when she struck. Upon this question my conclusion is that, as the evidence stands, it cannot be found that the cause of the injury was striking the old crib off 59th street. The case is then one where the tow-boat shows, that the boat was properly placed in the tow, and that, while being towed in the ordinary and proper channel, she was struck under water by something whose presence could not be known by any care exercised

by those in charge of the tow. In such a case the towing boat cannot be held liable. When, on the part of the tow-boat, it was shown that all care possible was taken to avoid all obstructions, and that the obstruction which hurt this boat was unknown, the burden of proof shifted to the libellants, and in order to recover they must show that the sinking was caused by negligence on the part of the tow. There must therefore be a decree dismissing the libel with costs.

Case No. 283.

The AMERICA.

[8 Ben. 491.]¹

District Court, E. D. New York. July, 1878.

DAMAGE TO CARGO—BILL OF LADING—INHERENT DETERIORATION—BAD STORAGE.

1. Oranges and lemons were shipped on a steamship at Valencia to be brought to New York under a bill of lading exempting the vessel from losses by perils of the seas or from inherent deterioration. On the discharge of the cargo at New York the fruit was found to be mostly decayed, and a libel was filed against the steamer to recover for its loss: *Held*, that on the evidence the cargo had not been so stowed as to permit proper ventilation.

[Cited in *The Portuense*, 35 Fed. 671.]

2. That it was not incumbent on the libellants to prove that there was no inherent deterioration in the fruit.

3. That the rotting of this fruit was undoubtedly unduly hastened by the manner in which it was stowed; and that the libellants were entitled to recover.

[Cited in *The Portuense*, 35 Fed. 671.]

[See *The Star of Hope*, 17 Wall. (84 U. S.) 651.]

In admiralty.

Scudder & Carter, for libellant.

Butler, Stillman & Hubbard, for respondent.

BENEDICT, District Judge. This is an action upon a bill of lading to recover for the loss of a quantity of oranges. The oranges were shipped in Valencia, to be delivered in New York in like good order. The bill of lading is in the ordinary form. It states that the fruit was shipped in good order and condition, and it exempts the ship from liability for damages arising from perils of the seas or from "inherent deterioration." After the shipment of this fruit in Valencia, the steamer went to Malaga, where the position of some portions of the cargo was changed, and other cargo was shipped.

From Malaga the steamer proceeded to Boston, and landed some cargo and thence

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she proceeded to New York. Upon arrival in New York the fruit was found substantially destroyed by decay. All of it was more or less rotten and it was worth little or nothing. Whereupon this action was brought to charge the steamer with the loss. The evidence renders it necessary to consider only the question of stowage. Upon this point the contention on the part of the libellant is that the damage arose from the cargo being so stowed as to afford no proper ventilation. On the part of the steamer, the bad condition of the fruit on arrival of the steamer is admitted, but the liability of the steamer is denied, first, upon the ground that no uniform mode of stowing so as to secure ventilation in such a cargo exists, and that, by the mode adopted in this case, sufficient ventilation was secured; and, second, that the evidence leaves it in doubt whether the decay of the oranges did not arise from inherent deterioration.

Upon the whole evidence it appears quite plainly that, after the restowage of the cargo at Malaga, the fruit in question was not so stowed as to secure proper ventilation. The proximity of the engine bulkhead; the absence of a well hole in the cargo under the main hatchway; the stowage of a quantity of dried fruit between the oranges and the fore-hatch; the absence of a booby-hatch over the main hatchway, and the closeness of the stowage by the beams, are facts abundantly sufficient to make out a case of bad stowage in a cargo of this description. The natural result of this mode of stowage would be to cause the fruit to decay, and, in the absence of any other cause, the conclusion must be that the stowage did cause the extraordinary decay which took place.

It has been argued in behalf of the steamer that the fact, which was proved, that sometimes oranges do decay on a voyage of importation, from inherent deterioration, renders it incumbent upon the libellant, before he can recover, to prove that no inherent deterioration existed in this fruit.

I do not so understand the law to be. The bill of lading states that the fruit was shipped in good order and condition. No witness is called to say that any defect existed in the fruit; and it is going far to say that the possibility that there might be inherent deterioration must prevent the libellant from recovering.

All oranges will rot, but that fact does not prevent the conclusion that the rotting of these oranges was unduly hastened to the damage of the libellant by the manner in which they were transported. My opinion, therefore, is that the libellant has made out a case which entitles him to a decree. Let a decree be entered for the libellant, with an order of reference to ascertain the amount.

Case No. 284.

The AMERICA.

[10 Blatchf. 155.]¹

Circuit Court, S. D. New York. Sept. 23, 1872.*

COLLISION—BETWEEN STEAMERS—PORTING HELM—LOOKOUT.

1. A collision occurred in the East river, between a steamboat from the Wallabout to the North river, and a ferry-boat crossing from New York to Brooklyn, on the Fulton ferry route: *Held*, on the facts, that the ferry-boat was solely in fault.

[See note at end of case.]

2. Although, at the time, the steamboat was in the sole charge of her pilot, and the assistant engineer, and her master and engineer, and the rest of the hands, were in the cabin, at supper, and such inattention was inexcusable, yet it did not contribute to the collision.

3. The two vessels approached each other so nearly end on, as to require each to keep to the right. The steamboat did so, and the ferry-boat did not.

4. A vigilant lookout on ferry-boats crossing the East river is required.

[Cited in *The Manhasset*, 34 Fed. 419.][Approved in *The Monticello*, 15 Fed. 477.]

[Appeal from the district court of the United States for the southern district of New York.

[In admiralty. Libel by the Camden & Amboy Railroad Transportation Company, owner of the steam tug *Fairfield*, against the steam ferryboat *America*, owned by the Union Ferry Company. In the district court the libel was dismissed, with costs. *The America*, Case No. 281. Libellants appeal. Reversed. This decree was reversed by the supreme court on appeal. 92 U. S. 432. See note at end of case. For the decree of this court on the question of damages, see *The America*, Case No. 285.]

Charles Donohue, for libellants.
Benjamin D. Silliman, for claimants.

WOODRUFF, Circuit Judge. It cannot be denied that it was unsafe and improper, on the part of the captain, engineer and hands employed on the vessel of the libellants, the steamboat *Fairfield*, to leave her in sole charge of the pilot and assistant to the engineer, at the time they went to their supper. She had been at the Wallabout, on the southerly or Brooklyn side of the East river, had left her tow, and had come thence out into the river, and swung around, taking her course down the river, to go around the Battery, to her slip on the North river. It was about five o'clock in the evening, on the 13th of December, 1866. The sun had set, and it was nearly dark, though the shores and objects at a considerable distance were

¹[Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

²[Reversing *The America*, Case No. 281. Decree of circuit court reversed by supreme court in 92 U. S. 432.]

still visible. The *Fairfield* was about to pass through a channel crossed by numerous ferry-boats, and ordinarily travelled by other craft, rendering it especially important that more than ordinary watchfulness and competent skill in navigation should be in constant exercise. That, in these circumstances, no lookout should be stationed, and the captain should relinquish all attention to the navigation of the vessel, and, with all hands other than the two above named, go to the cabin for supper, was extraordinary, and, as I think, inexcusable. Nevertheless, if this inattention on their part in no wise contributed to the collision, if, in fact, the pilot saw all that was material, which he could have seen, or of which he could have been informed, had a proper lookout been stationed, and others had been on duty, then the question ceases to be affected by the want of a lookout, &c., and becomes simply a question of proper navigation, in view of what the pilot saw and knew of the presence and course of the ferry-boat with which the collision occurred. The ferry-boat, the *America*, came from her slip at the foot of Fulton street on the New York side, bound upwards and across the river to her Brooklyn slip. The tide was ebb and running very strongly down the river, and, in order to make her passage with facility, it was necessary for her to swing around to port, on a starboard helm, head up the river against the tide, go above her Brooklyn slip, and then port her helm, and swing into her slip. According to the testimony of the witnesses she made a course, by this means, well described by the letter S, in which she would travel, at first, across, and more than half across, the river, swinging upwards, and then inclining towards the New York side, preparatory to her last manoeuvre, of swinging into her Brooklyn slip. The pilot of the steamboat, the *Fairfield*, saw her from the moment she came out of the slip, and watched her movements continuously to the moment of collision. If he had had the assistance of one or many on the lookout, he could not have been sooner apprised of her approach, and he conducted the navigation of the *Fairfield* with all the information they could have given him, and with the ferry-boat in full view. The responsibility of this navigation was upon him. He controlled the movement of the *Fairfield*, while the man in charge of the engine promptly obeyed his instructions, and slowed, stopped and backed at his signal. I cannot, therefore, discover that the absence of the lookout contributed, in any degree, to deprive him of information, or that his management of the *Fairfield* was in any manner affected by the absence of the others, master or crew, at their supper, until the danger of collision was imminent.

The question on the part of the libellants is, therefore, whether the *Fairfield* was, in fact, skillfully and properly navigated, with the ferry-boat in full view, and, on the other

hand, whether there was fault in the navigation of the ferry-boat. To determine this, it is important to ascertain the location of the two vessels at the time when it became the duty of one or both to take measures to insure safety. The testimony of the pilot of the *Fairfield*, corroborated by the testimony of the master and crew as to her course and location, both when they went to, and when they returned from, the cabin, is distinct and unqualified, that she was coming down nearly in the middle of the river. This is, also, her probable course, when her destination is considered, she being bound around the Battery to reach her slip. She, coming from the Wallabout, and taking her course down the river, would be under a temptation to incline towards the New York shore, and the witnesses on her part all state that such was her inclination. Some of them clearly exaggerate that inclination, but on the fact they are all agreed. This is denied by the witnesses from the ferry-boat. They say that the *Fairfield* was, when they saw her, on a course tending towards the Brooklyn shore, and some of them represent her as coming from the foot of Market street, on the New York side, obliquely, across the river, towards Brooklyn, near the very slip to which the ferry-boat was bound—in itself, not only in conflict with the witnesses from the *Fairfield*, but a most improbable story, and yet easily accounted for without imputing intentional misstatement to any one. In the first place, the witnesses on the *Fairfield* know, better than the others could know, her destination and her course. Next, in the obscurity of the evening twilight, observation from the ferry-boat is far less reliable than it would be if made in open day. Again, the witnesses from the ferry-boat did not see the *Fairfield* until the former had passed out into the river and swung around, so as to be headed up the river, still under a starboard helm, or at about the time her helm was steadied on her course upward. In the making of this movement, to all eyes on the ferry-boat the *Fairfield* would seem to be on a reverse course, and, especially at that time, and in so imperfect a light, the *Fairfield* would seem to be moving from them, in the opposite direction. Very great precision is rarely found in the statements of witnesses on either side, in cases of this description, and the imperfect light may have made the estimates of the witnesses from the *Fairfield* in some degree inaccurate, but their statements are not overcome by the observations from the ferry-boat, under circumstances so clearly adapted to deceive the observers, and when the admitted movements of the ferry-boat would easily produce the impression to which they testify, and yet be in perfect harmony with the fact, as stated by the libellants' witnesses. It is, also, true, that the testimony as to the distance of the place of collision from the Brooklyn shore is in conflict, and yet a small allowance, due

to the prejudice of the witnesses attached to either vessel, and, as to passengers, due to their observation, in which the motion of the ferry-boat was imputed to the Fairfield, leading them to the belief that the latter was moving in the direction of Brooklyn, removes this conflict from any great embarrassment. That the Fairfield was slowed, stopped and backed on the instant that the danger of collision rendered that proper, is very clearly proved. A main fact, which a just view of all the testimony seems to me to establish, furnishes to my mind the test of the responsibility for the collision; and this fact is not only supported by the witnesses for the libellants, as I have above stated, but is corroborated, not, perhaps, by the claimants' witnesses to their observation on the course of the Fairfield, but by their testimony to the course of their own boat. The fact is this. At the time when the two vessels gained such a position that precautions to pass each other in safety were proper, they were approaching each other so nearly end on, that the rule that each should keep to the right of the other applied to them.

Whatever be the rule respecting the duty of ferry-boats to keep a lookout from the forward deck, one thing is certain, that, in the navigation across this crowded channel, a most vigilant lookout from some place on the boat is required, and I can hardly conceive of any navigation in which, in view of the interests of life and property, and the dangers of inadvertence, it is more imperatively demanded. It is, also, clear, upon the proofs here, that the two men who are claimed to have acted as lookouts on the bow of the ferry-boat were wholly useless as such. They might as well have been in the cabin. They saw the Fairfield, it is true, before the collision, but made no report of her approach. Whether they even saw her before she was seen by the pilot, who was engaged in directing the boat out of her slip and into the river, and bringing her around to her course up the river, is, at least, doubtful, and, if they did, they gave no notice. It is, also, apparent, that the pilot himself did not see the Fairfield until he had accomplished all the manoeuvres last stated, and was near to the Fairfield, nor until she had obeyed the rule which, in the judgment of her pilot, required him to pass to the right, or port to port of the two vessels. The pilot of the ferry-boat was attentive to the endeavor to stem the strong ebb tide, and reach a point up the river at which he should make his final sheer into his slip, and he failed to discover the Fairfield, and learn her actual course and movement, so soon as it was the duty of either himself or some one who should inform him. He heard the one whistle of the Fairfield, but he was not at liberty to await that whistle, when the boats were approaching, as I think they were, so that each should keep to the right. This is easi-

ly accounted for. It was of importance to the ferry-boat that she should be kept up the river far enough, against the strong ebb tide, to enable her to swing readily around, so as not to strike below her slip. He was under a strong motive not to turn too soon to accomplish an entrance to his slip. Either because he did not see the Fairfield, and learn her true course, soon enough, or because he mistakenly persisted too long in keeping the ferry-boat up against the tide, he did not port his helm so soon as he ought. He did not do so till after the Fairfield had turned to the right, nor until, after that, she warned him, by her whistle, that she was acting in conformity with the rule which he also was bound to observe without such warning.

I cannot resist the conclusion, that the collision was due to the want of proper and seasonable observation on board the ferry-boat, to imperfect and mistaken observation when made in the dim twilight, to mistake, in imputing to the Fairfield an apparent motion due to the actual movement of the ferry-boat, to an over-anxiety to gain a distance up the river against the tide, to enable the ferry-boat easily to enter her slip, and, finally, to a neglect, from whatever cause, to turn to the right, as it was the duty of the ferry-boat to do, to avoid collision. These conclusions necessarily require that the libellants have a decree, to recover their damages and costs, and a reference to compute such damages must be ordered. 3 Ben. 424, [The America, Case No. 281.]

[NOTE. An appeal was taken to the supreme court, and the decree of the circuit court was there reversed. It was ordered that the damages resulting from the collision, and the costs of suit, be apportioned equally between the two vessels, on the ground that, if either had seasonably complied with the requirement as to the porting of her helm, the collision could not have occurred, and consequently both vessels were in fault. The America, 92 U. S. 432.]

Case No. 285.

The AMERICA.

[11 Blatchf. 485.]¹

Circuit Court, S. D. New York. Feb. 19, 1874.

COLLISION—TOTAL LOSS—RAISING SUNKEN VESSEL—INTEREST.

1. Where a vessel is sunk by a collision, and a recovery is had by her against another vessel for a total loss of her, as the damages caused thereby, an item for the expense of raising the former vessel will be allowed, if it does not appear that more was done, in raising her, than to enable proof to be given that she could not be repaired without too great expense.

[Cited in *The Mary Eveline*, Case No. 9,212; *The Havilah*, 1 C. C. A. 519, 50 Fed. 334. Distinguished in *Johanssen v. The Eloina*, 4 Fed. 574.]

[See *The Mary Eveline*, Case No. 9,212.]

¹[Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

2. In such an action, interest on the items of damage allowed is proper, as an allowance, as being necessary to indemnity.

[Cited in *The Alexandria*, Case No. 178.]

[In admiralty.. Libel for collision by the Camden & Amboy Railroad Transportation Company, owner of the steam tug *Fairfield*, against the steam ferryboat *America*, (the Union Ferry Company, claimant.) The district court dismissed the libel, with costs, (Case No. 281,) but on appeal the decree was reversed by this court, and a reference ordered, (*The America*, Case No. 284.)² Heard on exceptions to the commissioner's report. Overruled.]

In this case, which was an action in rem by the owners of the steamboat *Fairfield* against the steamboat *America*, to recover for the damages sustained by the former by the sinking of the *Fairfield* through a collision between her and the *America*, the libellants had a decree, in this court. The commissioner, in his report, allowed for a total loss of the *Fairfield*, but, in addition, one of the items allowed by him was the expense of raising the *Fairfield*. Another item allowed was interest on the items of damage allowed. To the allowance of these items the claimants excepted.

Charles Donohue, for libellants.
Benjamin D. Silliman, for claimants.

WOODRUFF, Circuit Judge. I think the exceptions filed in this case were properly overruled. There is nothing to show that the libellants did not exercise a just and wise discretion in raising the *Fairfield*. Until she was raised it was impossible to determine whether she could be repaired without too great expense. Indeed, had she not been raised, and the libellants had come into court claiming her value, the objection that they should have raised her, or proved that she could not be raised and repaired, would have been effectually urged by the claimants of the *America*. The libellants were at liberty, and, in fact, bound, to go far enough to enable proof to be given of the extent of loss; and the proof does not show that more than that was done.

As to interest, it has been often said, that, in actions of tort, where the damages are unliquidated, interest is not to be allowed as matter of law, but it rests in the discretion of the jury. The proposition is not unqualifiedly true, without exception. Thus, in actions of trover, which is an action of tort, the value of the property, with interest thereon, is held to be the rule of damages. Where the value of the thing lost, or the cost of repairs and the like, are the test or measure of recovery, and the amount of damages becomes mere matter of computation, interest is as necessary to indemnity

²[Reversed by supreme court in 92 U. S. 432. See *The America*, Case No. 284, note.]

as the allowance of the principal sums. But, if the allowance of interest rests in discretion, still, the indemnity of the party for injury from a collision occurring through the fault of another vessel, should be the object of the court in the allowance of damages. In this view, such allowance was, I think, proper. It is, in such case, not allowed as punishment. It is not like the allowance of punitive damages in actions of slander, assault and battery, and like cases. It gives indemnity only.

Let the exceptions be overruled, and a decree be entered for the amount reported.

Case No. 286.

The AMERICA.

[1 Blatchf. & H. 185.]¹

District Court, S. D. New York. Nov., 1830.
SEAMEN—UNLAWFUL DISCHARGE—WAGES FOR ENTIRE VOYAGE.

Where a seaman is unlawfully discharged during a voyage, or is compelled, by the cruelty of the mates, to leave the vessel, from a regard to his personal safety, he is entitled to full wages for the entire voyage.

[Cited in *Coffin v. Weld*, Case No. 2,953; *The Alvena*, 22 Fed. 862. See *Jones v. Sears*, Case No. 7,494; *Hunt v. Colburn*, Id. 6,886; *Page v. Sheffield*, Id. 10,667. Affirming *Sheffield v. Page*, Id. 12,743.]

In admiralty. This was a libel in rem for wages. The defence was desertion and forfeiture of wages. It appeared that the libellant shipped for a voyage from Savannah to Liverpool, and thence to New York. At Liverpool he left the vessel, and the claim was for wages out and home. It was proved that the libellant, who was the carpenter, was severely and unjustifiably beaten by the mates, and that he left the vessel in consequence. The first mate, on the same day, stopped his board on shore, and, one or two days afterwards, when he came down to the side of the vessel, forbade his coming on board. The entries in the log, in regard to the libellant's going on shore, were interlined with the words "without leave," several days after they were first made.

BETTS, District Judge. The evidence in this case establishes, that the carpenter left the vessel at a foreign port, because of inhuman treatment. He was afterwards refused support by the ship, and forbidden to come on board, and was not logged in the way directed by the statute to establish the fact of desertion.

The amount which a seaman can recover for a wrongful discharge in a foreign port, will vary to some extent with the circumstances of each particular case; but, ordinarily, he is entitled to the full wages of the voyage. The suit is usually brought for

¹[Reported by Mr. Justice Blatchford and Francis Howland, Esq.]

wages, and, under that name, admiralty awards a compensation commensurate to the injury sustained. The libellant in this case claims wages for the voyage out and home. It appears that he was obliged to procure a passage home in another vessel, and that he earned no wages on the voyage back. The 42d article of the Laws of the Hanse Towns [Fed. Cas. Append., last volume] provides, that if the master discharges a seaman during the voyage, for no lawful cause given, he is bound to pay him his whole wages, and defray the charge of his return. So the Laws of Oleron, article 13, and those of Wisbuy, article 25, [Fed. Cas. Append., last volume,] provide, that a seaman unlawfully discharged may follow the vessel to her port of destination, and recover such wages as he would have been entitled to if he had remained by the ship until the end of the voyage. The conduct of the mates in this case amounted to such a discharge; and, even if it did not, the libellant was justified in leaving the vessel from a regard to his own personal safety.—*Limland v. Stephens*, 3 Esp. 269; *Ward v. Ames*, 9 Johns. 138; *Relf v. The Maria*, [Case No. 11, 692;] *Rice v. The Polly and Kitty*; [Id. 11, 754.]—and comes within the spirit of the articles which have been cited. See *Emerson v. Howland*, [Case No. 4,441.] He is entitled to full wages for the voyage out and home. Decree accordingly.

Case No. 287.

The AMERICA.

[1 Gall. 230.]

Circuit Court, D. Massachusetts. Oct. Term, 1812.

PRIZE—CARRYING FOREIGN GOODS WITHOUT MANIFEST.

If a coasting vessel arrive from one district at another district in the same state, having on board foreign goods exceeding \$800 in value, without being provided with, or exhibiting a manifest of such cargo, it is not an offence for which the vessel is forfeited under the coasting act of the 18th February, 1793, c. 8.

[On appeal from the district court of the United States for the district of Massachusetts.]

In admiralty. This was an information claiming the schooner *America*, as forfeited, 1st. because certain goods, to wit, 120 tons of plaster of paris, were imported in said vessel into the United States from some port in Nova Scotia, and being of more than \$400 in value, were unladen in the night time without a permit, contrary to the collection act of 2 March, 1799, c. 128; 2d. because the same goods were, at some port of Nova Scotia, laden and put on board of said schooner, with the knowledge of the owner and master, with intention to import the same into the United States, contrary to

the act of March 1, 1809, c. 91; 3d. because the said vessel, being a vessel duly enrolled and licensed for the coasting trade, and having on board foreign merchandize of a value exceeding \$800, did arrive at the port and district of Boston from the district of Penobscot, without being provided with, or exhibiting a manifest of the cargo then on board of said vessel, or any manifest including said plaster, contrary to the coasting act 18 February, 1793, c. 8.

G. Blake, Dist. Atty., for the United States, in support of the first count, cited sections 27 and 28 of the act regulating the collection of duties; the first of which provides, that any foreign goods brought in from a foreign port, and unladen without a permit, unless in case of accident or distress, shall be forfeited; and the last, that the vessel which receives them shall also be forfeited. He also relied on the 50th section, providing that no goods brought from any foreign port or place shall be unladen but between sunrise and sunset, without a permit or license; and if so unladen, to be forfeited. And if the value at the highest market price be \$400, then the vessel, &c. are to be forfeited. He contended that no distinction was here made, as to goods not liable to duties. In support of the second count, he referred to the 4th, 5th, and 6th sections of the non-intercourse act 1 March, 1809. In support of the third count, he relied on the 46th and 50th sections of the coasting act, requiring the exhibition of a manifest.

W. B. Bannister, for claimant, contended as to the first count, 1st. that no goods, but such as were liable to duties, were intended by the act. The plaster, which composed this vessel's cargo, was not liable to duties. He referred to the act regulating the collection of duties, and also to the 4th and 51st sections of the coasting act; 2dly, that the facts must show it to be imported from a foreign port in the same vessel, unladen in the night time, and of more than \$400 in value. Without the papers, the evidence proves nothing of the quantity, nor whence it came. It only shows circumstances of suspicion. If the papers are resorted to, they must be taken for what they purport to be. They prove the schooner a coasting vessel, regularly enrolled, and the cargo cleared from Eastport. So also the depositions. The same facts form an answer to the second count. As to the third count, he contended that coasting vessels were not obliged to enter, or exhibit a manifest, unless required, and that the requisition was complied with in this case.

STORY, Circuit Justice.—To maintain the first count, it must be shown that the plaster was brought from a foreign port, but the whole evidence in the case shows that it was brought from a port within the district of Penobscot. To maintain the sec-

¹[Reported by John Gallison, Esq.]

ond count, it must, according to its allegations, be shown that the lading was at a port in Nova Scotia; and for the reason which I have already stated, this count also cannot be supported. I do not find that the third count alleges any offence, for the commission of which a forfeiture of the schooner would have been incurred. It is apparently founded on the 15th section of the coasting act, which certainly will not support it; and no other section of that or any other statute has been shown to the court, which countenances the forfeiture. I must, therefore pronounce also that the United States can take nothing by this count in the information.

Whether the facts in the case would have supported a prosecution for a forfeiture under other provisions of our statutes, it is not now necessary to consider. But I must say, that there have been great irregularities in the conduct of this vessel, which have not left her without heavy suspicions. I affirm the decree of the district court, but shall certify reasonable cause of seizure. Restored.

Case No. 288.

The AMERICA.

[2 West. Law Month. 279; 16 Law Rep. 264; 29 Hunt, Mer. Mag. 459.]

District Court, N. D. New York. 1853.

COLLISION—LIENS ON VESSELS—ORDER OF PAYMENT.

1. In a case of collision, the owner of a vessel injured has a maritime lien upon the offending vessel for the amount of the damages to which such owner is entitled in consequence of the collision; and this lien is of equal rank with those of material-men, bottomry-bond holders, and others, whose claims rest upon the necessities of the ship or the hazards of navigation.

[Cited in *Beane v. The Mayurka*, Case No. 1,175; *The China*, 7 Wall. (74 U. S.) 68; *The Avon*, Case No. 680. Disapproved in *Force v. The Pride of the Ocean*, 3 Fed. 166; *The F. H. Stanwood*, 1 C. C. A. 385, 49 Fed. 580.]

2. A creditor holding a maritime lien, who proceeds in rem in a court of admiralty, and obtains a final decree in his favor, before another creditor, having a co-ordinate or equal claim, has instituted proceeding or intervened in the prior suit to enforce his lien, is entitled to be paid his debt in preference to the creditor who has asserted no right until after the entry of such final decree.

[Cited in *The Lady Boone*, 21 Fed. 732. Distinguished in *The City of Tawas*, 3 Fed. 173. Disapproved in *The E. A. Barnard*, 2 Fed. 719.]

3. Such final decree may, however, be opened on the application of the apparently dilatory creditor, if such application be made within a reasonable time, while the fund still remains in court, and under circumstances which would excuse a default, and induce the court to open a decree for the purpose of enabling a proper claimant to set up a meritorious defence to the demand on which the decree was made.

4. If no preference has been obtained by the actual making of a decree, as above mentioned, the maritime liens, of the same class, or rank

of privilege, upon a ship sold under the order of a court of admiralty, should, as a general rule, be paid out of the proceeds in the inverse order of the dates of the creation of such liens.

[Cited in *The Fanny*, Case No. 4,638; *The E. A. Barnard*, 2 Fed. 719; *The Frank G. Fowler*, 8 Fed. 333; *The Lady Boone*, 21 Fed. 732. Disapproved in *The Minnie R. Childs*, Case No. 9,640; *Force v. The Pride of the Ocean*, 3 Fed. 166; *The Frank G. Fowler*, 17 Fed. 653; *The J. W. Tucker*, 20 Fed. 131; *The F. H. Stanwood*, 1 C. C. A. 385, 49 Fed. 580.]

5. Seamen's wages for the same voyage, and perhaps for the same season of navigation upon the great lakes, are, however, generally to be preferred to claims of material-men, &c.

6. Maritime liens arising out of contracts of affreightment, and other maritime liens not resting upon the necessities of the ship, or the hazards of navigation, should be assigned to a class different from that which embraces the claims of material-men, bottomry-bond holders, salvors, and collision claimants; and such liens should be postponed until all the liens belonging to superior classes, and arising at the same time, are paid.

In admiralty.

John Ganson, for libellant and petitioner.

E. Cook, T. C. Welch, I. T. Williams, and P. Hoffman, for sundry claimants opposing the petition.

HALL, District Judge. This is a cause of collision and damage. The libel was filed by De Witt C. Bancroft, on the 16th July, 1852; and on the 17th July the America was arrested on the warrant, issued in this suit, against the steamboat, her tackle, apparel and furniture. The collision occurred on Lake Erie, on the 12th July, 1852, during the last trip made by the America prior to her arrest. The office of the clerk of this court was then at Auburn, and there was consequently no unnecessary delay, on the part of the libellant, in instituting these proceedings; but the America, having been herself damaged by the collision, was on the marine railway, undergoing repairs at the time of her arrest. The vessel of the libellant was sunk by the collision, and totally lost. She was of the value of more than \$23,000; but this court having determined that those in charge of her were not entirely free from fault, divided the damages sustained by the colliding vessels, and on the 14th December, 1852, awarded to the libellant the sum of \$10,000 damages, and his costs. Pending the proceedings in this suit, and before any final decree therein, sundry seamen commenced original suits, or intervened in this suit, for the recovery of their wages as mariners on board the America; and sundry material-men instituted proceedings for the recovery of their respective claims. Proceedings were also instituted by Patrick Carroll, on the 2d October, 1852, to recover the damages sustained by him as the owner of a vessel which was injured by a collision with the America on the 11th July, 1852. The America was sold under an order of this court, on the 10th September, 1852. The

proceeds of the sale, amounting to \$10,950, were brought into the registry; and, soon after, applications were made for the payment of the decrees which had been rendered in favor of the seamen for their wages. These applications were not opposed. They were at once granted, and those decrees paid. Applications for the payment of several of the decrees obtained by material-men were subsequently made, and were opposed by the collision-claimants. After a slight examination of the questions involved in the applications, the decrees of the material-men whose liens attached subsequently to the collision with the vessel of the libellant, and who had either the possession of the America, and common law liens, or liens under the statute of this state, declaring that such liens upon a ship or vessel "shall be preferred to all liens thereon except mariner's wages," were also directed to be paid.—The claims of the other material-men having been held under advisement, the libellant in this case subsequently presented his petition, claiming the whole residue of the fund in court, upon the ground that he was entitled to a preference over all the other parties who had instituted original suits against the America, or intervened in this suit, for the purpose of obtaining payment of their respective claims.

The several questions raised in this case, in respect to the right of preference, or priority of payment, claimed by the respective parties, were elaborately and ably argued, and have been the subject of much examination and reflection. As questions depending upon the same principles are likely hereafter to arise in this district, it is deemed proper to express an opinion upon most of the questions argued, although some of them are not necessarily determined by the decision about to be pronounced. Some of these questions have not, it is believed, been directly and expressly determined by any court whose judgments are binding upon this; and in respect to some of them, apparently conflicting decisions have been made in different districts in the United States.—Under such circumstances, this court may, perhaps, be justified in attempting to establish, for its own guidance, some general principles in regard to the distribution of funds claimed by adverse parties under different maritime liens, until some authoritative adjudication in a higher court shall prescribe a different rule for its adoption, or until increased experience and more mature consideration shall produce a conviction that such principles ought no longer to be maintained. With these views I shall proceed to an examination of the questions arising in the present case.

The first question to be considered is, whether the libellant had, in consequence of the collision, a maritime lien upon the America; or, if he had not a technical maritime lien, such as exists in the case of contracts

giving a lien under the general maritime law, whether he had a charge upon the America in consequence of the collision, similar in character and effect to such a maritime lien; giving him substantially the same rights and entitling him to substantially the same remedies.

The cases of *The Volant*, 1 W. Rob. [Adm.] 333, and of *The Creole*, Fland. Mar. Law, § 330, note, were cited by the counsel opposing the libellant's petition. In the case of *The Volant*, Dr. Lushington is reported to have said: "By the ancient maritime law, the owners of a vessel doing damage were bound to make good the loss to the owners of the other vessel, although it might exceed the value of their own vessel and the freight. For the purpose of enforcing this obligation, the owners of the damaged vessel might resort either to the courts of common law or to the court of admiralty; and if they preferred the latter, they had their choice of three modes of proceeding, viz: Against the owners, or against the master personally, or by a proceeding in rem against the ship itself. The court of admiralty has jurisdiction over the whole subject-matter of damage on the high seas, and the arrest of a vessel is only one mode of proceeding. The damage confers no lien upon the ship, but an arrest offers the greatest security for obtaining substantial justice in furnishing a security for prompt and immediate payment." "Looking to a proceeding by the arrest of the vessel, it is clear, that, if no appearance is given to the warrant arresting the ship, there can be no proceedings against the owners; for the court can not know who are the owners; and the court can not exercise any power over persons not before the court and never cited to appear: The decree must be confined exclusively to the ship." In the case of *The Creole*, the learned judge of the eastern district of Pennsylvania, said: "There is, properly speaking, no lien in a case of collision, and can not be, for the subject is tort. Yet the remedy, according to the ancient and practically approved opinion in this district, is not affected by a change of property in the thing: No one has contended here, that his vessel was free of liability for a collision, because he had purchased her after it took place." In each of these cases, the right to proceed in rem against the vessel, by whose fault the damage was occasioned, was recognized and enforced; and, in the latter, this right was declared to continue even against a subsequent bona fide purchaser without notice. Other cases in the English and American courts of admiralty have sanctioned the same doctrines, and it has been declared that the rights of the collision-claimant should prevail over those of subsequent bona fide purchasers, and bottomry-bond holders, mariners and others, whose liens attached prior to the collision. It is, perhaps, not very material, after these decisions, to inquire

whether the right of the collision-claimant, as recognized and enforced in these courts, gives a technical maritime lien upon the vessel by which the damage was produced; but I can perceive no impropriety in denominating the fixed and acknowledged right of priority of payment over the rights of general creditors, subsequent purchasers and others, which is given to the collision-claimant, a maritime lien. It has been sometimes so denominated by distinguished admiralty judges, as some of the cases hereafter referred to will abundantly show. In the case of *Edwards v. Stockton*, [Case No. 4,297,] Judge Randall, of the eastern district of Pennsylvania, declared it to be "the generally received opinion of courts of admiralty," that "whenever one vessel does damage to another, within the admiralty and maritime jurisdiction, the offending vessel becomes hypothecated to the vessel and cargo sustaining the injury to repair the damages occasioned by the collision and the injured persons have a lien, or privilege, upon the guilty party, by the general maritime law of nations, to the extent of the injury sustained." See, also, 3 N. Y. Leg. Obs. 61. In the case of *Boon v. The Hornet*, [Case No. 1,640,] the late Judge Hopkinson declared: "There could be no suit in rem, unless there was a charge or lien upon the thing to answer for the debt;" and this, taken in connection with the acknowledged right of a libellant in a cause of collision and damage to proceed in rem, is an authority in favor of the existence of a maritime lien in behalf of a collision-claimant.

An able writer in the *London Law Magazine*, for February, 1853, whose article is published in the *Law Reporter*, for May last, (16 Law Rep. 1.) says: "Maritime liens, like all other obligations, arise either ex contractu and quasi ex contractu, or ex delicto and quasi ex delicto. In the first category are wages, pilotage, towage, salvage and bottomry-bonds. In the other is damage by reason of collision." Again: "In damage, which is a lien ex delicto," &c., "and as the law has made it a lien," &c. In the case of *Harmer v. Bell*,¹ (24th April, 1852,) Lord Chief Justice Jervis said: "A maritime lien is well defined by Lord Tenterden to mean, 'a claim or privilege upon a thing, to be carried into effect by legal process,'" and Mr. Justice Story, in 1 Sum. 78, [*The Nestor*, Case No. 10,126,] explains that process to be a proceeding in rem, and adds, that wherever a lien or claim is given upon the thing, that the admiralty enforces it by a proceeding in rem, and indeed is the only

¹ This case was argued on appeal before the judicial committee of the privy council, and is fully reported in the 22d volume of Little & Brown's series of *Law and Equity Reports*, page 72, et sequitur. The first statement of the points decided, is, "Damage creates a lien on the ship causing the collision." I had not the full report at the time this opinion was written. H.

court competent to enforce it. "A maritime lien is the foundation of all the proceedings in rem—a process to make perfect a right inchoate from the moment the lien attaches; and, whilst it must be admitted that, when such a lien exists, a proceeding in rem may be had, it will be found to be equally true, that in all cases when a proceeding in rem is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process." 15 Law Rep. 560. And see *The Rebecca*, [Case No. 11,619,] After a careful consideration of these and other authorities, I am unable to perceive any substantial difference between the settled right of the collision-claimant to enforce the payment of his damages by proceedings in rem, in disregard of the claims of subsequent bona fide purchasers without notice, prior bottomry-bond holders, and mortgagees of the offending vessel, and the right, which, in the case of material-men, &c., is constantly denominated a maritime lien. In neither case is there a lien in the common law sense of that term, as applied to personal property, but the term maritime lien has been long used, and its signification is well settled; as well, perhaps, as that of the term common law lien. It is constantly and legitimately used as expressing the existence of that privilege, or right of priority of payment, which seamen, pilots, material-men, and bottomry-bond holders, enforce in courts of admiralty, by proceedings in rem; and, in my judgment, there is manifest propriety, as well as convenience, in the use of the term to indicate the existence of the like privilege and right which accrues to the owners of vessels damaged by collision.²

Being satisfied that the libellant had a maritime lien upon the *America*, for the amount of damages to which he was entitled in consequence of the collision, or else a charge or privilege which gave him sub-

² Since this opinion was written, a report of the case of *General Mut. Ins. Co. v. Sherwood*, 14 How. [55 U. S.] 351, decided by the supreme court of the United States at its last term, has fallen under my observation. In that case, *Sherwood*, the owner of the brig *Emily*, brought his action against the insurance company, upon a policy of insurance, to recover the damages which had been decreed against the *Emily* by a court of admiralty, in consequence of a collision between the brig and the schooner *Virginia*, occasioned by the fault of those having the *Emily* in charge. Mr. Justice Curtis, in delivering the opinion of the court, said: "The loss was the existence of a lien on the vessel insured, securing a valid claim for damages, and the consequent diminution of the value of that vessel. In other words, the owners of the *Virginia* obtained a lien on the vessel insured, as a security for the payment of damages done to them for a maritime tort, whereby their property was injured." And see *Harmer v. Bell*, 22 Eng. Law & Eq. 72. Also *The New World v. King*, 16 How. [57 U. S.] 469, where the vessel was made liable in Spain to a passenger injured by an explosion of a boiler through the negligence of the engineer.

stantially the same rights and remedies, it becomes important to consider the claims of priority and preference which have been urged by the advocates for the respective parties in interest. The advocate for the libellant insisted, upon the argument, that his right of preference over all the other claimants, except seamen suing for their wages, was authoritatively settled by the opinion of Mr. Justice Nelson, in the case of *The Globe*, [Case No. 5,483;] but I do not so regard it. It is true that Mr. Justice Nelson, in that case, referred with approbation to the case of *The Triumph*, [Case No. 14,182,] decided in the southern district of New-York in 1841, and in which it was said by the learned judge of that district, "that maritime liens, or what are usually so denominated, are to be discharged and satisfied in the order in which the warrants of arrest were served upon the property, whether the vessel in kind or her proceeds in court; and that each action, with its appropriate costs, comes upon the fund, according to the period of its commencement." But this reference, by Mr. Justice Nelson, to the case of *The Triumph*, [supra,] is not of such a character as to make that case binding upon this court upon the ground that its doctrines were adopted and confirmed in the case of *The Globe*, [supra.] The latter case was an appeal from a decree of my predecessor; and in my judgment, the question was one of title only. The question of preference, or right of priority of payment, did not arise. The claimant in that case obtained his title to *The Globe*, [supra,] through a judicial sale, made in Ohio, and founded upon proceedings in rem, in one of the courts of that state. These proceedings were in accordance with a statute of Ohio, which gave material-men a right to proceed in the Ohio state courts, against the vessel itself, as a defendant, very much in the manner of the ordinary proceeding in rem in this court. The arrest and sale of the vessel, under the proceeding in Ohio, were subsequent to the creation of the debt or lien upon which the libellant proceeded in the district court; and if the proceeding in Ohio was a valid proceeding in rem, to which all persons having an interest in the ship were substantially parties, the right acquired by the claimant under a sale authorized by such proceedings was clearly good and available as against all parties whose rights accrued prior to such sale. In other words, the purchaser at a sale under such proceedings obtained the same title which is obtained by a purchaser under proceedings in rem in this court. All persons who had maritime or other liens on the property at the time of the sale, were therefore bound to look only to the proceeds of such sale, and were entitled to payment of their liens out of such proceeds, either pro rata, or in such order of priority as might be established

by the court making the distribution. If the proceeding in rem, in the Ohio court, was valid and binding, the person took the property discharged of all liens, and the question of priority of lien was one which could only be raised by the different claimants of the fund produced by the sale. If the libellant in the district court had a lien upon the vessel at the time she was seized under the process of the Ohio court, he should have established his right in the latter court, and received his just share of the proceeds of the sale, and his failure to do so could give him no right against *The Globe* in the hands of the purchaser at the Ohio sale; nor would it invalidate the proceedings, in that state, under its statutes.

Mr. Justice Nelson did not, therefore, necessarily consider the question of preference; and the case of *The Triumph* [supra] can not be regarded as conclusive authority binding the judgment of this court. It nevertheless demands that grave and respectful consideration which is always due to the decisions of the very learned and able judge of the southern district. Such decisions, when not opposed by decisions in other districts, or in the English courts of admiralty, I shall certainly deem it my duty to follow, until entirely convinced that they are inconsistent with well established principles; but the decisions hereafter alluded to, appear to me to authorize the adoption in the present case, of such rule as shall after mature deliberation, appear to be best sustained by authority, and by the principles of equity and commercial policy established and acted upon in the admiralty courts. It is understood that my learned predecessor uniformly adopted a different rule from that declared in the case of *The Triumph*, [supra,] and that, in cases of deficiency of proceeds, he ordered debts of the same class to be paid pro rata, without regard (so far as the clerk of the court can now recollect,) to the time when suits, pending at the same time, were commenced.³ In the cases of *The Paragon*, [Case No. 10,708,] and *The Phoebe*, [Case No. 11,065,] the very learned judge in the Maine district intimated that maritime liens of the same rank of privilege should be paid concurrently, without regard to the time the several claimants commenced

³ In the case of *The John Fehrman*, 20 Eng. Law & Eq. 648, the court allowed a bottomry-bond holder, who had caused the ship to be arrested under a libel filed on his bond, to pay, for the purpose of saving costs, the amount claimed in five actions subsequently commenced, three of which were for wages, one for pilotage, and one for towage. Certainly, the bond holder could have no interest in paying these claims on which suits were commenced subsequent to his own, if by the prior commencement of his suit he had obtained a preference over the claims for wages, pilotage and towage. It is presumed from the fact that most of these claims were for pilotage and towage, that these claims accrued on the return of the ship after the execution of the bottomry-bond, and were therefore entitled to a preference over it.

their proceedings; and no case has been referred to in which the case of *The Triumph* [supra] has been followed by other judges of the district courts. The questions in this case can not therefore be regarded as settled by the cases cited, and they must be determined upon authority and principle, giving due weight and consideration to each. In examining the authorities, it has been my object to discover the principles upon which the several decisions were made, and, if possible, to extract from them some general rule decisive of the rights of the parties now before me.

It is first to be observed, that the parties opposing the libellant's petition had instituted their proceedings before the final decree in his favor. If it had been otherwise, they would be postponed to the libellant and excluded from a participation in the distribution; for the reason that the creditor who obtains his final decree, before other creditors having co-ordinate or equal claims have brought their actions, is entitled to be paid his debt in preference to those who do not assert their claims until after the entry of such final decree. This rule prevails both at law and in equity, as well as in the admiralty courts. *The Saracen*, 2 W. Rob. [Adm.] 451; 16 Law Rep. May, 1853, pp. 1, 2. In the courts of admiralty this would seem to result from the course of their practice and the peculiar nature of their proceedings. A ship is arrested at the suit of the party first proceeding against it, and the proceeding is in rem, against the ship itself, and against all persons having or claiming any right or interest therein. Hence all persons have a right to intervene for their interests, and the suit is, in substance and effect, against such persons, as much as though they were specially named as defendants. They are bound by the proceedings and decree; and by a sale of the res, under such proceedings, their rights therein are effectually extinguished. By their failure to intervene for the protection of their own interests, they tacitly assent to a decree which establishes the right of the libellant to enforce his lien upon the property seized, and effectually appropriates it to the payment of his claim. The case of *The Triumph*, [supra.] perhaps, proceeded upon this principle; and if the final decrees there referred to were successively obtained, each before the proceedings next commenced were instituted, the decision would be consistent with the rules of preference, on account of the priority of proceeding, which this court considers as established. In case of a final decree, in favor of one creditor, before another having an equal paramount claim commences proceedings or intervenes for the protection of his interest, such may be opened, on sufficient cause shown, for the purpose of allowing the apparently tardy creditor to assert his claim. The intervention of a creditor for the purpose of obtaining payment of his claim

concurrently with, or in exclusion of, that of the libellant, is in the nature of a defence to the adverse claim of the libellant; and the same circumstances, which would induce the court to excuse a default and open a decree to let in a defence, will ordinarily induce it to open a decree for the purpose of allowing a creditor whose right would be barred by such decree, to appear and establish the right claimed. This will prevent the occurrence of gross injustice by reason of the application of a rule which favors a diligent creditor, and which courts of admiralty, from their peculiar practice and proceedings, must necessarily adopt. If no preference is obtained by the actual making of a decree. I am inclined to think that maritime liens of the same class, rank or privilege, existing upon a ship sold under the order of a court of admiralty, should, as a general rule, be paid out of the proceeds of such ship in the inverse order of the dates of their creation. The practical application of this general rule, to particular cases, may not be free from difficulty, and the rule itself must be subject to exceptions; but, in my judgment, it ought never to be departed from, except for cogent reasons. And it is believed that the principle of this rule will be found to be the basis upon which numerous decisions, both in this country and England, must rest. The adoption of such general rule is not inconsistent with that difference in rank and the classification of maritime liens, which have been recognized in the admiralty courts; and indeed the recognition of different classes of maritime liens is necessary to its just and successful operation.

Seamen's wages have almost uniformly been deemed to constitute a peculiar class, and claims for seamen's wages have been preferred to most other claims in all cases where there had been no unreasonable delay in instituting proceedings for their recovery. As between themselves, the wages of seamen for the last voyage have been preferred to those due for prior voyages of the same ship, and, it is believed, upon the general principle before referred to. In some cases, other claims, such as claims in causes of collision, and salvage, and bottomry claims, have been preferred to seamen's wages; but these cases proceeded upon the same general principle, the preferred claims having accrued subsequent to the claims for wages. Another, and perhaps the most numerous and important, class of maritime liens, are those which grow out of the necessities of the ship and the hazards of navigation. This class embraces the claims of salvors, bottomry-bond holders, material-men, and parties entitled to damages occasioned by collision. Pilotage, towage and wharfage, should also be included. For obvious reasons, the reports of the English admiralty do not afford any light in respect to the claims of material-men, and the order of their payment; but, in respect to the other claims of the charac-

ter just alluded to, several reported cases may be found in the English, as well as in the American reports. It is, perhaps, not too much to say, that the reported decisions have not satisfactorily established any fixed rule inconsistent with, if they are not sufficient to sustain, the general rule under consideration. Before advertent to these decisions, it may be useful to refer to the reason and policy by which the maritime liens belonging to this class are upheld, and which favor the adoption of the rule proposed. And first, in respect to those which arise ex contractu.

By the general maritime law, these liens exist only where the credit was given to the ship, either alone, or in connection with her master, or owners, or both. If it appear that the credit was given to the master and owners, or either, exclusively, the ship is not liable. Whenever the lien attaches, credit is given to the ship, and this must necessarily be to the ship as she stands, for the credit is given in a foreign port, where the creditor can not ascertain whether any, and, if any, what, maritime liens are existing against her. Hence, where the necessity which upholds the lien is established, the lien created when the credit is obtained should bind all the interests which centre in the ship; to the preservation and success of which the credit is essential. These liens rest upon the necessities of the ship, and their creation is required to secure alike the interests of the owners, and those having prior maritime liens upon the vessel. Neither the bottomry-bond holder nor the material-man can enforce his claim without averring this necessity, and proving it, if it be denied by the other parties in interest. These liens, when large, are generally created in cases of accident or distress, and when the creation of such lien in favor of the material-men or bottomry-bond holders affords the only means of saving the ship from sacrifice, and enabling it to earn its freight; thereby preserving for the benefit of all, the property to which all must look for payment, according to their respective rights. Suppose a vessel on a voyage from Boston to Vera Cruz and back, should necessarily subject herself to liens of material-men, or take up money on bottomry, in the latter port, and, on her return voyage, should suffer damage in a storm, and find it necessary to subject herself to similar liens in Charleston, and again, in consequence of further accidents, at Norfolk and New-York: Is it not clear, (the necessity being conceded,) that these liens ought to have preference in the inverse order of their creation? and suppose that important salvage services were afterwards rendered her, ought not the salvage compensation to be paid in preference to the prior claims?

The maritime lien is founded in principles of international and commercial policy, and it is allowed for the purpose of giving credit to the ship, to enable the master to obtain,

in a foreign port, the funds necessary to the safe and successful prosecution of his voyage, whenever those funds can not be obtained on the credit of the master and owners. It is therefore important that these questions of preference should be so settled as to maintain and secure this credit. The liens thus created are generally discharged by the earned freight, at the completion of the voyage; by freight which would, in very many instances, be wholly lost, and the ship itself sacrificed, if the necessary credit could not be obtained whenever the necessity for such credit might arise. If the last lien created under such necessity has a preference over every prior lien, except for seamen's wages, and if those, with the small claims, such as for pilotage, and towage, subsequently accruing, are all that are likely to take preference, the credit can generally be obtained; for the security will, in ordinary cases, be abundant, if the lien be enforced within a reasonable time after the voyage is completed. And this rule, while it will enable the ship to obtain the necessary credit, when in distress, without a stipulation for a ruinous premium, will also tend to prevent unreasonable delays in enforcing maritime liens, and their consequent unreasonable accumulation; and will, in most, if not all respects, best promote the interests of commerce. This rule has long been established between different bottomry-bond holders, and there is little substantial difference between the cases of material-men and lenders on bottomry. The latter, it is true, stand upon an express hypothecation, while the former rely on the implied hypothecation of the maritime law. But their claims are of equal validity, and should be subject to the same general rules of priority and preference, unless some other and more cogent reason to the contrary can be found. The material-man retains, and relies upon, the personal liability of the master and owners, while the bottomry-bond holder does not: The latter puts his money at hazard, and the payment of his debt is made to depend upon the safe arrival of the ship; but for each of these disadvantages, and the risk he assumes, he is allowed to reserve a fair and full equivalent in the marine interest for which he always stipulates. For this reason, the material-man, who secures to himself only common interest, and requires no extraordinary premium for the less but not inconsiderable risk which he necessarily runs, should, when the necessity which supports his claim is fully established, be placed upon the same footing, and entitled to equal equities, with the lender upon bottomry. Indeed, the money raised by bottomry is not unfrequently paid to the material-man, and it would be difficult to offer any substantial reason why the mechanic, or small dealer, who supplies labor and materials, should not be equally favored with the capitalist, or wealthy merchant, who lends money with a

clear knowledge of the risk he assumes, and secures to himself an ample interest for his money, and a satisfactory premium for the hazard to which it is subjected. Neither of these differences, nor any others that, at present, occur to me, are of such a character as to require that there should be, so far as the question of preference is concerned, any substantial distinction made between the claims of material-men and lenders upon bottomry.

The privilege of a successful suitor in a case of damage by collision, rests upon other grounds. "It is given to the creditor because the law favors him over others for having suffered a wrong—a loss imposed by the delictum of others—the master and crew of the vessel in fault. The damage, when recovered, operates not only as a civil indemnification, but as a quasi penalty against the wrong-doer; and it is for the public weal that the penalty shall always be enforced, so that such wrong may not, by passing unredressed, incite others to a similar negligence in navigation."—16 Law Rep. 6. The creditor in damage has no option, no caution to exercise; the creditor on mortgage or bottomry, or whose claim is for materials furnished, has. He may consider all possible risks, and give credit or not, as he may think most advisable for his interest. He has an alternative; the suitor in damage has none.—The *Aline*, 1 W. Rob. [Adm.] 118. These, and other considerations founded in justice and a wise commercial policy, are sufficient to give to the successful suitor, in a cause of collision and damage, a lien of as high a rank as that conceded to lenders on bottomry; and the English admiralty has uniformly placed such suitor in at least as favorable a position as that occupied by the bottomry creditor. The claims of the libellants in the collision cases will therefore be considered as of equal rank with those of material-men, and the general rule of preference, before stated, will be adopted, as just in principle, as required by considerations of commercial policy, and as the best sustained by authority. Not having had leisure to digest and arrange the authorities which sanction the adoption of this general rule, and which give a priority to seamen's wages, I shall refer to but a portion of the cases, and shall not attempt their orderly arrangement. Seamen's wages are preferred to most other claims, in all courts of admiralty. They are hard-earned, and liable to many contingencies; and few claims are more highly favored, or more carefully and zealously protected by law. The sailor's claim is a sacred lien; and as long as a single plank of the ship remains, he is entitled, as against all other persons, to the proceeds, as a security for his wages; for by his labor the common pledge for all the debts is preserved. His demand for wages is preferred to all other demands, for the same reason that the last bottomry-bond

is preferred to one of prior date. 3 Kent, Comm. 196, 197; *Blaine v. The Charles Carter*, 4 Cranch, [8 U. S.] 328, 332; *The Virgin*, 3 Pet. [33 U. S.] 533, 553; *Pitman v. Hooper*, [Case No. 11,185;] *The Madonna D'Ibra*, 1 Dod. 37; *The Sidney Cove*, 2 Dod. 13.

Numerous cases have established the principle, that the last bottomry bond is entitled to priority over previous ones, as well as over prior mortgages; and such is the rule as universally applied in this country and in England. 3 Kent, Comm. 197; *The Rhadamanthe*, 1 Dod. 201; *The Betsey*, Id. 239; *The Sidney Cove*, 2 Dod. 1; *The Eliza*, 3 Hagg. [Adm.] 87; *The Constanca*, 4 Notes of Cas. 285. In the case of *The Jerusalem*, [Case No. 7,294,] it was held by Judge Story, that a sum due for repairs made subsequent to the execution of a bottomry bond, should be paid in preference to the claim of the bond-holder, because the repairs were necessary to the security of the ship, and increased her value. And he declared that the case was analogous to that of a second bottomry-bond, or the lien of seamen's wages, which had always been held to have a priority of claim, though posterior in time to the first bottomry-bond.* In the case of *The St. Jago de Cuba*, 9 Wheat. [22 U. S.] 409, Mr. Justice Johnson, in delivering the opinion of the court, said, that certain questions arising in that case were "all solved by a reference to the nature, origin and objects of maritime contracts. The precedence of forfeiture has never been carried further than to overreach common law contracts entered into by the owner; and it would be unreasonable to extend them further. The whole object of giving admiralty process and priority of payment to privileged creditors, is to furnish wings and legs to the forfeited hull to get back, for the benefit of all concerned; that is, to complete her voyage. There are two considerations that fully illustrate this position. It is not in the power of any one but the ship-master—not the owner himself—to give these implied liens on the vessel; and in every case the last lien will supersede the preceding. The last bottomry-bond will ride over all that precede it; and an abandonment to a salvor will supersede every prior claim." In that case the court decided, "That the fair claims of seamen, and subsequent material-men," were not overreached by the previous forfeiture of the vessel, in consequence of a violation of the laws of congress relating to the slave trade; and it is presumed that the whole court concurred in the above dictum of Mr. Justice Johnson. In the case of *The Paragon*, ubi supra, Judge Ware said: "Among privileged debts against a vessel, after the expenses of justice necessary to procure a con-

* See the comments of Chief Justice Jervis, on the case of *The Aline*, 1 W. Rob. [Adm.] 111, as reported in *Harmer v. Bell*, on appeal, 22 Eng. Law & Eq. (Little & Brown's Ed.) p. 72.

demnation and sale, and such charges as accrue for the preservation of the vessel, after she is brought into port, (1 Valin, Comm. 362; Code de Commerce, 191,) the wages of the crew hold the first rank, and are to be first paid. And so sacred is this privilege held, that the old ordinances say, that the savings of the wreck, to the last nail, are pledged for their payment. Consulat de la Mer. c. 138; Cleirac sur Jugemens d'Oleron, Arat. 8, note 31." And this preference is allowed the seamen for their wages, independently of the commercial policy of rewarding their exertions in saving the ship, and thus giving them an interest in its preservation. The priority of their privilege stands upon a general principle, affecting all privileged debts, that is, that among these creditors, he shall be preferred who has contributed most immediately to the preservation of the thing. 2 Valin, Comm. 12, liv. 3, tit. 5, art. 10. It is upon this principle that the last bottomry-bond is preferred to those of older date, and that repairs and supplies furnished a vessel in her last voyage take precedence of those furnished in a prior voyage, and that the wages of the crew are preferred to all other claims, because it is by their labors that the common pledge of all these debts has been preserved and brought to a place of safety. To all the creditors they may say, "salvam fecimus totius pignoris causam." The French law (Ordonnance de la Marine, liv. 1, tit. 14, art. 16; Code de Commerce, 191) confines the priority of the seamen for their wages to those due for the last voyage, in conformity with the general rule applicable to privileged debts, that the last services which contribute to the preservation of the thing shall be first paid.⁵

The fact that Judge Ware said in the same case, "When all the debts hold the same rank of privilege, if the property is not sufficient to fully pay all, the rule is, that the creditors shall be paid concurrently, each in proportion to the amount of his demand," and also intimated in the case of *The Phoebe*, [Case No. 11,065.] that liens on the ship must be paid, "not in exclusion, but in concurrence with other liens, standing in the same degree of privilege," has not been overlooked, but considering the facts of those cases, and the language of the learned judge in the case of *The Paragon*, as first above quoted, it seems to be entirely clear that not only the character of the liens but the dates at which they attached, were, in the opinion of Judge Ware, to be taken into consideration in determining the order of preference, or "degree of privilege," of the respective claimants. In the case of *The Paragon*,

⁵ The provisions of article 191, of the Code de Commerce, to which Judge Ware refers, afford abundant evidence that the inverse order of creation was the general rule of priority of payment in respect to privileged debts of the same character, where the proceeds of a vessel were insufficient to pay all the privileged debts against it.

[supra,] the claims were three in number—two under bills of lading for the same voyage, and one for seamen's wages. The last was of course preferred, and the other two should, under the principles sought to be established in this case, have been paid concurrently, as directed by Judge Ware. The report shows that the different claimants in that case were not and could not have been held to be entitled to be paid concurrently, on the ground that their suits were simultaneously commenced.

In the case of *The Phoebe*, [supra,] the learned judge was speaking of a claim for wharfage, accruing while the vessel was under arrest; and this claim, as one of the expenses of the legal proceedings, should, of course, have been paid concurrently with the other expenses of such proceedings. It is also proper to remark in this connection, that the decisions of my learned predecessor, Judge Conkling, to which reference has already been made, may have been in cases where seamen were claiming wages for the same voyage; where materialmen had simultaneously given credit to the vessel, in furnishing materials for the same voyage or season; or where all the parties interested in the question of preference claimed under bills of lading for the same voyage. The cases referred to, as they were stated at the bar, may not have been inconsistent with the principles adopted in this case. In the case of *The Aline*, 1 W. Rob. [Adm.] 111, the successful suitor in the cause of collision and damage, was held to have a preferable claim to be indemnified, as against a mortgage or bondholder, prior to the period when the damage was done; but the court evidently entertained the most decided opinion, that if the repairs had been effected after the collision by a stranger, on the security of a bond of bottomry, the case would have been altogether different.⁶ In the case of *The Sabina*, 7 Jur. 182, it was held that subsequent salvage took preference of seamen's wages, as but for the salvage, the seamen's lien

⁶ The court in fact decided that the holder of a bottomry bond, given to raise money expended in repairing the ship after collision, would be preferred to the collision-claimant; for it declared the collision-claimant to be entitled only to the value of the ship before the repairs were commenced, and that portion of the repairs which were done after the arrest took place, as against Mr. Day, who had advanced the expenses of such repairs under an agreement for a bottomry-bond; and it retained the residue of the proceeds in court to meet the demand of Mr. Day. Pages 122, 123. See also the comments of Chief Justice Jervis on the case of *The Aline*, in *Harmer v. Bell*, 22 Eng. Law & Eq. 72. In this case of *The Aline*, it might, perhaps, have been insisted by the owners of *The Panther*, who were the libellants in the collision suit, that they had obtained their decree before the party claiming on account of the expenditure for repairs had intervened for his interest. If such was the fact, and the question had been raised, the collision-claimant would, perhaps, have been declared entitled to the whole fund. See *The Saracen*, 2 W. Rob. [Adm.] 451, and [*The Neptune*,] 3 Knapp, 94.

would have been lost. In the case of *The Exeter*, 1 C. Rob. [Adm.] 173, 177, where three several bottomry-bonds had been executed for moneys advanced on the same general invitation for loans on the security of the ship, but one bond bore a date different from that of the others, the late Lord Stowell declared that it appeared upon the evidence that the parties acted in privity and in concert with each other, as the money was advanced on the same general invitation, for the same repairs, in which all were equally interested, and on the same terms; and therefore held that the payments should be pro rata, without any preference. And this was in a case where it appeared that one of the bond-holders had commenced his suit long before the others instituted their proceedings. Indeed, no reference seems to be made, in the English reports, to the date of the commencement of proceedings pending at the same time, as affording a ground for giving to one claim a preference over others of the same class, except in the case of *The Saracen*, 2 W. Rob. [Adm.] 451. See the first case in 1 Swab. Adm. [*The Clara*,] where this case of *The Saracen* is referred to and approved. In that case the second action was entered after the hearing, and on the same day, (the 6th May, 1845,) that the decree was pronounced in favor of the libellant in the first suit; and the two suits were brought to recover the damages sustained by the libellants, in each, in consequence of the same collision. If the two suits had been commenced at the same time, it is clear that the libellants would have been entitled to be paid concurrently; but the court held that the party who had obtained a decree establishing his rights, before the other, having a claim of precisely the same character, and arising at the same time, had entered his action, could not be compelled to surrender the benefit of his decree by sharing it with the less diligent claimant. If the second libel had been filed before the hearing of the first, the court would, doubtless, have directed the two claims to be paid pro rata. The language of Dr. Lushington, in delivering his opinion in that case, appears to warrant that conclusion.⁷ In the case of *The Selina*, 2 Notes

⁷The decree of the court of admiralty, in the case of *The Saracen*, by which the libellant in the second suit was denied a participation in the proceeds of sale, was appealed from. The decree was affirmed on the ground that the libellant in the first suit had obtained a preference by the decree pronounced before the second suit was instituted, and without any objection or claim on the part of the libellant in the second suit having been interposed in the first suit. During the hearing on appeal, Lord Campbell remarked: "This appeal must depend upon the question whether the judgment of May 1845, (the decree in the present suit establishing the libellant's right to recover, and referring it to the registrar and merchants to determine the amount of his damages,) was final, the proceeds of the ship still being in court." And again: "There is a judgment that

of Cas. 18, Dr. Lushington held that seamen's wages which accrued after the salvage services in that case had been rendered, were entitled to a preference over the claims of the salvors, and that a bottomry-bond holder, where the money was properly taken up, on bottomry, after the salvage services, was entitled to a like preference. In respect to sums due for wages prior to the salvage service, he declared that he entertained some doubt; and yet it is quite clear that the inclination of his mind was strongly in favor of giving a preference to the salvors.⁸ In the case of *The Constancia*, 4 Notes of Cas. 285, 518, the last dated bottomry-bond was preferred; and two others, bearing the same date, were held to be entitled to be paid pro rata, without regard to the time when the bond holders severally instituted their proceedings. In this case, (page 518,) it appears that seamen's wages, earned both before and after the execution of bottomry-bonds, were preferred over them, and that subsequent towage and pilotage were also paid in preference to the bond holder's lien. In the same case, (4 Notes of Cas. 684,) Dr. Lushington held, that the lien of the bottomry-bond should not be defeated by a lien, prior in point of time, for goods thrown overboard for the safety of the ship. In the case of *The Mary Ann*, 9 Jur. 94, Dr. Lushington intimated a very decided opinion that seamen's wages on the outward voyage before a bottomry-bond was given, ought not to be preferred to the bond-holder's lien; but he declared that subsequent wages would have a preference. Subsequent salvage, seamen's wages, pilotage and towage, are entitled to a preference over a prior bottomry-bond. *The Selina*, 2 Notes of Cas. 18; *The Favourite* 2 C. Rob. [Adm.] 232; *The Douthorpe*, 2 W. Rob. [Adm.] 79.

An able writer upon the subject of mari-

damages are to be paid. Does not that give the party a vested right?" 11 Jur. 255. The case on appeal is also reported in 6 Moore, P. C. p. 56, et seq., and this report shows that the effect of the prior decree, and not of the prior arrest, was the question upon which the case turned. Lord Campbell is reported to have said: "The principle of the common law is to give priority to a party obtaining a judgment." Again: "This appeal really resolves itself into the question whether the interlocutory decree of the 6th May, 1845, was a final decree." And again: "There is a judgment that damages are to be paid. Does not that give the party a vested right? The court below considered the ship and proceeds bound by the decree, the same as the land would be by a judgment at law." In delivering the opinion of the judges who heard the case on appeal, Lord Langdale said: "We are of the opinion that the sentence of the 6th May, 1845, is to be considered as a definitive sentence in favor of the defendants; and that the appellants, whose suit was not commenced till after the sentence was pronounced, are not entitled to participate in the proceeds of the ship in common with the respondents, by whose diligence, and at whose risk and expense, the damage has been pronounced for, the ship condemned, and the proceeds realized." 6 Moore, P. C. 75, 76.

⁸ See *The Sabina*, 7 Jur. 182, as before cited.

time liens, in the very valuable article published in the Law Reporter, ubi supra, says, that "In liens ex contractu, this preference or right of priority, depends upon the dates at which the liens have attached. For the rule by which that priority is determined, requires that the demand or service for which that privilege is claimed, be posterior in date to other services or liens. The ground of this inversion of rule is just and obvious. In the hazardous trade of the sea, the services performed at the latest hour are the most efficacious in bringing the vessel and her freightage safely to their final destination. Each foregoing incumbrancer, therefore, is actually benefitted by means of the succeeding incumbrance, and the equity of the court of admiralty, in adjudicating cases of conflicting liens of this nature, takes that as the principle of its decisions." This writer states that, in the case of *The Chimera*, and other cases, seamen's wages were held not to take preference of the damages awarded in a cause of collision and damage, (see the article and cases cited in 16 Law Rep. 5, 9, 10,) but, after an examination of the cases of *The Sidney Cove*, 2 Dod. 13, *The Louisa Bertha*, 1 Eng. Law & Eq. 665, and our own authorities, I am inclined to think that seamen's wages for the same voyage, and probably for continuous services during the same season upon our lakes, should be preferred to the claims of the suitor in damage; though seamen's wages for a former voyage, or a former season, should not be so preferred. In England it seems to be still undecided, (same article, p. 9,) whether salvage of a vessel subsequently to that vessel's occasioning damage, is absorbed by the latter lien or has preference over it; but I see no reason for doubt upon that question. The last lien should be preferred, whether it attaches by reason of salvage services, or a collision. If a collision-claimant does not enforce his lien until the vessel is wrecked, or in danger of loss, and she is saved by the efforts of salvors, those salvors should certainly have the preferable claim;⁹ and if after salvage services are effected, the vessel causes damage before the salvor's lien is enforced; the right of the salvors, like any other lien or proprietary interest, must be subject to the claims of the injured party.

In short, all parties, except seamen, holding ordinary maritime liens upon a vessel, are, to some extent, treated as though they had a proprietary interest in the ship; and their interests, whatever they may be, are subject

to all liens which the necessities of the ship, or a collision caused by the carelessness or misconduct of those in charge, may subsequently impose. It can hardly be necessary to say that the order of preference, now indicated, will be followed only when the liens belong to the same class, and that it is not intended to decide that bottomry-bonds, executed by the owner, or claims under contracts of affreightment, are to be paid in the same order as though they were liens arising from, and founded upon, the necessities of the ship. Nor is it intended to declare that any difference will be made between seamen's wages for the same season of navigation upon the lakes or between the claims of material-men who are concurrently giving credit to a ship, or vessel, in fitting her out for a specific voyage, or in preparing her for business at the commencement of a season of navigation; or who keep, concurrently, open accounts with a vessel during such season of navigation. Their claims may, perhaps, properly be considered as accruing at the same time, and be paid concurrently, without any departure from the general rule we have been considering. For most purposes, a season of navigation, upon the great lakes and their connecting waters, may be assimilated to a voyage, as that term is frequently used in the admiralty reports; and to found distinctions and give preferences upon short inland voyages, occupying from one to ten days each, would, in many cases of seamen's wages, under shipping articles, for the season of navigation, for continuous services, and of several material-men keeping open accounts against a vessel, be impracticable, if not absurd. All these questions are, very likely, sooner or later to be presented for consideration, and the exercise of the admiralty jurisdiction upon our great inland lakes, will require a system of rules and a series of decisions quite different from those of the courts of admiralty sitting upon the seaboard, but consistent with, and founded upon, those great principles of commercial and international policy which have hitherto controlled the decisions of the courts of admiralty of the United States, and of the other commercial countries of the civilized world. It would be unwise to attempt to anticipate and decide these questions, or others of a similar character hereafter to arise; and, judging from the experience of the past, they are likely soon enough to be brought into litigation, and to demand the most careful examination and the most deliberate consideration. The general principle before stated, and its practical application in a case like the present, may be taken as the settled law of this court; but the other questions which have been suggested in the course of this opinion, will be still open to argument, and subject to future consideration, whenever suitors shall deem it for their interest to present and argue them.

⁹ In *The Elizabeth and Jane*, [Case No. 8,321,] Judge Ware said, in respect to the rights of a salvor of property found deserted: "The thing itself becomes bound to him for salvage, and he may retain it until he obtains satisfaction. This right of possession is necessarily exclusive of that of all other persons, because his interest in the thing takes priority of all other interests."

Case No. 289.**The AMERICA.**

[1 Low. 176; 2 Amer. Law Rev. 458.]

District Court, D. Massachusetts. Oct., 1867.

ADMIRALTY—JURISDICTION—RULES—PILOT'S LIEN
GIVEN BY STATE STATUTE—ENFORCEMENT.

1. The admiralty has jurisdiction to enforce a lien against a vessel given by a state statute in certain cases to a pilot whose services have been tendered and refused.

[Cited in *Flanders v. Tripp*, Case No. 4,854; *The California*, Id. 2,312; *The Williams*, Id. 17,710; *The George T. Kemp*, Id. 5,341; *The Kalmar*, Id. 7,601; *Joslyn v. Nickerson*, 1 Fed. 134; *The Alzena*, 14 Fed. 175; *The Edith Godden*, 25 Fed. 511.]

2. The twelfth admiralty rule prescribed by the supreme court, which, as amended, prohibits the district courts from enforcing certain liens created by state statutes, has no application to pilots; for they come under the fourteenth rule.

[Cited in *Flanders v. Tripp*, Case No. 4,854; *The George T. Kemp*, Id. 5,341; *The Edith Godden*, 25 Fed. 511.]

In admiralty.

J. B. Richardson, for libellant.

T. K. Lothrop, for claimant.

LOWELL, District Judge. The libellant, William R. Lampee, is a branch pilot, duly commissioned and qualified for the port and harbor of Boston. He spoke the brig *America* outside the line prescribed for that purpose, and offered his services to pilot her in, and was the first pilot that offered; but the master refused to employ him. The brig was inward bound, and was of a size and class presumed by law to require such services. Under these circumstances the vessel is bound, by the laws of Massachusetts, to pay the usual pilotage fee; and the same law gives a lien on the vessel and her appurtenances, for the space of sixty days, "for all legal claims on account of pilotage, either rendered or offered." Stat. 1862, c. 176, schedule, cls. 4, 5, 10. All this is admitted, but the claimants insist that this court has not jurisdiction to enforce the lien. The states have power to regulate pilotage, in the absence of legislation by congress; and a regulation which gives to a duly qualified pilot a fee for services offered and refused is reasonable, and in accordance with the policy and practice of many commercial countries. *Cooley v. Board of Wardens of Phila.*, 12 How. [53 U. S.] 299. A law substantially similar has been in force in this commonwealth from a period earlier than the adoption of the Constitution of the United States, and has been often construed and upheld by the courts. It does not impose a penalty, but implies a debt which may be recovered by an action of contract. *Com. v. Ricketson*, 5 Metc. [Mass.] 412; *Hunt v. Mickey*, 12 Metc. [Mass.] 346; *Winslow v. Prince*, 6 Cush. 368; *Hunt v. Carlisle*, 1 Gray,

¹[Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

257. By the Revised Statutes of Massachusetts of 1836 (chapter 32, § 12.) the master only was liable to make this payment; but by the regulations of the commissioners, under authority and having the force of law, the responsibility of the owner was added: *Hunt v. Mickey*, supra. In this state of the law Judge Sprague decided that the statute did not contemplate a lien on the vessel, but a mere personal debt, and that he could not supply the defect. *The Robert J. Mercer*, [Case No. 11,891.] The law has now been changed, and it is highly probable that the change was suggested by this decision. The liability is now attached to the vessel, in terms, without mention of either owner or master. No doubt this language may well be taken to imply a liability of both master and owner; but it certainly is intended to hold the vessel, for it proceeds to give a lien in the words already cited. This brings the case directly within the fourteenth admiralty rule: "In all suits for pilotage, the libellant may proceed against the ship and master, or against the ship, or against the owner alone, or the master alone, in personam." This is a suit for pilotage, that is, for a pilot's fee; not indeed for services actually rendered in piloting a vessel, but for an offer which the law makes the equivalent of such actual service. If the justice of the case required it, the libellant might be permitted to allege that he had piloted the vessel; but it does not, for the contract to pay the pilotage is complete, and conclusively presumed by law from the demand and refusal. If this court has not jurisdiction, the lien cannot be enforced; because the state law provides no process in rem, but leaves the pilot to the remedy which Judge Sprague would have granted, as he says, if the statute then before him had been like the law now in force. And even if the state statute had undertaken to give a remedy, it is very doubtful whether it could have been availed of against this foreign vessel consistently with the constitution of the United States. *The Moses Taylor*, 4 Wall. [71 U. S.] 411.

The cases, *People's Ferry Co. v. Beers*, 20 How. [61 U. S.] 393; *Maguire v. Card*, 21 How. [62 U. S.] 248; *Roach v. Chapman*, 22 How. [63 U. S.] 132,—are cited as authority for the position that this court can never enforce a lien given by a state statute. [If this were so, there would seem to be no jurisdiction anywhere to enforce this valid and reasonable regulation.]² But these cases, and others like them, have been fully and carefully explained as announcing only a rule of practice in the matter of repairs and supplies to domestic vessels, and not a general principle of jurisdiction; and, accordingly, a libel brought to enforce such a lien was upheld after the twelfth admiralty rule had been changed, on the ground that the

²[From the case as reported in 2 Amer. Law Rev. 459.]

libel was filed before that time. Of course that decision settles the right of a state to create a maritime lien, and of the admiralty court to enforce it, in proper cases; and vindicates the uniform action of the district courts from the foundation of the government: The *St. Lawrence*, 1 Black, [66 U. S.] 522. Whether the supreme court under its power to make rules, can lawfully oust the jurisdiction of the district courts in a case which is confessedly maritime, does not appear to have been very much considered by the court, and might be worthy of argument here after. Again: it has never been decided that, in the case of a contract [confessedly maritime and] which by the general maritime law would give rise to a lien, the remedy in admiralty would be taken away by the mere fact, that the duration and extent of the lien may have been lawfully regulated by state legislation. Such is the present case. The general maritime law, recognized in the fourteenth admiralty rule, gives pilots a lien on the ship; the state has the right to regulate the subject-matter, and declares that a pilotage contract is complete when a due demand has been made and rejected: can there be a doubt that the pilot thereupon has a lien upon the ship, by the general maritime law, to enforce this valid contract? If so, he surely does not lose it, because the state tries to help him to it. If he does, then he must equally lose his lien for pilotage actually performed; for they stand on the same foundation, and are given by the same clause of the statute. My opinion therefore is, that, as this case comes within the fourteenth rule, and not the twelfth, this court has jurisdiction to enforce a state lien; and if this were not so, that a lien is implied or results from a valid contract for pilotage, unless, as in the case before Judge Sprague, the law expressly or by implication denies it. Taken either way, there is a lien which gives the right to proceed here against the vessel.

AMERICA, The, (BRUCE v.)

[See *Bruce v. The America*, Case No. 2,046.]

AMERICA, The, (BRUNSGAARD v.)

[See *Brunsgaard v. The America and The Magdalen*, Case No. 2,056.]

AMERICA, The, (HUMPHREYS v.)

[See *Humphreys v. The America*, Case No. 6,869.]

AMERICA, The, (ORHANOVICH v.)

[See *Orhanovich v. The America*, Case No. 10,568.]

*[From the case as reported in 2 Amer. Law Rev. 459.]

AMERICAN, (GAYTES v.)

[See *Gaytes v. American*, Case No. 5,286.]

AMERICAN BANNER, The, (TOWN v.)

[See *Town v. The American Banner*, Case No. 14,112a.]

AMERICAN BAPTIST MISSIONARY UNION, (TURNER v.)

[See *Turner v. American Baptist Missionary Union*, Case No. 14,251.]

Case No. 290.

AMERICAN BASKET CO. v. FARMVILLE INS. CO.

[3 Hughes, 251; 8 Reporter, 744; 8 Ins. Law J. 331.]

Circuit Court, E. D. Virginia. Nov. 25, 1878.

INSURANCE—CONDITION OF POLICY—TITLE OF POLICY HOLDER TO ASSURED PREMISES—EQUITABLE TITLE.

1. Where the beneficial title remains in the insured, the fact that the naked legal title outstands in another does not vitiate a policy of fire insurance requiring that the insured should be "entire, unqualified, and sole owners for their own use and benefit."

[Cited in *Williams v. Buffalo German Ins. Co.*, 17 Fed. 65; *Lewis v. New England Fire Ins. Co.*, 29 Fed. 497.]

2. An oath to such ownership is not falsified by the title being in another, where the oath is made in good faith.

[Cited in *Williams v. Buffalo German Ins. Co.*, 17 Fed. 65.]

[At law. Action of assumpsit by the American Basket Company against the Farmville Insurance Company, pursuant to the Code of Virginia, on a policy of fire insurance, claiming \$1,750 damages. Verdict and judgment for plaintiffs.]

Plaintiffs are a corporation of the state of Connecticut. The defendants are a corporation of Virginia. The property insured and burnt was in the state of Delaware, at a place called Milford. Myers was a regular insurance agent in the state of Delaware, resident in Delaware City, and in this matter was the agent of the defendants. Williams was a resident of Milford, and a solicitor of insurance business for Myers. The property was insured through the agency of Myers; and the "application" of plaintiffs for insurance, which was signed by an officer of the plaintiffs, was a printed form of questions and answers, in which the answers were written in the hand writing of Williams. Evidence was given by the plaintiffs tending to prove that full explanations of the condition of the title of the property at or before the time when the application was written out were given. It was proved

*[Reported by Hon. Robert W. Hughes, LL.D., District Judge, and here reprinted by permission.]

that the property was bought and paid for in full by the plaintiffs, and that they were in undisputed possession and use of it. But the record-title was in Orrin E. North, an officer of the plaintiff company, in consequence of a law of Delaware which forbade a foreign corporation from holding real estate in that commonwealth. In the application, in the answer to the question, "In whose name is the title to the property" insured? it was stated, in the handwriting of Williams, it was "in the name of the American Basket Company." In the "proof of loss," made out after the fire, and signed by an officer of the plaintiffs, in answer to the question, "Did the building stand upon leased premises?" the answer, written in Myer's handwriting, was "No—held in fee." The policy contained a clause of forfeiture in the event of false swearing in the proof of loss; another clause requiring a full disclosure of the ownership in the application; and the "entire, unconditional and sole ownership in the property insured for the use and benefit of the assured." It contained no clause of forfeiture by future incumbrances; but did contain a provision voiding the policy if "any change should take place in the title or possession of the property by voluntary transfer" or other specified methods. During the period of insurance, and some four months thereafter, the plaintiffs caused Mr. North to make a deed of mortgage of the property for securing a considerable debt. The plaintiffs' witnesses testified to the solvency of their company. These were the principal facts of the case, and upon them the counsel on both sides asked instructions. The court modified and condensed these, and gave a preliminary opinion as follows.

Judge Meredith and John A. Coke, for plaintiffs.

W. W. Henry, P. W. McKinney, and J. P. Fitzgerald, for defendant.

HUGHES, District Judge. Policies of insurance, like all other written contracts, must be construed and enforced according to their terms. If they convey a plain, practical meaning, that meaning must be carried into effect. Policies of insurance differ somewhat from other contracts, however, in respect to the rules of construction to be applied to them. They are unipartite. They are in the form of receipts from insurers to the insured, embodying covenants to compensate for losses described. They are signed by the insurer only. In general the insured never sees the policy until after he contracts and pays his premium, and he then most frequently receives it from a distance when it is too late for him to obtain explanations or modifications of the policy sent him. The policy, too, is generally filled with conditions inserted by persons skilled in the learning of the insurance law and acting in the exclusive interest of the insur-

ance company. Out of these circumstances the principle has grown up in the courts that these policies must be construed liberally in respect to the persons insured, and strictly with respect to the insurance company. See *Insurance Co. v. Wilkinson*, 13 Wall. [80 U. S.] 232.

Another rule of the law in regard to fire insurances is to discourage wager policies; that is to say, policies taken by persons who have no interest in the property insured, and in which such persons merely bet that the property will not be burned. Such insurances are contrary to public policy and promote fires. The law will, therefore, give force to all provisions in policies of fire insurance which require that the person who takes out the policy shall have an interest in the property, and shall disclose that interest with precision in his "application" for insurance. That is the purpose of the law, and is the object sought to be subserved by the insertion of clauses voiding them in cases where deception is practiced in regard to the real ownership of the property insured; and terminating them whenever, during the period of insurance, the person holding a policy ceases to own the property, and it becomes thereby a wager policy. Therefore, clauses in policies requiring a truthful statement of the interest of the applicant for insurance, and forbidding changes of ownership during the period of insurance, are to be construed not technically to the prejudice of the policy-holder, but rationally and fairly to protect the insurance company from the extraordinary risks, and from the certain and numerous losses which would fall upon them from insurance of property not actually owned by the persons insured.

In the case under trial there are two questions, which have formed the subject of contention between counsel, and upon which instructions are asked of the court.

I. The first is, whether plaintiffs' right to recover is defeated by the fact that the record-title could not be held by the plaintiffs under the laws of Delaware, and was therefore vested in Mr. Orrin E. North, if not made known to the defendant or its agent at the time of the insurance of the policy, considered in connection with the statement in the application for insurance that the title was "in the name of" the plaintiffs. I am of opinion that it is not defeated by that fact if the plaintiffs were the "entire, unqualified, and sole owners" of the property insured "for their own use and benefit." I do not think that the fact of the record-title being in Mr. North of itself defeats their right to recover, unless their statement in the application was made to deceive and mislead the insurance company. The evil sought to be avoided by those provisions of the policy requiring a correct statement of the plaintiffs' interest in the property was the insurance of property not owned by the

holder of the policy, the destruction of which would not cause a loss to that holder equal to the value of the property destroyed. If the plaintiffs in the case at bar were the owners of the entire beneficial interest in the property at the taking out of the policy, and would have been losers to the full extent of its value if it had been destroyed, then this ownership fulfilled every purpose which the provisions of the policy in regard to a disclosure of interest were designed to secure, and, in the absence of fraud or fraudulent misrepresentation, a merely technical difference in the title, set out in the application, ought not in equity and good conscience to defeat the plaintiffs, if they are otherwise entitled to recover. The question for the jury in this point is, therefore, whether the statement in the "application" for insurance that the title was in the "name of the American Basket Company" misled the defendant or its agent, and was intended to do so. If they think not, it is my opinion that the fact of the record-title being in Mr. North does not of itself defeat the action, if the plaintiffs are otherwise entitled to recover. In this same connection I will consider the statement on oath in regard to the title made in the "proof of loss." The same rule of law as to the real ownership of insured property, which has been explained, applies here. If the person holding the policy swears that he was owner of property destroyed by fire, of which he was not in fact the full and sole beneficial owner, the fact that he was not owner proves that his policy, contrary to its carefully-expressed provisions, had been a wager policy, and defeats his right to recover; and this the more justly because he has practiced a fraud, and has added perjury to his fraud. It is for the jury to say from their view of the evidence whether the full beneficial ownership of the property destroyed in the case on trial was or was not in the plaintiffs; whether or not this ownership had been divested at the time of the fire by the mortgage deed of 18th of September, 1876, or by any other transfer, so as to render the statement on oath made by the plaintiffs' agent in the "proof of loss" that they were, such fraud or false swearing as is contemplated by the clause in the policy relating to that subject. Unless they believe that such fraud was practiced and such false swearing committed, the plaintiffs' action is not defeated by the statement in regard to the ownership and title in the proof of loss.

II. The second question of contest is in regard to the effect of the mortgage executed on the insured property by the plaintiffs on the 18th of September, 1876. The authorities on the subject are conflicting in cases where the policy does not provide against future incumbrances, the supreme courts of some of the states deciding that the execution of a mortgage deed of itself violates

the provisions usually found in insurance policies as to transfer and alienation of property during the period of insurance, and those of other states deciding that it is only after divestiture of title and ownership by foreclosure or otherwise that such result occurs. I am not aware of any decision of the court of appeals of Delaware or Virginia, or indeed of the supreme court of the United States, determining the law of this subject, and must act in the case at bar upon my own views of the law and equity of the case. And it seems to me that the provision in the policy now sued upon, forbidding any change in the title or possession of the insured property during the period of insurance, should be construed with reference to the cardinal object sought to be subserved in all provisions designed to prevent persons not having an interest and ownership in property from taking out policies, and to prevent insured persons who cease to have an interest and ownership in property from continuing to hold such policies. So that the inquiry for the jury is whether or not the mortgage of September, 1876, operated to deprive the plaintiffs of their ownership in the insured property, so that, if it was burnt, their loss would be to the extent of the full value of the property destroyed. If, therefore, a person who is insolvent, and so much so as to be hopeless of reinstating his affairs, mortgages his property and thereby ceases to have any real interest in it as owner, so that his loss, if it is burnt, would be merely nominal; or if, after mortgaging, he makes default, and a foreclosure and divestiture of his title and beneficial interest ensues, there is, in either case, such a change in the ownership as renders the policy as to him a wager policy, and as defeats his right to recover in the event of fire. But if the mortgagor remains solvent and thereby remains the sole beneficial owner of the insured property, and would sustain a loss, in the event of fire, to the full extent of the value of the property destroyed, then such a mortgage does not work such a change in the "title or possession" of the property insured as to defeat the plaintiffs' action, if they are otherwise entitled to recover. In accordance with these views I have modified the instructions for the jury respectively asked for by counsel in the cause, and embodied them as follows:

I. If the plaintiffs were the entire, unconditional, and sole owners of the property insured, for their own benefit, and had undisputed possession of it at the date of the policy, then the fact that the record-title was in another person does not defeat their right to recover in this action, unless they concealed the condition of the record-title from the defendant company and its agents, and misled them by a contrary statement in their application for insurance, or unless they sought to deceive and mislead them in regard to the record-title and ownership at

the time of the fire by false swearing in their proof of loss.

II. The execution of a mortgage by the plaintiffs, after taking out the policy of insurance, did not defeat their right to recover in this action, unless the mortgage, by reason of their insolvency or otherwise, wrought such a change in their ownership or interest in the property that their loss at any time before the fire would have been, or at the time of the fire was, less than the full value of the property destroyed.

The jury, after a short absence, brought in a verdict for the plaintiffs, with damages at \$1,750 and interest.

Case No. 291.

AMERICAN BIBLE SOC. v. HOLMAN et al.
VAN NORMAN v. SAME.

[2 N. W. (O. S.) 245; 5 Reporter, 645.]

Circuit Court, D. Minnesota. March, 1878.

WILL—BEQUEST OF PROCEEDS OF MORTGAGE—
FORECLOSURE.

Where a last will and testament provided that the "proceeds" of a certain mortgage should go to certain legatees named, and, prior to testator's death, such mortgage was foreclosed, and the lands purchased at the foreclosure sale for the benefit of, and the title thereto vested in, such testator: *Held*, that the fact of foreclosure was immaterial, and the proceeds of such mortgage existing at the time of the testator's death in the shape of lands that could be identified as such proceeds, would pass by the terms of the will.

In equity. These suits were brought to enforce the provisions of a will executed by Seth Holman, of Mass., November 16, 1860, by which he made the following bequest: "Eighthly. I bequeath and devise to the American Bible Society * * * one half of the proceeds of a mortgage given by Carlos Wilcox, of Minneapolis, Minnesota, to be disposed of by my executors to their best judgment. Ninthly. I bequeath and devise to the American Foreign Christian Union * * * one half of the proceeds of a mortgage given by Carlos Wilcox, of Minneapolis, Minnesota, to be disposed of by my executors to the best of their judgment." The complainant, Van Norman, is one of many persons who form a voluntary association under the laws of New York, called the "American Foreign Christian Union," and sued as well for his associates as himself. The "American Bible Society" is a charitable corporation, with power to take real and personal property by gift or otherwise. The Wilcox mortgage had been foreclosed by an agent at the time of the testator's death, and the lands covered by it had been purchased for his benefit, and a deed, conveying the same free from the equity of redemption, was executed by the sheriff in accordance with the laws of Minnesota, September 26, 1860. The testator died shortly after the execution of his will. It is urged on the part of the defendants, that by the foreclosure proceedings the mortgage was cancelled, and there being nothing upon

which the bequests could operate, they were defeated.

Davis, O'Brien & Wilson, for complainants.
Lochren, McNair & Gilfillan, for defendants.

NELSON, District Judge. The intention of the testator must control in the construction of this will, and if possible be ascertained from the instrument itself. The bequests or legacies are specific, and in terms one half of the proceeds of the Wilcox mortgage was bequeathed to each legatee. The defence is that Holman, at the time of his death, having the title in fee to the lands by foreclosure, and there being no mortgage out of which "proceeds" could be realized, the bequests fail. The testator undoubtedly intended to make valid bequests, available for the purposes designated, and I am not required to give a narrow construction to the word "proceeds," when a fair and reasonable acceptance of the word used would sustain the bequests. These are charities, and should be upheld if possible; and it is not a strained interpretation to make the word "proceeds" comprehend and embrace the avails of the mortgage in whatever form they existed at the time of the testator's death; in fact, such was the intention as gathered from the language of the will. The testator did not give a sum of money and require the payment to be made out of the mortgage, nor did he bequeath a sum of money equal to the amount due upon the mortgage, but he gave the "proceeds" of the mortgage specifically, and whether a foreclosure had taken place or not is immaterial, as the "proceeds" of the mortgage existed at the testator's death and could be identified. [Gardner v. Printup,] 2 Barb. 83; [Doe v. Tofield,] 11 East, 246; [Roe v. Pattison,] 16 East, 21. Decree for complainants.

AMERICAN BRIDGE CO., (SMITH v.)

[See Smith v. American Bridge Co., Case No. 13,002.]

AMERICAN BUTTON-HOLE & OVER- SEAMING CO., (CHABOT v.)

[See Chabot v. American Buttonhole & Overseaming Co., Case No. 2,567.]

Case No. 292.

AMERICAN BUTTON-HOLE, OVER- SEAMING & SEWING-MACH. CO. v. MURRAY et al.

[Syllabi, 109.]

Circuit Court, D. Minnesota. Dec. Term, 1876.

BONDS—SIGNING ON CONDITION—FRAUD AFFECTING NOTE FOR INDEBTEDNESS ON BOND.

[1. Where the obligors upon a bond securing payment of debts of third parties sign a note for the amount due thereon, as a consideration for an extension of time for payment, they can avail themselves of any defense, as against the

payee of the note and obligee on the bond which would defeat a recovery upon the bond.]

[2. The fact that two obligors signed the bond at the request of a third, and on condition that it should not bind them unless he obtained certain other signatures, which he failed to do, is a defense if the obligee knew of the condition, but not otherwise.]

[3. Where two obligors sign and deliver a bond to the general agent of the obligee, with a condition that it should not bind them unless certain other signatures are obtained, which is not done, they are not liable on the bond, nor on a note which they are induced to sign by a statement of the agent that it covers an indebtedness for which they are liable on the bond.]

[4. The fact that they were induced to sign the note by a statement that another person, who could not read nor write, had authorized his signature, and that his alleged signature was forged, is not a defense to an action on the note, for they should have ascertained whether his signature was properly on the note.]

At law. The facts sufficiently appear in the charge of the judge.

Simonton & Reid, for plaintiff.

Wilson & Taylor and S. L. Campbell, for defendants.

NELSON, District Judge. Charge to jury. This action is brought upon a promissory note for \$770.68, dated March 23, 1876. Five defendants have interposed several defenses. One defendant, Murray, is in default, and submits to a judgment. Fraud and want of consideration are alleged by all the defendants answering, except Mullane, who claims the note never was signed by him, or by one authorized by him to do so.

The undisputed facts are briefly these: J. M. Murray had the exclusive right within certain territorial limits to sell sewing machines manufactured by plaintiff; and being supplied on credit, he was required to execute a bond, with good and sufficient sureties, for the payment of notes given on the purchase of the same. He delivered to plaintiff a bond purporting to have been executed March 17, 1875, by himself and defendants Byrnes and Dailey; and another on September 25, 1875, executed by himself and Harlan, Smith and Gregg. Some time in March, 1876, Murray was indebted to plaintiff on several notes which had matured, and was requested to pay, or suit would be commenced upon the bonds. An arrangement was made whereby the plaintiff agreed to extend the time for the payment of the amount due in case Murray would give it a note executed by himself and the sureties upon his bonds. There was due at that time \$240, for which the sureties upon the bond executed Sept. 25, 1875, were liable, if at all. The sureties upon the first bond, executed March 17, 1875, were responsible for the payment of the whole amount claimed, \$770.68, and this was the indebtedness upon which the plaintiff was willing to grant an extension. In view of these facts, the defendants contesting, with the exception of Mullane, who was not upon either bond, can avail

themselves of any defense which would defeat a recovery upon the bonds. If you believe Mullane never authorized his signature to the note, no recovery can be had against him.

Byrnes and Dailey, who signed the bond executed March 17, 1875, claim that they signed it at the request of Murray, and upon the condition that it should not be obligatory upon them unless three additional responsible names should be obtained. This is a good defense if the condition was known to the plaintiff at the time, but if it was only known to Murray, the principal obligor, and the bond, perfect on its face, was accepted without knowledge of that condition, these defendants, Byrnes and Dailey, cannot say that they did not intend to be bound unless the names of three other persons, not on the bond when they signed, should be obtained. [Dair v. U. S.,] 16 Wall. [83 U. S.] 1. See, also, article in [10] Alb. Law J. [257,] on liability of sureties. If this defense is not available to defeat a recovery upon the bond, it cannot be urged in this suit, for they were bound by their obligation to pay the amount due the plaintiff from Murray, and the execution of the note gave an extension of time for payment, and was no injury to them.

Smith and Gregg, sureties upon the bond executed Sept. 25, 1875, also allege that the bond they signed is void, for the reason it was executed at the request of Murray, and upon the condition that it should not bind them unless three other responsible sureties should be obtained, and that the plaintiff acquiesced in this condition. It is urged by them as a defense, also, that, when the note was signed, the agent of the plaintiff falsely represented that they were liable on their bond to the full extent of the note, whereas, if the bond could be enforced, the amount of their liability would be only \$240, and that they declined to sign unless three responsible names were obtained in addition to the sureties on the bonds. It is conceded that their liability was for that amount only, and that when the note was afterwards presented for their signatures, in compliance with their request, it had the name of Mullane upon it, which the defendant Murray told them he signed by the authority of Mullane. They claim to have been induced to sign it by the fact that Mullane, who was a well-to-do farmer, had authorized his signature, and insist they are not liable if his signature is a forgery.

If you believe it is a forgery, and that Smith and Gregg refused to sign until some other responsible name was secured, but mentioned no person whose signature they required, still, as Mullane could not read or write, and his name appeared to be signed by some other person, they should have ascertained before signing it whether his signature was properly to the note, and are not discharged unless the plaintiff had

knowledge of the forgery. And if Smith and Gregg, when they signed the bond, delivered it to the general agent of the plaintiff, and it was not to be considered obligatory until the names of three other persons were secured, then, as only themselves and one other appear to have executed it, the plaintiff cannot recover against them upon the note, for it was given on an indebtedness which the plaintiff's agent stated was covered by their bond.

Harlan urges that he signed the note upon the condition that Gregg and Smith would also sign it. Now, as he was only liable upon his bond to the extent of \$240, if you believe a recovery cannot be had against them, the plaintiff cannot hold him, for the reason that his signature was obtained upon the condition known to it, that Smith and Gregg were to share the liability with him.

The jury gave a verdict against all the defendants except Mullane.

AMERICAN BUTTON-HOLE, OVER-SEAMING & SEWING-MACH. CO., (PARHAM v.)

[See Parham v. American Button-Hole, Over-Seaming & Sewing-Mach. Co., Case No. 10,713.]

AMERICAN CENT. INS. CO., (GRACE v.)

[See Grace v. American Cent. Ins. Co., Case No. 5,648.]

Case No. 293.

AMERICAN COTTON-TIE CO. v. SIMMONS et al.

[3 Ban. & A. 320; 13 O. G. 967.]

Circuit Court, D. Rhode Island. June, 1878.²

PATENTS FOR INVENTIONS—LICENSE "TO USE ONCE ONLY."

1. When the proprietors of a patented article sell it for the purpose of allowing it to be used in the ordinary pursuits of life, and to pass into the market of the country as an ordinary article of commerce, and subject to unrestricted purchase and sale, he waives his right to affix conditions or restrictions to its use and sale, and consents that, after one sale and the payment of one royalty, it shall pass out of the limits of the monopoly. *Hawley v. Mitchell*, [Case No. 6,250,] distinguished.

[See, contra, *American Cotton-Tie Supply Co. v. Bullard*, Case No. 294.]

[See note at end of case.]

2. Complainants sold patented buckles for use, in connection with an iron strap, for a tie or fastening to cotton bales. The buckles had printed on them the words "licensed for one use only," and on the bill-head was a notice, either to the same effect, and that they were sold and purchased subject to the restriction, or, that the buckles were the property of the complainants, who reserved the right after such use to recover possession of them wherever found: *Held*, that the purchasers took an unrestricted

title to the buckles without any reservation in the vendors, and that the case fell within the principles laid down in *Goodyear v. Beverly Rubber Co.*, [Case No. 5,557,] and *Washing-Mach. Co. v. Earle*, [Id. 17,219.]

[See, contra, *American Cotton-Tie Supply Co. v. Bullard*, Case No. 294.]

[See note at end of case.]

[In equity. Bill by the American Cotton-Tie Company, Limited, James J. McComb, administrator of Mary T. McComb, deceased, and others, against Simeon W. Simmons and others, to enjoin the infringement of patents Nos. 23,291 and 31,252, and for an accounting. Bill dismissed. Decree reversed on complainants' appeal. *American Cotton-Tie Co. v. Simmons*, 106 U. S. 89, 1 Sup. Ct. 52.]

S. A. Duncan, for complainants.

B. F. Thurston, for defendants.

SHEPLEY, Circuit Judge. The complainants are engaged in the manufacture and sale of a patented buckle for use in connection with an iron strap for a tie or fastening to cotton bales. There can be no reasonable doubt that cotton-ties sold by defendants are covered by the patents under which complainants claim. Nor does the evidence in this case leave any reasonable doubt that the buckles sold by the defendants are the identical buckles made and sold by the complainants under their patent. The complainants contend that they sold the buckles under a restriction which limited them to one use, and did not convey an unrestricted title, and that the buckles never passed out of the monopoly of the patent. The facts are that the complainants sold the patented buckles with the words printed on them, "Licensed to use once only," and that up to the season of 1876 on the bill-heads and invoices of all their agents were the words: "The cotton-ties sold by this invoice are licensed to be used only as bailing-ties, and are sold and purchased subject to this restriction." During the season of 1876 the following clause was printed on their bills: "The buckles accompanying these bands are the property of the American Cotton-Tie Company, limited, and are licensed to be used for one season only, the company reserving the right after such use to recover possession of them wherever found." The company clearly had the right, in selling a patented article, to put a restriction on its use or sale, and to convey only a restricted title, or to license only a restricted use, and the purchaser under such a restricted title could not convey a greater or better title than he had himself. The law upon this subject was fully stated in *Hawley v. Mitchell*, [Case No. 6,250,] and affirmed in the supreme court of the United States. 16 Wall. [83 U. S.] 544. But when the proprietor of a patented article sells it for the purpose of allowing it to be used in the ordinary pursuits of life, and to pass into the market of the country as an ordinary article of commerce,

¹[Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

²[Reversed in 106 U. S. 89, 1 Sup. Ct. 52.]

and subject to unrestricted purchase and sale, he waives his right to affix conditions or restrictions to its use or sale, and consents that, after one sale and the payment of one royalty, it shall pass out of the limits of the monopoly. If a manufacturer of patented pins, or nails, or wood-screws, or any similar article, were to affix to his invoice of sale a condition limiting them to one use, and sell them in quantities to retail dealers to be sold again, he must know and intend that they are to pass into the commerce of the country and be sold over and over again, and sold only to persons who would not buy anything less than an unrestricted title. Shall the purchaser of a packing-box be treated as an infringer, and as pirating an invention, because he uses again and for another purpose the screws or nails which held the box together, and which he purchased when he purchased the box and its contents? May he not reasonably presume with regard to articles of this description, that pins, and nails, and screws do not go into the market with an incumbrance upon their title or a restriction on their use, and that he is not bound to trace the title to see if it be unrestricted, for the reason that he may well suppose no one would expect to affix a restriction on the use of such articles which would be operative, or, if he could do so, would ever find purchasers of them? The buckles sold by the complainants belong to this class of articles. They are sold for the purpose of being used to confine a bale of cotton, as a nail or screw confines a packing-box. It appears in evidence that when a bale of cotton is sold it is without tare, and consequently the buckle and the strap it confines are sold and resold with the bale of cotton to which they are attached. If the cotton takes fire or is otherwise damaged, and requires to be rebaled, must the owner put the same buckle back on the same bale, or be liable to the penalties of an infringer?

When the cotton bales are opened for use at the factories, the manufacturer who has purchased the ties and buckles with the cotton, having no further use for them, sells them to the junk-dealer. From the junk-dealer the defendants purchase them and repair them and sell them again. The vendor of the patented buckles sells them to be applied to the bales of cotton with the full knowledge that they will be sold and resold as often as the cotton is sold. They impliedly consent to these unrestricted sales. They cannot under such circumstances be fairly considered as retaining the title to the buckles in themselves, or as parting only with such a restricted title as would require each vendor of the cotton to sell it accompanied with a restriction on the title and use of the buckles. The very purpose of the original sale, with the knowledge of the subsequent use and sales necessarily incident, imply a parting with the unrestricted

title, and a passing out of the limits of the monopoly of the thing sold, as much as it would if the vendor sold patented thread, nails, or screws, to be used in fastening packing-cases to be sold with the goods packed.

The facts in this case show that the owners of the patent buckle intended and contemplated that the purchasers should buy an unrestricted title, inconsistent with any reservation of title or use in the original vendors. Such a sale does not fall within the principle as stated in *Hawley v. Mitchell*, [supra,] but clearly falls within the language and principle of the decisions in *Goodyear v. Beverly Rubber Co.*, [Case No. 5,557,] and *Washing-Mach. Co. v. Earle*, [Id. 17,219.] The case is very different from that of the sale of a machine easily identified, and to which a restriction may easily be attached, or where a license to use only may be sold unaccompanied with any title, or accompanied with a restricted title. But when pins, nails, screws, or buckles are sold, if some of them are sold with a restricted and some with an unrestricted title, there are no means of identification which enable the purchaser, after they have passed into the market and common use, to distinguish the articles licensed or restricted in their use from those absolutely sold. In the case of articles of that description, the patentee may fairly be presumed to have received his royalty when he parted with the possession of the articles and allowed them to go into common and general use. The public should not be vexed with litigation about reserved rights or conditions affixed to the title of such articles, or put upon the investigation of incumbrances or restrictions on the title of nails, screws, buckles or pins, before they can be safely used by a person who has bought them of parties who obtained them of the patentee with the right to sell them in the open market. It is more for the interest of inventors that they should obtain their royalty on such articles when they first put them upon the market, than to make the monopoly odious by the attempt to fix restrictions on the subsequent use. Bill dismissed, with costs.

[NOTE. On appeal to the supreme court, this decree was reversed, with an order that the circuit court enter a decree for plaintiffs for an account of profits and damages. Mr. Justice Blatchford, in delivering the opinion of the court, said: "A buckle without a band will not confine a bale of cotton. Although the defendants use a second time buckles originally made by those owning the patents, and put by them on the market, they do not use a second time the original bands in the condition in which those bands were originally put forth with such buckles. They use bands made by piecing together several pieces of the old bands. The band, in a condition fit for use with the buckle, is an element in the third claim of the Brodie reissue. That claim is for a combination of the open slot, arranged to allow of the sidewise introduction of the band: the link or buckle with the single rectangular opening arranged so as to hold both ends of the band and the band.

* * * Whatever right the defendants could acquire to the use of the old buckle, they acquired no right to combine it with a substantially new band to make a cotton-bale tie." *American Cotton-Tie Co. v. Simmons*, 106 U. S. 89, 1 Sup. Ct. 52. In the circuit court, southern district of New York, in action concerning these same patents, it was held that, the defendant having bought the buckles stamped "Licensed to use once only," and with new hoops, sold them as cotton ties, he had infringed the plaintiff's patents. *American Cotton-Tie Supply Co. v. Bullard*, Case No. 294.]

Case No. 294.

AMERICAN COTTON-TIE SUPPLY CO. v. BULLARD et al.

[17 Blatchf. 160; 4 Ban. & A. 520; 17 O. G. 389; 9 Reporter, 70.]

Circuit Court, S. D. New York. Sept. 29, 1879.

PATENTS FOR INVENTIONS—INFRINGEMENT—LICENSE "TO USE ONCE ONLY."

The plaintiff was the owner of patents covering improvements in metallic cotton ties, consisting of buckles and hoops, for compressing bales of cotton. Neither the plaintiff nor any prior owner of the patents had granted any licenses to make buckles or ties, but they had made and sold the ties. The buckles were stamped, "Licensed to use once only," and were sold with invoices declaring that the ties were licensed to be used once only, as baling ties. The defendant bought the buckles so once used, from cotton mills and junk dealers, and put up some with new hoops, and some with pieces of the original hoops pieced together, and sold them as cotton ties: *Held*, that the defendant had infringed the patents, and ought to be enjoined from further infringement.

[See *American Cotton-Tie Co. v. Simmons*, 106 U. S. 89, 1 Sup. Ct. 52; *Id.*, Case No. 293.]

[In equity. Bill to restrain the infringement of patents Nos. 23,291, and 31,252.² Preliminary injunction granted.]

S. A. Duncan and J. R. Beckwith, for plaintiff.

C. C. Beaman, Jr. and B. F. Thurston, for defendants.

BLATCHFORD, Circuit Judge. The bill in this case sets forth that the plaintiff is "a joint stock company, duly and legally organized under the laws of the state of Louisiana, and having its principal place of business in New Orleans, in said state." It does not aver that the plaintiff is a corporation or that it is a citizen of the state of Louisiana. It avers that the defendants are citizens of the state of New York. The plaintiff is referred to in some of the affidavits as a corporation, and it is, doubtless, a corporation created by the state of Louisiana. This being so, the bill can be amended, and it must be, to show a capacity in the plaintiff to sue.

The bill is founded on re-issued letters patent No. 5,333, granted to James J. McComb, March 25th, 1873, for an "improvement in cotton bale ties," (the original patent hav-

ing been granted to George Brodie, March 22d, 1859, and re-issued to him April 27th, 1869, and extended for seven years from March 22d, 1873,) and on letters patent No. 31,252, granted to J. J. McComb, January 29th, 1861, for an "improvement in iron ties for cotton bales," and extended for seven years from January 29th, 1875. The plaintiff is the owner of both of the patents.

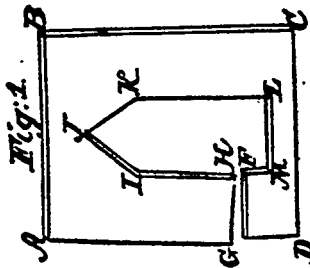
The specification of No. 5,333, (called the Brodie patent,) sets forth that the invention is one of "improvements in cotton ties, or metallic bands and their connections, for baling." It says: "My invention relates to the combination with open slot ties of metallic bands having their ends free and held in position by the expansion of the bale. * * * Fig. 6 is a top view of the open slotted link, shown in Figs. 7, 13 and 14. * * * Figs. 6, 7, 13 and 14 show an open slotted link or tie. In Fig. 7 this is shown in connection with pins, and in Figs. 13, 14 and 15 in connection with the band alone, the ends being turned under the link and held in position by the pressure exerted by the expansion of the bale. In the latter mode of use, the slack may be readily taken up by forming the loop in the iron at the moment of making the fastening, and passing the end thus looped through the opening in the side of the link. The band is thus slipped sidewise through the opening into the slot, instead of thrusting it through endwise." The 3d, 4th and 5th claims of the patent are as follows: "3. The combination of an open slot for introducing the band sidewise, with a link having a single rectangular opening for holding both ends of a metallic band, and the band. 4. An open slotted link, when combined with metallic bands, the ends of which are turned under the link and held in position by the expansion of the bale. 5. The method of baling cotton with metallic bands, and of taking up the slack of the band, by bending the same at any desired point into the form of a loop, and passing such loop sidewise, through an open slit, into the slot intended to receive it, and over the bar of the clasp intended to hold it."

The specification of No. 31,252, (called the McComb patent,) sets forth that the invention is "a new and improved mode of fastening iron hoops on cotton bales." It says: "The nature of my invention consists in the use of a peculiarly shaped buckle, as a fastening or tie for the ends of the iron hoops which it is desired to substitute in place of the hemp ropes now made use of in baling cotton, said iron hoops being so much safer in case of fire. * * * The tie or buckle is a piece of wrought iron or other metallic substance, about the eighth of an inch thick, an inch and three-quarters wide, and two inches long, (the size being modified to suit the width of the hoop used,) with an oblong hole or aperture cut or punched through the centre. The diagram No.

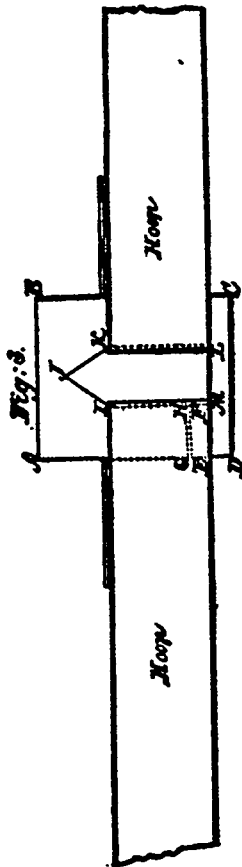
¹[Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

²[See note at end of case.]

1, lettered A, B, C, D, represents the exact size of one of the ties or buckles, with aperture cut to receive a hoop an inch wide. The sides A, B, and D, C, are equal and parallel, as are also the sides B, C, and A, D. The letters M, I, J, K, L, shows the shape of the aperture or hole which is punched or cut through the centre of the plate, the two longer sides, M, I, and K, L, being equal in length to the width of the hoop of the size above mentioned. In the side A, D, is cut a slot, which is indicated on the diagram by the letters E, F, and G, H, the side G, H, of the slot being turned outward the eighth of an inch, to facilitate the insertion of the end of the hoop." The buckle is of this shape:



The hoop and buckle are arranged as follows in use:



The claim is as follows: "Forming a link or tie with an oblong aperture, one end of which is arrow shaped, or, rather, presents two sides of an equilateral triangle, the design of this arrow shaped end being not only to force the hoop, or bend of the hoop, over the slot, which it does with unerring precision when the bale expands, after being released from the press, but also to secure an equal bearing upon the separated parts of the slotted side of the tie."

A patent was granted to Frederick Cook, March 2d, 1853, for an "improvement in metallic ties for cotton bales." This patent was extended for seven years from March 2d, 1872. As extended, it was assigned by Cook to James J. McComb. March 21st, 1872. In June, 1874, McComb assigned the Cook patent and the Brodie patent to a firm called "The American Cotton-Tie Company." In March, 1876, that firm assigned those patents to "The American Cotton-Tie Company, Limited," a corporation, and at the same time that corporation acquired the title to the McComb patent. From that corporation the title to the three patents passed to the plaintiff. Neither McComb, nor any of the subsequent owners of the patents, granted any licenses thereunder to make buckles or ties, but they retained to themselves the monopoly of manufacture, and made the ties and supplied the market with them, to an extent always equal to any demand. The tie mainly sold since March, 1872, by them, has been the "arrow tie" of the McComb patent. The bands have been cut to the length of eleven feet, bent over upon themselves once, and put up in bundles of thirty each, the buckles being strung upon one of the inner bands.

The defendants have used upon the cotton ties, which they have put up or sold, second-hand buckles, which they have bought from cotton mills and from junk dealers, and which were made and disposed of by the plaintiff, or its predecessors, under the Brodie and McComb patents. These buckles have had stamped upon them the words: "Licensed to use once only," and were formerly put upon the market by the plaintiff, or its predecessors, in the usual course of their business, with the following words printed on the bill-heads or invoices which went to the first transferee of the ties: "The cotton ties included in this invoice are licensed to be used once only, as baling ties, and are sold and purchased subject to this restriction," or the words: "Each bundle of cotton ties charged in this invoice consists of 30 bands. The buckles accompanying these bands are the property of The American Cotton-Tie Supply Company, (or, American Cotton-Tie Company, Limited,) and are licensed to be used once only, the company reserving the right, after such use, to recover possession of them wherever found." The first of the above forms of bill-head was used during the years 1873, 1874 and 1875, and the other

one during the years 1876 to 1879 inclusive, except that, for a portion of the latter four years, such bill-head used the words, "for one season," in lieu of the word "once."

In this country, cotton is usually sold without tare, that is, the purchaser pays a certain price per pound upon the aggregate weight of the bale, which is made up of the bagging, the ties (bands and buckles) and the material which they confine. In England, cotton is sold with tare, that is, the weight of the ties and bagging is deducted from the aggregate weight of the bale, and the purchaser pays so much per pound for the cotton, net weight, but takes the ties and the bagging with the cotton which they confine.

The ties which the defendants have sold embody the principles of construction which are found in the inventions covered by the 3d, 4th, and 5th claims of the Brodie patent, and in the invention covered by the McComb patent. The defendants' ties, as sold, consist of bands eleven feet in length, put up in bundles, each band accompanied by a buckle. In regard to some of such ties, the buckles being second-hand buckles, the bands are entirely new. In regard to others, the buckles being secondhand buckles, the bands are not, as whole bands, the original bands, bought at second hand, but consist of pieces of such original bands pieced together to make the proper length.

The question presented for consideration is, whether, on the foregoing facts, the defendants may lawfully sell such ties, consisting of such bands and such buckles. This question has been before the courts. In August, 1876, the American Cotton-Tie Company, Limited, and others, brought a suit in equity, against one Chapman, in the circuit court of the United States for the district of Louisiana, on the Cook, the Brodie and the McComb patents. The defendant had procured second-hand buckles lawfully put into use on cotton bales, under said patents, and had put new bands with them, and sold the combination as ties. It appeared, in that case, that, at the cotton presses at New Orleans, when the bales bound with the plaintiff's ties, consisting of the bands and buckles, were ready to be compressed, the bands and buckles were stripped off from the bales, and thrown on one side in a pile promiscuously with others, and that, when the bales were in the press, they were fastened together by the first ties that might be reached by the pressman out of the pile, no care being taken to use the same ties upon the bale, when compressed, which were so taken off from it. The facts, before mentioned, were before the court, as to the sale of cotton in this country without tare, and as to the stamp on the buckles, and as to the contents of the original bill-heads. The buckle used by Chapman was that of the McComb patent. The case came before Judge Billings, the district judge, on a motion for a preliminary injunction, and he granted the injunction, in No-

vember, 1876, after hearing counsel for both parties, and after the defendants' answer and a replication thereto were filed. The decision of the court is embodied in the order for the injunction.³ It sets forth, that the Cook and the McComb patents secure the exclusive right to a cotton tie buckle having an open slot or slit, into which a flat iron band can be inserted sideways, known commonly as the open-slot buckle, and that the third and fourth claims of the Brodie patent secure the exclusive right to an open-slot buckle in combination with a flat band of iron, to be combined for and used as a tie for baling cotton or other compressible and elastic material; that the defendant had made and sold to be used a combination of a flat band of iron in combination with an open-slot buckle; that he had so combined and sold both the open-slot buckle in the exact similitude of the invention secured to the plaintiffs, as well as said open-slotted buckle combined with a flat band of iron, without any license, except such as was averred to have resulted from an alleged sale of said buckles by the American Cotton-Tie Company, Limited, to other persons than the defendant, whereby it was insisted by the defendant that he acquired the right, by purchase from said third persons, to combine said buckles with flat bands of iron, and sell the same; that the plaintiffs, in the protection of their rights, did not dispose of said buckles in full property, but with a condition that the same should only be used once for the purpose of baling cotton or other compressible material, and that the said condition was known to the defendant, it being stamped, in a permanent manner, on said buckles; that the contract by which said cotton ties and buckles were disposed of for use by the American Cotton-Tie Company, Limited, contained the same condition and stipulation as was stamped on said buckles; that said license to use said open-slot buckles, and a combination of the same with a flat band of iron, as a cotton tie, had, on the terms on which it was granted by the American Cotton-Tie Company, Limited, expired and been expended before the same came into the possession of the defendant; and that the sale of the open-slot cotton tie, known in the trade as the arrow tie, and the sale of the said open-slot buckles, in combination with a flat band of iron, to be used as a tie for baling cotton, or other compressible and elastic materials, was a substantial invasion and infringement of the right secured by said patents. It then proceeded to enjoin the defendant from using or selling for use any open-slot cotton tie buckle of the kind commonly known as the arrow tie, described and secured by any of said patents, upon the pretence that the same had, at any former time, been sold by the American Cotton-Tie Com-

³[Nowhere reported; opinion not now accessible.]

pany, Limited, or its agents, and been once used for the purpose of baling cotton or other material before coming into the possession of the defendant, and from combining any such open-slot cotton tie buckles with a flat band of iron, to be used, or vended to others to be used, as a tie for baling cotton or other elastic or compressible material.

In January, 1877, the American Cotton-Tie Company, Limited, and others, brought a suit in equity against Grover, Stubbs & Co., in the circuit court of the United States for the southern district of Georgia,⁴ on the same three patents. The defendants set up that they had never made any ties, but had sold ties made by the American Cotton-Tie Company, Limited. The ties they had sold were arrow ties. The facts of the stamps on the buckles, and of the contents of the bill-heads, before mentioned, were before the court. The ties were spliced. The case came before Judge Woods, the circuit judge, on a motion for a preliminary injunction, and he granted it, after hearing counsel for both parties. The order enjoined the defendants from selling ties known as the arrow tie, unless said ties should be purchased directly or indirectly from the plaintiffs, or their duly authorized licensees, or their vendees, or vendees of vendees, and from selling ties stamped with the words, "licensed to be used once only," or words of similar import, after said ties had been used once.

In January, 1877, the American Cotton-Tie Company, Limited, and others, brought a suit in equity against A. C. Wyly and others, in the circuit court of the United States for the northern district of Georgia,⁴ on the same three patents. The defendants set up that they had bought and sold metallic cotton ties known as piece ties, made by taking ties that had been once used in baling cotton, and afterwards cut from the bales, and rejoining the several parts with rivets, retaining the same buckles. The buckles were arrow buckles. The facts as to the stamps on the buckles, and the contents of the bill-heads, before mentioned, were before the court. Judge Erskine, the district judge, in March, 1877, granted a preliminary injunction, in the same terms as in the said suit against Chapman.

In January, 1877, the American Cotton-Tie Company, Limited, and others, brought a suit in equity against C. W. Simmons & Co., in the circuit court of the United States for the southern district of Georgia,⁴ on the same three patents. The defendants had sold second-hand arrow buckles with pieced bands. The facts as to the stamps on the buckles and the contents of the bill-heads, before mentioned, were before the court. Judge Erskine, the district judge, in April, 1877, granted a preliminary injunction, after hearing counsel for both parties, restraining the

defendants from making, using, or vending to others to be used, buckles for iron ties for cotton bales, known in the market as arrow buckles, or ties formed by the combination of an iron band with an open-slot buckle or arrow buckle, except the same should be purchased from or licensed by the plaintiffs, their assignees or their vendees or licensees.

In October, 1876, the American Cotton-Tie Company, Limited, and others, brought a suit in equity against Simeon W. Simmons and others, in the circuit court of the United States for the district of Rhode Island, on the same three patents. There was an answer and a replication, and the case was heard, at final hearing, on pleadings and proofs, by the circuit judge, Judge Shepley. The defendants had procured from cotton mills second-hand buckles and second-hand hoops, which had been once used on cotton bales. The hoops were not of the original length, but were in cut pieces, and the defendants pieced them together, by riveting, to the proper length. The buckles and hoops had been put upon the market by the American Cotton-Tie Company, Limited, under the three patents in question. There was evidence as to the stamping of the buckles and as to the contents of the bill-heads, before mentioned. In June, 1878, Judge Shepley gave a decision dismissing the bill, 13 O. G. 967, [American Cotton-Tie Co. v. Simmons, Case No. 293.] He said: "The complainants contend that they sold the buckles under a restriction, which limited them to one use, and did not convey an unrestricted title, and that the buckles never passed out of the monopoly of the patent. * * * The company clearly had the right, in selling a patented article, to put a restriction on its use or sale, and to convey only a restricted title, or to license only a restricted use, and the purchaser under such a restricted title could not convey a greater or better title than he had himself. The law upon this subject was fully stated in *Hawley v. Mitchell*, [Case No. 6,250,] and affirmed by the supreme court of the United States, 16 Wall. [83 U. S.] 544. But, when the proprietor of a patented article sells it for the purpose of allowing it to be used in the ordinary pursuits of life, and to pass into the markets of the country as an ordinary article of commerce, and subject to unrestricted purchase and sale, he waives his right to affix conditions or restrictions to its use or sale, and consents that, after one sale and the payment of one royalty, it shall pass out of the limits of the monopoly. If a manufacturer of patented pins, or nails, or wood screws, or any similar article, were to affix to his invoice of sale a condition limiting them to one use, and sell them in quantities to retail dealers to be sold again, he must know and intend that they are to pass into the commerce of the country, and to be sold over and over again, and sold only to persons who would not buy anything

⁴[Nowhere reported; opinion not now accessible.]

less than an unrestricted title. Shall the purchaser of a packing box be treated as an infringer, and as pirating an invention, because he uses again, and for another purpose, the screws or nails which held the box together, and which he purchased when he purchased the box and its contents? May he not reasonably presume, with regard to articles of this description, that pins, and nails, and screws do not go into the market with an incumbrance upon their title, or a restriction on their use, and that he is not bound to trace the title, to see if it be unrestricted, for the reason, that he may well suppose no one would expect to affix a restriction on the use of such articles, which would be operative, or, if he could do so, would ever find purchasers of them? The buckles sold by the complainants belong to this class of articles. They are sold for the purpose of being used to confine a bale of cotton, as a nail or screw confines a packing box. It appears in evidence, that, when a bale of cotton is sold, it is without tare, and, consequently, the buckle and the strap it confines are sold and resold with the bale of cotton to which they are attached. If the cotton takes fire, or is otherwise damaged, and requires to be rebaled, must the owner put the same buckle back on the same bale or be liable to the penalties of an infringer? When the cotton bales are opened for use at the factories, the manufacturer who has purchased the ties and buckles with the cotton, having no further use for them, sells them to the junk dealer. From the junk dealer the defendants purchase them and repair them and sell them again. The vendor of the patented buckles sells them to be applied to the bales of cotton, with the full knowledge that they will be sold and resold as often as the cotton is sold. They impliedly consent to these unrestricted sales. They cannot, under such circumstances, be fairly considered as retaining the title to the buckles in themselves, or as parting with only such a restricted title as would require each vendor of the cotton to sell it accompanied with a restriction on the title and use of the buckles. The very purpose of the original sale, with the knowledge of the subsequent use and sales necessarily incident, imply a parting with the unrestricted title and a passing out of the limits of the monopoly, of the thing sold, as much as it would if the vendor sold patented nails or screws, to be used in fastening packing cases to be sold with the goods packed. The facts in this case show that the owners of the patented buckle intended and contemplated that the purchasers should sell an unrestricted title, inconsistent with any reservation of title or use in the original vendors. Such a sale does not fall within the principle stated in *Hawley v. Mitchell*, [Case No. 6,250,] but clearly falls within the language and principle of the decisions in

Goodyear v. Beverly Rubber Co., [Id. 5,557,] and *Washing-Mach. Co. v. Earle*, [Id. 17,219.] The case is very different from that of the sale of a machine easily identified, and to which a restriction may easily be attached, or where a license to use only may be sold, unaccompanied with any title or accompanied with a restricted title. But, where pins, nails, screws, or buckles are sold, if some of them are sold with a restricted and some with an unrestricted title, there are no means of identification which enable the purchaser, after they have passed into the market and common use, to distinguish the articles licensed or restricted in their use from those absolutely sold. In the case of articles of that description, the patentee may fairly be presumed to have received his royalty when he parted with the possession of the articles and allowed them to go into common and general use. The public should not be vexed with litigation about reserved rights or conditions affixed to the title of such articles, or put upon the investigation of incumbrances or restrictions on the title of nails, screws, buckles, or pins, before they can be safely used by a person who has bought them of parties who obtained them of the patentee, with the right to sell them in the open market. It is more for the interest of inventors that they should obtain their royalty on such articles when they first put them upon the market, than to make the monopoly odious by the attempt to fix restrictions on the subsequent use." The proceedings in the four cases above mentioned, in which injunctions were granted, were put in evidence in the case before Judge Shepley.

In a like suit in equity, by the same plaintiffs, against *Williams, Black & Williams*, in the circuit court of the United States for the district of South Carolina, in which the main issues were like those in the suit before Judge Shepley, the circuit judge, Judge Bond, followed the decision of Judge Shepley.

In view of these decisions, the question involved in this case may fairly be considered an open one, on authority as well as on principle. It is manifest, that the owners of the patents intended, by the stamps on the buckles and the imprints on the bill-heads, to grant a restricted license for the use of the ties and the buckles, and that the intended restriction was to a use of them once only, as baling ties. The words "licensed to use once only," stamped on each buckle, was notice to every one who handled it that there was attached to it a restriction in the shape of a license, and of a license merely to use, and of a license to use only once. This was a lawful restriction. The only question is, whether it was an effective and operative one, or whether it was strangled in its birth by the circumstances which attended the original putting of the ties and

buckles on the market, or whether, being created, it was waived by the voluntary action of the owners of the patents.

The defendants do not deny that the owner of a chattel may dispose of the same with restrictions upon the title, and they concede that the owner of a patented article has a right to put a restriction on its use or sale, both as to the extent of the territory within which it can be used and as to a period of use within the term of the patent. But they contend that a restriction thus imposed may be waived by the party who has imposed it, and that such waiver may be the legal result of acts, and be, in fact, contrary to the purpose and intention which the party has in his mind. They further contend, that, notwithstanding any restriction imposed in this case, the planter sold the cotton, and the ties and buckles which bound it into bales, without any restriction, and that the same fact existed with respect to every succeeding sale of the bales, down to the consumer; that the plaintiff permitted the planter to sell the cotton baled with the patented ties which he had purchased by the pound or the bundle, and to pass the property in such ties from purchaser to purchaser in succession, without any restriction; and that all such unrestricted sales were made, by implication of law, with the authority and by the direction of the owners of the patents, and were not the illegal acts of persons having possession of the property without title to it, because such sales were contemplated by the plaintiff as a part of the business of providing the market with ties. They liken the case to that of the license of a machine with a restricted right under a patent, and a subsequent acquiescence by the licensor in the sale of the machine by the licensee in derogation of the restriction. They insist, that, as the original vendors of the ties knew and intended that the cotton, with its bagging, bands and buckles, would and should be sold, and pass from purchaser to purchaser, without restriction, and that the bands and buckles would and should be treated as and become the property of the several purchasers in succession, by either a purchase at a price per pound, or by being given to the purchaser as a perquisite, the price being included in the price of the cotton, each successive purchaser of the baled cotton became the owner of the buckles and bands, and that any owner of the buckles has a right to put them a second time to the use contemplated in the Brodie patent, if they have once paid a patent royalty.

It is difficult to see how, in view of the facts of the case, the owners of these patents can properly be said to have sold the buckles for the purpose of allowing them to be used in the ordinary pursuits of life and to pass into the markets of the country as

an ordinary article of commerce. They put them forth with a restriction imposed on them, that they should be used "once only" as baling ties. The good sense of the words "once only" is, that they shall be used to confine the bale until it is opened for use by the consumer and until the cotton has thus ceased to need longer confinement in a bale. A fair and liberal construction, consistent with the necessary intention of the owners of the patents, permits, in the business of pressing, a buckle and a band to be transferred from one bale which is on its way from the planter to the consumer to another bale which is on its way from the planter to the consumer, and does not require that such use should be regarded as a use more than once of the buckle and the band. The original license is fairly a license to have the buckle and the band confine a bale until the consumer needs to confine the bale no longer, and a license for no longer time. There is no purchase of buckle and band by a purchaser of the baled cotton, except as he purchases them confining the cotton and to confine it till it reaches the consumer, and such purchase of buckle and band is, in effect, only a purchase of them subject to such original license. It is quite as reasonable to say that the purchaser of the cotton buys subject to such license as it is to say that the licensor, having imposed the restricted license, permits it to be instantly destroyed. The former view is consistent with the original intention, and the latter view is inconsistent with it. The fact, that, in this country the cotton, the bagging, the iron band and the buckle, which compose the bale, are weighed as a whole and paid for at so much a pound for each pound of the whole weight, cannot have the effect to change the fact that the purchaser buys subject to a restricted license to use the band and the buckle only to confine the cotton which he is buying. What he pays for other than the cotton or the bagging is paid for subject to such license, the price being computed in the particular way agreed upon.

The foregoing views apply to the use a second time of original buckles, by themselves, or to the use a second time of the original buckles and the original bands. But the use of a buckle without a band will not confine a bale of cotton, and, although the defendants use a second time the original buckles, they do not use a second time the original bands in the condition in which those bands were originally put forth with such buckles. The defendants use entirely new bands or bands made by piecing together pieces of the old bands. In doing this they infringe the 3d, 4th and 5th claims of the Brodie patent. When they combine the old buckle with the new band they make anew the combination. They do the same when they combine it with a

pieced band. Piecing together the pieces of the old bands, after such bands have been voluntarily severed by the consumer of the cotton, is not a repair of the tie in any sense in which the right of repair attaches to the license. If a band were broken in transit, in an intermediate hand, the right of repairing it might exist. The defendants participate in combining the open-slot, the link and the band, as in the 3d claim of the Brodie patent, and in making the combination set forth in the 4th claim of that patent, and in practising the method set forth in the 5th claim of that patent, when they sell ties having the features set forth in those claims, and capable of the use described in those claims, and needing only the bale of cotton and the application of the tie to it to make the combinations set forth in those claims, and to produce the results there set forth by the means there set forth.

The question presented is one entirely of law. There is no disputed question of fact. There is nothing to be elucidated by testimony. The right of the plaintiff is regarded as clear. The validity of the patents and the identity of the defendant's articles with those of the patents is not disputed. There is as much ground, on the question of comity, for following the decisions of Judge Woods, Judge Billings and Judge Erskine, as for following those of Judge Shepley and Judge Bond, and, the question for decision in all the cases being one of law, on undisputed facts, a decision of it on a motion for a preliminary injunction is of equal weight, on a question of comity, as a decision of it on a final hearing.

The preliminary injunction asked for is granted, to be issued after the bill shall have been properly amended, as before suggested.

[NOTE. Patent No. 23,291 was granted March 22, 1859, to G. Brodie, and reissued March 25, 1873. It has been the subject of judicial construction in the following cases: American Cotton-Tie Co. v. Simmons, 106 U. S. 89, 1 Sup. Ct. 52; *Id.*, Case No. 293; Same v. McCready, *Id.* 295. Patent No. 31,252 was granted January 29, 1861, to J. J. McComb, and was also involved in each of the above cases.]

Case No. 295.

AMERICAN COTTON-TIE SUPPLY CO. v.
McCREADY et al.

[17 Blatchf. 291; 4 Ban. & A. 588; 17 O. G. 505; 8 Reporter, 811.]

Circuit Court, S. D. New York. Nov. 11, 1879.

PATENTS FOR INVENTIONS — INFRINGEMENT — ENJOINING TRANSPORTATION OF INFRINGING ARTICLE.

1. Cotton ties made in infringement of patents owned by the plaintiff were being shipped

from New York to ports in the southern part of the United States, by steamers belonging to a corporation of which the defendants were the managing officers, for persons whose names they refused to disclose to the plaintiff, the ties being shipped to be sold at such ports for use: *Held*, that such carrying of such ties by said steamers was an infringement of the patents, and that such officers would be restrained by an injunction from doing so.

[Cited in New York Bung & Bushing Co. v. Hoffman, 9 Fed. 201; Bate Refrigerating Co. v. Gillett, 30 Fed. 684; Hatch v. Hall, *Id.* 614.]

2. Under section 4921 of the Revised Statutes, the court has power to enjoin the infringement of a patent, independently of the award of any other relief thereon.

[In equity. Bill by the American Cotton-Tie Supply Company against McCready, as president, and Stanford, as secretary and general freight agent, of the Old Dominion Steamship Company, for an injunction restraining defendants from transporting certain infringements of plaintiff's patents Nos. 23,291, and 31,252, for other parties. Injunction granted.]

S. A. Duncan, for plaintiff.

F. D. Sturges, for defendants.

BLATCHFORD, Circuit Judge. This bill is founded on two patents. One of them, No. 23,291, was granted to George Brodie, May 22d, 1859, for 14 years from March 22d, 1859, for "improvements in metallic bands for baling," and was re-issued to him April 27th, 1869, as re-issue No. 3,405, and was extended for seven years from March 22d, 1873, and was re-issued March 25th, 1873, as re-issue No. 5,333. The other patent, No. 31,252, was granted to James J. McComb, January 29th, 1861, for 14 years from that day, for an "improvement in iron ties for cotton bales," and was extended for seven years from January 29th, 1875. The plaintiff, a Louisiana corporation, is the owner of the patents. The validity of the patents and the right of the plaintiff to be protected by preliminary injunctions against infringements are not in question in this suit.

The charge of infringement made in the bill is, that the defendants, without license, have entered upon, and are now engaged in infringing upon, the rights of the plaintiff, by aiding and abetting various other persons, not licensees of the plaintiff, in making, selling and using iron cotton ties which embody the said patented inventions. The defendant McCready is the president of the Old Dominion Steamship Company, a Delaware corporation, the defendant Stanford is the secretary and general freight agent of the said corporation, and the third defendant is the assistant general freight agent of the said corporation. The bill alleges, that the defendants, as officers and agents of the said corporation, have been for some time past

¹[Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 588; and here republished by permission.]

²[For other suits involving the same patents, see note to American Cotton-Tie Supply Co. v. Bullard, Case No. 294.]

and now are actively engaged, without the license or authority of the plaintiff, and against the plaintiff's protest, in transporting cotton ties, embodying the said inventions, from the port of New York to various points in the south, and particularly to Norfolk, Petersburg and Richmond, well knowing that such ties are intended for sale and use in the cotton districts and in the cotton ports of the south; that the plaintiff has already suffered damage from such acts of the defendants; and that the defendants have been duly notified of the plaintiff's rights in the premises, and requested to desist from such acts, but refuse to do so, except as they shall be restrained therefrom by the order of this court. The bill prays that the defendants may account for profits and damages, and may be enjoined from making, using or vending the said inventions and from aiding others in so doing.

The bill is accompanied by an affidavit made by Frederic Cook, an agent of the plaintiff, on the 13th of October, 1879, setting forth that the said corporation has been engaged, without the license or authority of the plaintiff, in transporting from the city of New York to Norfolk and other places in the state of Virginia, iron cotton ties embodying the inventions covered by the 3d, 4th, and 5th claims of the Brodie patent, and the claim of the McComb patent; that, within the past two weeks, he has seen upon the pier of said corporation, various lots of said ties which he carefully examined and is sure were not of the manufacture of the plaintiff, but were unlicensed and infringing ties; that he has been unable to learn from the officers of said corporation who the actual shippers of the said infringing ties have been, although he has caused proper enquiry to that end to be made, the officers of the corporation declining to furnish the information, on the ground that the rules of the corporation forbid it; that he believes that other persons than those who have been restrained in suits brought by the plaintiff, in this court, against Bullard & Wheeler and John S. Long, V. Pugsley and G. P. Chapman, Earle & Perkins and Moses & Cohen, are making such shipments by the said line; that, on the 10th of October, 1879, there was received at the New York office of the plaintiff, a letter from its Norfolk agent, C. Phillips, enclosing a copy of a part of the manifest of the Old Dominion, one of the steamships of the said corporation, which lately arrived from New York at Norfolk, and which showed the shipment on that vessel of six lots of cotton ties consigned to different parties, none of whom are agents of the plaintiff; that such ties were described in said letter as arrow ties; that the writer of the letter went on to state that the large quantity of such ties brought into his territory from New York was seriously affecting his trade, and that, unless the further introduction of such ties could be prevented, his sales would not be one-half of

what they would otherwise be; that a letter of similar import was written within a few days, and received from the Petersburg agents of the plaintiff, in which complaint is made of the large number of competing ties brought into the Petersburg market from New York; that the counsel for the plaintiff has caused the attention of the officers of the said steamship company to be called to the injury that is thus being inflicted upon the plaintiff, and has served upon said company and one or more of the defendants herein a copy of the restraining orders and injunctions which have been issued in the abovenamed suits, but that, while the officers of said company acknowledge their obligation to refrain from transporting ties for the special parties defendant in said suits, they do not feel that they are at liberty to decline taking similar freights from other persons; that the counsel for the plaintiff has caused to be represented to the officers of said company the difficulty which the plaintiff now finds in protecting itself against shipments of infringing ties by unknown parties, and that it may, therefore, become necessary to apply to this court, for an order restraining the said company generally from acting as carriers for parties who may offer such ties for shipment from the port of New York, and that the officers of said company have signified not only their willingness to yield a ready obedience to any such order, if obtained, but a disposition to abstain from any attempt to embarrass the plaintiff in securing such order; that he greatly fears that unless the said company be so restrained forthwith and before a motion for an injunction can be heard in the due course of practice, infringers will succeed in removing their ties to points in the south and outside of the jurisdiction of the court; that, should they succeed in this, it will necessarily result in irreparable damage to the plaintiff; and that this is the most critical period of the cotton tie season, and a few thousand bundles of infringing ties thrown into the market at this juncture will almost inevitably unsettle prices and greatly disturb the trade, and thus inflict an injury upon the owners of the patents for which there is no adequate remedy.

On the bill and such affidavit an order was made by this court, on the 13th of October, 1879, ordering that from and after the service of the writ of subpoena in this cause, and a notice of motion for an injunction pendente lite, to be heard on October 24th, 1879, with copies of the papers on which said motion is to be made, "the said defendants, and each of them, their agents, servants, attorneys, workmen and employees, and each of them, be and stand in all respects restrained and prohibited from receiving at the wharves or docks of the said Old Dominion Steamship Company, or from placing on board said company's steamships, or from shipping or transporting from any point or points within the jurisdiction of this court, under any pretext

whatever, any cotton ties containing the features of invention, or any of them, which form the subject of the third, fourth and fifth claims of the said patent No. 5,333, or the claim of the said patent No. 31,252, and particularly ties composed of a flat band of iron and an open-slotted link or buckle, having a single central opening for receiving the band, unless such ties be offered for shipment or transportation by the said American Cotton-Tie Supply Company, or its duly authorized agents, and that they and each of them do stand so restrained and prohibited until the hearing of such motion, and until the same shall be by the court determined and decided."

The motion has been heard. It is opposed on the part of the defendants, by an answer to the bill and by affidavits. The defendant McCready, in an affidavit, says, that he is president of the Old Dominion Steamship Company, a corporation created under and by virtue of the laws of Delaware, and engaged in the business, as common carrier, of carrying and transporting freight and passengers between the ports of New York, Norfolk and Richmond, and having its general office in the city of New York; that said company owns many large steamships, by which it carries on its said business, which sail from the port of New York six times a week, laden with large cargoes of all kinds of merchandise; that said company receives upon its wharf, at pier 43, North river, from a very large number of persons, all kinds and descriptions of freight, in all quantities; that he is not acquainted with any of the details of such transportation, so far as the names of shippers and the different kinds of merchandise are concerned, his duties being confined to the general management of the business; that it would not be practicable for him to inform himself each day as to such details; that he has no knowledge whatever as to the claim of the plaintiff herein to the patents specified in the bill, nor to the articles claimed to be manufactured in accordance therewith; that it would be impossible for him, as president of said company, to inform himself, each day, or at any time, whether the articles received by the said company for shipment, are shipped by persons licensed by the plaintiff, or whether the articles have been properly purchased by the shippers from the plaintiff, or whether the articles themselves are infringements of the plaintiff's manufacture, or different from the same; that, with regard to the shipments heretofore made, he has been entirely ignorant in the respects above set forth, except so far as he has been informed by persons acting for the plaintiff, that the articles were infringements; that the business of said company is very large, and it would be impossible, in the proper conduct of the same, for the said company to inform itself of all the facts with regard to the articles shipped, to ascertain whether or not they were in-

fringements of the plaintiff's manufacture; that it would necessitate the employment of experts to examine each and every one of the articles, out of many tons thereof, to determine whether or not they were infringements; that it would be necessary to employ persons to make enquiries as to the shippers of the articles, to learn, if possible, whether they had the right to ship the same; that all of this would seriously impede and delay the business of the said company, to its great and irreparable injury; that he has in no way infringed upon the rights of the plaintiff; that he has not aided or abetted any persons, whether licensees of the plaintiff or otherwise, in making, selling or using the articles claimed by the plaintiff; that he has no knowledge, nor any means of ascertaining, whether or not the said company is shipping or transporting cotton ties embodying the plaintiff's patented invention, shipped by persons without authority or license; and that neither he nor the other officers of the said company would hesitate to obey any proper order of this court, but the said company and its officers do most earnestly oppose the making of any order which would inflict any serious injury upon said company, as the order prayed for herein inevitably would.

The defendants Stanford and Guillauden, in a joint affidavit, state that Stanford is secretary and general freight agent of the Old Dominion Steamship Company, and that Guillauden is assistant general freight agent of said company; that they have read the affidavit of the defendant McCready, and the same is true in every respect; that the defendants are entirely ignorant of the matters in the bill and affidavit of the plaintiff set forth, with relation to the letters patent and the plaintiff's rights and acts thereunder, as alleged in said bill and affidavit, nor have they any means of informing themselves as to such matters; that they deny any individual connection with, or relation to, the acts charged against them in said bill and affidavit, and allege, that their only connection, directly or indirectly, with such matters is as officers and agents of the Old Dominion Steamship Company; that said company acts, in relation to the transportation of the articles alleged to be infringements of the plaintiff's invention, only as a common carrier for others, and that it has no other interest or connection with said articles; that the deponents are employed entirely in the office of said company; that they have never seen any of said articles; and that they have no power or authority to refuse to transport the same.

The defendant Stanford, in a separate affidavit, states that he is secretary and general freight agent of the Old Dominion Steamship Company; that, since the restraining order in this suit was issued, cotton ties have been offered to said company for shipment; that,

by reason of said order, and the inability of the officers and agents of said company to ascertain and determine as to whether or not the said ties were infringements of the plaintiff's alleged inventions, or whether or not the persons offering the same were rightfully authorized to ship them, the said company was compelled to refuse to receive or transport the same; that the said ties were subsequently offered to another company, a competitor of the Old Dominion Steamship Company, which received and transported the same; that, by reason of being placed in such a position, the said company is sustaining and will continue to sustain very serious injury, not only with regard to the freight on said ties, but with regard to other freight; that such injury will amount to upwards of one thousand dollars a month directly, in addition to its liability to action by the parties offering said ties; and that the competitors of said company are thus greatly benefitted at its expense and to its great injury.

It is contended for the defendants, that the steamship company, as it acts solely in the capacity of common carrier of these ties, does not come within the meaning of the statute, as an infringer of the patents; that it has nothing to do with the rights of the plaintiff or the invasion of those rights by others; that it does not use, or aid others in using, the ties, because such use cannot be had until after transportation and delivery; that the company, by transporting the ties, does not sell them to others to be used, or aid in selling them to others to be used; that, as a common carrier, the company is bound to receive and carry all goods offered by any person; that it would be against public policy to restrain the company; that it would impede its business and inflict injury on the whole community; that the suit is improperly brought against the defendants and should be brought against the company; that the defendants are only officers of the company, with distinct duties, and have no control over the goods and no power to refuse to receive them; that the company ought not to be compelled, at its own expense, to protect the plaintiff's business; and that it owes no duty to the plaintiff, to answer for the diligence which the plaintiff ought to use in protection of its own interests.

It is entirely clear that the owners of infringing and unlicensed cotton ties, who are causing them to be transported by the vessels of the Old Dominion Steamship Company, are sending them for sale and use, and are employing said company and its officers as agents and servants in promoting and effecting such sale and use. It would seem, on principle, that there ought to be no difficulty in restraining by injunction all persons, whether officers of a corporation or not, who are aiding in the promotion of the infringing sale and use, whether such persons would be liable for profits or damages or not. It has

been so held by this court. *Goodyear v. Phelps*, [Case No. 5,581;] *Poppenhusen v. Falke*, [Id. 11,279.]

In *Hunt v. Maniere*, 34 Law J. Ch. (N. S.) pt. 1, p. 142, a wharfinger received notice that certain wine, deposited at his wharf was marked with a fraudulent imitation of a trade-mark, and that the owner of the trade-mark was about to apply to the court of chancery for an injunction to prevent the wine from going on the market. After the injunction had been granted, but before the wharfinger had notice that it had been granted, he refused to deliver the goods to their owner. It was held by the master of the rolls, and, on appeal, by the lords justices, that he was justified, in equity, in such refusal, and that the owner of the goods would be restrained from suing him at law for a wrongful conversion of the goods. The master of the rolls observed, that the plaintiff acted rightly; and that, being in the possession of goods which he knew to be a fraudulent and spurious imitation of the manufacture or growth of other persons, and being informed that an injunction would be obtained, and being notified not to deliver the goods, he would have acted culpably if he had parted with the goods.

In *Upmann v. Elkan*, 7 Ch. App. 130, affirming the decision of the master of the rolls, (L. R. 12 Eq. 140,) a firm of forwarding agents in London received from correspondents abroad several boxes of cigars bearing forged brands, which were to be delivered to several persons in England. On application by the makers whose brand had been forged, the agents gave information as to the consignors, and offered either to send back the cigars, or to erase the brands. On a bill for an injunction, filed by the makers whose brands were forged, it was held that the fact that the agents were merely carriers was no defence to the suit, but that, as they had given sufficient information and had offered to erase the brands, they were not to pay costs. The defendants were forwarding agents, to whom the goods had been consigned to pay the duty on them and forward them to persons named. They were to be paid for so doing, but their profit did not arise from the sale of the goods. The master of the rolls said: "It does not, in my opinion, make any difference whether the goods are sent to a person who does not deal in the article consigned, and whose duty is simply to distribute the goods to other persons, or whether the goods are sent to him as consignee, for his own purposes. In either case they are sent to the dock to be at his disposal, and without his signature the goods cannot be disposed of. It will not do for him to say, as he does in this case, 'I know nothing about the goods sent. I do not know whether they have any, or, if any, what brand on them, or whose it is.' It is his duty to know this, and, if he receives notice that they bear a fraudulent

imitation of another man's brand, he ought to ascertain this as speedily as possible after such notice, and to take the proper and necessary steps to prevent their being disposed of in that state. It may be, that, without notice, and when he sees the trade-mark, he does not know that it belongs to another. If so, he may deal with them innocently. But, as soon as he is informed of the fact, he should act at once, so as not to be, in any event, either from wilful or from accidental ignorance, made a party to the fraud committed by another; and, when he ascertains the fact, he should at once inform his correspondent abroad. If it be argued, that this imposes upon him serious inconvenience, and a duty which, by taking the order for goods, he never undertook, this may be admitted to be true; but it is only what would be the case in the event of the importation of prohibited articles, and it arises from the circumstance that he has not taken sufficient care to ascertain what sort of persons the correspondents are for whom he consents to act as agent." Lord Hatherley, on the appeal, said: "It has been argued, that the plaintiffs were not entitled to an injunction against the defendants, who had been guilty of no offence, being merely carriers receiving goods, which, though fraudulently marked, were not for their own use, nor to be sold by them for their own benefit, but were received merely for the purpose of transmitting them to the persons to whom they were consigned. I cannot conceive a doctrine more dangerous or mischievous, or more fatal to the authority of the court with respect to trade-marks. If that argument prevailed, any persons, being abroad, as was the case in this instance, and minded to commit frauds upon an English trade-mark, could easily do so by sending their different consignments together to persons in the position of the defendants, who appear to be respectable agents and warehousemen, thereby committing an injury in a manner most convenient for themselves, and very mischievous to the person entitled to the benefit of the trade-marks."

In *Orr v. Diaper*, 4 Ch. Div. 92, it was held that a bill would lie against ship owners who had shipped goods bearing counterfeits of the plaintiff's trade-marks, for a discovery of the names of the consignors from whom the goods had been received.

The doctrine of these cases in regard to trade-marks is entirely applicable to the case of the infringement of a patent. As the defendants have refused to disclose the names of the infringing shippers of ties, the plaintiff is without remedy by injunction, in respect of the infringing ties which the defendant's company transports in its vessels, unless it can obtain an injunction in this suit. It clearly ought to have such a remedy.

No authority is cited by the defendants

in which it is held that an injunction will not lie in a case like the present. The cases cited for the defendants are cases where it has been held that workmen and employees will not be held liable for profits and damages, in a suit for the infringement of a patent. Under section 4921 of the Revised Statutes, the authority of this court, in a case arising under the patent laws, of which it has jurisdiction, to grant an injunction, according to the course and principles of courts of equity, to prevent the violation of any right secured by a patent, is entirely independent of the award of any other relief in the same suit.

The officers of the steamship company must have the same power to refuse to accept infringing cotton ties that they have to accept them. The defendant *McCready* does not disclaim such power to refuse. The cases of *Lightner v. Kimball*, [Case No. 8,345,] and *Heaton v. Quintard*, [Id. 6,311,] are distinguishable from the present case.

As to the suggestion of hardship to the defendants and to their company, there can be no difficulty in so framing the order of injunction, that, with the cooperation of the agents of the plaintiff, there will be but little practical difficulty in securing obedience to the injunction without serious practical inconvenience to the defendants. The defendants' company will be deprived of no more carrying trade in respect to infringing ties, than they would be deprived of if the shippers of such ties were enjoined, and it must be presumed that they would be enjoined, if their names were known. The defendants' company could have caused such names to have been disclosed, on enquiry, but it did not. The allegation that the information was asked and refused is not denied. The injunction asked for is granted.

AMERICAN DAIRY, ETC., CO. (HOWARD v.)

[See *Howard v. American Dairy, Etc., Co.*, Case No. 6,753.]

Case No. 296.

AMERICAN DIAMOND ROCK BORING CO.
v. SHELDON et al.

[17 Blatchf. 208; 4 Ban. & A. 551.]¹

Circuit Court, D. Vermont. Oct. 9, 1879.²

PATENTS FOR INVENTIONS—REISSUE TO ASSIGNEE
—VALIDITY—DISMISSAL—EFFECT ON SUBSEQUENT
SUIT.

1. The re-issued letters patent, No. 3,690, granted to Asahel J. Severance, as assignee of

¹[Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 551; and here republished by permission.]

²[Reversed on rehearing. *American Diamond Rock Boring Co. v. Sheldon*, 25 Fed. 768.]

Rodolphe Leschot, October 26th, 1869, for an improved rock drill, are valid.

[See note at end of case.]

2. Where a re-issue is granted to an assignee, it is to be taken that he had title to the patent, unless the contrary is made to appear.

3. A suit which is dismissed for want of prosecution is no bar to a subsequent suit for the same cause of action.

4. The question of the infringement of said re-issue considered.

5. In determining whether a re-issue is for a different invention from the original patent, the two must be compared, to see if the invention patented in the re-issue is in any manner described in any part of the original and whether it might have been patented there.

[In equity. Suit by the American Diamond Rock Boring Company against Charles Sheldon and others to enjoin infringement of letters patent No. 39,235, reissue No. 3,690, and for an accounting. Decree for complainants.

[In course of litigation, complainants subsequently moved for an injunction, and defendants objected, on the ground that the patent had expired. Objection overruled. American Diamond Rock Boring Co. v. Sheldon, Case No. 297. Defendants' motion for a rehearing was denied, and the injunction was restored as to machines made in infringement of patent. *Id.*, 1 Fed. 870. Complainants' motion for attachments for contempt for violation of injunction was denied. American Diamond Rock Boring Co. v. Sutherland Falls Marble Co., 2 Fed. 353. Defendants' motion for a rehearing was granted. *Id.*, 24 Fed. 374. On rehearing, complainants' bill was dismissed. *Id.*, 25 Fed. 763.]

Charles F. Blake, for complainant.

E. J. Phelps and W. G. Veazey, for defendants.

WHEELER, District Judge. This suit is brought for relief against infringement of re-issued letters patent, No. 3,690, to Asahel J. Severance, as assignee of Rodolphe Leschot, October 26th, 1869, for an improved rock drill, and has been heard upon pleadings, proofs, and argument of counsel. The plaintiff shows title from Severance. The defendants claim that Severance had no title, and that, therefore, the plaintiff has acquired none, and is not the owner of the patent; that Leschot was not the first inventor of the invention patented; that the re-issue is for a different invention from that in the original patent and is, therefore, void; that the plaintiff is estopped from maintaining this suit, by a decree of the circuit court of the United States for the district of New Hampshire, dismissing a bill brought by the plaintiff against the Sullivan Machine Co., of whom these defendants bought the machines claimed here to be an infringement of the patent, for an infringement there of this same patent; and that the defendants do not, in fact, infringe.

That the patent was valid, and that it was

infringed by a drill then in use by the Sullivan Machine Co., was adjudged in favor of the plaintiff, in a suit in favor of the American Diamond Drill Co., from whom the plaintiff derives title to the patent, against the Sullivan Machine Co., from whom the defendants acquired title to the machines in question, in the circuit court of the United States for the southern district of New York. American Diamond Rock Boring Co. v. Sullivan Mach. Co., [Case No. 298.] That was a suit between privies to these parties, and would seem to settle those questions, as between them. And, if that judgment would not be technically conclusive, the authority of it would be sufficient ground for determining the same questions in the same way here, unless presented upon different facts; and there is nothing before the court here which was not produced there, that should vary the result.

An English patent to Robert Bearl, before Leschot's invention, is presented here, as showing an anticipation, and was not presented there; but, the devices described in that patent are not like Leschot's. It made use of water, but not in the same way, and did not have diamonds, as Leschot's has, nor anything equivalent to them, for the purpose for which they were used. Other things prior have been put in evidence, properly enough for the purpose of showing what was in existence at the time of Leschot's invention, to construe the patent by, but not pleaded, or stipulated about, so as to be properly in the case to be considered upon the question of anticipation of the entire invention. There are, however, none of them, as they have been viewed, which would appear adequate for that purpose, if properly set up in the answers. These matters are, therefore, left to stand as they were placed by that decision.

As the re-issue was granted to Severance, it is to be taken that he had title, unless the contrary is made to appear. The defendants have introduced an abstract of title, which shows that Severance acquired title from one Dow, and shows a contract between him and Leschot, upon which there is some question about whether it carries title or not. But, showing that title does not show that there is no other, and there is a lack of any competent evidence in the case to show that there is not, by some other line of conveyances, a perfect title. If the certificate to the copies could be said to imply that there was no other title of record, it would not be evidence of the fact. Such copies are evidence of what is of record, as the originals would be, but are not evidence of the fact that there are not other records. Rev. St. § 892; 1 Greenl. Ev. § 498. But, even if this was not so, the abstract produced shows that Dow had full title to one-half of the patent which would pass to Severance and to the plaintiff, and, as there has been no objection to any

non-joinder of any other party, that title would be sufficient to maintain this suit, for the protection of that interest, at least.

The defendants set up the decree in the district of New Hampshire, as a bar, legal or equitable. The plaintiff traverses the answer, which makes it necessary for the defendants to make proof of that defence, because it is not responsive to the bill. The proofs do not at all show that the bill there was for the same relief as this one. The making and selling these machines to these defendants may have been long subsequent to the bringing of that bill, and even to the decree. If the bill had been for the same relief, and had been dismissed on its merits, it would have been entirely conclusive as between the parties to it and their privies, as to that cause of action, upon every question which might have been raised concerning it, whether actually made upon pleadings or evidence or arguments of counsel, or considered by the court, or not. But, where a judgment upon a different cause of action is relied upon as settling a question, it must be shown that the question was actually raised and decided. *Cromwell v. Sac Co.*, 94 U. S. 351; *Davis v. Brown*, Id. 423. The record produced, and that is the only evidence upon this subject, fails to show that any question open here was, in fact, passed upon there. It shows that the bill was dismissed, with costs, but shows no ground upon which it was dismissed, except the want of appearance of the plaintiff; and a dismissal for that cause is not conclusive in favor of the defendant, even upon another suit for the same relief. *Mitt. Eq. Pl. 238*; *Carrington v. Holly*, 1 Dickens, 280; *Rosse v. Rust*, 4 Johns. Ch. 300; *Badger v. Badger*, [Case No. 717]; *Porter v. Vaughn*, 26 Vt. 624. That suit appears to have been, in reality, dismissed for want of prosecution, and, in effect, is like a nonsuit in an action at law.

This leaves the question of actual infringement, by the machines now in use by these defendants, to be determined here. This question was expressly left open and undecided by Shipman, J., in *American Diamond Rock Boring Co. v. Sullivan Mach. Co.*, [Case No. 298.] before cited. The drill now in use is precisely like that adjudged to be an infringement in *American Diamond Drill Co. v. Sullivan Mach. Co.*, [21 Fed. 74.] except that, in the latter, the diamonds at the circumference projected beyond it, while in the former the stock is enough larger than in the latter to fill out and be flush with the diamonds at the circumference. The diamonds themselves stand precisely as they did before, and the proof is quite full, especially that on the part of the defendants, that they operate precisely as they did before. It was supposed that, with the stock flush with the outer edges of the diamonds, there would not be room for the detritus to be carried up outside of the stock, even if

the drill would penetrate the rock far enough to make any to be carried up; but it was found, on experiment, that the diamonds, when projecting, always cut a hole larger than the circle they would describe when centred accurately, and enough larger to permit the detritus to pass upward with the spaces between them filled, and that filling the spaces, by bringing the stock out flush with them would not interfere with their operation. The diamonds are the operative things, and the drill, with the stock flush with them at the circumference, has all the elements for cutting that one with the diamonds projecting there has, and operates in precisely the same way. The flush stock is better than the other, in some respects. Making it flush is, probably, an improvement upon the other, but, if so, it is an improvement, made by adding to the other, and not by altering its constituent parts or their mode of operation. As the use of the other without the addition to the thickness of the stock was an infringement, it would seem that the use of this in the same way, with the addition, would be.

Besides this, Leschot's patent was not merely for a drill with the addition of laterally projecting diamonds. It did not purport, on its face, to be for such an invention; neither is it necessary, on account of the prior state of the art, to construe it as being only for that, in order to sustain it at all. The patent was as much for the forward projecting diamonds and their mode of operation, as for any other part. No one before had ever made a drill, either annular or cylindrical, armed with diamonds, and worked by a rotary and direct forward motion communicated to it by power. Still less had any one ever invented such a drill, assisted in its operation by water carried in through a tubular bar and stock. The original patent did not cover the mode of using water, although the specification showed that to be a part of the invention. This made it a very proper case for a re-issue, to cover that part before omitted. It is, probably, true, as argued by counsel for the defendants, that the first re-issue was altogether too broad and could not have stood, which made it proper to have that corrected by another surrender and re-issue, as was done. The second re-issue was proper, as stated by Shipman, J., in the case before cited, and it would not be affected at all by the faults of the first re-issue, but would correct them. In *Thomas v. Shoe [Machinery] Manuf'g Co.*, [Case No. 13,911,] Mr. Justice Clifford said: "Where the commissioner accepts a surrender of an original patent and grants a new patent, his decision in the premises, in a suit for infringement, is final and decisive, and is not re-examinable in such a suit in the circuit court, unless it is apparent upon the face of the patent that he has exceeded his authority, that there is such a repugnancy between the old and the new patent that it

must be held, as matter of legal construction, that the new patent is not for the same invention as that embraced or secured in the original." "Inquiries in such a case are restricted to a comparison of the terms and import of the two patents, in view of the drawings and patent office model. If, from these it results that the invention claimed in the re-issue is not substantially different from the one described, suggested or indicated in the specification or drawings of the original patent or patent office model, the re-issued patent must be held valid, as all other alterations and amendments plainly fall within the intent and purpose of the provision in the act of congress, which allows a surrender and re-issue; or, in other words, if the re-issued patent does not, upon the face of the instrument, embrace anything not substantially described, suggested, or indicated in the specifications, drawings or model of the original, the defense that the re-issued patent is not for the same invention as the original must be overruled." Under this rule, upon this question in this case, there is nothing to do but to compare the re-issue upon which the suit is brought with the original patent, disregarding all else, to see if the new invention patented in this re-issue is the same that is in any manner described in any part of the original; not whether it was patented, or even thought or sought to be, there, but whether it appears, from what is there, that it might have been patented there if it had been thought of and desired. Upon such comparison, there is nothing in the re-issue which is not in the specification of the original distinctly mentioned, although, as argued, it is not all claimed. It is quite clear, upon principle and authority, as well as upon the former adjudication, that this re-issue is valid.

Upon the question of infringement, it appears that the defendants make use of as much of Leschot's invention as he would, in removing as much of the rock as he would remove, by cutting. By his method he would cut an annular hole and leave a core to be removed otherwise. They cut what would be the annular hole by the same means and in the same way. They have added, in the middle of their drill, enough similarly cutting material to cut away the core also, but they none the less cut away the rest by his method. This addition is an improvement, when it is not desirable to save the core, but Leschot's drill is made use of as a basis for the improvement, and the owners of the patent, as also held by Judge Shipman, in the former case, cannot be improved out of their right to it. The case, in this respect, is somewhat like *Electric Telegraph Co. v. Brett*, 4 Eng. Law & Eq. 347. That patent was for giving signals at distant places by means of electric currents sent through metallic circuits consisting of wires extending to the places and back. The defendants made use of the earth, to

complete the circuits, in place of the returning wire, and claimed that this constituted the whole a different machine that was not an infringement. It was held, however, that they made use of so much of the patented invention as was involved in the wire which they did use and its operation, and they were made liable for that infringement.

It is stoutly insisted, in behalf of the defendants, that the invention was of, and the patent for, a mere tool, and not for any machine, combination or arrangement, and that the drill used by the defendants is a very different tool, especially in form and appearance. It is true, that the two do not at first, look alike, but that is not by any means a full or accurate test. The outward form of them is not at all material. Their operation and performances are what are important. In *Machine Co. v. Murphy*, 97 U. S. 120, Mr. Justice Clifford, in speaking of such a question, again said: "Except where form is of the essence of the invention, it has but little weight in the decision of such an issue, the correct rule being, that, in determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of the things, but are to look at the machines, or their several devices or elements, in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function, in substantially the same way, to obtain the same result, always bearing in mind, that devices in a patented machine are different, in the sense of the patent law, when they perform different functions, or in a different way, or produce a substantially different result. Nor is it safe to give much heed to the fact, that the corresponding device in two machines organized to accomplish the same result is different in shape or form, the one from the other, as it is necessary, in every such investigation, to look at the mode of operation or the way the device works, and at the result as well as at the means by which the result is attained. Inquiries of this kind are often attended with difficulty, but, if special attention is given to such portions of a given device as really do the work, so as not to give undue importance to other parts of the same which are only used as a convenient mode of constructing the entire device, the difficulty attending the investigation will be greatly diminished, if not entirely overcome.

Here, the thing invented and the device which the defendants use are parts of machines. The operative things which do the work are the diamonds which abrade the rock, and the water which carries off the detritus. The stock merely holds the diamonds in place upon itself and imparts its

motion to them. In each machine the diamonds work with their forward faces, by having a rotary and progressive forward motion given to them by means of the stock; and, in each, the water does its work by being injected through the stock and flowing out around it. The form of the stock is of no importance, further than to hold the diamonds and admit the flow, in and out, of the water. The flush stocks or heads do both of these precisely as the receding ones do. They, doubtless, hold the diamonds more firmly and better, because the diamonds are imbedded deeper in them, but not because they are held otherwise than by being imbedded in them. They cut more of the hole, but do it by the same means, operating in the same manner. The corresponding parts in each perform no different functions and produce no different results. It is quite plain, upon this comparison, in the light of the rule laid down in the case mentioned, that the defendants do make use of the patented invention, and thereby infringe upon the exclusive rights of the orator.

Let a decree be entered for an injunction and an account, according to the prayer of the bill.

[NOTE. The points decided in this case did not arise and were not discussed in the opinions subsequently rendered in the course of litigation, and reported in American Diamond Rock Boring Co. v. Sheldon, Case No. 297, 1 Fed. 870, 2 Fed. 353, and 24 Fed. 374. On final hearing this case was reversed, Wheeler, district judge, holding that the second, third, and fourth claims of the reissue were not infringed by defendants, and that "the first claim is not for a tool operating substantially as specified, as the claim of the original patent is, and does not therefore take in the operation including the means of operation, as that claim might, but is for the combination of any boring-head having projecting diamond points with merely a tubular boring-bar. It leaves out the injection of water through the boring-bar from the combination, which the claim of the original might cover, and leaves out the limitation of that claim to an annular boring-head, and extends the combination to that extent beyond what the original would cover. This enlargement of the claim, so long after the original, is not valid according to the series of later decisions upon reissued patents, as now understood. The combination is an entirety, not separable from what the original would cover. The statute in force when this patent was first granted, giving patentees the right to maintain an action for infringement of such parts of their inventions as were bona fide their own, as well as that in force when the reissue was granted and now, carefully limited the right to such material and substantial parts of the thing patented as could be definitely distinguished from the parts claimed without right. The part of this claim that might cover the infringement is blended with, and not separable or distinguishable from, the rest. There is no claim in the reissue, or set of claims, that covers the same invention as the original, and no more, and no claim of the reissue that is within the claim of the original and covers the infringement. These considerations lead to the same result that was reached upon the same patent in American Diamond Drill Co. v. Sullivan Mach. Co., 21 Fed. 74. A decree dismissing the bill of complaint necessarily follows." 25 Fed. 768.]

[The original patent involved in this litigation,

No. 39,235, was granted July 14, 1863, to R. Leschot, and was reissued October 26, 1869, No. 3,690. For other cases involving this patent, see American Diamond Drill Co. v. Sullivan Mach. Co., 21 Fed. 74; Steam Stone-Cutter Co. v. Sheldons, 15 Fed. 608.]

Case No. 297.

AMERICAN DIAMOND ROCK BORING
CO. v. SHELDON et al.

[17 Blatchf. 303; 4 Ban. & A. 603.]

Circuit Court, D. Vermont. Nov. 12, 1879.

PATENTS FOR INVENTIONS—TIME OF EXPIRATION—
BURDEN OF PROOF.

1. Letters patent for an invention were granted in England, dated September 3d, 1862. The specification was filed in the great seal patent office there, March 3d, 1863. Letters patent for the same invention were granted by the United States, July 14th, 1863, for 17 years. The date of the application for the United States patent was not shown: *Held*, that the date of the filing of the specification in England must be taken as the date of the patenting in England, for the purposes of section 6 of the act of March 3, 1839, (5 Stat. 353.)

2. The invention was, therefore, not patented in England more than six months before the United States patent was applied for, and so the act of 1839 did not apply, and the United States patent was valid for 17 years from July 14th, 1863.

3. The burden of proof is upon a party who claims that a patent should be limited in duration, to show the facts which would limit it.

[In equity. Suit by the American Diamond Rock Boring Company against Charles Sheldon and others to enjoin infringement of letters patent, No. 39,235, reissue No. 3,690, and for an accounting. Decree for complainant. American Diamond Rock Boring Co. v. Sheldon, Case No. 296. Complainant moves for an injunction, and defendants object on the ground that the patent has expired. Objection overruled. For subsequent history of litigation, see statement to and note at end of same case.]

Charles F. Blake, for complainant.

E. J. Phelps and W. G. Veazey, for defendants.

WHEELER, District Judge. This cause has been further heard upon a motion of the plaintiff for an injunction, which is opposed on the ground that the patent has expired. The patent was granted July 14th, 1863, for seventeen years, and would expire, according to its own terms, July 14th, 1880. English letters patent for the same invention were granted, dated September 3d, 1862, pursuant to which the specification was filed in the great seal patent office, March 3d, 1863. The act of July 4, 1836, § 7, (5 Stat. 119,) provided for issuing patents if the inventions had not been patented or described in any printed

[Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 603; and here republished by permission.]

publication in this or any foreign country, but, (section 8,) that nothing in that act should deprive an inventor of the right to a patent by reason of his having previously taken out letters patent in a foreign country, and the same having been published, at any time within six months next preceding the filing of his specification. The act of March 3, 1839, § 6, (5 Stat. 354,) provided that no person should be debarred from receiving a patent for an invention by reason of the same having been patented in a foreign country more than six months prior to his application, but that, in all cases, every such patent should be limited to the term of fourteen years from the date or publication of such foreign letters patent. Patents were, at that time, granted for fourteen years, and might be extended seven years more. By the act of March 2, 1861, § 16, (12 Stat. 249,) all patents thereafter granted were to remain in force seventeen years, without extension. In *Weston v. White*, [Case No. 17,458,] it was held, that the effect of the act of 1861 was to change the term of fourteen years to seventeen, as well in respect to patents limited by prior foreign patents, as in respect to others. The defendants claim, that, under these statutes and that holding, this patent is limited to seventeen years from the date of the English patent, which would expire September 3d, 1879, or, at least, to seventeen years from the filing the full specification of that patent, which would expire March 3d, 1880. The plaintiff insists that it is not limited by that patent at all. The act of 1839, by its express terms, applies only to patents for inventions patented in some foreign country more than six months prior to the application for a patent in this country. The date of the application in this country does not appear, but it must have been earlier than the date of the patent, or fully as early. Assuming that it was coeval with the patent, then the question arises whether the invention was patented in England more than six months before that. The English patent was dated more than six months before, but the full specification was not filed until within six months before. English patents are granted upon condition that a full specification shall be filed at some time within six months from the date. *Agn. Pat. 322; Woodbury, J., in Hogg v. Emerson*, 6 How. [47 U. S.] 479. As said by *Grose, J., in Hornblower v. Boulton*, 8 Durn. & E. [Term R.] 105, the English patent was nothing without the specification, and the patentee could gain no advantage by it. The question is, was it patented there before the specification was filed. In *Howe v. Morton*, [Case No. 6,769,] it was held, in an elaborate opinion, that an invention was not patented abroad until there was a full and perfected patent. And, in *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, the question seems to be settled, or treated as settled before, in the same way. Mr. Justice Strong

said, page 498: "Of the English patent of Charles Goodyear it is enough to say, that, though the provisional specification was filed March 14th, 1855, the completed specification was not until the 11th of September following. It was, therefore, on the last mentioned date that the invention was patented." So, this patent does not depend at all upon the act of 1839. It was grantable under the provisions of the act of 1836, without resorting to the act of 1839, and does not come within the latter act. By the terms of the two acts, inventions patented abroad more than six months before were limited to fourteen years from the date or publication of the foreign patent, while those patented abroad within six months before were not affected at all by the foreign patent. This patent is one of the latter class, and, so far as now appears, is good for the term of seventeen years from its date, under the act of 1861. In *Weston v. White*, [Case No. 17,458,] the foreign patent was several years before the application in this country.

This case, as it now stands upon this question, is open to the further remark, that the act of 1839 applied only to patents for inventions patented in a foreign country more than six months prior to the application for the patent here. As the date of the application does not appear apart from the date of the patent, it does not appear that the date of, or the application for, the English patent was more than six months, or any other space of time, prior to the application here, unless the date of the patent is to be taken as the date of the application, upon this question. Upon a question of priority of invention, the presumption, in the absence of proof, would be, that the application was of the same date as the patent; but there the burden of proof would be upon the party claiming a prior application describing the invention, to show it. Here, the burden rests upon the party claiming that the patent should be limited, to show the facts which would limit it. This would include showing the application, and that the invention was patented abroad more than six months prior to it. These essential facts, necessary to limit this patent, are lacking, so far as the English patent is concerned; and, as that is the only foreign patent shown by the record, for this invention, they are lacking, so far as this question, as now presented, is concerned. These considerations obviate all necessity for considering the question as to whether the term of the patent would begin to run from the date of the English patent, or from the time of the filing the full specification under it, which would arise, if this patent came within the act of 1839, and was supposed to arise, until the connection and application of that act were particularly noticed. This objection is overruled, but the injunction is withheld to await the decision on a motion made by the defendants in respect to the French patent.

Case No. 298.

**AMERICAN DIAMOND ROCK BORING CO.
v. SULLIVAN MACH. CO. et al.**

[14 Blatchf. 119; 2 Ban. & A. 522.]¹

Circuit Court, S. D. New York. Jan. 29, 1877.²

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION—NECESSITY OF AFFIDAVITS.

1. The invention set forth in reissued letters patent No. 3,690, granted to Asahel J. Severance, assignee of Rudolph Leschot, October 26th, 1869, for an "improved rock drill," the original letters patent having been issued to said Leschot July 14th, 1863, defined, [and held valid.]

[Cited in American Diamond Rock Boring Co. v. Sheldon, Case No. 296, 1 Fed. 871, and 24 Fed. 374.]

2. It is not limited to an annular boring head, but covers a convex boring head.

3. A constructor of a machine infringes, if he makes his machine with express reference to a result which he knows will happen when the machine is put to its use, and which result, if originally introduced in the machine, is an infringement.

4. It is not proper to grant a motion for a preliminary injunction on a patent, on a theory which, although it may be true, is not supported by affidavits.

In equity.

Charles F. Blake and Benjamin F. Thurston, for plaintiffs.

Edwin T. Rice and Edward N. Dickerson, for defendants.

SHIPMAN, District Judge. This is a motion for a preliminary injunction to restrain the defendants from the infringement of reissued letters patent No. 3,690, [Patent No. 39,235,] issued to Asahel J. Severance, as assignee of Rudolph Leschot, and dated October 26th, 1869, for an "improved rock drill." The original patent was issued to Rudolph Leschot, and dated July 14th, 1863. The plaintiffs became the owners of said reissued patent on June 4th, 1875. The American Diamond Drill Company, the assignor of the present plaintiffs, brought in this court, in the year 1872, their bill in equity against the Sullivan Machine Company, one of the present defendants, for an injunction against an infringement of this patent, and, after a full hearing upon proofs, a decree directing an injunction was entered in April, 1875. The injunction was duly served upon said company. As no opinion was filed in that case, it becomes necessary to state briefly the facts which were found by the court in regard to the patent, the invention and the infringement, in order to a proper understanding of the questions which are at issue upon the present motion.

¹[Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 2 Ban. & A. 522; and here republished by permission.]

²[This bill was subsequently dismissed in American Diamond Drill Co. v. Sullivan Mach. Co., 21 Fed. 74. See note to American Diamond Rock Boring Co. v. Sheldon, Case No. 296.]

The invention and tool of Leschot are described in the reissued patent as follows: "This invention consists of a boring tool composed of a series of diamond edges, attached to an annular or tubular stock or crown, of steel or other metal, to which a rotary and a direct forward motion are given, and which is thereby caused to cut or bore an annular groove or hole, leaving a central core or kernel, which is easily detached by the subsequent operation of a gad or wedge. It also consists in the combination with the described boring tool, of a tubular boring bar or drill rod, whereby motion is imparted to the boring head, and through which a stream of water is forced, as hereinafter set forth. * * * A is the annular or tubular socket or crown, of steel or other metal; a, a¹, a², are edged cutters, composed of diamonds fitted and set firmly into suitable notches or mortices in the face of the crown or stock A. These diamonds are such as, from their color, are least valuable for jewelry. They are respectively so arranged in the crown or stock A, that the cutting edges of some project in a forward direction from the face or front end of the said crown or stock, as illustrated by a, a, while the edges of others project outwardly from the outward periphery thereof, as illustrated by a¹, a¹, and the edges of others project inwardly from the inner periphery, as illustrated by a², a². This crown or stock is secured by a bayonet fastening, or other means, to a tubular boring bar, of any suitable length, whose outer diameter is not greater than that of the said crown or stock, and whose inner diameter is not less than that of the said crown or stock, and this bar is arranged to form part of a machine of suitable construction, or otherwise furnished with suitable mechanical appliances, according to the nature of the work to be performed, by which it has imparted to it both a rotary and a direct forward or feeding motion, whereby it is caused to cut or bore an annular groove or hole in the rock or other hard body upon which it is employed. The operation of the tool will be greatly assisted by the injection of a stream of water through the tubular boring bar and crown or stock, for the purpose of washing out and carrying away the detritus which is produced, and which would otherwise choke up the annular opening and impede the action of the tool." The second and third claims of the reissued patent, which are, perhaps, the only claims which it is important now to consider, are: "2. The row of cutting edges a¹, when attached to a revolving boring head, so as to project beyond the circumference thereof, for the purposes specified. 3. In combination with a revolving and progressing boring head, having cutting points projecting beyond the periphery thereof, a hollow central drill rod, through which the water is forced or passed."

The device of the defendants, which was

in controversy in the case of the American Diamond Drill Company, was a boring tool, consisting of a hollow boring head, convex upon its surface, having two holes extending from the cavity on the inside to the outside surface. The convex surface is armed with diamonds, which project from the surface, and a portion of which diamonds project outwards from the periphery. The only difference between the two devices is, that Leschot's drill abrades only a portion of the rock, the annular boring head acting upon the rock in such a manner as to enable an annular groove to be formed in the stone by the rotary and progressive motion of the boring head, and to leave a core within the groove. This core was subsequently removed by wedges. The defendants' tool abraded the entire surface of the rock through which it passed. Each instrument was provided with diamonds, the cutting edges of which extended outside of the periphery of the boring head, so that a larger hole was formed than the diameter of the boring head, and each was attached to a hollow bar, through which water was passed to wash out the detritus, the water being injected through the tubular boring bar and the boring head, and escaping, in the Leschot tool, through the annular boring head, and, in the defendants' device, through the two holes upon the convex surface of the boring head.

From an inspection of the defendants' drill and the reissued patent, it was obvious that the terms of the second and third claims of the patent were infringed. The defendants' drill was an exact imitation of the plaintiffs' device, with the exception, that, in place of the annular boring head, was substituted a convex boring head, with two holes in its surface. The annular head was partially plugged, so that the entire surface of the rock could be abraded. It may have been, and, perhaps, was, an improvement upon Leschot's tool, but an improvement which required little, if any, invention. It contained the principle of Leschot's invention, which was the effecting a clearance, by diamond points projecting beyond the periphery of a revolving and progressing boring head, so that the drill should not be clogged by the detritus, and the combination of the cutting mechanism with the hollow drill rod, into and through which, and through the orifice in the boring head, water could be injected, for the purpose of washing out the detritus. The distinctive features of the invention, as detailed in substance by the plaintiffs' expert, were, in combination, 1st. The boring head, adapted to being revolved and progressed or moved forward; 2d. Cutting points of diamonds, projecting beyond the periphery of the said boring head, so that they will cut a hole of larger diameter than the boring head, and so as to give a clearance; 3. A hollow drill rod or boring bar, adapted to connecting the boring head with mechanism for causing it to revolve and pro-

gress, and also adapted, by reason of its tubular form, to permitting the injection of a stream of water through the orifice in the boring head, for the purpose of washing out and carrying away the detritus which is produced by the abrasion of the stone by the diamond points. These distinctive features were all found in the defendants' drill.

An earnest attempt was made to avoid the effect of the infringement, by the claim that the reissued patent is for an invention different in kind and character from the one which was claimed in the original patent. It is not different from the one which was described in that patent. But it was contended that the original patent was for an annular tool and was confined to such a tool. That Leschot attributed importance to the annular character of his invention is plain, but that his invention was not limited to an annular tool is equally plain. He described fully the manner in which the diamonds were placed, whereby a larger diameter was given to the hole which was cut than the diameter of the boring head. The reissued patent embraces merely what was not only substantially but fully indicated and described in the original specifications, drawings and model.

It was also claimed, that there was no novelty in Leschot's invention, by reason of the prior French inventions of Georges Hermann and M. Fauvelle. Hermann's mechanism was originally for polishing a fashioning stone. His patent was subsequently enlarged, by a "certificate of addition," so as to include the cutting of stone by diamonds at the bottom of an annular head. It did not embrace all the features of Leschot's invention, and, especially, was not designed or adapted to make a clearance by projecting diamonds, and had not the hollow boring bar, for the introduction of water. The Fauvelle device was for an instrument which acted by percussion. The combination of a cutting or abrading tool with a hollow boring bar was novel.

A decree was passed which declared that the defendants' drill was an infringement of the second claim of the plaintiffs' patent. It was equally an infringement of the third claim, and a decree declaring that the third claim had been infringed would have been passed, if it had been desired, or if it had been deemed important.

Subsequently to the service of the injunction order, the defendants altered their drill, so that the diamonds were placed flush or even with the periphery of the boring head. The present bill was brought for the purpose of testing the question, whether or not the drills, as now used by the defendants, are or are not an infringement.

Upon the hearing of this motion, two affidavits were presented by the plaintiffs, to the effect that the defendants use, in a marble quarry in this district, boring heads or bits, on which the diamonds in fact pro-

ject between 1-32d and 1-16th of an inch beyond the outer circumference of the drill heads. The plaintiffs, admitting that the diamonds may have been originally set flush with the circumference, say that the inevitable result of use is, that the steel head wears away by contact with the marble, and leaves the diamonds projecting; that the defendants intentionally placed the diamonds in such a position that use would inevitably cause a projection; and that such a construction is a mere evasion and an infringement.

It is true, that, "if a machine is constructed so as to conform in all respects to the description in a patent, except as to one particular, or as to one motion and effect, yet is so constructed and intended as to obtain that motion or effect in the usage of the machine, by the action or wearing of the parts, and it is so obtained, it is a piracy of the principle, and a violation of the patent." Page v. Ferry, [Case No. 10,662.] If the object, in placing the diamonds flush with the circumference, was, that, when put to use, they should inevitably become projecting, there is an infringement. A constructor of a machine infringes, if he makes his machine with express reference to a result which he knows will happen when the machine is put to its use, and which result, if originally introduced in the machine, is an infringement.

The defendants have presented thirteen counter affidavits, which are generally to the effect that a new flush-set diamond drill head performs its work in a marble quarry better than one which had become so worn by use that the diamonds project; that the new flush-set head makes a hole in marble larger than the diameter of the head; that this clearance is effected not by the cutting of the marble by the projecting diamond edges, but because the material of which marble is composed is crystalline, and, as the convex drill head advances into the marble, the crystals are fractured, and crumble for a little space exterior to the diameter of the head; that the steel circumference of the head is worn away by the attrition of the detritus as it is carried to the surface, and not by the attrition of the steel against the solid marble; and that it is not necessary that the metal should be worn away from the diamonds in order to make the drill operative, but that the wearing of the metal injures the head for boring purposes. If these affidavits are true and will endure the test of cross-examination and rebutting testimony, while the position of the diamonds was changed in order to avoid the charge of infringement, yet it cannot be found that the intent, in setting the diamonds flush with the circumference, was that they should speedily become projecting by wear and use, or that the object of the defendants was to have a projecting diamond drill.

The plaintiffs, in reply, urge, in argument, that the diamonds were so placed that the drill head must describe an eccentric movement, and that the effect of this construction is that the diamonds practically project. They say, "that the diamonds are so set on the conical head of the bit that they must cause the bit to revolve eccentrically, whereby a diamond on the periphery will describe a circle of larger diameter than the diameter of the metallic head in which they are mounted," and that this method of setting "is a mere mechanical equivalent for projecting the diamond radially outward from the head." No affidavits were presented from experts or others in support of this proposition. It is hardly proper to grant a motion for preliminary injunction upon a theory which, although it may be true, is not supported by affidavits. In view of the testimony now offered I think that the motion for an injunction should be denied, and that the questions which are at issue should be left to final hearing upon proofs.

The motion for a preliminary injunction is denied.

[NOTE. The original bill was subsequently dismissed. For opinion, see American Diamond Drill Co. v. Sullivan Mach. Co., 21 Fed. 74. For other cases involving this patent, see note to American Diamond Rock Boring Co. v. Sheldon, Case No. 296.]

Case No. 299.

AMERICAN DREDGING CO. v. The BEDOWIN.

[37 Leg. Int. 52; 26 Int. Rev. Rec. 38.]¹

District Court, D. New Jersey. Dec. 10, 1879.

ADMIRALTY—PRACTICE—COLLISION—DREDGE AT ANCHOR.

1. Where a case turns upon the negligence of the respondent, and the negligence appears from the admissions of the answer, the libellant may ask for a hearing without further proofs.

2. Dredging machines lawfully engaged in improving navigation, have the rights of a vessel at anchor.

3. Where a collision occurs—one of the vessels being at anchor—the presumption is, that the other vessel is at fault; and must make full compensation for the damages, unless the accident was inevitable.

[In admiralty. Libel in rem for collision, by the American Dredging Company, owners of the steam dredge Baltic, against the steamship Bedowin, her engines, etc. On libellant's motion for an interlocutory decree. Granted.]

J. Warren Coulston, for libellant.

H. G. Ward and M. P. Henry, for respondent.

NIXON, District Judge. This is a motion for an interlocutory decree against the respondent, upon the libel and answer.

¹[Reprinted from 37 Leg. Int. 52, by permission.]

Although not according to the usual practice in the admiralty, the advocate for the libellant claims that where the case turns upon the negligence of the respondent, and the negligence clearly appears from the admission in the answer, it becomes not only the privilege, but the duty, of the libellant, to ask for a hearing without any further proofs. Such a course, doubtless, is sanctioned by the late Judge Conkling, in his *Treatise on the Jurisdiction, Law, and Practice in Admiralty*, (volume 2, p. 256,) where it is said: "If the answer of the defendant contains admission of the allegations of the libel to an extent sufficient, in the opinion of the libellant, to supersede the necessity of proof, he may at once have the cause set down for hearing upon the libel and answer alone. No good reason is perceived why such a practice should not be allowed. What the effect would be of finding against the libellant on the motion, need not be discussed or decided until the question arises.

The allegations of the libel substantially are, that the dredge "Baltic" is a floating vessel, supplied with steam power, machinery, and apparatus to dredge and deepen waters; that on the 17th day of July, 1879, about half-past three in the afternoon, she was anchored, with three anchors out and two spuds down, holding her firm and fast, and engaged at work in the business of dredging the channel of the Patapsco river, in the state of Maryland, below Hawkins' Point, under a contract with the government of the United States, to improve the navigation of the said river; that whilst thus engaged the steamship "Bedowin," loaded and bound out, was steaming down the river, and came into collision with the dredge, head on, and striking her with such force and violence as to do her considerable damage; that the collision occurred when the weather was fair and clear, in broad daylight, and with water of sufficient depth on all sides of the dredge to admit of the passing of vessels going up and down the river with absolute safety, and that it was caused solely by the negligence, carelessness, and want of proper skill and management of those in charge of the steamship.

The answer avers that the "Bedowin" is of 1,990 tons registered tonnage, 295 feet in length, and at the time of the collision was loaded with wheat for Havre, France, and drawing 21 feet and 9 inches forward, and 21 feet 11 inches aft; that she was in the charge of a duly licensed pilot, and had been going down the river at half speed, which was about five knots an hour; that just before she reached the dredge she put her helm a-port to clear some shipping in the river; that as there was not water enough in the channel to pass the dredge on the starboard, she put her wheel hard-a-starboard with the intention of passing the dredge on the port side; but that she was then sucking the bottom, and continued on

her course without responding to her helm; that perceiving a collision was imminent, the engines of the steamship were stopped, and then reversed full speed astern; but that, notwithstanding the efforts of the pilot and those on board to prevent it, she struck the dredge, causing some damage, but not to the extent complained of. It denies the allegation of the libel that there was water enough on either side of the dredge for vessels to pass up and down the river with absolute safety, but admits that there was sufficient on the port side; and also denies that the accident was the result of any want of care on the part of the steamship, but attributes it to the narrowness and direction of the channel, and especially to the position of the dredge, which made safe navigation under the circumstances impossible.

The dredge was anchored, and therefore incapable of getting out of the way. An attempt was made on the argument to refuse to dredging machines the privileges of a vessel at anchor, but the supreme court has clearly recognized their right to occupy the channels of rivers when lawfully there to improve the navigation. See *The Virginia Ehrman*, 97 U. S. 309. The libellant's dredge was fixed in the channel, engaged in widening and deepening it under a contract with the government of the United States, as appears by the production of said contract to the court, by the consent of the parties in the hearing. Being lawfully there at anchor, and without fault, the libellant is entitled to full compensation for the damage received by the dredge, unless the collision occurred from inevitable accident. *Id.* 310. I think it is fairly to be inferred, from what is contained as well as from what is omitted in the answer, that the accident was not inevitable, and that the libellant is entitled to a decree without going to the proofs. In cases of collision, where one of the vessels is at anchor and the other in motion, the presumption always is that the latter is in fault. This is emphatically the case where the moving vessel is a steamer, which is more absolutely under control than a sailing craft. The burden of proof is therefore upon the respondent. What excuse does the answer make? The collision was in the middle of a pleasant afternoon. The dredge was in open sight, and the steamship was under the direction of a licensed pilot, whose profession and business it was to know the channel and the depth of the water, and to be in readiness for any emergency that might arise from the steamer "smelling the bottom." The answer admits that she was of heavy draft, and claims that the channel was narrow and the navigation difficult, and yet there seems to have been no exercise of carefulness or any request to the dredge to move out of the way, or any attempt to stop the steamer until the danger of collision was imminent. It was then

too late to avert the accident, and I must hold the respondent responsible for the consequences of such want of care.

Let an interlocutory decree be entered for the libellant, and a reference be made to the clerk as commissioner, to ascertain and report the damage sustained by the dredge and her owners by reason of the collision.

Case No. 300.

The AMERICAN EAGLE.

[Cited in *The Waverly*, 42 Fed. 189. Nowhere reported; opinion not now accessible.]

Case No. 301.

The AMERICAN EAGLE.

The FOREST CITY.

[1 Lowell, 425.]

District Court, D. Massachusetts. Feb., 1870.

COLLISION—BETWEEN STEAMERS—SAILING WITHOUT LIGHTS—RULES BY SUPERVISING INSPECTORS OF STEAMBOATS.

1. The supervising inspectors of steamboats have power, by law, to make regulations not inconsistent with the general laws of navigation, for steamers passing each other.

[Cited in *U. S. v. Miller*, 26 Fed. 97.]

2. Rule one adopted by the inspectors, so far as it purports to authorize pilots to disregard the general law concerning vessels meeting end on, is void.

3. A pilot who obeys the inspectors' rule does so at his own risk, if it turns out that he has disobeyed the law.

4. If a vessel is sailing at night without lights she is prima facie in fault.

5. So if she has no lookout forward.

In admiralty. Collision. The libel first in date was brought by the owners of the steamer *Forest City*, a large coasting vessel which plies between Portland and Boston, against the steam-tug *American Eagle*, for a collision in the harbor of Boston, at a quarter before six o'clock on Christmas morning, 1869. In the other case the parties were reversed. The steamer was coming up the main channel towards East Boston, heading northwest, intending to sweep round near the Grand Junction wharves and proceed to her dock at India wharf. This is the usual course for large steamers when the tide is ebb. The tug was coming down from East Boston towards Dorchester, heading southeast, and was lashed to the port side of a schooner loaded with coal. Neither the schooner nor the tug had any lights, because the master of the tug, who had the entire control of the navigation of both vessels, thought they would be of no use in so light a night. The officers of the steamer saw the tug and schooner, but swore that they could not make out that they were in

motion, and after they found out that fact, were uncertain in which direction they were moving. When they saw that the vessels were approaching each other, the steamer's men sounded their steam-whistle once, which is the signal to go to the right; and they all swore that they distinctly heard one whistle and only one from the tug; the steamer's helm was put to port, but they soon after discovered that the tug had starboarded, and was swinging in the same direction with themselves. They then stopped and reversed their engine, but the vessels came together, and the bow of the schooner struck the port side of the steamer about thirty feet from her stern. The place of meeting was a few hundred feet ahead of the school-ship. On the part of the tug, the evidence was equally clear and positive that she sounded her whistle twice, as a signal to go to the left, and heard no reply from the steamer, but discovered the mistake and stopped and reversed.

H. W. Paine and R. D. Smith, for the *Forest City*.

G. O. Shattuck, for the tug.

LOWELL, District Judge. By twenty-ninth section of the act of 30 August, 1852. (10 Stat. 72,) and the ninth section of the act of 1866, as amended by that of 1867, (14 Stat. 228, 411,) the supervising inspectors of steamboats are empowered to make rules, not inconsistent with the navigation laws of the United States, for the government of certain domestic steam vessels in passing each other; and the rules have been made and revised from time to time, and duly promulgated, and both parties in this case appear to have had these rules in mind and to have intended to follow them. Of the latest revision, that of January, 1869, the first rule is that where steamers are approaching each other head and head, or nearly so, it shall be the duty of each to pass to the right, and the pilot of either steamer may be the first to determine to pursue this course, and thereupon shall give one short and distinct blast of his steam-whistle, which the other pilot shall promptly answer. So far the rule is in accordance with the act of congress for preventing collisions, and seems well calculated to aid in its observance. It then proceeds: "But if the course of such steamers is so far on the starboard of each other as not to be considered by the pilots as meeting head and head, or nearly so, or if the vessels are approaching each other in such a manner that passing to the right, as above directed, is deemed unsafe by the pilot of either vessel, the pilot so first deciding shall immediately give two short and distinct blasts of his steam-whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his steam-whistle, and they shall then pass to the left, or on the starboard side of each other."

¹[Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

The attempt by the tug to carry out the second part of this rule was a prominent cause of the collision. It so happened that her pilot, instead of being the first to decide to go to the left, actually made the decision at the same moment that the steamer's pilot determined to follow the general rule, and so they both turned in the same direction and came together. It is argued very forcibly that here was an attempt by both parties, acting in good faith, and with equal diligence, to observe the same regulation, and that it cannot be imputed to either as a fault that the regulation failed to meet the case; but that the accident, humanly speaking, was inevitable. On the other side, it is urged that the rule itself is void, because the act of congress positively requires both vessels to go to the right. If the rule is to be construed to mean that when steam vessels are actually meeting end on, or nearly so, either pilot may decide to disobey the statute, and may thereupon compel the other to do so, it is null. But if it be intended, as the argument for the tug insists, only for those cases in which the vessels are not in fact meeting at all, but in a situation in which they would pass clear to the starboard of each other, and gives to the pilot who first discovers this to be so the power to notify the other not to go to the right, but to keep on or a little to the left, it may be a useful and proper regulation. But suppose the steamers are meeting, and do meet, notwithstanding that the two whistles are heard and acted on, it seems impossible to maintain that the pilot who notified and required a departure from the usual course did not do so at his own risk. The serious objection to the rule is, that it gives the decision to one vessel exclusively upon a point on which the law casts it upon both. Of course, there will remain the case in which the pilot who decides to go to the left finds some obstacle or danger in the other course, which is unknown to the pilot who is meeting him. This exceptional case excepted, it seems to me that he who deviates from the law must assume the responsibility. By making the decision he guarantees its propriety, that is, that the vessels are not meeting. The tug did not even obey the rules of the inspectors, of which the third is, that if the pilot of either vessel fails to understand the course or intentions of the other, whether from the signals being erroneously answered or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed, &c. The master of the tug did not give these short and sharp blasts, and the obligation rested upon him to do so, because he knew that his signal had not been answered, while the steamer's pilot had good reason to believe and did believe that his signal had been answered, and so

was off his guard. He says there was no time; but the evidence on both sides seems to show that the vessels were more than half a mile apart when the signals were given.

The tug and tow had not the lights required by law. The witnesses on both sides say that the night was bright and clear, and that a vessel could be seen two or three miles off. But those of the steamer swear positively that they were for some time in doubt whether the schooner and tug were under way, and in what direction. If this is true, and I see no reason to doubt it, the want of lights contributed to the collision, because the steamer's whistle was sounded as soon as her pilot found that the other vessel was coming towards him, and it would probably have been sounded earlier had this fact been made out earlier. I cannot exonerate the party who has failed in a statute obligation, unless it is plain that the fault has had no effect on the disaster. Then, again, there is no evidence of a lookout on the forward part of the schooner. If there had been the tug might have whistled earlier. There appears to have been a series of unfortunate coincidences by which each vessel discovered the direction of the other at the same moment, and that, possibly, a somewhat late one. But one had the lights and the lookout, and the other had neither. I consider, therefore, that the latter must be held to be in fault, independently of any question of the course pursued after the danger was discovered. I do not choose to rest my decision upon the narrow ground that the tug did not, in fact, whistle first; because her pilot had no reason to know that; but I feel bound to hold that his want of lights and of lookout may probably have contributed to the accident by retarding the action of both parties; and if not, and the whistles were sounded in good season, then he disobeyed rule three, and neglected to give instant notice that something was wrong, a fact which the other pilot had not the same reason to suspect. Either way the tug is responsible. And I may add that if the time was so very short as not to admit of a correction of signals, I doubt very much whether the pilot could be justified in going to the left under rules which evidently contemplate a much earlier action. Decree for the steamer.

AMERICAN EXP. CO., (MALTZ v.)

[See Maltz v. American Exp. Co., Case No. 9,002.]

AMERICAN EXP. CO., (INDIANA v.)

[See Indiana v. American Exp. Co., Case No. 7,021.]

AMERICAN FIRE INS. CO., (BASSELL v.)

[See Bassell v. American Fire Ins. Co., Case No. 1,094.]

AMERICAN GOLD COIN, (UNITED STATES v.)

[See United States v. American Gold Coin, Case No. 14,439.]

AMERICAN HAIR MANUF'G CO., (MUSCAN HAIR MANUF'G CO. v.)

[See Muscan Hair Manuf'g Co. v. American Hair Manuf'g Co., Case No. 9,970.]

AMERICAN HARD RUBBER CO., (ABBOT v.)

[See Abbot v. American Hard Rubber Co., Case No. 9.]

Case No. 302.

AMERICAN HIDE & LEATHER SPLITTING & DRESSING MACH. CO. v. AMERICAN TOOL & MACH. CO. et al.

[Holmes, 503; 4 Fish. Pat. Cas. 284; Merw. Pat. Inv. 99.]

Circuit Court, D. Massachusetts. Nov., 1870.

PATENTS FOR INVENTIONS — SUIT FOR INFRINGEMENT—STATUTORY NOTICE TO LICENSEES — DEFENSES—PUBLIC USE—BURDEN OF PROOF—ABANDONMENT—PRESUMPTION—DRAWINGS OF PATENT.

1. Under the act of March 3, 1839, (5 Stat. 353,) a patent is invalid, if the patented invention was in public use (unless merely for purposes of experiment), or on sale, with the consent or allowance of the inventor more than two years before his application for the patent.

[Cited in Consolidated Fruit-Jar Co. v. Wright, 94 U. S. 94; Andrews v. Hovey, 124 U. S. 709, 8 Sup. Ct. 676.]

2. An inventor may abandon his invention to the public at any time. Abandonment is a matter of fact to be proved. It is never to be presumed.

[As to what constitutes an abandonment, see Locomotive Engine Co. v. Pennsylvania R. Co., Case No. 8,454; McGaw v. Bryan, Id. 8,793; Thompson v. Haight, Id. 13,957; Woodbury Patent Planing-Mach. Co. v. Keith, Id. 17,970; Sayles v. Chicago & N. W. R. Co., Id. 12,414; Bell v. Daniels, Id. 1,247; Adams v. Edwards, Id. 53; Adams v. Jones, Id. 57.]

3. The "public and common use" in the United States necessary, under the sixth section of the act of March 3, 1839, to invalidate a patent for an invention previously patented in a foreign country, is a common and general use by the community.

4. What would amount to such use depends upon the nature of the invention patented.

5. It is not necessary that the drawings of a patent should be capable of use as working drawings, or that a machine made according to the exact scale of the drawings should be an operative machine. It is sufficient that the invention be so described and shown that one skilled in the art to which it relates would be

able, by the aid of the description and drawings, to embody the invention in an operative and efficient form.

[Cited in Hamilton v. Ives, Case No. 5,982; Henry v. Francestown Soapstone Co., 2 Fed. 78.]

6. Where, in a suit for infringement of a patent, no question is made by the pleadings as to the novelty and originality of the patented invention, and the prior use relied on in defence is a use by the inventor or under his license, it is not necessary to give notice of the persons so using the invention, or the places where it was used.

7. If an inventor has abandoned his invention to the public, his right to a patent therefor is irrevocably lost.

[8. Cited in Henry v. Francestown Soapstone Co., 2 Fed. 80, to the point that, to work a forfeiture of a patent by a sale more than two years prior to the application for the patent, the thing sold need not have been perfect in the mechanical sense, but only in that it embodied the completed invention in a form which would be operative.]

[9. Cited in Rein v. Clayton, 37 Fed. 357, to the point that an inventor has no right to his invention at common law, but that such right is the creature of statute and of grant.]

At law. This was an action on the case, tried by Judge Shepley and a jury, and brought [by the American Hide & Leather Splitting & Dressing Machine Company against the American Tool & Machine Company and George H. Fox] to recover damages for the infringement of letters patent for an "improvement in leather-splitting machines," granted to Joseph F. Flanders and his assignee, Enos G. Allen, August 14, 1860, [No. 29,649.] The patented invention was an improvement upon and particularly applicable to leather-splitting machines, in which was employed a "belt-knife," consisting of an endless band of steel having a cutting edge and made to run over two pulleys like a belt, which was the subject of invention described in letters patent granted to the said Joseph F. Flanders and one Jeremiah A. Marden, August 29, 1854. The nature of the invention set forth in the patent of 1860, in controversy, is indicated by the following language of the the specification: "In machines for splitting leather it has been found extremely difficult, on account of the varying thickness of the hide, to cut or split the grain of uniform thickness throughout, the tendency to form an irregular cut being increased by the weight of the split which drags the leather downward from the knife. The essential feature of my invention consists in a novel arrangement of devices whereby these objections are entirely obviated, the uniformity of the thickness of the grain being invariably secured, whatever may be the irregularities of the leather to be split. The desired result is effected by the use of a sectional roll, consisting of rings hung loosely upon a shaft immediately under the leather and made to have an upward bearing thereon by means of an India-rubber roll, or other suitable elastic bearing that presses upward against the rings. This arrangement constitutes in

[Reported by Jabez S. Holmes, Esq., and Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion were taken from Holmes, 503, and the statement from 4 Fish. Pat. Cas. 284. Only partially reported in Merw. Pat. Inv. 99.]

effect an elastic bearing to the leather, consisting of a series of separate and independent springs that possess all the necessary elastic force and yet are remarkably free to play, much more so than any ordinary arrangement of springs, thereby affording a yielding and elastic bearing to every inequality or indentation of the leather, and one that is peculiarly sensitive thereto. Although the sectional roll may be placed directly over the elastic roll, I prefer to place it a little to one side of the vertical axis thereof, as when placed in the same vertical line, the rings, by the motion of the rubber roll, have a tendency to crowd back and then to snap forcibly back against the leather, which prevents the cut from being uniform. What I claim as my invention, and desire to have secured to me by letters patent, is: First. The arrangement of sectional rollers for the direct or immediate support of the hide, or leather, at the delivery of the same to the edge of the circulating knife in combination with a roller located below the sectional roller and constructed as described with elastic surface and fixed bearings. Second. Placing the sectional roll to one side of the vertical axis of the elastic roll as described.

The evidence tended to show the following facts: This invention was made by Flanders as early as July, 1855, while endeavoring to improve the construction of a leather-splitting machine embodying the improvements secured by the prior patent of Flanders and Marden. In January, 1856, he and the other owners of that patent sold it to a corporation known as the American Leather Splitting Company, which proceeded to manufacture machines embodying not only the improvement patented to Flanders and Marden, August 29, 1854, but also the other improvements which afterward formed the subject matter of the Flanders and Allen patent of August 14, 1860. During the fall of 1856, one or two of these machines were publicly exhibited in operation at the factory of the Patent Tanning Company, in Newark, New Jersey, and were offered for sale to the public; and before April, 1858, the American Leather Splitting Company made the following sales of such machines, viz: one to the Chadwick Patent Leather Manufacturing Company at Newark, in December, 1856; one to Joseph Byron, at West Roxbury, Massachusetts, in March, 1857; one to J. H. and T. W. Dawson, at Newark, in the spring of 1857; one to Julius S. Shailer, at Roxbury, Massachusetts, in the summer of 1857; another to the Chadwick Patent Leather Manufacturing Company, at Newark, in February, 1858, and one to R. Ward & Co., at Newark, in March, 1858. All these sales were made with the full knowledge and consent of Flanders, who owned largely in the capital stock of the American Leather Splitting Company, and acted in its behalf to exhibit these machines and to procure the sale of them, and in fact set up and put into operation the

four machines above mentioned that were sold at Newark. In March, 1858, Flanders procured Samuel Cooper, a patent solicitor of Boston, to solicit for him an English patent for a leather-splitting machine, containing the very improvements which were afterward set forth and claimed in the letters patent of the United States, granted to Flanders and Allen, August 14, 1860. This English patent was granted and sealed June 25, 1858, to one William Edward Newton, an English resident, who acted as Cooper's agent and who held the patent for Flanders' sole benefit. In July, 1858, Flanders sold another of these machines to William Pyle, of Wilmington, Delaware, and in October, 1858, he entered into a written agreement to sell such machines on commission for Pyle, who had then bought the exclusive rights under the Flanders and Marden patent for the states of Massachusetts, New York, and New Jersey. Before the year 1860, there had been in all about ten of these machines sold and put in operation, of which, at the date of this trial, two at least were still in use, and the remainder had been continued in use for different lengths of time from one to five years, and the machine sold by Flanders to Pyle, in July, 1858, was employed so constantly and efficiently that there were split by it on an average, from that time until July, 1861, some ten thousand hides per year. The machines made and sold prior to 1860 were, however, not well constructed nor well proportioned. They needed constant repair, and underwent many alterations in their working parts to improve their mechanical operation and means of adjustment; but, nevertheless, no substantial change was ever made in the arrangement and mode of operation of the sectional roller and the rubber roller upon which it rested, after the first machine had been exhibited in successful operation at Newark, in the fall of 1856. In 1860, George H. Fox & Co. bought of William Pyle the exclusive rights secured by the Flanders and Marden patent, within and throughout the state of Massachusetts, and a year or two afterward they also bought the exclusive rights under the same patent for the state of New York, all of which they at a later date sold and transferred to the American Tool and Machine Company, which further secured to itself the same rights under the extension of that patent; and the bell knife leather splitting machines that have been manufactured and sold into use by these owners—who are the defendants in this case—have been greatly superior to the earlier machines in their mechanical construction. There was also testimony that, at the time of the trial, there were about forty of these machines in operation within the United States; that they were expensive machines both to construct and to keep in repair; and that the number of places in the country where they could be employed to advantage was comparatively few. The date of Flan-

ders' application for the patent granted to him and Allen was April 11, 1860.

Baxter E. Perry and Alfred B. Ely, for plaintiffs.

George L. Roberts, for defendants.

SHEPLEY, Circuit Judge, [charging jury.] This is an action brought by the American Hide and Leather Splitting and Dressing Machine Company, as plaintiff, against the American Tool and Machine Company and George H. Fox, as defendants, for an alleged infringement of letters-patent of the United States, granted Aug. 14, 1860, to Joseph F. Flanders, the alleged inventor, jointly with one Enos G. Allen, to whom Flanders had assigned one-half of his interest prior to the issue of the letters-patent, which, by mesne assignments, are alleged to have passed to the plaintiff corporation before the date of the infringement complained of. The defendants do not deny, and for the purposes of this trial it is admitted, that they made and sold one machine embodying the invention described and claimed in the letters-patent declared on; and that, therefore, they have infringed the plaintiff's rights, unless they have established by evidence one or more of the defences set forth in their special pleas, or have proved to the satisfaction of the jury one or more of the special matters in defence of which they gave notice under the statute. The principal grounds of defence relied upon in this case are: First, that the invention was in public use and on sale, with the knowledge and consent of the inventor, more than two years prior to his application for a patent; second, that he had abandoned the invention to the public prior to his application for a patent; and, third, that the same invention had been patented by him in England more than six months prior to his application for a patent in the United States, and had been introduced into public and common use within the United States prior to his application for a patent in the United States.

Now, as to the first of these three grounds of defence, the act of March 3, 1839, modified the law of patents as it existed under the act of 1836, and as it had previously existed with regard to the public use of the invention prior to the application for a patent. Since the act of March 3, 1839 (except in case of proof of abandonment to the public, or what perhaps would be a better term, dedication to the public, though I have used the words of the statute), no purchase, sale, or use of the invention invalidates a patent, unless such purchase, sale, or use has been for more than two years prior to the application for a patent; but a public use or sale of the invention, with the knowledge and consent of the inventor more than two years prior to his application, does invalidate a patent and make it void. The burden of

proof is always on the defendant who sets up such prior sale or use; and he must show it to have been with the knowledge and consent of the inventor, and to have been public in the ordinary way of a public use or sale of a machine, and not to have been a use for the mere purposes of experiment. But if it is in public use or on sale with the consent or allowance of the inventor more than two years prior to his application for a patent, and not in use merely for the purposes of experiment, then, as I have already instructed you, the patent is void. I shall have occasion to call your attention more particularly to this matter hereafter, when I come to refer to the special instructions which have been asked for in relation to some of the questions arising with regard to public use and to abandonment. In this view of the law, gentlemen, what is the testimony in relation to the public use and sale of this invention more than two years prior to the application? The date of the application for this patent is April 11, 1860. About that, there is no controversy. The question, then, under the first branch of defence, for you to consider, is, whether this invention was in public use or on sale with the knowledge and consent of the inventor prior to April 11, 1858. Such public use, within the statute applicable to this branch of the defence, may be by the inventor himself, of one machine, or by any other person, with his knowledge and consent or approval. I do not instruct you, as matter of law, that such public use or sale of one machine would necessarily involve it; but I say the jury are authorized, if they find one machine to have been in public use or on sale, with the knowledge and consent of the inventor, more than two years prior to his application for a patent, to find that sufficient to make the patent void. This is distinguishable from the "public and common use," which I shall have occasion to refer to hereafter, and which makes a patent void if it continues for more than six months before the patent is applied for in this country after the inventor has taken out one in England. That "public and common use" is a different use from the "public use" referred to in the sixth section of the statute of 1839.

It is not my purpose or intention, gentlemen, to recapitulate to you the testimony in this case, but only to call your attention to enough of the evidence, on either side, to enable you to understand the application to that testimony of the principles of law which I shall state to you. The Flanders and Marden patent of Aug. 29, 1854, was obtained for the rotating knife, which has been explained to you and exhibited in the drawings and models. Under that patent, which passed through successive mesne conveyances into the possession of a corporation bearing the name of the American Leather-Splitting Company, to the titles of which the present plaintiff corporation is the successor, the first

machine which was constructed by the inventor, Flanders, originally contained only the application of this rotating knife to an old machine which was then in existence; and this first machine, as he constructed it, contained apparently no new device except that of the rotating knife; but before he conveyed his interest in this patent and in the machine, which was then in the process of manufacture and perfection, to his sub-owners, and before they conveyed to the American Leather-Splitting Company, the device of the sectional rollers and the rubber roller, according to the testimony as I understand it, and as I understand it to be uncontradicted, was inserted in the machine which passed to them; and if I understand the testimony rightly, the American Leather-Splitting Company never made, never sold, never put on sale or exhibition, or had manufactured, any machine that did not contain this device of the sectional rollers and the yielding elastic rubber roller upon which they rested.

With the exception of the first machine which went into Sibley's shop, in Hawley street, and which was never sold to the public, but was only being manufactured for the purpose of experiment, some time in the year 1855, I have failed to see any evidence in this case (you will judge, gentlemen) that any machine was ever made by Flanders, by his grantees, or by anybody under that patent, or was ever put upon sale or upon exhibition, which did not contain the device of the sectional rollers and the rubber roller, substantially as set forth in the subsequent patent of Aug. 14, 1860; that is to say, according to the testimony of witnesses examined on the respective sides, the device of the sectional rollers, resting upon this rubber roller which had a fixed axis of revolution so as to embody the principle of adapting the under surface upon which the leather rested to the inequalities of the thickness of the leather to be split, so that, however unequal the under surface might be, the upper surface should always be in a line parallel with the gauge-roller above it, so that the knife should cut from the leather a slice or layer or stratum, which should be of uniform thickness. I say, there is no question in this testimony, so far as I have seen, that this device of the sectional rollers with the rubber roller, thus put in for that purpose, was in every machine that ever was held out here to the public as a leather-splitting machine under the Flanders and Marden patent. That does not make it certain that this device passed by title to the American Leather-Splitting Company, or that it ever came by mesne assignments down to the present company, who are the successors to the title of that company in the Flanders and Marden patent. It does not follow, because that device was in those early machines, that it ever came to the defendants, who own the rights under that

patent in two states, or in the state of Massachusetts, which is enough for the present inquiry. These defendants have no record title. I instruct you that they have no record title to Flanders's invention of this device under the conveyances which have been read to you. Flanders did not undertake to convey to those under whom they claim title any thing; but what his patent of Aug. 29, 1854, described, and that was his rotating knife. But then, gentlemen of the jury, you are to inquire whether he did or did not at the same time convey to them a machine embodying this device, and whether he did or did not, as a stockholder in the American Leather-Splitting Company, and as their agent, under the patent and rights so conveyed to them, introduce to the public and put on sale and in public use a machine embodying this invention, which he has described in the patent of Aug. 14, 1860. And if you find that prior to April 11, 1858, that corporation, with his knowledge and consent or allowance, or that he himself, acting as the representative and agent of that corporation, sold one or more of these machines, embodying not only the invention which he had described in the Flanders and Marden patent, but also the device referred to in the first two claims of the patent of Aug. 14, 1860, and called here the sectional rollers and rubber roller; and if you further find that the machine thus put in public use and on sale prior to April 11, 1858, was, so far as the invention of that device was concerned, an effective, operative, and useful machine; that is, that the machine successfully, for practical use, split leather, holding it up to its proper position to be split by the operation of the devices described in the patent of Aug. 14, 1860, so as to retain the upper surface of the leather in a line parallel with the cutting knife and so as to cut the upper portion of the leather of a uniform thickness without regard to the inequalities in the thickness of the under portion: then the patent obtained by him afterward for the invention of this device was void; and it would be a fraud upon the public, to whom those machines had been sold, and a fraud upon that corporation whom he had thus allowed to incorporate and sell this device in those machines, for him to attempt to set up this patent against them.

Much has been said to you about the rights and claims of the inventors. An inventor has no right to his invention at common law. He has no right of property in it originally. The right which he derives is a creature of statute and of grant, and is subject to certain conditions incorporated in the statutes and in the grants. If to-day you should invent an art, a process, or a machine, you have no right at common law, nor any absolute natural right, to hold that for seven, ten, fourteen, or any given number of years, against one who should invent

it to-morrow, without any knowledge of your invention, and thus cut me and everybody else off from the right to do to-morrow what you have done to-day. There is no absolute right, or natural right at common law, that I, being the original and first inventor to-day, have to prevent you and everybody else from inventing and using to-morrow or next day the same thing. But there is a statutory right, a public grant of a monopoly, which does enable you or me to do this. If we are the original and first inventors, the law secures to us a monopoly of the invention for a given number of years, upon certain conditions; and one of those conditions is, that we shall not put this invention on sale or in public use, and then, after the lapse of more than two years, treat as infringers everybody else who has it in public use or on sale, and who may not have it by grant from us. The condition is no more inequitable than the grant itself. The patentee gets his right to the patent, not on the ground of any inherent natural right which he has, or right at common law, but because he is entitled to it by the terms of the statute of the United States which gives it to him; and, therefore, he has no rights except in compliance with those terms and upon those conditions. Now, gentlemen, you will apply these principles to the consideration of the testimony in this case. You will consider, in the first place, whether these machines were put on sale or in public use prior to April 11, 1858; whether Flanders knew it, and allowed it, or consented to it. You will then consider whether the machines which he had in use and on sale, if any, or which were put on sale and in public use prior to April 11, 1858, with his consent or allowance, embraced and embodied the devices and the invention described in the letters-patent of Aug. 14, 1860. If you find they did, you will then consider whether those machines so put on sale or in public use were effective, operative, successful machines, competent to do the work which that invention was calculated and intended to perform; and then you will consider whether such machines were put on sale or into public use as matters of profit and gain, or whether it was for the mere purpose of experiment and perfecting the invention.

I instruct you upon this point that if Flanders, with the consent of those to whom he had sold the Flanders and Marden patent for the rotating knife, or with the consent of the purchaser from them of a machine embodying that invention, attached to that machine an invention which he had made separate and distinct from the invention described in that patent; and if he put it on for the mere purpose of experiment, to see whether it would work, and with the view of perfecting it as a separate invention, and not for the purpose of rendering the machine which had been sold perfect as an

operative machine; that would not be such a public use or sale as would invalidate his patent, or deprive him of the right to a patent. In that view, gentlemen, you will take into consideration the testimony which has been introduced to you. Is there or is there not any evidence in this case, that when these machines were exhibited in the tanning company's office, in Newark, New Jersey, when they were sold to the Chadwick Company, to Dawson, and to Byron, any of these parties were informed by Flanders, who is testified here to have had intimate knowledge of all these sales and of the operation and working of these machines, that in purchasing them of the corporation which then owned the Flanders and Marden patent, they were not obtaining the right to use the whole machine and all the devices embodied in it, or that there was any particular device attached to the machine for the mere purpose of experiment and test? What was the operation which was going on when Flanders was endeavoring to perfect that machine in these different workshops and factories in which he had placed it in use and on sale? Has it or has it not, been proved here that those machines were sold, in some instances the sale not to take effect until the machine was an effective working machine? Was or was he not, laboring to make those machines under the Flanders and Marden patent operative and successful? And was he or not, experimenting with a view to make these machines under that patent successful; or was he experimenting with a view to perfect another device and invention, in which none of the owners of those machines, Chadwick, Byron, Dawson, Shailer, or any of those grantees, was to have any right or interest?

Language has been used by the court in regard to such use of a device, before the obtaining of a patent, which seems to me particularly applicable to this case. I refer to the case of Sanders v. Logan, [Case No. 12,295:] "It is clear, therefore, that assuming that Sanders was the sole inventor of the machine as perfected in 1845, with Justus's assistance, yet that he was not entitled to a patent for the same. The evidence established a clear case of abandonment; and, moreover, that the invention was publicly used, with the knowledge, consent, and approbation of the complainant more than two years previous to his application for a patent. The allegation that these machines were made and incorporated into so many mills all over the country for the purposes of experiment, is too absurd to be entertained for a moment." Now, is it or is it not true in this case, that wherever the Flanders and Marden machine was used, wherever it was exhibited, and wherever it was sold, there was attached to it the invention or device described in the patent of Aug. 14, 1860? I do not understand that there is any controversy on that point. I have

not heard any evidence that any machine was ever set up, sold, exhibited, or put in use, which did not contain this device, with one single exception. It is claimed on the part of the plaintiff that all the machines did not contain this device in the manner referred to in the second claim of the patent of Aug. 14, 1860, because it is contended that a perpendicular plane which would pass through the axis upon which the rubber roller revolved would be coincident with the perpendicular plane which passed through the axis upon which the sectional rings revolved; while, on the part of the defendants, it is contended that in some of the machines, if not in all of them, which were thus sold, the perpendicular planes passing through the respective axes of the rubber roller and the sectional roller were not coincident. In the one case, the two cylinders would be the one directly over the other; in the other case, they would be at an angle, more or less. That is a question upon which you have testimony here from the different parties; it has been very fully and ably commented upon by the respective counsel, and therefore it is unnecessary for me to recapitulate.

Then the next question is: If these machines were thus put upon sale and into use, were they constructed so as to operate successfully? Mr. Shailer, one of the witnesses, for instance, testifies that he used one of them for a number of years; that it had everything in it which it has now, and was as good a machine as it is now; that he split leather with it for himself, and took leather in to split by it. He says: "When we first had it, the two axes were nearly in the same perpendicular plane. Afterward, we altered the axes toward an inch apart from each other; namely, the plane of the axis of the sectional roller an inch from the plane of the axis of the rubber roller. After exhibiting it several weeks, we sold one machine. After we made these alterations, the machine worked as well as the machine now does. The one sold to the Chadwick Company," he says, "worked admirably. Whenever the knife was in proper position, we did splitting as well as it could be done. The machine has been but very little improved since." Several other witnesses have testified as to the amount and quality of the work that the machine did. But there is another matter which it is proper for you to consider, as affecting the question whether this was a successful and operative machine, working well; and that is this: It is claimed on the part of the plaintiff, that, although these machines may have embodied the devices described in both these patents, the machines which were put on sale and in public use were not perfect machines; that perfection had not been attained; and that they were put on sale in a crude and unfinished condition, for experiment. It is not for you to consider upon this point whether this whole

machine used for splitting leather was or was not a perfect machine in the sense in which "perfect" is usually understood. You are to consider whether the machine, so far as it covers these devices, was or was not a perfect machine, so far as these devices are concerned. You are to consider whether it was perfect in the sense that it embodied a completed invention, and not whether it was perfect in mechanical execution, as you might expect a machine to be in its most highly finished state of mechanical perfection. A perfect machine, in that sense of the word "perfect," means a perfected invention; not a perfectly constructed machine, but a machine so constructed as to embody all the essential elements of the invention, in a form that would make them practical and operative so as to accomplish the result. But it is not necessary that it should accomplish that result in the most perfect manner and be in a condition where it was not susceptible of a higher degree of perfection in its mere mechanical construction. If, therefore, you find that prior to April 11, 1858, this machine was put in public use and on sale, with the consent and allowance of Flanders; if you find that it did embody the devices and invention described in the patent of Aug. 14, 1860; and if you find that it embodied all of that invention in a form that was practical, operative, and useful: then it is a bar to this patent, and the patent is void.

The next ground of defence is an alleged abandonment to the public. That does not differ very materially, so far as its application to this case is concerned, from the question of public use and sale, except that the abandonment to the public, in the sense in which it is here used, need not be two years before the date of the application for the patent: it may be afterward, although the presumption always is against an abandonment to the public by a patentee after he has applied for his patent. But he can do so; he can do so within two years; he can do so at any time. It is a matter that may be proved, but it is never to be presumed. A person is sometimes said to have abandoned his invention when he gives up the idea; abandons it in the popular sense; relinquishes the intention of perfecting his invention, so that another person may take up the same thing and become the original and first inventor. But that is not the kind of abandonment that is referred to here. There is another kind of abandonment; and that is where a party, having made an invention, allows the public to use it, with his knowledge and consent; allows it to be incorporated into other machines with his knowledge and consent, and to be used by anybody without objection; as, for instance, if you should invent a machine, put it into public use and sell it to everybody who chose to buy it, and if you should attach to that machine another invention of yours,

and allow everybody who chose to buy that and use it, without objection on your part, with your consent, with your permission, with your allowance, not for the mere purpose of experiment, but for the purpose of profit and gain, that would be an abandonment of it to the public; and you could not afterward rightfully, honestly, honorably, legally, take out a patent for that invention. "The question arises upon this provision, then, whether the particular purchase, sale, or prior use may of itself, under some circumstances, furnish proof of abandonment to the public, or whether such an abandonment must be proved by other cases, or by other evidence dehors the particular purchase, sale, or prior use, that happens to be in question. The obvious construction of the act is, that a purchase, sale, or prior use before the application for a patent, shall not invalidate it, unless it amounts to an abandonment to the public; a purchase, sale, or prior use shall not have this effect, per se, but, if connected with facts which show an abandonment to the public, or if it has been for more than two years prior to the application, it will have this effect." Curt. Pat. (Ed. 1867,) pp. 417, 418, § 393: I read this to you, because these are not merely the words of the text-writer, but the exact words of the decision of the court as to the construction of this clause of the act of 1839. The other ground of defence set up here is, that this invention had been patented in England more than six months prior to the application for a patent in the United States, and had been introduced into public and common use in the United States prior to that application. Upon that I am requested by the plaintiff's counsel to instruct you that "section 6 of the act of 1839 must be construed in connection with section 7 of the same act, and that the purchase, sale, or prior use named in section 7 differs from the public and common use named in section 6, or else the two are incompatible." That alternative I need not put in; but I give you the instruction, that the "public and common use" in the sixth section which has been read to you, and which applies to public and common use prior to the application for an American patent, where there is an English patent procured by the inventor more than six months prior to the application for an American patent, is a different use from the "public use" which I have already explained to you, and which, having obtained for more than two years prior to the application, voids the patent.

This "public and common use" prior to the application in this country, in the case of a foreign patent procured by the inventor more than six months before his application here, must be something more than the mere use of one machine or more by the inventor himself, in public, or by other persons with his consent and allowance. The

invention must have passed into general use in the community. To invalidate a patent upon the ground of a prior English patent, the use of the thing patented must not only be public within the United States, but must be a common and general use by the community. There is an obvious reason in my mind for this distinction, which existed in the statute in force up to the act of July 8, 1870, but which does not now exist, because the time has been extended to two years, and the word "common" has been stricken out. In order now to void a patent upon the ground of a prior patent in England, the invention must have been in public use two years prior to the application here, although it is not required to be in common use; but this law was not in force before the act of July 8, 1870, and is not applicable to this case. This case is to be decided upon the construction of the statute of 1839; and I instruct you that the use referred to in the sixth section of that act must be a general use as well as a public use; it must be a common use as well as a public use of the invention which is to void the patent in the United States, if it has been prior to the application here, in case there has been a patent taken out in England by the patentee more than six months before his application here. What would be a common use, however, must be considered with reference to the device invented or the thing patented. What would be a passing into common use of one invention might be a very different thing from what would be a passing into common use with regard to another invention. For instance, a hotel annunciator might be an invention applicable to hotels alone, and useless for any other purpose. Such an invention could never come into common use in the community in the sense in which a friction-match or a paper-collar would, or any other device or invention which was intended to be used by the community. You might, therefore, in the case of the annunciator, consider its use, in a very few instances, a common use, as compared with what would be a common use of a thing designed for the use of every person. So there might be an invention applicable to only one species of manufacture; and if there were only three manufacturers of that particular article in the United States, and each one of these three publicly used the invention, and if they were the only persons who would be likely to use, or whose business would require them to use, such an invention, you might be justified in finding that that invention had passed into public and common use when it became universal with all the persons or in all the manufactories for whose use the invention was designed.

And I instruct you further, that if an inventor obtained an English patent more than six months before he made his application in the United States for a patent for the

same invention, and after it had been patented abroad and prior to the application here, that invention passed into public and common use in this community so as to become a part of the manufactures of this country, then whether the persons through whom it had been introduced here had derived their information of it from the English patent, or had invented it themselves, or had derived it from the first inventor himself, the patent would be void. The statute was intended to require the patentee to use reasonable diligence and to fix a proper time within which he must make his application, in justice to the public; so that an invention which has been patented abroad, and has become a matter of public notoriety, and of common knowledge among persons engaged in that art or manufacture, shall not pass into the commerce of the country and into common and daily and public use by the community, and then, after the lapse of any length of time, the party go on and obtain a patent and prosecute the whole community as infringers. Congress has, with propriety, fixed a time which they consider reasonable for the exercise of diligence in this matter; and if you find that this inventor allowed that time to pass by, and that this invention had been introduced into public and common use, into general use in the community, then this patent is void. And in determining what is common and general use, you have a right to take into consideration the nature of the machine, the effects which it is designed to produce, and the number of persons or of manufactories likely to use it, so as to determine whether, in view of all the devices which constitute the characteristics of the invention, and the uses to which it can be, and is designed to be, applied, the use is a general and common and public use, or a private, special use, under a particular grant or license.

I have said, gentlemen of the jury, that I do not intend to recapitulate the testimony in this case. These questions of fact it is your province to determine; and I do not wish you to consider any thing I have said as intended to influence you in your determination of them. I am only endeavoring to give you the principles of law which are to guide you, and which you are to apply to the consideration and determination of these questions of fact. It is for you to find whether, upon the testimony, there has been this public use and sale or not; whether it has been for the length of time, under the circumstances and conditions which I have previously stated to you. It is for you to find whether there has or has not been this abandonment or dedication to the public; and it is for you to find whether or not this invention had been introduced into public and common use prior to the application for a patent, in this country, under the conditions which I have stated to you in relation to the English patent. Whether the English

patent is or is not for the same invention, you have had the testimony of experts, and you will have the drawings and models before you. The conflict apparent in the testimony upon that point relates principally to one question, and that is, the practicability of making an operative, effective machine by the aid of the specification and drawings of the English patent. Now it is not necessary, in order to make a patent valid, that the patentee should so make the drawings in his patent that they could be used for working-drawings, or that a machine made in accordance with the exact scale of the drawings, which accompany the patent in the patent office, either in England or in this country, should be an operative machine. It is necessary, however, that the patentee should so describe his invention that a mechanic skilled in the art to which that invention relates would be able by the aid of the description and drawings of the patent to embody that invention in a practical, operative, efficient, and effectual form. That is all that is necessary; and, therefore, if you find, upon a critical examination of these drawings, that there are some slight differences in distance, or in proportion, which, if exactly carried out upon the same scale, in a machine constructed according to the patent, would require modification in order to make the machine operative, that does not affect the question. You are to consider whether, in the light of the testimony which has been introduced to you, on both sides, the English patent does or does not embody what is in the American patent, striking out of consideration those claims in the respective patents, which are not in issue here, and whether, so far as relates to that invention which is in issue here, they are or are not identical.

I am requested by the plaintiff to give you the following instructions:

I. "If the defendants give notice of special matter in defence under the general issue, and rely upon any prior knowledge or use of the thing patented which the statute may contemplate as a defence to the action, they must give the names and places of residence of those whom they intend to prove had any such knowledge, and where such use was had." I have already ruled upon this point; and I instruct you, that, upon the pleadings in this case, there being no question made that the plaintiff's patentee was the original and first inventor, and the prior use relied upon being a prior use only by the inventor himself, or under his license, it is not necessary, in the statutory notice, to give the names of the persons using, or the places where used. I therefore decline to give you the first instruction requested by the plaintiff. In the construction I give to the statute, when a party gives notice of special matter of defence under the general issue, and in that notice sets up priority of invention and of use by oth-

ers, for the purpose of showing that the patentee was not the original and first inventor, he must in his notice specify the names of the persons using, and the place where used; but if the prior use relied on be a use by the inventor, or by persons with his consent or allowance, then it is not necessary to notify him of the names of the persons using the invention, or of the places where used.

II. The second instruction asked for is, that "abandonment means a general abandonment to the public, and must be shown affirmatively and positively as affecting the interest of the party." I give you that instruction, saying here, that, in the sense in which "abandonment" is used in this connection, it is dedication to the public; a giving up of the claim to monopoly in the invention; and it must be shown affirmatively. The burden is upon the defendants.

III. The next instruction which I am requested to give you is, that "'use and on sale with the consent and allowance of the inventor,' means use and sale of the perfected invention, and not its use in an imperfect and inchoate and experimental condition. If, therefore, in this case the use prior to April 11, 1858, would seem to be that of an invention not perfected, which the inventor was striving to make perfect and practical, it would not be such a use as would work forfeiture, but would be considered experimental only." One portion of that instruction I give you. I do not give you the inferences which are drawn from it. "Use and sale with the consent and allowance of the inventor," does mean use and sale of the perfected invention, and not of the invention in an imperfect, inchoate, and experimental condition. But then, gentlemen, you must distinguish between the invention and the machine which embodies it. The invention may be perfect, and the machine which embodies that invention and several others may be an imperfect machine. In this instance, the imperfection of the rotating knife, which was the subject of another invention in these machines, would not have made this invention imperfect. Suppose that the machine had had a badly cutting knife, or that, in consequence of the imperfection of the jaws which held the knife in place, there had been so much friction that the knife did not operate, it would not be for your consideration here. You must apply this instruction to the devices and mechanism which are the subject of the invention in this patent, and not to the machine embodying several other inventions. So far, then, as relates to this invention, the public use and sale referred to must be of the perfected invention, and not of an experiment, or for the purposes of experiment, or in a merely experimental form.

IV. The next instruction requested is, that "the putting of a device intended to improve the working operation of a patented machine

upon such machine, when sold, would not necessarily be such sale of the device as would work abandonment and forfeiture of right to a patent, but might well be put on for experimental purposes, and especially where such is the best, if not the only, means for the inventor to test the practical utility of the device." I give you that substantially. I give it to you in these words: The putting of a device intended to perfect the working operation of a patented machine upon such machine, when sold, would not necessarily imply that the patentee intended to abandon it to the public, or to put it in public use or on sale. But that is a question of fact purely, for your determination. Whether he put it on merely for the purpose of experiment, or put it on and sold it with the rest of the machine, for gain and profit, and let it go into public use, is a question of fact for you to determine.

V. The next instruction asked has reference to the sixth section of the act of 1839, and I have already given it to you.

VI. The next is as follows: "Without regard to section 7. of the act of 1839, if the English machine, as shown, would require experiment and change in regard to the adjustment of the parts, in order to bring it to the perfection of the American machine, as shown, the English patent will not be allowed to work forfeiture of the American patent." I do not give you this instruction in the words in which it is requested, because I think it is ambiguous. I do, however, instruct you, that if the English machine is shown to have required further invention to make it a practical and operative machine, and to embody the same invention which is described in the American patent, it would not work a forfeiture of the American patent. I do not say that, if the English machine would require change or adjustment of its parts, it would not work such forfeiture; because a change or adjustment of its parts might have nothing to do with the question of invention. But if you find that in the English machine there was the same device, the same combination of elements to produce the same results in the same mode, so that there was an identity of invention, then it is immaterial whether it did or did not require more adjustment of parts or mechanical perfection to make it work as well or better than the American machine.

VII. The next instruction I am requested to give you is, that "it is not the policy of the law that an American inventor shall fare worse in his application for an American patent, by reason of his having previously obtained a foreign patent for the same invention, and the same having been published, than if the same thing had been patented abroad by some other person." I decline to give you that, upon the ground that it is not the duty of the court to instruct you as to what the policy of the law is, but only as to its construction.

I am also requested on the part of the defendants to instruct you:

1. "If the jury find that more than two years prior to the application of Flanders for the patent declared on, one machine embodying the invention set forth and claimed therein had, with his knowledge and consent, been sold or openly and publicly used by even one other person, he thereby forfeited his right to the patent." I give you that instruction, with the qualifications which I have already stated, and which are, that experimental use, or use to test it for the purpose of experiment, or for the mere purpose of perfection, not for gain or profit, and with no intention to put it into public use for any other purpose than experiment, is not the public use contemplated by the statute.

2. "If the jury find that more than two years prior to the application of Flanders for the grant of the patent declared on, one or more machines embodying the invention set forth and claimed therein had been sold and publicly used with his knowledge and consent, and if the jury further find that such sale and public use was caused or permitted by the said Flanders for the sake of pecuniary gain and profit directly or indirectly to himself, the same was incompatible with any use for the sake of experiment or trial of the machine, with the view of testing or perfecting it, which the law would allow, and the patent is therefore void." I do not give you that instruction in those words, because it combines a question of law and fact. Whether it is incompatible with the purpose of experiment or not, is a question not for me to determine. But I give it to you in this form: If the jury find that more than two years prior to the application of Flanders for the grant of the patent declared on one or more machines embodying the invention set forth and claimed therein had been sold and publicly used with his knowledge and consent, and if the jury further find that such sale and public use was caused or permitted by the said Flanders for the sake of pecuniary gain and profit directly to himself, and not merely for the sake of experiment and trial, with the view of perfecting the invention, then the patent is void.

3. "If the jury find that more than two years prior to the application of Flanders for the patent declared on one or more machines embodying the invention set forth and claimed therein were sold by him, or with his knowledge and consent, to be publicly used by the purchasers thereof in their ordinary and proper business, and that such machines were then capable of useful operation, when skilfully managed, and were thereupon in fact publicly put into useful operation by the said purchasers, such a sale and use worked a forfeiture of Flanders's right to the grant of a patent for the said invention." That instruction I give you.

4. "If the jury find that more than two years prior to the application of Flanders for

the patent declared on one or more machines containing and embodying the invention set forth and claimed therein had been sold by him, or with his knowledge and consent, and if they also find that the said machine or machines after such sale were put into useful operation by the purchaser or purchasers thereof more than two years prior to the said application, the forfeiture of Flanders's right to the grant of the said patent would not be avoided or removed by any alteration, modification, or improvement in the mechanical construction or mode of operation of the said machine or machines, which may have been made between the time of such sale and of such useful operation, provided that when so put into use and operation they continued to embody the said invention." I do not give you this instruction in the exact words in which it is asked, because I have already instructed you upon this subject, carefully distinguishing, what I do not think this so fully distinguishes, such modifications as amount to structural changes from such modifications as amount to mere mechanical perfection of the machine.

5. "If the jury find that more than two years prior to the application of Flanders for the patent declared on one or more machines embodying the invention set forth and claimed therein were sold by him, or with his knowledge and consent, to be used by the purchasers thereof freely and openly in their regular business, and if the jury further find that the said machines were thereafter in fact put into useful operation by the said purchasers, the said patent is invalid, even if the said machine or machines so sold were, before being put into useful operation, modified, altered, or improved, in their mechanical construction or mode of operation in respect to any parts thereof not claimed as new in the said patent." I give you that instruction, substantially, in these words: If you find that more than two years prior to the application of Flanders for the patent declared upon, machines embodying the invention set forth and claimed therein were sold by him, or with his knowledge and consent, to be used by the purchasers, and were freely, openly, and publicly put into useful operation by them, the patent is invalid without regard to any such modification, alteration, or improvement in the other parts of the machine which did not embody any part of this invention and were not claimed as new in this patent.

6. "If the jury find that the English patent granted to Newton, April 27, 1858, was solicited and procured at the instance and request and for the benefit of the said Flanders, and that the specification and drawings thereof set forth substantially the same mechanism, arranged to operate in substantially the same mode as the mechanism set forth and claimed in the patent declared on, and if the jury further find that, prior to the application of the said Flanders for the grant

of the said letters-patent declared on, one or more machines embodying the invention therein set forth and claimed had been openly and regularly used by others in the ordinary prosecution of the business of splitting leather in a leather manufactory within the United States, then the said invention had been introduced into public and common use within the meaning of the statute in such case made and provided, and the said Flanders was thereby debarred from obtaining and receiving a valid patent for the same." I do not give you that instruction, because I have already stated to you that the "public and common use" mentioned in the sixth section of the act of 1839 is a different use from the "public use" mentioned in the seventh section, and this instruction seems to contemplate the identity of the two.

7. "If the jury find the facts in respect to the English patent to be as set forth in the sixth instruction prayed for, and the jury further find that within the United States, prior to the application of the said Flanders for the grant of the letters-patent declared on, machines embodying the invention therein set forth and claimed had been put and continued on sale to the public, and some of them had been actually sold to the public and put into open, continuous, and ordinary use by the purchasers thereof, then the said invention had been introduced into public and common use within the meaning of the said statute, and the said patent declared on is invalid." I have given you, gentlemen, what amounts very nearly to the instruction requested here, and I think it supersedes the necessity of my giving you this, because I have given to you full and general instructions as to what would constitute common use, and have stated to you that you had a right as a question of fact, in determining what amounted to common use, to consider the nature of the device, and result intended to be effected by the invention and the machine which embodied it, the number of persons in the community or of manufactories who might use it, and that there might be a common use of one invention which would be a very specific, restricted, and special use of another.

8. "If the jury find the facts in respect to the English patent to be as set forth in the sixth instruction prayed for, and if the jury further find that within the United States, and prior to the application of the said Flanders for the grant of the said patent declared on, machines embodying the invention therein set forth and claimed had been put and continued on sale to the public, and had in fact been sold to the public in numbers sufficient to supply the public demand for the same, and had thereupon been put into open and ordinary use by the purchasers thereof, then the said invention had been thereby introduced into public and common use within the meaning of the statute in such case made and provided, and the grant of

a valid patent therefor was prevented." I give you that instruction, omitting the words "open and ordinary use," and substituting the words "public and common use" for them.

9. "In determining how many such machines were sufficient to supply the public demand for the same at any time prior to the said application, the jury may properly take into account the character of the machine itself in respect to its cost of construction, the expense of purchasing and of running it, the number of men then having sufficient knowledge and skill to operate it effectively, and the number of places in the country where it could then have been profitably employed." I have already instructed you that you were entitled to take those elements into consideration in determining what constituted the "common use" of this invention.

10. "If the jury find that, prior to the application of the said Flanders for the patent declared on, machines embodying the invention set forth and claimed therein, and so constructed as to be capable of useful operation, were by others, with the said Flanders's knowledge and consent, put and continued on sale, and in fact sold and put into public use, and if the jury further find from the acts and declarations of the said Flanders that he intended to give to all purchasers of the said machines the free and unrestricted use of the said invention embodied therein, and to allow the sale and public use of the said machines to be continued by others without any claim on his part of any adverse right to the said invention, then he could not afterward resume his original rights in respect thereto, nor obtain a valid patent." I give you that instruction. That is to say: If you find, as matter of fact, that Flanders had once dedicated this invention to the public; had abandoned it, and allowed it to be made and sold and to go into public use with the other inventions embodied in the machine; it would not be competent for him to resume his original right to it. If a person has once abandoned his invention or dedicated it to the public, then, as a matter of law, it has gone from him, and he has no power of revocation or resumption.

11. "If the jury find that, prior to the application of Flanders for the patent declared on, he assigned, gave, or surrendered to others his rights to take a patent for the invention set forth and claimed therein, and that he in fact did not secure a patent for the benefit of those to whom he had so assigned, sold, or surrendered his said right, but acquiesced in and encouraged the sale and public use by them and their vendees of machines embodying the said invention, and that such machines were in fact, by those to whom the said Flanders had so assigned, sold, or surrendered his said right, sold, and by their vendees put into open and ordinary

use with his, the said Flanders's, knowledge and consent, and if the jury further find that the said Flanders did not intend to apply for a patent to secure the said invention for his own benefit, and did intend to give the free and unrestricted use of the said invention to all purchasers of the said machines, then it was such a dedication and abandonment to the public as he could not afterward recall or revoke, and the said patent is void." I decline to instruct you that any specific state of facts would in law amount to abandonment, but I give you what is substantially this instruction. I have told you what would constitute abandonment; and I repeat to you, that if Flanders put this device upon these machines, without the intention of obtaining a patent for it, and allowed them to go out to the public, and to come into public use, so that whoever bought one of these machines embodying this device and invention had a right to use it without objection on his part, these are facts from which the jury, if they choose, have a right to presume a dedication to the public. Abandonment or dedication to the public is a question of fact for the jury to determine, not for the court; and I instruct you, that, if you find the state of facts to be as set forth in this instruction asked for, you have a right to find that Flanders abandoned his invention to the public, without 'strutting you that that follows as a matter of law.

12. "If the jury find that, prior to the application of the said Flanders for the patent declared on, the invention therein set forth and claimed was, with his knowledge and consent, embodied in leather-splitting machines so as to be usefully operative therein, and that such machines were, with his knowledge and consent, put and continued on sale to the public, and some of them actually sold to others and put into open and ordinary use, and if the jury further find that the said Flanders intended to give to the public the free and unrestricted right to continue the sale and use of such machines, he thereby forfeited his original right to the grant of a patent for the said invention." I give you that instruction, adding only one word: "And that such machines were, with his knowledge and consent, put and continued on sale to the public, and some of them actually sold to others, and put into open and ordinary and public use."

It is unnecessary that I should incumber you with a minute statement of the several issues of fact which are presented by the pleadings in this case. You will, therefore, consider the plea of the general issue, and under it the special defences set forth in the notices, and you will be prepared, when you come in, to answer to the court these questions:

First, Whether or not the invention was in public use and on sale, with the knowledge and consent of the inventor, more than two

years previous to his application for the patent in issue.

Second, Whether or not the inventor had abandoned his said invention to the public prior to his application for the said patent. If you find that his invention was in public use and on sale, or that he had abandoned it in accordance with the instructions which I have previously given you, it is unnecessary for you to consider the other issue; but if you should not so find, then you will consider the special plea, and be prepared to answer:

Third, Whether or not the said invention had been patented in England by the said inventor more than six months prior to his application for the United States patent here in issue, and whether or not the said invention had been introduced into public and common use within the United States prior to his said application for the said United States patent.

The jury found for the defendants; and, upon being interrogated by the court, answered each of the foregoing questions in the affirmative.

[NOTE. So far as ascertained, there are no other cases reported prior to 1880 involving this patent.]

Case No. 302a.

AMERICAN INS. CO. et al. v. CANTER.

[1 Pet. (26 U. S.) 516, note.]

Circuit Court, D. South Carolina.

TREATIES—CEDED TERRITORY—LEGAL STATUS OF FLORIDA—FEDERAL AND TERRITORIAL COURTS—CONFLICTING JURISDICTION.

[1. The right of the United States to acquire territory by cession from a foreign sovereignty is incidental to the treaty-making power, and the government of such acquisition is left to the legislative power of the Union so far as that power is controlled by treaty; but the government and laws of the United States do not extend to such territory by the mere act of cession, for the laws, rights, and institutions of the territory so acquired remain in full force until rightfully altered by the new government.]

[See note at end of case.]

[2. Act May 26, 1824, (4 Stat. 45.) providing that each of the superior courts of the territory of Florida shall have the same jurisdiction within its limits, "in all cases arising under the laws and constitution of the United States," which by the act of September 24, 1789, § 10, (1 Stat. 77.) was vested in the court of the district of Kentucky, restricts the jurisdiction of the superior courts to "cases arising under the laws and constitution of the United States," and does not include causes for salvage arising on wreck of the sea, which are left to be administered under the laws of the territory.]

[See note at end of case.]

[3. Act March 30, 1822, § 5, (3 Stat. 655.) establishing a territorial government for Florida, with a legislative council, with "power to alter, modify, or repeal the laws which may be in force at the commencement of this act," provided that "the legislative powers shall extend to all rightful subjects of legislation, but no law shall be valid which is inconsistent with the constitution and laws of the United States." *Held*, that jurisdiction of salvage cases was a

rightful subject of legislation, and that the territorial legislature had the right to create a municipal court with jurisdiction of such cases.]

[See American Ins. Co. v. Johnson, Case No. 303, note.]

[See note at end of case.]

[4. An action to set aside a sale of wrecked property, directed by a territorial court of Florida to satisfy demand for salvage, on the ground that the court was without jurisdiction, is not a case "arising under the laws of the United States," although the validity of the sale depends on the legality of powers exercised by the territorial court, which depends on powers vested in the territorial legislature, which finally depends on acts of congress. *Osborn v. Bank of U. S.*, 9 Wheat. (22 U. S.) 738, not followed.]

[5. The judicial acts of the United States did not become laws in the territory of Florida under the act of March 30, 1822, § 9, (3 Stat. 656,) making in force within the territory all public laws of the United States not repugnant to the provisions of the act, as no circuit and district courts of the United States had been organized in the territory.]

[See American Ins. Co. v. Johnson, Case No. 303, note.]

[See note at end of case.]

[6. Under the act of March 30, 1822, § 5, (3 Stat. 655,) reserving to congress the right to repeal acts of the territorial legislature of Florida, territorial enactments did not require the ratification of congress to render them valid.]

[See note at end of case.]

[7. Act May 26, 1824, § 1, (4 Stat. 45,) gives original jurisdiction to the superior courts of the territory of Florida in all cases of \$100 in value; and Act March 30, 1822, §§ 6, 7, (3 Stat. 656,) provide "that the judiciary power shall be vested in two superior courts, and in such inferior court and justices of the peace as the legislative council of the territory may from time to time establish," and confine the superior courts exclusively to jurisdiction over the cases arising under the laws and constitution of the United States of which the Kentucky district court had jurisdiction. *Held*, that the act of the legislative council erecting a territorial court with jurisdiction of salvage cases was valid, as such council was not precluded by statute from making any distribution of jurisdiction consistent with preserving to the superior court a concurrent jurisdiction.]

[See American Ins. Co. v. Johnson, Case No. 303, note.]

[See note at end of case.]

[Appeal from the district court for the district of South Carolina.

[In admiralty. Libel by the American Insurance Company and the Ocean Insurance Company to set aside a judicial sale of 356 bales of cotton, (David Canter, claimant.) From a decree setting aside the sale, and directing the restitution to libelants of a part of the cotton, both libelants and claimant appeal. Reversed. Decree of reversal subsequently affirmed on appeal to the supreme court. 1 Pet. (26 U. S.) 511.]

H. N. Cruger, for libelants.

King & Gadsden, for claimant.

JOHNSON, Circuit Justice. This case comes up on a cross appeal, from a decision of the district court, adjudging a part of the res subjecta to the libelants, and the residue to the claimants. The decree establishes the right of the parties libelant to recover,

but dismisses the libel as to a great proportion of the cotton, on the ground of a defect of evidence to identify it. From the pleadings and testimony, it appears that the libelants were insurers to a large amount on a quantity of cotton shipped by certain individuals, in the French ship Point a Petre, on a voyage from Orleans to Havre; that the ship was stranded and lost on the coast of Florida, and the cotton abandoned to these underwriters. That the cotton libeled was a part of the cargo of the Point a Petre is admitted; but it appears, that after being saved from the wreck, it was deposited at Key West, where it was sold and purchased by Canter, the claimant, under the order of a municipal court, constituted under a law of Florida, with jurisdiction over cases of salvage.

The preliminary question alone has now been argued, to wit, whether the sale by that court was effectual to divest the interest of the underwriters. The general principle is not denied as to the mutations of property which takes place through the intervention of courts of justice; but it was argued that the constitution of the United States vests the admiralty jurisdiction exclusively in the general government. That no state can exercise a concurrent jurisdiction over admiralty and maritime causes, and that salvage was of that description. Wherefore the legislature of Florida had, in organizing this court, exercised a power not legally vested in it, and the act constituting it being a void act, it was as though no such court existed. That moreover, the nullity of that court did not rest merely on an inherent want of power to constitute it, but on positive prohibition contained in the acts organizing the government of the territory to pass any laws contrary to the laws and constitution of the United States. That the act organizing this court was an act of this nature, inasmuch as jurisdiction of causes, admiralty and maritime, were expressly vested in the superior courts of Florida; and that, without the right of exercising a concurrent power over the subject vesting this jurisdiction in an inferior court, is quoad hoc, divesting the superior court of its jurisdiction, and rendering null the act of congress, which vests the admiralty jurisdiction in that alone. On the other hand, it has been contended, that salvage is a subject of municipal and common law cognizance, not exclusively belonging to the admiralty; that although the constitution may vest the exclusive cognizance of admiralty and maritime causes in the United States, in those instances in which the admiralty at the adoption of the constitution had exclusive jurisdiction of the subject, yet, in those cases in which the common law exercised a concurrent jurisdiction with the admiralty, there is no reason for carrying the grant beyond a concurrent jurisdiction with the common law courts of the states. That

the court which ordered this sale was properly a municipal court, and a court of a separate and distinct jurisdiction from the courts of the United States, and as such its acts are not to be reviewed in a foreign tribunal; of which description, it was contended, were the courts of the United States for South Carolina district. That the district of Florida was no part of the United States, but only an acquisition or dependency, and as such the constitution, per se, had no binding effect in or over it. And, finally, that argument drawn from the assumed fact that the admiralty and maritime jurisdiction was by law expressly vested in another court, originates in a misconstruction of the law, inasmuch as no act of congress vests in the superior court any other portion of the jurisdiction of the Kentucky court than that of causes arising under the laws of the United States. That this is not a cause of that description; it is one arising under a casualty in which no law of the United States came necessarily under review. To this it was replied that it was a cause arising under a law of the United States, and the case of *Osborn v. Bank of U. S.* [9 Wheat. (22 U. S.) 738] was quoted and insisted on as furnishing a decision in point. That if the cause there was one of that description, because the bank was incorporated by a law of the United States, for the same reason was this a cause of that description, because the body politic here was like the body corporate there, created by a law of the United States; and, if at every step there the court was met by the law which made the one a bank, gave it power to make by-laws, and to act under those by-laws, so was it equally met here by the laws which made this a state, gave it power to legislate, and legalized this transfer of property under laws which, without the laws of the United States, were mere nullities.

It becomes indispensable to the solution of these difficulties that we should conceive a just idea of the relation in which Florida stands to the United States, and give a correct construction to the second section of the act of congress of May the 26th, 1824, [4 Stat. 45,] respecting the territorial government of Florida; correct views on these two subjects will dispose of all the points that have been considered in argument. And first, it is obvious that there is a material distinction between the territory now under consideration and that which is acquired from the aborigines, (whether by purchase or conquest,) within the acknowledged limits of the United States, as also that which is acquired by the establishment of a disputed line. As to both these there can be no question that the sovereignty of the state or territory within which it lies, and of the United States, immediately attach, producing a complete subjection to all the laws and institutions of the two governments, local and general, unless

modified by treaty. The question now to be considered relates to territories previously subject to the acknowledged jurisdiction of another sovereign; such as was Florida to the crown of Spain. And on this subject we have the most explicit proof that the understanding of our public functionaries is, that the government and laws of the United States do not extend to such territory by the mere act of cession. For, in the act of congress of March the 30th, 1822, section 9, [3 Stat. 659,] we have an enumeration of the acts of congress, which are to be held in force in the territory; and, in the 10th section, an enumeration, in nature of a bill of rights, or privileges, and immunities which could not be denied to the inhabitants of the territory if they came under the constitution by the mere act of cession. As, however, the opinion of our public functionaries is not conclusive, we will review the provisions of the constitution on this subject.

At the time the constitution was formed, the limits of the territory over which it was to operate were generally defined and recognized. These limits consisted in part of organized states, and in part of territories, the absolute property and dependencies of the United States. These states, this territory, and future states to be admitted into the Union, are the sole objects of the constitution; there is no express provision whatever made in the constitution for the acquisition or government of territories beyond those limits. The right, therefore, of acquiring territory is altogether incidental to the treaty-making power, and perhaps to the power of admitting new states into the Union; and the government of such acquisitions is, of course, left to the legislative power of the Union, as far as that power is controlled by treaty. By the latter we acquire either positively or sub modo, and by the former dispose of acquisitions so made; and in case of such acquisitions I see nothing in which the power acquired over the ceded territories can vary from the power acquired under the law of nations by any other government over acquired or ceded territory. The laws, rights, and institutions of the territory so acquired remain in full force until rightfully altered by the new government. In the present instance, however, the laws of Florida were not left to derive their force from general principles alone; for by the 13th section of the same act it is declared, "that the laws in force in the said territory at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force until altered, modified, or repealed by the legislature. From these views of the subject it results, 1st. That, whatever may be the correct idea of the distribution of the admiralty jurisdictions as between the states and the United States, it can have no application here, since this territory does not stand in the relation of a state to the United

States. 2nd. That, whether salvage be of admiralty jurisdiction exclusively or not, it is immaterial to this cause, since the whole power of legislation over the subject in Florida existed exclusively in the general government. 3rd. That the general principles of international law on the immunities of foreign courts and foreign decisions have no application here, since the courts of Florida have a common origin with this court. Our authority flows from the same source. We are connected at the fountain-head, governed by the same legislative power, and have equal access to the laws which constitute and govern us. It follows that neither can regard the decisions of the other, if acting without authority derived through the legislature of the Union. The act entitled "An act for the establishment of a territorial government in Florida," [Act of March 30, 1822; 3 Stat. 654.] and the acts in pari materia of the 3d March, 1823, [3 Stat. 750.] and the 26th May, 1824, [4 Stat. 45.] constitute what may be properly termed the constitution of Florida. The first provides for the appointment of an executive, with powers not material here to be considered. It constitutes a legislature, organizes a judiciary, and imposes upon the one and the other some general restrictions, subject to which they are empowered to exercise the legislative, judicial, and executive powers which belong generally to an organized government. The act of March, 1823, goes over the same ground, and repeals the preceding act so far as the provisions of the latter are inconsistent with those of the former act. And with regard to both, or either, as far as the latter remains unrepealed, the position is incontrovertible that the legislative power could enact nothing inconsistent with what congress has made inherent and permanent in the form of government of the territory. Therefore, if the admiralty jurisdiction is made inherent in the superior courts, it was not in the power of the territorial legislature to transfer it to any inferior tribunal. To determine this question we must examine the provisions of the several acts touching the exercise of legislative and judicial power.

In defining the legislative power, the words of the act of 1822 are these: "They shall have power to alter, modify or repeal the laws which may be in force at the commencement of this act. These legislative powers shall, also, extend to all the rightful subjects of legislation; but no law shall be valid which is inconsistent with the constitution and laws of the United States, or which lay any person under restraint, burthen or disability, on account of his religious opinions, professions or worship; in all which he shall be free to maintain his own, and not to be burthened with those of another." The language of the act of 1823 [3 Stat. 751, § 5] is: "They shall have legislative power over all rightful subjects of legislation; but no law shall be valid which is inconsistent with the

constitution and laws of the United States; or which lay any person under restraint," &c.

That jurisdiction of salvage is a rightful subject of legislation is not to be questioned. The jurisdiction, then, vested by the legislature in this municipal court, must be sustained, unless inconsistent with the laws or constitution of the United States. But with the constitution, in legislating on the subject of salvage, there can be no incongruity; it is only, therefore, the supposed inconsistency with the act of congress of May, 1824, that can impugn it. The provisions of that act upon this subject are these: "Each of the said courts (meaning the superior courts of the district of Florida) shall moreover have and exercise the same jurisdiction within its limits, in all cases arising under the laws and constitution of the United States, which, by an act to establish the judicial courts of the United States, approved the 24th day of September, 1789, [1 Stat. 73.] and 'an act in addition to the act, entitled an act to establish the judicial courts of the United States, approved the 2d of March, 1793,' [1 Stat. 33, c. 22.] was vested in the court of Kentucky district." The question, then, is reduced to this, in what cases arising under the laws and constitution of the United States is jurisdiction vested in the court of Kentucky district by the two acts of the 24th September, 1789, and the 2d March, 1793? It has been erroneously assumed, that all the jurisdiction vested by those acts in the Kentucky court, was vested by this law in the superior court of Florida; it is expressly confined to cases arising under the laws and constitution of the United States; and the reason is obvious. In all cases arising under the laws of the district, jurisdiction is given by the preceding section of the same act; but, as most of the laws of the United States had been made of force in the territory as before observed, the 2d section is intended to extend the jurisdiction of the court to cases arising under the latter laws, and further, if necessary, to all cases arising under laws of the United States, over which jurisdiction had been given to the Kentucky court,—a practice in defining jurisdiction that had been pursued by congress with regard to all the territories subsequent to the time when the Kentucky court was established. In the original organization of the judiciary of the United States, Kentucky and Maine were excluded from the arrangement of circuits. And, as no circuit court was required in law to be held there, the district court was vested with circuit court jurisdiction. This is the whole purport of the act of 1789, referred to in the Florida act of 1824. The other act there referred to, to wit, that of 1793, has no other operation as to the Kentucky court, besides vesting in it the power given to the circuit courts to hold special sessions. If the Florida act were as broad in its operation as the two

acts referred to, it would indeed be a serious question, whether the legislature of Florida could divest its superior court of any part of its admiralty jurisdiction, as existing in and exercised by the district courts of the United States. But I think it incontestable that the jurisdiction here given is explicitly restricted to so much of the jurisdiction of the Kentucky court only as comes within the description of cases arising under the laws and constitution of the United States. Now, excepting in the single instance of the present Bank of the United States, congress never has vested a jurisdiction even in its circuit courts, generally, over causes arising under the constitution and laws of the United States. It has given an appellate jurisdiction, and that only to the supreme court, over causes of that description, when such causes arise in the state courts, but we look in vain through the law defining the jurisdiction of the Kentucky court for any general claim to jurisdiction under the description of "cases arising under the laws and constitution of the United States." Yet, very ample operation must be given to these words of the Florida act, considered in reference to the jurisdiction actually possessed and exercised by the Kentucky court, under the two laws of 1789 and 1793. The land laws, revenue laws, laws of trade, criminal laws, and many other public laws, were all laws of the United States, under which cases might arise, and over which the Kentucky court was undoubtedly vested with jurisdiction. Nor do I doubt that the admiralty jurisdiction over revenue cases, as exercised by the Kentucky court, is rightfully vested (and that beyond the control of the Florida legislature) in the superior court of this district. But here, it appears to me, the grant of jurisdiction terminates. The admiralty jurisdiction, beyond this limit, is left to be administered under the laws of the territory, for this simple reason, that other causes, occurring in the admiralty, cannot be brought within this description of causes, arising under the laws of the United States. At least this appears incontrovertible, when applied to questions of salvage arising on wreck of the sea—to questions of salvage on captures as prize of war, I am inclined to think it would extend, at least, to all causes, in which the distribution of prize money depends upon laws of the United States. But it is argued that this is a cause arising under the laws of the United States, within the reason of the decision of the supreme court, in the case of *Osborn v. Bank of U. S.*; that the validity of the sale, divesting the interests of these libellants, depends upon the legality of the powers exercised by the court of Key West, which depends upon the powers vested in the legislature of Florida, which finally depends upon the acts of congress which created the body politic of Florida; that creating a body politic, is only creating a body

corporate on a larger scale, but essentially the exercise of one and the same power; that whether the one or the other sues or defends, legislates or acts, by itself or its agents, all must be done with reference to the law that creates and organizes it; and in fine. In the language of the court, in the case cited, "the charter not only creates it, but gives it every faculty that it possesses. The power to acquire rights of any description, to transact business of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of the law, but all its actions, and all its rights, are dependent on the same law," &c.

I have taken a week to reflect upon this question alone, and I cannot withhold from the gentleman, who argued the cause for the libellants, an acknowledgment, that I have not been able to draw any line of discrimination, between this and the decided cause, which satisfies my mind. Yet, I am thoroughly persuaded that the learned men who decided that cause, never contemplated that such an application would have been given of their decision. I am happy in the prospect that this cause will finally be disposed of elsewhere, not doubting that the mental acumen of those who decided the other, will be found fully adequate to distinguish or reconcile the two cases, on grounds which have escaped my reflections. At present, I must content myself with observing, that it is too much to require of a court, upon mere analogy, to sustain an argument that not only proves too much, if it proves anything, but which leads, in fact, to positive absurdity. It will be recollected that it is not only in the territories that we find bodies politic created by the laws of the United States, but that near one-half the states derive their origin and admission into the Union under laws of the United States. But will it be contended that all the causes arising under their laws, are causes arising under laws of the United States? It is true, that in the District of Columbia, the appellate jurisdiction given to the supreme court, can be maintained only on the ground that the laws of that District are laws of the United States; and that all the laws of the district of Florida derive directly, or indirectly, their force from the same origin. But in the case of the District of Columbia, this power is expressly given to the supreme court, and we are not now inquiring whether congress might not have vested this jurisdiction in the superior court of Florida, but whether they have so vested it. The simple inquiry is, what force and operation is to be given to those words, in the second section of the act of 1824, "Jurisdiction in all cases arising under the laws and constitution of the United

States?" And what could be more absurd than to decide that the same force is to be given to those words as if they were not there? Expunge that sentence altogether, and the construction of the clause will be necessarily and precisely that contended for by the libelants, to wit, an unrestricted grant of the jurisdiction vested by law in the Kentucky court. It not unfrequently happens, that in the construction of a whole law, or a section, or a clause of law, words, or even sentences, are declared surplusage, or irreconcilable with other words or sentences; but here we are called upon to give a meaning to words, which deprives them of all meaning, and that without any incongruity with other words, or want of distinct meaning in themselves, but from an analogy with another case, in which similar words have received a construction which produces that consequence, when applied to these words. Until better advised, I must maintain that these words have a definite meaning and bearing in their place in this law, and amount to a restriction of the jurisdiction of the superior court of Florida to a class of cases which does not comprise salvage on wreck of the sea.

Some minor grounds have been dwelt upon in argument, of which it is proper to take a brief notice. It has been argued that the superior court of Florida acquired jurisdiction in another way, to wit, that the 9th section of the Florida act of 1822 makes of force in the territory all public laws of the United States not repugnant to the provisions of that act; that the judiciary acts are acts of that description, and, therefore, are laws of the territory. But this argument is without point, until such an organization of circuit and district courts of the United States takes place in that territory as will admit of the application of this law to the jurisdiction of its courts; or, rather, it takes effect as to the subject now under consideration only through those clauses which relate to the jurisdiction of the Kentucky court, and thus returns, in a circle, to the argument which we have been before considering.

It has also been contended that the Florida act, under which the court at Key West was organized, is void, 1st, because never ratified by congress; and 2nd, because inconsistent with that provision of the first section of the act of 1824, which gives original jurisdiction to the superior courts of the territory in all cases of \$100 in value. To the first of these reasons, the 5th section of the act of 1822 furnishes an unequivocal answer. It is only the right of repealing that congress retains over the laws of Florida. That clause which requires the governor to report the laws of the territory to the president, to be laid before congress, is merely directory, but has no bearing upon the validity of those laws, until repealed. The words are "which, if disapproved by con-

gress, shall thenceforth be of no force;" necessarily implying their previous operation. With regard to the second, I have no doubt but that the individual who chooses to resort to his common law remedy, of an action for work and labor, instead of libeling for salvage, may maintain an original suit in the superior court of the territory. But I see nothing in the act which makes that jurisdiction exclusive, in a case in which both remedies are open to the choice of the party. The language of the 6th section is, "that the judicial power shall be vested in two superior courts, and in such inferior court and justices of the peace as the legislative council of the territory may from time to time establish." The 7th section of this act, and the 2d of the subsequent act, confine to the superior courts exclusively the jurisdiction over the cases arising under the laws, &c., of the United States, of which the Kentucky court had jurisdiction; but as to all others, I perceive nothing in the law which precluded the Florida legislature from making any distribution of jurisdiction, consistent with preserving to the superior court a concurrent jurisdiction, to be exercised according to its own terms.

It is proper to remark here, that whatever may be the fact as to the integrity and propriety, which regulate the proceedings of the court of Key West, there is nothing novel or unprecedented in the organization of that court. The model of it is of great antiquity, and throughout the civilized world some such summary mode of adjusting salvage, in cases of wreck of the sea, is to be found. We had just such a court here, and I believe in most of the states, when the constitution was adopted; and although jurisdiction of the subject has been everywhere abandoned to the district courts of the United States, where it is generally adjusted with great solemnity and discretion, and, I believe, very much to the satisfaction of all the commercial world, there exists no reason to preclude the congress of the United States from constituting similar summary tribunals, whenever and wherever it may become necessary. The establishment of this tribunal, therefore, however justice may be distributed in it, is no unwarrantable exercise of the legislative or judicial power vested in Florida.

Finally, I am of opinion that there is error in the decision of the district court, and adjudge that it be reversed, and the goods restored to the claimant with costs.

[NOTE. The decision of the circuit court was affirmed on appeal by the supreme court, Chief Justice Marshall rendering the opinion, in the course of which he said: "The constitution confers absolutely on the government of the Union the powers of making war and of making treaties. Consequently, that government possesses the power of acquiring territory, either by conquest or by treaty. The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere

military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by that treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated 'political,' is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force, until altered by the newly-created power of the state. On the 2d of February, 1819, Spain ceded Florida to the United States. * * * This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. They do not, however, participate in political power, they do not share in the government, till Florida shall become a state. In the mean time Florida continues to be a territory of the United States, governed by virtue of that clause in the constitution which empowers congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.' * * * The powers of the territorial legislature extend to all rightful objects of legislation, subject to the restriction that their laws shall not be 'inconsistent with the laws and constitution of the United States.' * * * All the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force until altered by the government of the United States. Congress recognizes this principle, by using the words 'laws of the territory now in force therein.' No laws could then have been in force but those enacted by the Spanish government. If, among these, a law existed on the subject of salvage,—and it is scarcely possible there should not have been such a law,—jurisdiction over cases arising under it was conferred on the superior courts, but that jurisdiction was not exclusive. A territorial act, conferring jurisdiction over the same cases on an inferior court, would not have been inconsistent with the 7th section of the act of 1823, vesting the whole judicial power of the territory 'in two superior courts, and in such inferior courts and justices of the peace as the legislative council of the territory may from time to time establish.' * * * The 11th section of the act declares 'that the laws of the United States relating to the revenue and its collection, and all other public acts of the United States, not inconsistent or repugnant to this act, shall extend to, and have full force and effect in, the territory aforesaid.' The laws which are extended to the territory by this section were either for the punishment of crime or for civil purposes. Jurisdiction is given in all criminal cases by the 7th section, but in civil cases that section gives jurisdiction only in those which arise under and are cognizable by the laws of the territory. Consequently all civil cases arising under the laws which are extended to the territory by the 11th section are cognizable in the territorial courts, by virtue of the 8th section; and in those cases the superior courts may exercise the same jurisdiction as is exercised by the court for the Kentucky district. * * * The constitution and laws of the United States give jurisdiction to the district courts over all cases in admiralty; but jurisdiction over the case does not constitute the case itself.

* * * The constitution declares that 'the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction.' The constitution certainly contemplates these as three distinct classes of cases, and, if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them in the constitution is, we think, conclusive against their identity. A case in admiralty does not, in fact, arise under the constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise. It is not, then, to the 8th section of the territorial law that we are to look for the grant of admiralty and maritime jurisdiction to the territorial courts. Consequently, if that jurisdiction is exclusive, it is not made so by the reference to the district court of Kentucky. * * * The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3d article of the constitution, but is conferred by congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states in those courts only which are established in pursuance of the 3d article of the constitution, the same limitation does not extend to the territories. In legislating for them, congress exercises the combined powers of the general and of a state government. We think, then, that the act of the territorial legislature, erecting the court by whose decree the cargo of the Point a Petre was sold, is not 'inconsistent with the laws and constitution of the United States,' and is valid. Consequently, the sale made in pursuance of it changed the property." 1 Pet. (26 U. S.) 511.]

Case No. 302b.

AMERICAN INS. CO. v. CANTER.

[3 Pet. (28 U. S.) 316.]

Circuit Court, D. South Carolina. 1829.*

ADMIRALTY—DECREE—DAMAGES TO RESPONDENT
—PRACTICE.

[A respondent in an admiralty suit may raise the question of his damages, upon a remand of the cases, after affirmance by the supreme court of a decree which is silent upon that question.]
[See note at end of case.]

[In admiralty. The original libel in this case was by the American Insurance Com-

*[Nowhere fully reported. The report here given was compiled from the report of the case in the supreme court. 3 Pet. (28 U. S.) 316.]

*[Affirmed by supreme court in *Canter v. American Ins. Co.*, 3 Pet. (28 U. S.) 308; but see note at end of case.]

pany against Three Hundred Fifty-Six Bales of Cotton, (David Canter, claimant.) From a decree for libelants (nowhere reported) both parties appealed, and this court reversed the decision, and decreed restitution. American Ins. Co. v. Canter, Case No. 302a. On libelants' appeal, this decree was affirmed by the supreme court. 1 Pet. (26 U. S.) 511. The case again came before this court upon the mandate from the supreme court and claimant's application for a reference to fix the amount of his damages was granted against libelant's protest (nowhere reported.) The hearing is now on the register's report. Decree for claimant. From this claimant appealed to the supreme court, where the decree was affirmed. Canter v. American Ins. Co., 3 Pet. (28 U. S.) 307. See note at end of case.

[The libelants entered their protest against the reference on the ground that the mandate gave no authority to inquire into damages; that none had been in fact awarded, either by the district, circuit, or supreme court; and that the libelants were not in any manner liable for damages. The register, notwithstanding the protests, proceeded to inquire into the damages, and made his report thereon to the circuit court, where the same grounds of objection were again taken by the libelants. The court, upon the hearing, asserted the right to inquire into the damages, as a matter undisposed of in the former decree, but denied any allowance of them upon the merits, and decreed costs and expenses only to the claimant.]

[NOTE. This decree of the circuit court is nowhere reported. On claimant's appeal, this decree was affirmed by the supreme court, on the ground that there was no authority to inquire into the question of damages. The court, per Mr. Justice Story, said that "the original decree of restitution, with costs, without any allowance of damages, or any express reservation of that question, was a virtual denial of damages, and a final decree as to the demand of damages set up by Canter in his original claim. * * * We wish it now to be understood by the bar, as the settled practice of this court, that wherever damages are claimed by the libelant or claimant in the original proceedings, if a decree for restitution and costs only passes, it is a virtual denial of damages; and the party will be deemed to have waived the claim for damages, unless he then interposes an appeal or cross appeal to sustain that claim. * * * As to the costs and expenses, we perceive no error in the allowance of them in the circuit court. They are not matters positively limited by law, but are allowed in the exercise of a sound discretion of the court; and, besides, it may be added that no appeal lies from a mere decree respecting costs and expenses." Canter v. American Ins. Co., 3 Pet. (28 U. S.) 307.]

AMERICAN INS. CO., (CARPENTER v.)

[See Carpenter v. American Ins. Co., Case No. 2,428.]

AMERICAN INS. CO., (HOLBROOK v.)
[See Holbrook v. American Ins. Co., Case No. 6,589.]

Case No. 303.

The AMERICAN INS. CO. et al. v. JOHNSON.

[1 Blatchf. & H. 9.]

District Court, S. D. New York. Sept. 15, 1827.

ADMIRALTY JURISDICTION—PARTIES—MARITIME TRANSACTIONS—SALVAGE.

1. Parties whose interests rest upon a cause of action common to all, may unite in the same libel in admiralty, though as between themselves their interests are separate and distinct.
2. A libel in personam, resting upon a common cause of action, may be filed for the libelants and for all others interested, whenever the whole subject matter can be disposed of in one suit.
3. A libel may be amended on motion by striking out unnecessary and impertinent allegations.
4. Admiralty courts have jurisdiction equally in personam and in rem.
5. When admiralty jurisdiction has once attached, it is not divested by reason of any further acts done upon land in continuation of the maritime act which gave jurisdiction.
6. Admiralty jurisdiction, when administered under the restrictions of the English jurisprudence, is co-extensive with the ebbing and flowing of the tide.
7. The test of admiralty jurisdiction is whether the transaction is of a maritime character.
[Cited in The Richard Busteed, Case No. 11,764; Five Hundred and Twenty-Eight Pieces of Mahogany, Id. 4,845.]
8. A party deprived of his property on the high seas in any manner has, as a general principle, his remedy in admiralty.
[Cited in Five Hundred and Twenty-Eight Pieces of Mahogany, Case No. 4,845.]
9. Where money is paid by the owner of property to the purchaser of it under an unauthorized sale to satisfy a claim against it for salvage, if it is paid for the purpose of recovering possession of the property, and with an express reservation of all rights, the owner is not prevented from maintaining an action against the salvor founded upon the wrongful sale.
10. The salvor in such case, if he has not been guilty of an intentional tort, is liable only to the extent of the salvage received by him.
11. A salvor forfeits all claims to salvage by neglecting to inform the salvaged vessel beforehand of an imminent and secret danger known to him, and against which he is able to warn her.
12. But he may be entitled to a compensation for services performed, although his conduct has been such as to forfeit all claims to a salvage remuneration.
13. Testimony taken ex parte is to be received with the greatest caution.

In admiralty. This was a libel in personam, in behalf of ten Marine Insurance Companies of the city of New-York [against

[Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

Charles Johnson.] The libellants were underwriters upon the cargo of the brig Hercules, by twenty-eight several policies, to the amount of \$151,875, for a voyage from New-York to Mobile. The brig sailed with a cargo valued at \$180,000, and, in September, 1825, grounded on Carysfort reef on the coast of Florida. The respondent, who was master of a wrecking schooner, saw the Hercules the day before she grounded. At the time the two vessels came in sight of each other the wind was N. E., the schooner standing S. W. by S., on a direct course to Key West, and the brig about S. S. E. The schooner was to the windward, and passed the brig the same day. The vessels were about two miles apart. There was evidence to show that the respondent believed the brig to be in danger of running ashore, but it did not clearly appear whether it would have been practicable for him to approach near enough to warn her of her danger, the seamen of the two vessels, who were the witnesses, varying in their representations on this point, according to their situations and apparent prepossessions. No attempt was made on the part of the schooner to approach the brig, or to give her any notice, or to put her on her guard. After the accident, the respondent, with two wrecking vessels, came to the rescue of the brig, and got her off the reef. The brig was thought to be in a good deal of peril, and the respondent took possession of her at the request of her master. After depositing a large part of her cargo in the two wrecking vessels, the respondent navigated the brig to Key West. Seaman, the master of the brig, did not at first show any unwillingness to go there, though, after the brig had started, he requested the respondent to proceed to Mobile, her port of destination; but the respondent, who had shown a strong preference for Key West from the first, resolved to take her there. Proceedings to obtain salvage were instituted by the respondent in the territorial court of Florida, which awarded 31¼ per cent. of the value of the brig and her cargo, and, under the decree of the court, the vessel was sold at auction at Key West for \$1,531 12, and the cargo for \$77,853. The salvage money was finally adjusted at \$25,006 27. The respondent purchased property at the sale to the amount of \$9,046. The master of the brig was examined as a witness in the Florida court, but did not acquiesce in the award of salvage, and attempted, without success, to enter a formal protest against the sale of the vessel and cargo. Although the property was sold at a sacrifice, it did not appear that the sale was fraudulent, or that the respondent was guilty of any bad faith. The greater number of the purchasers who attended the sale were from Havana and Matanzas. The owners of the cargo abandoned it to the libellants, who sent one Earle, as an agent, to Key West. He found, on his arrival there, that the brig and her cargo were already

sold. The nearest court then in session was held at St. Augustine, and, before he could have gone there and returned, the goods would have been taken beyond its jurisdiction. Under these circumstances, he offered \$72,500 to recover possession of the brig and her cargo from their respective purchasers, but with an express reservation of all his rights, and with the open assertion that he ransomed the goods as if from pirates. The \$72,500 was finally given to one Whitehead, a member of the firm of Greene & Co., which had sold the brig and cargo at auction; and that firm agreed, for that sum, to recover back the brig and her cargo, and return them to Earle. This was done. The libel prayed that the salvage money be refunded, and that the \$72,500 paid to the respondent and his associates to redeem the vessel be decreed to the libellants, with costs and damages.

The respondent filed a plea to the jurisdiction of the court, setting forth that the territorial government of Florida had authority to pass any laws not inconsistent with the laws and constitution of the United States, and that, on the 4th of July, 1823, they passed an act entitled "An act concerning wreckers and wrecked property," prescribing certain formalities, according to which the brig and her cargo had been sold, as would appear by a copy of the record of the territorial court of Florida. To this plea the libellants demurred. In March, 1826, this court (Van Ness, district judge) gave judgment for the libellants upon the demurrer, with leave to the respondent to answer over. The grounds of the decision were, that all cases of admiralty and maritime jurisdiction were, by the 9th section of the judiciary act of September 24, 1789, (1 Stat. 76,) originally cognizable in the United States district courts exclusively; that salvage was a case of admiralty and maritime jurisdiction; that the United States district courts had exclusive original cognizance of a case of salvage, unless congress had conferred jurisdiction on some other tribunal; that congress had not granted to the legislative council of Florida authority to establish a court with jurisdiction over cases of salvage on the high seas; and that such a court was unconstitutional and its acts were void. [See note at end of case.] After his plea was overruled, the respondent answered to the merits, and incorporated in his answer the substance of the plea. The cause was then heard upon pleadings and proofs. The evidence consisted mostly of depositions taken before a commissioner, though the same witnesses were in some instances examined both before the commissioner and in court. The opinion of the court supplies all the facts necessary to an understanding of the case.

Beverly Robinson and William Slosson, for libellants.

Robert Tillotson and Seth P. Staples, for respondent.

BETTS, District Judge. There are three objections raised upon matters of form to the libellants' recovery, which it may be well to consider before proceeding to the merits of the case.

It is insisted, first, that the libellants show no joint interest or common cause of action which entitles them to unite in this action. Points of practice and forms of pleading have for ages formed the most perplexing and entangled subjects of litigation in the jurisprudence we have adopted in this country. Those courts which derive their rules of procedure from the civil law have been generally supposed to be most free from this difficulty. Yet, on the other hand, it is imputed to them that they are destitute of any distinct principles in this behalf, which may serve to insure uniformity in their procedure, or to modify the mere discretion which courts may be prone to apply in dictating for each case the law deemed most fit for it. It has been adjudged that in certain branches of the practice of a court of admiralty, the technical niceties of the common law are not to be regarded. *The Merino*, 9 Wheat. [22 U. S.] 391; *The Samuel*, 1 Wheat. [14 U. S.] 9; *Locke v. U. S.*, 7 Cranch, [11 U. S.] 339. And there might probably be no incongruity in applying that doctrine to the whole extent of the jurisdiction of the court. The supreme court has decided that in cases of information in a court of admiralty, it is enough to set out the offense so as to bring it within the statute upon which the information is founded, and to give notice to the opposite party of the charge he is called upon to answer. This is, unquestionably, the true spirit of all pleadings; and it will not be denied that there is a higher philosophy in it than there is in determining the sufficiency of a pleading by merely ascertaining its conformity to some formula which was contrived for general application, and not framed with a view to the facts or circumstances to be actually brought before the court. Still it leaves much to discretion, and the justness with which the principle may be carried out in practice, will depend upon the competency of the magistrate who is called upon to administer it.

It does not belong to the functions of this court to enact a system for the correction of such supposed defects. Its province is to inquire whether there are any determinate rules established which regulate the matter. If there are none, its duty is to bring the case within the analogy of such as are most consonant to the principles regulating the course of courts of maritime jurisdiction. A research into the sources of the practice of this court affords very little light on the subject. From its earliest history, the business of the court seems to have proceeded in about one course. But when the authority for employing certain branches of practice is sought for, none other is discoverable than that the court at some early day began to

employ them; and ever after, on a recurrence of like circumstances in a suit, it was probably found more convenient to apply the means before used than to establish methods by positive appointment. This may be sufficient to create or sanction those uses; yet it is not accompanied by what ordinarily attends the growth of a rule of pleading or practice in other courts—the adjudication of the court upon the point, declaring or confirming the reasons for its introduction or continuance.

The civil jurisdiction of the admiralty is generally held to be according to the forms of the civil law, by which is understood, in the United States and England, the positive law of the Romans, exhibited in the compilations of Justinian, and not, as on the continent of Europe, the modern private laws of the various nations which adopted the Roman law. Its course of proceeding in the United States was originally appointed to be conformable to the same law, (Act Sept. 20, 1789; 1 Stat. 93,) and is remarkable for comprehension, brevity, celerity and simplicity. 1 Kent, Comm. 380. In relation to the point now under consideration, the method of drawing out the written pleadings, the civil law would supply us no satisfactory assistance. At various periods of the Roman jurisprudence, formalities and ceremonies abounded in the institution of actions and in the methods of conducting them, and a scrupulous observance of verbal niceties in the frame of process was exacted. *Quintil. de Oratore*, 3, 8. So, also, each proceeding in the cause was taken with an accompaniment of symbols and fixed phrases. 4 *Gibb. Decline & Fall*, c. 44; *Bever, Rom. Laws*, b. 2, c. 4. Primarily, the manner of instituting a cause was of the most rude and abrupt character. The plaintiff himself took the defendant, without warrant or precept, before the Praetor, *oblato collo*, (by the collar,) and the proceedings there seem to have been conducted *ore tenus* by the parties, in short assertions and replies, very like the ancient method of pleading reported in the *Year Books*. *Adams' Rom. Ant.* 193. And, as a remnant of such usages, *viva voce* libels are yet admissible in summary causes in the ecclesiastical courts, the processes of the canon courts being derivatives from the civil law. *Clerke, Prax. Adm.* tit. 19; *Cockb. Ecc. Prax.* c. 5; 1 *Hall, Law J.* 83. In process of time, the allegations or demands of the actor were presented in writing, in what was termed "libellus," or "libellus supplex." *Gibb. Forum. Rom.* 23; 2 *Browne, Civil Law*. (Ed. 1799,) 26; *Adams' Rom. Ant.* 220; *Cockb. Ecc. Prax. Append.* 59; 1 *Hall, Law J.* 81; *Consett, Ecc. Prax.* pt. 3, c. 1, § 1. It does not appear to have been a subject of specific regulation in the civil law, (or in the French practice, which is closely modelled upon it,) as to what interests might be prosecuted jointly, or how far relief was restricted to the special manner in which the case

was charged or articulated. The allegations of the parties might be expanded through a series of pleadings, *sponsio*, *replicatio*, *duplicatio*, *triplicatio*, etc., (*Livy*, b. 39; *Cicero in Verr.*; *Id.* in *Cocc.*) yet the constituents of each particular pleading are not clearly defined by the books, (*Spence, Orig. Laws; Sevigne, Hist. Rom. Law; 4 Gibb. Decline & Fall*, c. 44.) The reasonable presumption, however, is, that these counter allegations were designed to maintain the controversy upon the allegations first propounded, and were not employed to determine the scope of the action or the competency of the actors to it. The libel was not required to correspond exactly with the demand put forth by the actor, either as to amount, time, place or thing. *Just. Inst.* b. 4, tit. 6. The only qualities apparently prescribed by the text of the law were, that the libel should state the complaint with distinctness, certainty and aptness, with a proper conclusion or prayer, and without being contradictory to itself. *Wood, Inst. Civil Law*, bk. 4, c. 3, § 3. This was no doubt the substance of the action given by the Praetor, whether one for which a precedent was found, or one devised for the particular case. *Inst.* bk. 4, tit. 6; *Dig.* bk. 2, tit. 13, § 1; *Heinecc. Syntag.* 673; 2 *Browne, Civil Law*, 349, 350. Whatever, then, might be comprehended within the action, might be properly made part of the complaint in the libel, and no interdiction to pleading in one action a right common to several parties, appears to have been made in the edicts or expositions of the laws.

Clerke and Browne consider the practice of the ecclesiastical courts in England to be the source from which that of the admiralty courts is drawn, and upon which it relies for authority. *Clerke, Prax. Adm.* tit. 19; 2 *Browne, Civil Law*, (Ed. 1799.) 149. This only removes the inquiry one step further, without affording a solution of the difficulty presented. For the ecclesiastical law of England was modeled from the canon law, and, in all defective or doubtful cases, recourse was had to the body of the pontifical canon law for authority and guidance. 4 *Reeve, Eng. Law*, cc. 24, 25. And then, again, proceedings in the courts of canon and civil law were considered identical. *Bac. Abr.* "Eccles. Courts, E."

It accordingly still remains to determine what the original rule—that of the civil law—was. Baron Gilbert regards a libel under the civil law, and a bill in the court of chancery, to have been the same in their structure. *Gilb. Forum Rom.* 44. In early practice, the bill in chancery was merely a petition to the chancellor, narrating the petitioner's case, and asking redress, without respect to form. *Wyatt, Pract. Reg.* 57; *Wood, Inst. Civil Law*, bk. 4, c. 3, § 3. Though subsequent practice has amplified and affected to give great formality to bills in chancery, yet they still retain the sub-

stance of the libel employed in the canon courts. *Bart. Suit Eq.* 19, 26. From the chancery court having been, for many ages, under the presidency of ecclesiastics, with whom the canon law was a rule both of conduct and of faith, it was natural that the proceedings of the one forum should be, as they proved in practice, common to both. We might, therefore, reason with tolerable directness, from the principles known to have been introduced into the court of chancery in respect to pleadings, as to what those principles were as then understood in the civil law. Yet we must be careful to discriminate between the practice and pleadings as known in the court of chancery during the early period of its history, and that which has grown up since the days of Lord Bacon and Lord Nottingham. The canon law only required in the libel a plain narrative of facts. 2 *Browne, Civil Law*, (Ed. 1799.) 79. Reeves says it must contain the thing in question, with the quality of the action. 4 *Reeves, Eng. Law*, 14. The ecclesiastical courts in England require the libel to be clear and explicit. 1 *Hall, Law J.* 81; 2 *Browne, Civil Law*, (Ed. 1799.) 101, 102. *Consett* says, that in the plenary proceedings the plaintiff's claim is set forth simply, in a continued speech or oration; or articulate, in which the merits of the cause are propounded by articles. *Consett, Eccl. Prax.* 402. The choice of these varieties seems to have been left wholly to the pleader. When the libel was obscure, uncertain, confused or preposterous, and exception was taken to it for such causes, the most liberal practice in respect to amendments prevailed. *Id.* pt. 3, c. 1, § 2. And they were commonly made instantane, at the suggestion of the excepting party. *Cockb. Ecc. Prax.* c. 5, § 4. And, though numerous provisions are made by the civil law for various defences against what are held to be, *prima facie*, efficacious actions, yet the defences relate in no case to matters of form. No system of rules seems ever to have been designed in the civil law, like those established by the common law, to destroy the plaintiff's action because he had framed or managed it inaptly. *Just. Inst.* lib. 4, tit. 13; *Pandects*, lib. 44, tits. 1, 2. Such, also, seems to be the case in the French courts, whose practice has been conformed with great exactness to that of the civil law. 13 *Poth. Works*. So far, therefore, as the pleadings in a cause were subject to regulation under the civil law, it would appear that little more than simplicity and perspicuity in their structure were required. It was sufficient if they plainly informed the court and the opposite party of the object sought, though they might be destitute of that technical fulness or unity of object which was exacted by the common law, and which has, in later times, grown into use in the court of chancery. None but substantial defects were regarded; and, if no exception was taken to the sufficiency

of a pleading, an amendment was permitted at any time before final sentence; and, when an exception was formally taken, the amendment might be made at any time before contestation of suit, (Consett, *Ecc. Prax.* pt. 3,) and at any time before sentence was pronounced, if the defendant had not previously excepted to the defects, (*Id.* pt. 3, § 2.)

The objections raised upon the defectiveness of the libel in the present case, were offered at the hearing of the cause after the proofs were all taken. They are said, however, to be in time, because they arise out of the testimony, the allegations of the libel importing that the libellants have a joint interest in the whole subject, while the proof shows that their interests are entirely distinct. I do not think the libel bears the interpretation put upon it by the respondent's counsel. In the introductory part it does, indeed, assert "that the libellants, by twenty-eight several policies, became underwriters upon the cargo of the brig Hercules." This language might perhaps indifferently bear the construction that each libellant subscribed all the policies, or that, the policies being several, they were so both in respect to the portions of cargo insured and to the parties underwriting. But the libel is made sufficiently distinct in this respect by the subsequent allegation, that the parcels were broken open at Key West, and the marks so defaced and altered that the libellants "were unable to identify the several parts and parcels thereof by them respectively insured as aforesaid." This denotes that the libellants were not joint insurers.

If any advantage could legally be taken of this want of joint interest, the respondent should have interposed the proper exception. But I do not think the fact of any importance, however it is brought to the notice of the court. The canon law permitted several actions to be joined in the same libel. 2 *Browne*, *Civil Law*, (Ed. 1799,) 79. And our own courts sustain libels uniting the most dissimilar interests. In *The Amiable Nancy*, the libel was filed by the owners of the vessel, the master, the supercargo and a mariner, for trespass to the vessel, and for an assault and battery on some of the libellants. Damages were awarded by this court for each of those causes of action, and its decision was sustained, on appeal, by the circuit court and by the supreme court. [Case No. 331.] 3 *Wheat*. [16 U. S.] 546. The practice of the court of chancery permits suitors who have a like interest in the subject matter to unite in a bill, though they are not to participate with each other in the recovery. *Lloyd v. Loaring*, 6 *Ves.* 773; *Adair v. New River Co.*, 11 *Ves.* 429; *Good v. Blewitt*, 13 *Ves.* 397; *Mitt. Pl.* (Amer. Ed. 1816) 135 et seq. There is a manifest fitness and convenience in allowing parties in admiralty suits to join as libellants, whose interests rest upon a cause of action common to all, though

as between themselves their interests are separate and distinct, and I find no rule or principle of the civil law interdicting such junction. This libel, however, should be amended so as to state that the cause is prosecuted for the libellants and for all others interested who may come in and establish their rights in the subject matter. One action is enough to determine the right of the respondent in respect to the vessel and her cargo; and the judgment should be so far final as to protect him from any further proceedings in relation thereto. This would be so if the suit were in rem; and actions in personam and actions in rem being co-ordinate, and resting upon like principles in a court of admiralty, ought to be attended with the same result in this respect.

The second objection taken by the respondent is, that the libel is only adapted to a case of force or fraud, and that as neither of these is proved, no remedy can be had *secundum allegata* for a mere illegal privation of property. It is true that the libel admits of this exception. The brig was put in possession of the respondent by her master, both for the purpose of immediate relief from her peril, and to be afterwards piloted out of the reefs and into port. She was at that time in great danger, and required immediate assistance. Nor was there any force or fraud in conveying her to Key West. The testimony of Seaman, her master, though much more clear and explicit as taken before the commissioner than as given in court, yet in both cases agrees in this, that he did not urge the respondent to take the vessel to Mobile until she had got under weigh. The respondent was under no obligation to take her to her port of destination, there being an intermediate American port to which she could go with but slight interruption of her voyage. Neither is the respondent made a trespasser from the beginning by reason of any misconduct of his in Key West, or by his invoking the authority of the local court there. The allegations of the libel, which charge the respondent with obtaining possession of the brig by force or fraud, cannot be supported. But I attach no importance to these allegations. They may be treated as surplusage or as matter of aggravation, and the libellants are at liberty to strike them out, if they shall be so advised. The court proceeds upon the whole case as it is made out, without regard to what the libellants have denominated it, as in admiralty practice there is no discriminating appellation of actions. The remedy is upon the case made, and not in conformity to any nomenclature of the action.

I perceive nothing in the cases cited or in the argument urged, to support the third objection, namely, that this proceeding cannot be sustained in personam, but only in rem against the brig and her cargo to reclaim them in kind. There is no doubt of the power of the court to proceed with like authority in personam as in rem, where the

subject matter is within its jurisdiction. Blackstone admits that the first process in admiralty is frequently by arrest of the person. 3 Bl. Comm. 108; *Smart v. Wolff*, 3 Term R. 323, 330. This concession is fortified by the whole tenor of the practice of the court, and of decisions here and in England. *Clerke's Prax.* by Hall; *Brevoor v. The Fair American*, [Case No. 1,847.] There is no reason for requiring a different form of libel in respect to parties or causes of action in the one case from what is proper in the other. The seizure of the article and the monition consequent upon that, is equivalent to an arrest of the person, and was probably introduced as a substitute for a personal arrest; and it is not to be supposed that such attachment brings the subject matter in contestation more immediately before the court, than if the party were held in actual arrest. The character of the court and the subjects with which it deals render it of signal advantage to suitors that its functions can be exercised in relation to maritime matters with all the benefits of a personal summons or arrest of parties, without incurring the delays, if not impracticability, of making a personal service of process. That end is effected by seizing the subject which gives cause to the litigation.

But it is urged, that if the libel be sufficient in point of form, the matters charged therein do not make a case of admiralty and maritime jurisdiction, cognizable in this court, because the cause of action, if any, arose not out of the original taking possession of the vessel and her cargo upon the high seas, but from transactions subsequent thereto, on land, at Key West, within the body of a county, so that if any wrong was there committed, the libellants must seek redress in a court of law. It is not denied that if the original possession of the vessel had been wrongful, the act would have been a marine tort, and within the jurisdiction of this court. When the jurisdiction of a court of admiralty has attached, it is not divested by means of acts subsequently done on land and cognizable by the law tribunals. Jurisdiction in admiralty once acquired cannot be thus ousted. The after acts, when incidents of the first, are, in respect to jurisdiction, all regarded as one.

In this case, the cause of action is the taking and holding possession of the goods by the respondent, in the character and with the authority of salvor, to which all that subsequently transpired was incident. Over that principal act the court has undoubted jurisdiction, and it also has cognizance of every accessory act done on land, although not of itself sufficient to confer jurisdiction. 1 Kent, Comm. 379; *Rex v. Broom*, 12 Mod. 135; *Dean v. Angus*, [Case No. 3,702.] Moreover, if the cause of action arose at Key West, it was in respect to property waterborne, and a sea-going vessel; and the admiralty jurisdiction embraces ports and havens

as a portion of the high seas. Nor is there evidence that the harbor of Key West is land-locked so as to be within the body of a county, and within the restriction of the English rule. *Willets v. Newport*, 1 Rolle, 250; *Montgomery v. Henry*, 1 Dall. [1 U. S.] 50. I am satisfied that, as a general rule, a party deprived of his property by any act on the high seas, whether that property be jetsam, flotsam or ligan, be abandoned by those who have charge of it, or be voluntarily delivered over by them to another without authority, has his remedy in this court, because the transaction is of a maritime character, without regard to any question of marine tort connected with the possession. *De Lovio v. Boit*, [Case No. 3,776.]

It is insisted for the respondent, that admitting the court at Key West had no jurisdiction, yet that objection had been waived by the assent of Seaman to the proceedings, and the subsequent composition and adjustment made by Earle with those claiming the cargo as purchasers under those proceedings. It is not necessary to inquire whether Seaman possessed authority to bind the libellants by the assent supposed, since the fact of the assent is not established. His appearance as a witness before the local court does not amount to a submission to the authority, which the court assumed, to award salvage and condemn the vessel and her cargo to sale, to satisfy its decree. He had no reason to suppose the court would do more than fix a reasonable compensation for the particular services rendered, and such compensation he professed a willingness to pay. When the court ordered a sale of the vessel and her cargo, he remonstrated against and excepted to the whole proceeding, and thus plainly evinced that he never assented to or acquiesced in the authority which the court undertook to exercise. As to the composition entered into by Earle, there is no question, that if one who is tortiously deprived of his property, freely and voluntarily compounds with the wrong-doer, the original tort is thereby extinguished, and cannot afterwards be made a ground of action, unless there was duress or fraud practised in obtaining the compromise. The \$72,500 were not paid to the respondent to discharge his lien upon the property as salvor, but was paid to parties who claimed the absolute title to the property as owners, and who are not now before the court. Such payment, therefore, did not amount to a waiver of any rights whatever, as between the libellants and the respondent, at least without an express stipulation at the time to that effect. No contract or understanding of the kind is proved. It appears that Earle was unable to obtain the property in any other way. On the question of fact, therefore, whether the agent of the libellants acquiesced in the assumed ownership of the property, and paid the sum upon that footing, I am convinced, upon the evidence, that he did not, and that he in-

sisted upon a reservation of all the rights of his principals, and refused to take any steps that might impair them. Earle's testimony is entitled to full credit. It is corroborated, also, by all the facts in the case, and is called in question only in some particulars by the testimony of Mr. Whitehead, who, though he has no such fixed legal interest in the case as would make him an incompetent witness, is nevertheless so implicated in the transaction as to be under a strong bias of mind adverse to the libellants and in favor of the respondent, as his own integrity is involved in upholding the judgment of the court and the proceedings under it. I must, therefore, hold that the rights of the libellants remained, after the re-purchase or redemption of the property by Earle, in the same condition as before.

Since, therefore, the libel must be regarded as sufficient in matter of form and of substance, and the court has jurisdiction in the case, and the libellants have established claims against the respondent not waived by them, it remains to determine the extent of the respondent's liability.

The libellants demanded remuneration for all they have lost in consequence of the proceedings at Key West, on the ground that the act of the respondent in taking the brig into Key West was intentionally tortious, and that he is therefore liable for all the consequences of that wrong. But the evidence fails to establish any such wrongful intent. It has been already shown that he did not acquire possession of the brig by force or fraud, and did not retain her, by right of possession, against the demand of her owners, but handed her over to what was claimed to be the custody of the law. The decree of the territorial court having been unauthorized, he is liable to the extent of the property acquired by him under it, but he is not necessarily answerable for all the property the libellants have lost, into whose-soever hands it may have gone. It is evident that the respondent desired to go to Key West, yet there is not enough to charge him with bad faith in the proceeding. There is, indeed, ground for suspicion that he intended or hoped to secure a more favorable award of salvage at Key West than he could expect at any other of the places proposed. But there are not enough circumstances to warrant the conclusion that he resorted to Key West for the purpose of perpetrating a fraud upon the parties interested in the brig or her cargo. The utmost sum for which he can be held liable is the sum received by him as salvage, which is asserted by the libellants to have been \$25,006 27; and it is not denied by the respondent that he obtained that amount.

On the other hand, the respondent rendered important services at a time when the brig was in a perilous situation on the reefs; and there is some reason for supposing that but for his timely appearance she would

before long have been abandoned by her crew. He is, then, entitled to compensation therefor, unless he has, by his own misconduct, forfeited the right, not only to salvage, but to every other reward. If the charges made in the libel are sustained by the evidence, he has no claim to salvage. This court, having a broad discretion in cases of this character, takes into consideration the merits and motives of the salvor, in regulating the amount of salvage to be awarded him, in some cases giving a large proportion of the property saved, and in others diminishing it to a compensation for pilotage or mere labor, or denying it altogether. The *Vrouw Margaretha*, 4 C. Rob. [Adm.] 104; *Mason v. The Blaireau*, 2 Cranch, [6 U. S.] 240. It is charged upon the respondent that he neglected to inform the brig of her danger, though well aware of it, and fully able to warn her; that he predicted her grounding when he first fell in with her, and placed himself near the spot where it actually occurred, with a view to make a profit from the calamity which he was aware must befall her. The obligation which a vessel is under to warn another of a danger clearly discerned by her, but of which the other is ignorant, is so far an imperfect one that it may not supply a right of action by the party injured against the other for a neglect to comply with it. But if the party in fault comes into a court of justice seeking salvage for rescuing the other from a danger which he might have prevented, it is clear that all right to a salvage reward is destroyed. That is a recompense resting essentially upon equitable considerations. The respondent, if he claims as salvor, must present his claims with clean hands. The evidence to show that the respondent was aware of the danger to which the brig was exposed, consists of his declarations on board his vessel, his answer to the libel, and his conduct at the time the brig was in view before her disaster. His declarations are sworn to by the master and seamen of the *Hercules*; but their evidence is open to obvious objections, and their depositions, like all ex parte examinations, are to be received with the greatest caution, particularly as, in this case, their testimony before the commissioner was much more full and compromising to the respondent than their evidence as given in court. His own answer to the libel is not so explicit as could be wished. The navigation of those seas and the situation and employment of the respondent are to be considered in estimating the character of this answer. The Gulf-Stream at that place runs northerly at the rate of at least three miles an hour. A northeast wind raises the stream upon the Florida shore, and gives it a direction towards the land. From a minute chart of that section of the coast, previously made by the respondent, it appears that the current tends towards the spot where the *Hercules* grounded. No observation had been

taken by the brig for one or two days before the accident, on account of the weather, and the master of the brig was out of his reckoning. The respondent was perfectly familiar with the navigation of those seas. He must have been able to determine whether the master of the brig was a good pilot or not. He was himself bearing straight for the land, and he observed the brig on a course varying but three or four points from his own, tending towards a long line of reefs, and continually nearing a lee shore, where there was no harbor, and where the danger to her must continue for hundreds of miles. The master of the brig supposed himself to be on the other side of the Gulf-Stream. The respondent, in his conversation with his son, anticipated danger to the brig, not from any change of wind or weather, but from her course when he last saw her. He predicted that she would "be either on the Bahama banks or Carysfort reef." It is not easy to see why the Bahama banks were mentioned. They were from sixty to one hundred miles distant on the other side of the Gulf-Stream. The wind, the current and the direction of the brig, all tended from the Bahama banks towards the Florida reefs. The respondent added: "unless the captain was a good pilot." But how much confidence he placed in the ability of the "captain" may be gathered from his having advised his son that they had better remain where they were, to be ready in case of accident. If danger was equally to be apprehended from the Bahama banks, why should they both remain sixty miles from those banks, and within a mile of Carysfort reef? Why did the respondent come to anchor at mid-day? He says, because the weather was squally; but it is abundantly shown that the sea was smooth at the time the Hercules ran aground. From these and other circumstances, I am convinced that the respondent understood the danger to which the brig was exposed, and kept himself in readiness to take advantage of an accident to the brig, should it occur.

The remaining question is, whether the respondent was able to warn the brig of her danger. The vessels were two or three miles apart, running with the wind, upon courses differing only three or four points. It does not appear that there would have been any danger or difficulty to the respondent in bearing directly for the brig; and, though his son says that he bore away one point for the purpose of speaking the brig, but she hauled her wind, as he supposed, to avoid him, yet this is wholly unsupported by any other evidence, and, had it been true, it must have attracted the notice of some of the seamen or officers of both vessels. The respondent also would have set it up in his answer as evidence of his having discharged his duty, but he makes no mention of anything of the kind. It does not even appear that a flag was raised or a signal shown, and it is not to be assumed that the respond-

ent was unable to warn the brig of her danger, without evidence of any attempt on his part to do so. His claim to salvage should, therefore, not be entertained. He has forfeited it by his conduct in the critical situation of the brig. He acted under a persuasion that she was about to incur the very danger which occasioned the acceptance of his services, and he manifestly contemplated all that occurred. This fact takes from those services, however opportune and indispensable, those meritorious qualities which characterize a salvage service.

At the same time, the respondent rendered valuable assistance to the brig. He did not bring her on the reef, and was under no legal obligation to get her off; and he might have left her there without incurring any personal responsibility. It is evident that the brig was in danger, and the aid he offered was accepted by the master. Nineteen men and two vessels were engaged six days in lightering the cargo and transporting it to Key West, and in piloting the vessel there, a distance of from ninety to one hundred miles. Without pretending to estimate with great exactness the value of the services rendered, I shall allow the respondent therefor the sum of \$3,000.

The respondent must, therefore, pay into court the balance of the money received by him from the proceeds of the brig and cargo, with interest, after deducting \$3,000. No costs will be allowed to the libellants, since the respondent, in retaining the money awarded to him at Key West, cannot be considered as wrongfully withholding it, as long as the right to it was not settled by a court of adequate authority. The clerk must ascertain the proportion that the respective interests of the libellants in the brig and such of her cargo as was stowed below decks bore to the sum received by the respondent. The deck-load was thrown over-board before the respondent came on board. The clerk will then ascertain and report the proportion due to each of the libellants according to their several interests. Decree accordingly.

NOTE, [from original report.] Upon the question raised by the plea to the jurisdiction, the opinion of this court was, that the legislative council of Florida did not intend, by the act of July 4th, 1823, to confer upon the courts of Florida any other powers or duties than those of common law courts; that the words wrecked property, in that act, were to be understood of wrecks at common law, namely, goods cast or left upon the land by the sea. (Sir H. Constable's Case, 5 Coke, 107; Jacobsen's Sea Laws, 540; Republica v. Lacaze, 2 Dall. [2 U. S.] 122.) of which the English common law courts had jurisdiction; that the act was not intended to confer jurisdiction over cases of salvage upon the high seas; and that if it were so intended, the legislative council of Florida had no constitutional authority to confer such jurisdiction. The case of American Ins. Co. v. Canter, [Case No. 302a.] which arose about the same time in the district of South Carolina, presented the same question, and was decided

In the same way, but was carried by appeal to the circuit court, and finally to the supreme court of the United States, (1 Pet. [26 U. S.] 511,) where the decision of the circuit court reversing that of the district court was affirmed, and the point was settled, that though admiralty jurisdiction in the states could be originally exercised only by the district courts of the United States, yet the same limitation did not extend to the territories; that in legislating for them, congress exercised the combined powers of the general and state governments, and that the act of the territorial legislature of Florida, erecting a court which proceeded under the provisions of the law to award salvage and to decree the sale of the cargo of a vessel which had been stranded, and which cargo had been brought within the territorial limits, was not inconsistent with the constitution and laws of the United States, and was valid. The opinion of this court upon the point raised by the plea in this case is therefore omitted. On the 1st of February, 1826, about four months after the decree of the territorial court awarding salvage to the respondent, the act of the legislative council of Florida of July 4th, 1823, was annulled by an act of congress, (4 Stat. 138,) and, on the 23d of May, 1828, an act was passed by congress to establish a southern judicial district in the territory of Florida. (Id. 291.)

AMERICAN INS. CO., (NICOLL v.)

[See Nicoll v. American Ins. Co., Case No. 10,259.]

Case No. 304.

AMERICAN MANUF'G CO. v. LANE et al.

[14 Blatchf. 438; 3 Ban. & A. 268; 15 O. G. 421; Merw. Pat. Inv. 358.]¹

Circuit Court, S. D. New York. April 27, 1878.

PATENTS FOR INVENTIONS — WHAT CONSTITUTES INFRINGEMENT — SIMILARITY — IMPROVEMENT IN TEMPERING UMBRELLA RIBS.

1. The invention set forth in letters patent granted to A. Stewart Black, July 14th, 1863, for an "improvement in tempering umbrella ribs," defined.

2. The first claim of said patent, namely, "constructing the tempering die with a square hole, corresponding in size to the wire to be tempered, in order that the wire may be straightened in all directions, and the flattened portions of the wire be brought in line with each other, as and for the purposes specified," is infringed by the use, for the tempering of umbrella ribs of U-shaped wire, with wider flattened parts in them, of a die formed of two plates, one above and one below, with the groove in one plate shallow and semi-elliptical, to accommodate one edge of the flattened parts of the rib, and with the groove in the other plate broader and deeper, and, in its cross-section, the shape of the body of the wire, with a channel opposite to and like the groove in the other plate, to accommodate the other edge of the flattened part of the rib.

3. The prior existence of a square hole or groove for the purpose of drawing through it square bars or strips of metal, to compress them and straighten them, does not anticipate the invention claimed in said first claim.

¹Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 3 Ban. & A. 268; and here republished by permission. Merw. Pat. Inv. 358.]

[In equity. Bill for injunction to restrain the infringement of patent No. 39,210. Injunction granted.]

Everett P. Wheeler, for plaintiff.
John D. Shedlock, for defendants.

BLATCHFORD, Circuit Judge. This is an application for a provisional injunction to restrain the alleged infringement of letters patent granted to A. Stewart Black, July 14th, 1863. The specification of the patent sets forth that Black has "invented, made and applied to use a certain new and useful improvement in tempering umbrella ribs and similar articles." The specification says: "In tempering ribs for umbrellas and parasols and similar articles, great difficulty is experienced in obtaining a uniform temperature throughout the entire length, so as to temper all parts equally. Some parts are tempered too much and bend in use, and others are not tempered enough and break. Besides this, the hardening operation renders the wire composing such ribs more or less crooked, and they have to be straightened at the time of tempering, while in a heated state. Various attempts have been made to effect these operations, however, with but partial success. The nature of my said invention consists in a peculiar construction of grooved or perforated metallic tempering die, that is heated to a sufficient extent to temper the umbrella rib or similar steel article, and the groove or opening in said die, being straight and of the size required for containing such article, straightens it at the same time that its temper is drawn to the degree required. I make use of gas flames or jets to heat the said tempering die, whereby greater uniformity can be obtained in the same than by a fire heat, and said heat can be kept uniform, hour after hour, without especial attention, thus rendering my apparatus adapted to tempering in the most uniform and delicate manner, even when attended by boys, or comparatively unskilful workmen; whereas, the tempering of such articles has heretofore required the exercise of great judgment by skilful workmen." There are three figures of drawings referred to. Figure 1 "is a vertical section of the tempering apparatus, at the line x x, of Figure 2." Figure 2 "is a plan of said apparatus, partially in section, to show the interior." The specification proceeds: "In the drawing, a is a metallic bar, of the requisite size and length, with grooves planed or otherwise formed in the upper surface, as seen in the section, Figure 1, and these grooves are to be of the size required for admitting the wire forming the umbrella spoke or other article; and I prefer, for such ribs, that the grooves be formed with square corners, to allow the flattened parts of the ribs to pass, as illustrated in larger size in Figure 3, said flattened parts being made for the reception of the holes re-

quired at the ends and near the middle of such ribs, and, when placed in the said grooves, these flattened portions are diagonal and are brought properly into line with each other by the groove itself. The grooved bar a is to be covered with a second bar b, setting closely to the bar a, so as to form a perforated tempering die. It will be seen that this form of construction is preferable to any other in which the hole might be bored or formed partly in each bar, as this construction is the cheapest and most accurately made, although I do not confine myself in this particular. Where desired, the upper bar b may also be grooved with the same or a different sized groove or channel, setting intermediate to those in the bar a; and the parts a and b may be held together by screws or otherwise. The perforated metallic tempering die made as aforesaid, and heated by competent means, will temper wire umbrella ribs, or similar articles passed through it, and hold the same in a straight position while being tempered, the wire or ribs being passed in at one end and forcing out the tempered rib at the other end." The specification then describes an apparatus for heating the dies, by means of gas-burners, and says, that, "by this device, the temperature of the dies is rendered uniform and continuous, and can be regulated with the greatest exactness, by the flow of gas admitted." There are three claims, as follows: (1.) "Constructing the tempering die with a square hole, corresponding in size to the wire to be tempered, in order that the wire may be straightened in all directions, and the flattened portions of the wire be brought in line with each other, as and for the purposes specified;" (2.) "Constructing the tempering die with the grooves in one of the half-pieces coming opposite the flat surface of the other half-piece, whereby the tempering dies are more easily made and kept in order, as set forth;" (3.) "The tempering dies constructed substantially as specified, and enclosed in a suitable casing, in combination with gas-burners applied substantially as shown, whereby the temperature of the said tempering dies is easily regulated and maintained with uniformity, as set forth."

The defendants have made umbrella frames called "paragon" frames, the ribs in which are constructed of U-shaped wire. Such wire cannot be tempered and straightened in a die with a square hole, if there are wider flattened parts in the wire. The die with a square hole can be used to temper and straighten only round wire, if there are wider flattened parts in the wire. The wire referred to in the specification of the plaintiff's patent is round wire. The "paragon" ribs tempered and straightened by the defendants have wider flattened parts in them, and have been tempered and straightened by them in heated dies. The dies are formed of two plates, one above and one be-

low. The groove in one plate is shallow and semi-elliptical, and the groove in the other plate is broader and deeper. The former groove accommodates one edge of the flattened parts of the rib, while the latter is, in its cross-section, the shape of the body of the wire, with a channel opposite to and like the groove in the other plate, to accommodate the other edge of the flattened parts of the rib. In the square-holed die, the wider flattened parts of the round wire are accommodated in the diagonal corners of the square hole, while the surface of the round wire touches the four sides of the square hole. In the defendant's die, the contour of the body of the wire touches the surface of the body of the groove at all points, while the wider flattened parts of the wire pass through the two narrow grooves.

In each of the two constructions of dies the result is attained of tempering and straightening the rib at the same time, and of doing this after the wider flattened parts have been formed in the rib. In each the groove is straight longitudinally, and is of the shape and size requisite not only to contain the rib, but to embrace and support it at such points as will serve to straighten it in its passage, and to admit at the same time of the free passage of the wider flattened parts through portions of the groove, which are so arranged as to keep such wider flattened parts of the rib in line with each other. In each the dies, when heated, will temper the rib, and hold all parts of it in a straight position while being tempered, and the tempering and straightening take place while the rib is moving through the groove longitudinally from end to end. The mode of operation of the two dies, in their use in connection with the wire which is passed through them, is the same. The defendants' tempering die is constructed with a hole which corresponds in size to the wire which is to be tempered, and, in tempering the wire, by drawing it through such hole when the die is heated, the wire is straightened in all directions, and the flattened portions of the wire are brought in line with each other. The language of the first claim of the plaintiff's patent describes the defendants' die and its effect on the wire that is drawn through it, except that such claim describes the hole in the die as square. The hole in the defendants' die is not mathematically square. But, the whole tenor of the specification shows that the meaning of the claim is, that the hole or groove shall be of such size and shape as to allow the body of the wire to go through and be straightened while it is being tempered, and also to allow the flattened parts of the wire to go through and be kept in line with themselves and with the body of the wire. For a round wire a square hole will accomplish all of these results. The corners of the square are merely supplementary spaces for the

passage of the wider parts. The shape of the exterior walls of such spaces is manifestly immaterial, so long as the spaces exist and have exterior walls. In the patent the spaces are described as corners of a square. But, whether the two lines of the corner form a right angle with each other, or a greater angle than a right angle, or form together any other figure, is manifestly shown by the specification to be immaterial, so long as the walls of the groove hug the body of the wire and yet leave space for the wider flattened parts. The corners of the hole in the defendants' die, though not mathematically square, are, to all practical intents, square, so far as the supplementary spaces are concerned. The invention embodied in the first claim of the patent is found, in all particulars, in the defendants' dies. The first claim of the patent is not limited to a groove which is wholly in one of the two half-pieces of the die. That feature exists in the second claim; but the specification states that a groove formed partly in each of the two half-pieces is contemplated by the inventor.

The specification is not artistically drawn. It seems to set out with describing the invention as being to draw the rib through a straight heated groove of the proper size in a metallic die, and it follows out that idea. It states the leaving of a space for the flattened parts of the rib to pass through, as a preferential construction. It would seem as if the intention originally was to claim broadly the tempering and straightening of the rib in a heated metallic die having a straight groove in it of the size and shape of the rib. But there is no such claim. The first claim is narrowed to a construction which includes only a rib with flattened parts, and a groove which will accommodate such flattened parts, which are shown in Figure 3 of the drawing as projecting beyond the line of the body of the unflattened parts of the rib. The first claim does not include a rib which has no flattened parts, nor does it include a groove which will accommodate only a rib which has no flattened parts. It is contended by the defendants that the first claim claims merely a die with a square hole, as a structure, and that, if a square hole in a metallic die is shown to have existed before, the first claim is void for want of novelty. But, the fair construction of the first claim, in connection with the body of the specification, is a claim to the mode or process of tempering and straightening a rib which has a body, and flattened portions other than such body, by drawing the rib through a straight hole or groove in a heated metallic die, of the proper size and shape to at once embrace closely the body of the rib, and yet, by supplementary spaces in the groove, to allow such flattened portions to pass through freely and be brought in line with each other. The whole text of the specification shows that

the invention is declared to be one of an improvement in tempering the rib, that is, in the process or mode of tempering it, and the description is declared to be a description of such improvement. The square hole or groove may have existed before and been used for the purpose of drawing through it square bars or strips of metal, to compress them and straighten them, but, such prior existence and use of the square groove does not anticipate the invention claimed in the first claim of the Black patent, as such invention is above defined. In such aspect, the use of the square groove in the manner and for the purpose indicated in such first claim is not the mere use of an old thing for a new purpose, or the mere application of the square groove to a new use.

The defendants adduce various prior inventions, but none of them anticipate the invention covered by the first claim of the patent. The Holland patent has semicircular grooves for straightening and tempering umbrella ribs, but makes no suggestion as to ribs with wider flattened parts. The Fox patent is for tempering and straightening cylindrical wire in circular grooves. The same is true of the Chesterman patent and the Maddin patent. The Hadfield and Shipman patent shows square holes and round holes through which to draw metallic strips, to temper them, but nothing is disclosed that suggests anything more than that round wire is to be drawn through a round groove and square wire or steel through a square groove. So far as appears, Black was the first person to perform the process described in the first claim of the patent by the means therein described, and thus the first to temper and straighten an umbrella rib having the wider flattened parts in it.

I do not see that there is any infringement of the second and third claims. Let an injunction issue as to the first claim.

[NOTE. So far as known, this patent, No. 39,210, has not been involved in any other cases reported prior to January 1, 1880.]

Case No. 305.

AMERICAN MIDDINGS PURIFIER CO.
v. ATLANTIC MILLING CO.

[4 Dill. 100; 3 Ban. & A. 168.]

Circuit Court, E. D. Missouri. 1877.

INJUNCTION AGAINST INFRINGERS IN PATENT CASES
—VALIDITY OF PATENT—EFFECT OF DECREE OF
CIRCUIT AND SUPREME COURT SUSTAINING A
PATENT—BOND AS THE ALTERNATIVE OF AN
INJUNCTION—ORDER AS TO KEEPING AN ACCOUNT.

1. An application for an injunction, pendente lite, to restrain defendants from an alleged infringement of the Cochrane patent (owned by the plaintiff) for the "new process" of manufacturing flour from "middlings:" the patent having been sustained by a decree of the su-

¹[Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

preme court, and that decree not having been shown to be collusive, the validity of the patent was considered as sufficiently established to give the right to an injunction; but the injunction was refused because the infringement was not satisfactorily shown.

2. The alleged invalidity of the reissued Cochrane patent on the ground that it contains claims not warranted by the original patents, and on the ground that the invention was not novel, was not shown with such clearness as to justify the court in holding, on a preliminary application, a patent to be void, which had been sustained by the supreme court.

3. The giving of a bond by a defendant as a condition of avoiding an injunction, will not be required, except in a case where, if the bond is not given, an injunction will and ought to issue.

4. Although an injunction was denied, the defendants were required to keep an account of the amount of flour manufactured in their mills, and report the same monthly, under oath, and to submit to an examination of their mills, when in operation, by the plaintiff, its counsel, and expert witnesses.

[In equity. Bill by the American Middlings Purifier Company against the Atlantic Milling Company for infringing patents Nos. 37,317, 37,318, and 37,321. Heard on motion for provisional injunction. Injunction refused. On final hearing, plaintiff's bill was dismissed. American Middlings Purifier Co. v. Atlantic Milling Co., Case No. 306.]

The plaintiff company, as the assignee of the Cochrane patent for the "new process" of making flour from "middlings," filed a bill against the defendant company, and against several other mill owners in St. Louis, charging them with infringing the reissued Cochrane patent, and asking, *inter alia*, for a preliminary injunction. Answers were filed in all of the cases, assailing the validity of the patent and denying the alleged infringement. Only one affidavit to support the charge of infringement was filed. There were numerous affidavits denying the infringement. The following opinion was delivered on the application for an injunction.

Rodney Mason, John A. Hunter, and C. H. Krum, for plaintiff.

George Harding and F. N. Judson, for defendant.

Before MILLER, Circuit Justice, and DILLON, Circuit Judge.

MILLER, Circuit Justice. The bill in this case charges the defendants with infringing several patents issued to William F. Cochrane, all of which have been assigned to plaintiff. These patents are reissues following upon a surrender of original patents, and they relate to the "new process," as it is called, of making a superior flour out of middlings, which were formerly rejected, or, if used, were very inferior in quality and value. The patent of principal importance in the case is for the process by which these middlings are purified and converted into flour, and the others are patents for several machines used in the process. The bill prays for a preliminary injunction, and due notice of the application was given. The case hav-

ing been fully heard on affidavits and argument of counsel, we now proceed to its decision. It is proper to add that, before the hearing, the answers of the defendants were filed.

The defences are: First, that the patents are invalid; and, second, that if valid, they have not been infringed by the defendants. The patents have been found to be valid by the judgment of the supreme court of the United States at its last term, in the case of *Cochrane v. Deener*, [95 U. S. 355.] and a copy of the record of that case is produced as evidence in this case. And while it is conceded that the judgment in that suit is not an estoppel as to the defendants in this, because they were not parties to the former, it is not denied that it is conclusive on this court as to the principles which it decides, and raises a *prima facie* presumption of the validity of those patents, which requires clear and satisfactory proof to the contrary, before it can be rebutted. This proposition was announced in the case of *American Middlings Purifier Co. (present plaintiff) v. Christian*, [Case No. 307.] on a similar application in the Minnesota circuit court, a few months ago, and we adhere to it now. To avoid the legitimate effect of that judgment, it is alleged by defendants that the judgment of the supreme court was obtained by fraudulent collusion between the plaintiff and the defendant, imposing upon the court what it believed to be a genuine contest, while in fact it was intended and desired by both parties that the patent of plaintiff should be established by its judgment.

There is, in our opinion, a failure to prove this collusion. The fact that the parties to this suit and others similarly interested have, during the vacation of the supreme court, filed a motion to vacate that judgment on that ground, certainly has no tendency to prove it. And scarcely any more weight can be attached to *ex parte* affidavits purporting to retail, at two or three removes by hearsay, the statements of the counsel of one of the parties to that suit. Nor can a presumption of such collusion arise from the fact that the case was heard on printed argument instead of oral, or that the two counsel of defendant, who each presented a printed argument, did not make it longer or fuller. These arguments in the supreme court were very fully considered and accurate models were examined. A division of opinion in the court caused a protracted examination of the case, which was before the court after its submission some six months—a very rare thing.

It is next urged that the reissued patents are void because they differ from the originals in important particulars, and contain claims not justified by the originals, and it is said that this question was not before the supreme court. It appears to be true that no such question was considered by the

court, and if the showing of the defendants were such as to convince our judgment, or satisfactorily prove that the position is well taken, we should give the defendants the benefit of it. But the action of the officers in the patent office, in making these reissues, must be presumed to be right, and the burden of proving the reverse is on the defendants. They have produced nothing on that subject but the specifications of the original and reissued patents, and insist that it appears clearly from a comparison of these, that the reissue is for a different thing from the original. The comparison, as thus made, and especially when extended to all the patents relating to the same improvement issued to the patentee on the same day, does not satisfy us that the reissues are void on that ground. They are not, in our judgment, sufficient, in the absence of the original applications in the patent office, to justify us on this preliminary motion and imperfect presentation of the case, to hold patents which have been passed upon by the supreme court, and by the circuit court of Minnesota, void. The same remarks apply to the next objection to the patents, namely, that they were not novel. The principal evidence offered on this subject is an extract from a French publication, which is said to be now in the patent office at Washington, bearing a date anterior to the date assigned by Cochrane to his invention. The correctness of the translation offered is disputed. The original is not before us. The whole matter is so imperfectly presented, that it would be a gross injustice to hold the patents void without a more extended examination of the matter. It may be observed in respect to both these objections, that, on final hearing, when the issues are clearly made and seen, and the testimony of witnesses subjected to cross-examination, with the aid afforded to the court by models and drawings illustrated by full argument, they can receive that careful consideration of the court which they cannot here, and which is necessary to justify the rejection of the patents.

For the purposes of the present motion, we are bound to treat the patents set up by the plaintiff as valid. There remains to be considered the question of infringement. The case standing at the head of this opinion was heard and argued with four others, brought by the same plaintiff for a like infringement by other defendants. In all these cases, the bills charge the infringement and the answers deny it under oath. It is necessary, therefore, for the plaintiff to sustain the allegation of infringement by a preponderance of evidence. There is but one witness on the part of plaintiff in all the cases. The defendants in each case have introduced several witnesses, who, on oath, deny that the defendants use the process or the machines described in plaintiff's patent. Looked at in this general way, there is the force of the answer and the more numerous witnesses

of the defendants, none of whom are impeached, against the testimony of a single witness.

If we examine more closely the statements of these affidavits, it does not appear that Mr. Paige, the witness of plaintiff, ever saw any of the machines of plaintiff, or any model of them, or of the Welch patent. He describes their mode of operation and the process of plaintiff from the language of the patent alone. Conceding that he is sufficiently an expert to understand this, and taking his description of the mode or process of the defendants, some of which he does not pretend to describe except by reference to others, his affidavit is liable to the objection of a want of minuteness and precision in those descriptions. These affidavits are unaccompanied by any models or drawings of defendants' machines, or anything whatever by which the court can institute for itself a comparison of the processes used by the defendants with those patented by plaintiff. This is a very serious defect in the presentation of the case. When the case in Minnesota [American Middlings Purifier Co. v. Christian, Case No. 307] was before me, several models were introduced, and the patent which defendant used was brought into court and the actual process of bolting, with the use of the current of air, was put in operation before our eyes. The defendant then claimed that the patent of which that model was an exhibit, antedated that of plaintiff and rendered it void. There was scarcely a question that, if it was not an anticipation of plaintiff's invention, it was an infringement of it. The infringement in that case was but feebly denied and was manifest. Here it is very different. The infringement is but feebly supported by a single witness and denied by many. Mr. Paige, himself, seems to recognize two variations of the processes of defendants in all the cases from those of plaintiff. One of these is, that plaintiff describes a process by which the middlings are purified in the first separation from the superfine flour, the meal going through a series of reels and bolting cloths, subjected from the beginning to the current of air, and the middlings, when this part of the process is ended, being left in the reel purified and ready for regrinding. The defendants do not use the air current in the first step of the bolting, but, following the old mode, separate, without the use of the air current, the superfine flour from the middlings, ship-stuff, etc., and then taking the middlings, run them through the sieves prepared for the purpose. In the mills of a majority of defendants the current of air is not introduced into the sieve where the middlings are until they have been rebolted several times. The other variation is, that the defendants use the old mode of bolting, by which the meal, as it progresses, passes over cloths, the meshes of which are continuously coarser, while with plaintiff's they grow successively

finer. The result of this is obvious, namely: that the middlings with such heavy particles of bran and other impurities as cannot be driven off by the air-blast, all remain in the bolt in plaintiff's process. These same middlings pass through the bolting cloth in defendants' process and are found in the chest, divided by the relative size of the meshes of the cloth into middlings, shipstuff, etc.

Another variation insisted upon as important by Mr. Harding, is that in all the defendants' processes the current of air is produced by suction, while in plaintiff's they are created by pressure forcing the air into the machine. We do not think we are called upon to determine with critical accuracy, upon consideration of the doctrine of equivalents, whether these variations which are apparent now are such as to exempt the defendants on a final hearing from the charge of infringement. On that hearing, no doubt much that is obscure will be made clear. Drawings and models will be shown, and witnesses subjected to cross-examination. Other competent witnesses will have opportunity to examine defendants' process. The law of equivalents will be discussed as it has not been now. The decision of the supreme court is strong evidence that plaintiff's patent is valid, and is conclusive that Deener, in the use of Welch's patent, infringed it. But it is no evidence that these defendants have infringed it. The full burden of proving that rests upon the plaintiff as an entirely new issue of fact. When we consider the consequences to defendants of stopping their mills by injunction at this season of year, that we are asked to do this in a summary manner on a hearing at short notice, without the usual test of cross-examining witnesses, we are of opinion that the case which demands such a grave interference with the business of individuals should be clearly made out and should not rest upon unsatisfactory evidence that the acts charged have been committed. It may be said that, by placing defendants under bonds, as we did in St. Paul, their business can go on without interruption; but we can only require bonds as an alternative, the other branch of which is, that if they do not give bonds, they must be stopped by injunction; we can only demand a bond, therefore, in a case in which, if it is not given, the injunction must issue.

We do not see that such a case is made in regard to the defendants in either of the cases before us. As there is no allegation of present or threatened insolvency in any of the bills or affidavits, and as substantial precautionary justice can be fully attained by requiring the defendants to keep an account and report monthly under oath, and to submit to a thorough examination of their mills, while in operation, by plaintiff, his counsel and expert witnesses, we shall make such an order and deny the injunction.

Judge TREAT, though not constituting a part of the court, has heard the case and

given us the benefit of his counsel, and agrees to what is here said.

DILLON, Circuit Judge, concurs.

Ordered accordingly.

NOTE. See American Middlings Purifier Co. v. Christian, [Case No. 307.]

Case No. 306.

AMERICAN MIDDINGS PURIFIER CO.
v. ATLANTIC MILLING CO.

SAME v. CHRISTIAN.

[5 Dill. 127; 4 Ban. & A. 148; 15 O. G. 467.]

Circuit Court, D. Minnesota, E. D. Missouri.
March, 1879.

COCHRANE REISSUED PATENT — NEW PROCESS
FLOUR—PURIFICATION OF MIDDINGS — EXPAN-
SION OF CLAIM IN REISSUED PATENT.

The Cochrane reissued patent, sustained in *Cochrane v. Deener*, 94 U. S. 780, for the manufacture of new process flour by the purification of "middlings" by screening and blowing, was held void because no such process was described, suggested, or claimed in the original patent.

[In equity. Bill by the American Middlings Purifier Company against the Atlantic Milling Company, and another bill against John A. Christian & Co. for infringing plaintiff's patents Nos. 37,317, 37,318, and 37,321. On application a preliminary injunction was refused in the Atlantic Milling Case, (Case No. 305,) and also in the Christian Case, provided the defendants would give bonds, etc. (Id. 307.) The cases came on for final hearing, and were argued together. Bills dismissed.]

On the 6th day of January, 1863, letters patent, numbered 37,317, were granted by the United States to William F. Cochrane for "a new and useful method of bolting flour." The claims in this patent were as follows: "1st. Bolting the meal over a series of reels covered with cloths of increasing fineness, in combination with a blast, substantially in the manner described. 2d. Running the offal through the entire series of reels, substantially in the manner described, for the purpose of making the flour bolt more freely. 3d. Rebolting the 'white middlings' flour after regrinding and mixing them with offal, substantially in the manner described. 4th. Conducting the flour made upon each reel into a separate compartment, substantially in the manner described, for the purpose of making a variety of grades, or of mixing them in any proportion desired, as set forth."

On the 24th day of April, 1874, the above-mentioned patent was reissued, numbered 5,841, for "a new and useful improvement

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in the art of manufacturing flour." The claim in the reissued patent was as follows: "What I claim as my invention, and desire to secure by letters patent, as an improvement in the art of manufacturing flour, is the hereinbefore-described process for manufacturing flour from the meal of ground wheat, by first taking out the superfine flour, and then taking out the pulverulent impurities by subjection to the combined operations of screening and blowing, and afterwards regrinding and rebolting the purified middlings."

The complainant is the assignee of the reissued patent. The reissued patent was sustained by the supreme court, in *Cochrane v. Deener*, 94 U. S. 780. A motion was made in the supreme court to vacate that decree, because it was procured by collusion. The charge was not sustained, but in denying the motion the supreme court said: "Under the circumstances, we think that third parties, who had no opportunity of being heard, and whose interests as opposed to the Cochrane patents are very important, should not be concluded from having a further hearing upon it whenever a future case may be presented for our consideration." [95 U. S. 355.] The defendants in their respective answers deny the validity of the reissued patent on various grounds, the more important of which are that such reissue is not for the same invention as that described and claimed in the original patent, and that the invention had been anticipated by others, and described in various publications and patents prior to 1863; and the defendants also deny the alleged infringement. Voluminous proofs were taken, accompanied with many diagrams, models, and exhibits.

By consent of parties, the arguments were heard by the circuit judge and Judges Treat and Nelson.

Rodney Mason, Charles F. Blake, C. H. Krum, and others, for complainant.

George Harding, Gordon E. Cole, F. N. Judson, and others, for defendants.

Before DILLON, Circuit Judge, and TREAT, and NELSON, District Judges.

DILLON, Circuit Judge. The reissued patent is a process patent for an alleged new and useful improvement in the art of manufacturing flour. "The claim therein," as construed by the complainant, "is for the use of five consecutive steps performed in the art of manufacturing flour, in a definite order, viz.: 1st, Grinding the wheat into meal; 2d, Taking out the superfine flour; 3d, Taking out the pulverulent impurities by the combined operation of screening and blowing so as to purify the middlings, which are then, 4th, Reground, and then, 5th, Rebolting."

The real value of the invention described and claimed in the reissued patent consists in the purification of the middlings by

screening and blowing, thus freeing them from pulverulent impurities, and thereby fitting them to be reground into flour of a superior quality. The mode described in the patent and accompanying model and drawings for effecting the purification of the middlings is by the agency of revolving bolts acting upon the meal or "chop" as sieves or screens, assisted in their operation by blasts of air introduced within them. The claim of the complainant is that wherever, in the manufacture of flour, the wheat is ground by the first operation of the stones into meal, so that superfine flour is by the next step of the process taken therefrom, any purification of the middlings in residual mass (of which the valuable constituent is the middlings) by the combined operation of screening and blowing, intermediately, for the purpose of regrinding and rebolting, whether such purifying is within the flour reels or upon vibratory screens outside of reels, is an infringement of the Cochrane patent.

Flour made from purified middlings is now, and since about the year 1871 or 1872 has been, well known throughout the country as "new process flour." In what consists the essential value of this "new process?" The answer is, purified middlings—that is, the making of a first grade, and even the best grade, of flour out of middlings—from which it had generally been considered by the millers of this country (although more intelligent or advanced ideas prevailed in France, and perhaps elsewhere in Europe) impossible to produce, or, at all events, impracticable profitably to produce, flour of the first quality.

A fundamental question in the cause, underlying all others, is: Did Mr. Cochrane, in his original patent, granted January 6th, 1863, contemplate or provide for the purification of middlings by the combined action of the screen and blast? If he did not, the reissue, which must be for the same invention as the original patent, and which makes the basis of its claim such purification of the middlings, is void.

In the light of arguments of great ability and thoroughness, extending over a period of fifteen days, and illustrated at every step by exhibits, diagrams, and models, the judges who sat at the hearing have deliberately considered the question above stated, and have reached a unanimous conclusion upon it. It becomes my duty to announce the judgment of the court. I shall content myself with stating it, without displaying in detail the reasons, or elaborating the grounds upon which it rests.

The description of the invention in the original patent as a "method of bolting flour;" the progressively finer meshes in the three bolting reels therein described; the absence of any "returns;" the statement therein that the agency of the blast is to "assist the bolting;" the cupola, or dome, on the

model, provided with screens, which could have no other effect than to arrest the impurities, or the most of them, and return them directly to the flour; the enforced circuit of air, containing any impurities that might escape the screens in the cupola, and returning the air, under the conditions specified, laden with such impurities, directly into the reels; the absence of any statement in the patent of a purpose to purify middlings; the absence of any claim for purifying middlings; the statement that air is used "to aid bolting," and the obvious consideration that, if air was used to purify middlings, it could not fail to have occurred to so ingenious a mind as Mr. Cochrane's that this could be most easily and most effectually applied as it is now almost universally applied—outside of the reels or bolts, and not within them; the failure to provide for blasts of air in the "separator," or in a separator; the low grinding which his process evidently contemplated, as evidenced by the successively finer meshes; the fact now established, that the manufacture of middlings flour is not practiced without more or less high grinding, or higher grinding than was ordinarily used in this country—the foregoing considerations, in connection with the extrinsic testimony as to what was done under the patent, all concur to satisfy us that the idea of Mr. Cochrane was the use of the blast in the reels as an aid in the mere process of bolting, with the view of obtaining an increased quantity of choice flour, and not for the production of purified middlings.

The reissued patent having been expanded to embrace a claim for purifying middlings, when no such process was described, suggested, or claimed in the original patent, it is void. If this conclusion is sound, it is not necessary to consider the questions of anticipation or infringement, upon some of which, if compelled to decide them, we might not agree. The result is that the bills must be dismissed, and decrees will be entered accordingly. All concur.

NELSON, District Judge. I concur in the opinion of the circuit judge. The actual invention of Cochrane has been enlarged by the addition of new matter in the reissue, so that, when the two patents are compared, the expansion is apparent. The new patent is not for the same invention secured and embraced in the original letters patent.

TREAT, District Judge. I concur in the opinion just delivered by the circuit judge. The reissued patent, No. 5,841, is not for the same invention as patent No. 37,317, and is consequently void. In addition to the summary of reasons just announced for the conclusion reached, it seems advisable to state that the original patent was merely for an improved method of bolting in the manner described, whereby an increased quantity of choice flour could be obtained from the ordi-

nary process of milling, without any reference to purified middlings, by combined blowing and screening in an intermediate or any other stage of the operations.

The original contract of Cochrane, in 1860, with Warder & Barnett, shows that his purpose was, by low grinding, to produce a superior grade of flour in larger quantities than heretofore known. He agreed to make "the most superior grade of flour in the United States out of four bushels and twelve pounds of choice wheat for each barrel of flour," which result could not be accomplished except by low grinding, if at all. His scheme or plan did not contemplate a large amount of middlings, and could not have done so, for the lower the grinding the less the quantity, and, as a general rule, the poorer the quality, of the middlings.

At the time said contract was made, Cochrane had an interest in the Coggswell & McKiernan patent, the devices of which he evidently designed to utilize. His experiments at Lagonda, and subsequently at the first Barnett mill, also show that his purpose was to produce a large amount of such choice flour by low grinding from the least possible, or a comparatively small, quantity of wheat.

The early experiments were directed to that end, and hence the satisfaction evinced when the required amount of flour was produced approximately from the designated amount of wheat. When, however, it was ascertained that no grade of good middlings flour could be thus made, the resort was had to higher grinding, of which, as to the result, Warder & Barnett complained as being one-quarter too much.

They prove by their correspondence at the time, just as the original patent shows, that the inventor supposed that by his process and devices for bolting he could accomplish his purpose by using the ordinary process of milling. This is evident, not only from the correspondence at the time, but from the mechanical inventions to which he referred, and also from the special stress placed on meshes of increasing fineness. In that correspondence there was a constant boast of the new mode of bolting, whereby the meshes were to be kept cool, and free from clogging, etc., and also of the device for returning the current of air through the cupola back into the reels, whence it had just escaped through the perforated pipes, meshes, etc. In one of the letters it was confidently claimed that the difficulties as to low grinding, even of spring wheat, could be overcome by Cochrane's contrivances—that grinding of even that class of wheat could not be so low as to prevent "cleaning up." It was low grinding, then, whereby the large quantity of choice flour was to be made, that the inventor had in view. This was to be effected, not by an "intermediate" stage of purification between the production of superfine flour and the re-grinding of middlings, but by the use of

meshes of increasing fineness in the flour bolts, assisted by blasts of air. Those blasts of air were to spend their force within the first three reels; for no blasts were to be used in the separator before regrinding. The necessary effect of using successively finer meshes, instead of successively coarser, was to prevent the escape through the meshes of a larger quantity of impurities, and, consequently, of making the flour thus screened clearer and better. The impurities thus prevented from passing through the screens into the flour would necessarily be retained in the reels, and pass off with the tailings, consisting of middlings, shipstuf, etc. It is not to be supposed that meshes of increasing fineness could operate in any other way. Hence the Cochrane process was not to purify the middlings, or increase their quantity or quality, but merely by his "improved method of bolting" to obtain a larger amount of choice flour from the specified quantity of wheat.

In his original patent, No. 37,317, he formulated four claims, not one of which was for purifying middlings, but two were specially directed to his mode of "bolting." He especially stated that the flour screened through each of his first three reels could be kept separate or mixed, as the miller might desire, without a hint that the siftings of the third reel would consist of dirty flour, or pulverulent impurities, not fit to be used, or which it was sought to remove, either from the flour thus sifted through the third reel or from the middlings within that reel, which were to pass off with the tailings.

The devices specified in the original patent are very significant on this point. They provided for the introduction of a blast of air through perforated pipes into each reel, as stated, for the purpose of keeping the meshes open, cooling, etc., without mentioning any effect to be produced towards removing pulverulent impurities, or even naming such impurities. Indeed, if that effect had been contemplated, the invention would not have provided a cupola with two screens and brushes to arrest the escape of whatever was blown or wafted into the cupola, and to cause that wafted matter to be thrown back or discharged directly into the first flour chest. If that wafted matter, whether flour, dust, or pulverulent impurities, was to be thus returned and mixed with the siftings of the first reel, it is evident that the invention had no reference to the removal and separation of such matter from the flour. The devices involved necessarily a contrivance for the escape of the air forced into the reels—for an enforced current of the kind must have an outlet, otherwise disastrous results would follow, or the blasts cease to be operative. The screens in the cupola, and the brushes, for the purpose of returning the arrested particles into the reel-chest, indicate plainly enough that there was no thought of causing pulverulent im-

purities to escape through the cupola. This is made still more apparent from the fact that whatever escaped through the cupola was, in the normal operation of the connecting tubes, to be blown back into the very reels from which it had been just expelled. It was only in exceptional states of the weather that the valve in the tube was to be opened, but at all other times there was to be a return of the current escaping from the cupola into the reels, carrying with said current whatever it contained. If, then, the purpose was to expel impurities, why such well-arranged devices to force them back into the contents of the reels?

Again, the "cant" ventilator of Cogswell & McKiernan, and their air blasts through zinc jackets, had been used at Lagonda and in the Barnett mill before the original patent, No. 37,317, issued, and simultaneously with that patent Cochrane had procured for his "cant" ventilator his patent No. 37,321; yet in the specifications and claims of No. 37,317 he omitted, and it must have been ex industria, all reference to his No. 37,321, and substituted therefor his cupola, with screens and brushes. When he had ascertained, in 1874, that his devices, as referred to in the original patent, would not purify middlings, nor essentially aid in so doing, he interjected into his specifications for a reissue the rejected device No. 37,321. The testimony sufficiently explains why, from his experimenting at Lagonda and in the first Barnett mill, he discarded the "cant" ventilation, independent of its anticipation by Cogswell & McKiernan. The devices by which the improved method of bolting was to be carried on, so far as air was concerned, looked to an enforced current, or blast, operating from within the reels outward, and not by induced currents operating from without, through the screens, inward or upward, as in flat and vibrating sieves.

Whatever construction may be properly put on the words "combined operations of screening and blowing," it is obvious that the original invention contemplated a blast of air from within the reels, whereby its force should be directed not only through the meal as it was whirled around inside the reels, but also against the meshes of the reels, tending to force through whatever was small enough to pass. If the flour dust was thus forced through and wafted into the cupola, while the heavier particles—small enough to pass—fell by their greater specific gravity into the conveyers, the extremely comminuted particles of the integuments of the wheat berry, or of its cell-walls, would, like the flour dust, pass into the cupola by force of the blast, there to be arrested and brushed back into the flour, or returned through the tube into the reels, to be again and again whirled in and out in a continuous round.

The many changes made by Cochrane, and Warder & Barnett, after the original patent

issued, and also after the reissued patent was granted, in order to adjust the devices referred to in No. 37,317 to an induced current or suction, indicate very clearly that the idea or thought of a process for purifying middlings in an "intermediate" or any other stage of the manufacture, by the combined operations of blowing and screening, was not originally in the mind of the inventor. The testimony is clear that when the Cochrane device or machine was rearranged and altered so as to work by suction, the perforated pipes performed no function. The manner of inducing or drawing the air into the reel-chests by suction, and the operation of the reel-screens when suction was used, were the reverse of combined blowing and screening. It cannot be fairly said, in the light of facts and circumstances now in evidence, that those reverse modes of operating were substantially the same, or immaterial changes as to form or modes of accomplishing what the patent covered. Even after the reissue, No. 5,841, Cochrane and Warder & Barnett had to resort to important changes as to the modes of introducing air into their reel-chests; they abandoned the device of a cupola with screens and brushes, introduced practically a new tube and valve, left their perforated pipes functionless, and changed blasts into suction, or enforced into induced currents. In brief, the essential changes in Cochrane's devices, as described in No. 37,317, which he was compelled to make in order that a beneficial result might follow, so far as purifying middlings went, demonstrate that a process for purifying middlings and making therefrom a high grade of flour, superior to superfine, was not thought of by him in or before 1863.

But where can there be detected in No. 37,317 a suggestion either of a mode of purifying middlings by the combined operations of blowing and screening, or of an "intermediate" stage therefor between the production of superfine flour and the regrinding of the middlings? Where is or was such an "intermediate" stage? It is contended that the screenings by the first reel were superfine flour, or, if not, perhaps the screenings also of a part or whole of the second reel, and, consequently, the combined operations of blowing and screening in the third reel purified the middlings at that stage which was intermediate the production of superfine flour and the regrinding of the middlings. But we have endeavored to show that the screenings of the third reel were flour, which could be mixed with the flour from the first two reels, and that the patent so states. If, then, by meshes of increasing fineness, the middlings discharged at the tail of the third reel were less free from impurities than they would be if coarser meshes were used, the process of purification could not occur by the use of that reel, nor at that stage of the operations. There is suggested in the original patent neither the idea of purifying the

middlings at the intermediate stage mentioned, nor the use of the combined operations of screening and blowing for that specific purpose. It cannot be said that the mention of "white middlings" embodies such a conception, so that the reissue, without expansion, could cover the purification of middlings in the manner and at the stage claimed, for the term "white middlings" was well known to the art of milling long before, and also to the commercial world. The manner in which "white middlings" are referred to in the patent shows that the term was used as one well known, and not as a new or special product of any superior value.

A comparison of the original and reissued patents, and an examination of Cochrane's contract with Warder & Barnett in 1860, also of the correspondence of the latter and of the testimony concerning low and high grinding in connection with Cochrane's invention, will show that the purpose was as stated, viz., by the ordinary process of milling, through his method of bolting, to increase the yield of choice flour. He soon learned that higher grinding, or what Professor Horsford's report terms "half-high milling," was necessary to the production of the best quality of flour, or of that superior grade which he contracted to make. Instead of accomplishing the promised result by low grinding from four bushels and twelve pounds of wheat, higher grinding was soon resorted to, requiring five bushels and twenty pounds of wheat per barrel. He complained to his millers, it is said, that they persisted in grinding too low, although that mode of grinding was necessary to make the required yield, and insisted that they should grind higher. It was well known in the art that high grinding made a better quality but less quantity of good flour, but Cochrane thought he could increase the quantity of choice flour by his process. Warder & Barnett, it seems, following, it may be, the suggestion of Cochrane, began the use of high grinding at an early day, and stated to their correspondents that certain shipments made were from grinding "high," yet, in one of their letters, they then boasted that by the new method even spring wheat could not be ground "too low" to prevent its being "cleared up." The ordinary process of milling, in connection with which Cochrane's method of bolting was to be employed, must have been, if not low grinding, certainly not the high grinding used in defendant's mill; for the value of his method looked to the greater yield of choice flour.

The reissue says: "It is this intermediate treatment (between the separation of the superfine flour and the completion of the middlings flour by regrinding and rebolting) for the separation and removal of the pulverulent impurities which distinguishes my improvement in the art from all before known modes of manufacture." In the original patent there is not only no such claim, but

nothing is said about the removal of pulverulent or any other impurities, or any such intermediate treatment. A brief use of air in an expanded portion of one reel at Lagonda, operating as a separator, was soon abandoned in the course of the early experimenting, and, hence, in the original patent no use of air in the separator was mentioned.

The proof is that, in the modern or present mode of purifying middlings, the purification occurs in connection with what answers to Cochrane's separator; and in that connection a current of air is now employed, while Cochrane did not call for any blast of air at that stage of the process, and previous to regrinding. His plan or process was not to use blasts of air in connection with the separator, but to rely on the ordinary process of screening, without the use of air blasts or currents. The reissue attempts to expand the original invention to cover, therefore, in connection with the separator, what he did not originally claim or suggest, in order that he might appropriate to himself what had been since discovered or used outside of his invention.

As the conclusion is reached that the reissued patent is void, it is unnecessary to consider whether the process claimed was anticipated in any of the various publications, or by any of the persons or processes as set up by defendants. The questions concerning "high milling," the French and economical processes as used in Europe, the connection of the Cabanes and other patents with such processes, and also of Gove's method and machine, would, if fully considered, involve a very elaborate investigation of details, and require, for a clear presentation of their analysis, resort to numerous drawings and models.

If the reissue had been held valid, an embarrassing and delicate question would have arisen concerning the alleged infringement by the defendant. In the case of *Cochrane v. Deener*, [94 U. S. 780.] the United States supreme court decided that the Welsh patent was an infringement of Cochrane's. That court had before it not only the process patent of Cochrane, but also his patents for machines; and to what extent this court, under the circumstances, should venture to enter upon the subject anew—if an investigation as to that point were needed—might be doubtful. But, if an appeal is taken, that court will have before it in this suit the large amount of new evidence introduced, in the light of which it can determine for itself whether it will review its former opinion or not. Were it necessary for a decision on that point to be now made, and were it open for our consideration, we might possibly reach a different conclusion. Decree accordingly.

NOTE, [from original report.] Questions growing out of this patent, see *American Middlings Purifier Co. v. Atlantic Milling Co.*, [Case No. 305.] Same v. Christian, [Id. 307.]

AMERICAN MIDDINGS PURIFIER CO.
v. CHRISTIAN.

[See *American Middlings Purifier Co. v. Atlantic Milling Co.*, Case No. 305.]

Case No. 307.

AMERICAN MIDDINGS PURIFIER CO.
v. CHRISTIAN et al.

[4 Dill. 448; 3 Ban. & A. 42; 1 N. W. (O. S.) 91.]

Circuit Court, D. Minnesota. Aug., 1877.

PRELIMINARY INJUNCTIONS IN PATENT CASES—EFFECT OF DECREE OR JUDGMENT SUSTAINING A PATENT—PREVIOUS USER—EXPERT TESTIMONY—BOND AS AN ALTERNATIVE FOR AN INJUNCTION.

1. Application for an injunction pendente lite, to restrain the defendants from an alleged infringement of the plaintiff's patent for the "new process" of manufacturing flour from middlings: the validity of this patent having been sustained by the supreme court (*Cochrane v. Deener*, October term, 1876, [94 U. S. 780.]) and that judgment not being shown to have been collusive, and the infringement being made probable, the court ordered an injunction unless the defendants would give a bond conditioned for the payment of any final decree for money in favor of the plaintiff, and for keeping an accurate account of the amount of flour made by them, and to report the same every three months to the court.

[Cited in *Hoe v. Boston Daily Advertiser Corp.*, 14 Fed. 916.]

2. The principles which guide the courts in granting or refusing such injunctions, considered by Miller, circuit justice.

3. A decree or judgment of a circuit court, after full hearing or trial in an adversary cause, sustaining a patent, is very strong evidence of its validity in an application for an injunction; and such a decree or judgment of the supreme court is of still greater weight, if not absolutely conclusive.

[Cited in *American Paper Pail & Box Co. v. National Folding Box & Paper Co.*, 51 Fed. 232, 2 C. C. A. 165.]

4. Previous user of the patent by the plaintiff, or those who claim under him, is not absolutely essential to the right to an injunction: if the validity of the patent has been established by a decree or judgment of the circuit or supreme court, the plaintiff, if otherwise entitled, may have an injunction without showing previous general user, especially where the patent is for a process, as distinguished from a machine.

5. Effect of plaintiff's laches on his right to an injunction, considered; and, under the circumstances, held not to defeat the right.

6. Expert testimony in patent causes, and the weight to be attached to ex parte affidavits, commented on.

[In equity. Bill by the American Middlings Purifier Company against John A. Christian & Co. for infringing plaintiff's patents Nos. 37,317, 37,318, and 37,321. Heard on motion for preliminary injunction. Motion allowed unless the defendants give security in the sum of two hundred and fifty thousand dollars. On final hearing plaintiff's bill was dismissed. *American Middlings Purifier Co. v. Atlantic Milling Co.*, Case No. 306.]

[Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

This suit was commenced in May last, by the complainant, as the owner of the patent by assignment from the patentee, to recover damages in the sum of \$300,000, for an alleged infringement by the defendants of the process for manufacturing flour and purifying middlings, which was patented to William F. Cochrane, originally in 1863, and afterwards by a reissued patent in 1874, on which reissued letters patent the complainant's claim is based. At this term of the court (June, 1877), the complainant's counsel moved, upon the bill of complaint and affidavits, that an injunction be issued, restraining the defendants from using this process in the manufacture of flour until the final determination of the suit. This motion was vigorously opposed by the counsel for the defendants, by models and a large number of affidavits, their defence being that Cochrane, the patentee, was not the first inventor of the process, but that, as long ago as 1856, a description of the same process was published in France as the invention of one Cabanes, and that it was patented by him in England in the preceding year; also that the process had been in use in this country for many years in the farina mills of New York, and that if the complainant ever had any rights, it had lost them through its laches or negligence, in allowing so long a time to elapse before asserting them or making them known. On the other hand, the complainant's counsel contended that this process differed substantially from that of Cabanes'; and that in the case of *Cochrane v. Deener*, [94 U. S. 780,] which was decided by the supreme court of the United States at the last October term, the validity of this patent was fully established.

Rodney Mason, and John B. & W. H. Sanborn, for complainant.

Gordon E. Cole, H. R. Selden, E. B. Selden, and Mr. Gridley, for defendants.

Before MILLER, Circuit Justice, and NELSON, District Judge.

MILLER, Circuit Justice, orally.—In the matter of the application of the American Middlings Purifier Company against John A. Christian & Co., we are compelled, this morning, to announce the result of our consultations on it, although, perhaps, very inadequately prepared to do it with perfect satisfaction to ourselves. I must leave today, in order to reach the circuit court at Denver, Judge Dillon not being in attendance at that court, and it will have been in session a couple of days when I get there in any event, and, under the circumstances, we must give it the best judgment that we have.

The application is for a preliminary injunction in behalf of the plaintiff, upon allegation that the process used in the manufacture of flour patented by plaintiff's assignor in 1863, and a reissue in 1874, is in-

fringed by the defendants. There is no answer to the bill, and the motion is heard on the bill on the affidavits of plaintiff and the affidavits of defendants. The plaintiff brought suit on this same patent in the supreme court of the District of Columbia, a year or two ago, against Deener and others, for an infringement of it. In the court of that district the plaintiff failed to establish his case. Upon what precise ground the court below rendered its judgment I do not know, and it is not material. The plaintiff here and the plaintiff there took an appeal to the supreme court of the United States, and that case was heard and decided at the last term of court. The decision of the supreme court of the District of Columbia was reversed, and a decree was rendered in favor of the plaintiff in the supreme court of the United States. [94 U. S. 780.] The effect to be given this decree in the present proceedings is one of the main questions to be determined now. The counsel for the plaintiff in this case insists upon treating it as almost conclusive of the validity of the plaintiff's patent. The counsel for the defendants, in their argument, treat it as of very little value in a suit against the present defendant, who is a different party from the defendant in that suit.

I think that the uniform course of decisions in the courts of the United States, where a previous decision has been had by a circuit court with regard to the validity of a patent, has been to treat it as of the very highest nature, and as almost conclusive in an application for injunction in another case founded on the same patent. No one pretends, no one argues, that such a decision, even by a circuit court, is absolutely conclusive on a final hearing on the merits of the case; but since patents are of such extensive and general operation all over the country, and since the litigation in regard to patents has been found so expensive and so wearisome to the courts, it has become almost a matter of necessity, after the validity of a patent, as distinguished from the question of infringement, has been passed upon by a competent tribunal upon a fair hearing, to treat that decision, in any future application in other courts and against other parties, as strongly persuasive of the validity of the patent; and this is especially so on the question of a preliminary injunction, and there is reason for it. The decision of the circuit court (I am saying nothing about the supreme court of the United States) in such cases is generally, I may add, always, except where there are cases of collusion, the result of careful and deliberate consideration, either of a protracted trial before a jury, or of a careful and full hearing upon depositions before a court. The presumption, therefore, that the title to the patent itself, and its validity (if that were brought in question in one of these suits), was more critically and more thoroughly looked into,

and decided upon better hearing and more mature consideration than it can be in a preliminary injunction, is very strong. Therefore, I think I may state it, fairly and correctly, that wherever a patent has been established, even by the decision of the circuit court, under a careful consideration, in a subsequent application, either before the same court or any other, for a preliminary injunction or for any preliminary relief, that decision is of very great weight.

This case stands on better ground than that. The decision which is brought to our notice in this case is a decision of the supreme court of the United States, the court whose judgments are final upon all questions of patent law; whether the parties in interest now were before it or not, its decision as to what is law in the case governs the decision of all the other courts in the United States. Where the question is one of complicated facts, and the facts may be controverted, and are controverted in the supreme court of the United States, with regard to the validity of the patent, of course the decision of that court upon those facts is conclusive, so far as the facts are the same; and, in addition to that, it is a very fair presumption that wherever the validity of the patent is a question which is brought to the attention and consideration of the supreme court of the United States, all the questions concerning that patent which could possibly be before the court, were before it, and were fully and well considered, and received its full and careful attention. I, therefore, cannot agree with the counsel, who has so ably argued this case for the defendants, that the case comes here as though this was the first time the patent was brought before the court.

As regards this particular judgment of the supreme court of the United States, it is assailed on the ground, in the first place, that the validity of the patent was but a minor consideration in the case, and did not receive the full and careful attention of the court; and, in the second place, on the ground that the whole suit, from beginning to end, in which that question was decided, was collusive and fraudulent, for the purpose of procuring the judgment of the appellate court in favor of the validity of this patent.

As to the first proposition, that the question of the validity of the patent did not receive the attention of the court carefully, that is refuted at once by the record of the case, and by the opinion of the court. The record of the case shows that it was assailed; that as many as seven or eight different grounds assailing it were set up in the supplemental answer, filed for that very purpose, and it shows that these questions were argued by the counsel upon their briefs, and it shows that the court turned its attention to the questions that were raised in this defence, especially upon that class of objections which go to show the want of novelty—the

one that is most relied upon in this case. I may, perhaps, add my personal knowledge of what took place in court which I do not think I am at liberty to disregard here, although sitting in another court, as to the attention which the whole of this case received. It was submitted to the court on printed argument very early in the term—I should think certainly as early as sometime in the month of October; that is my recollection. It was submitted on printed briefs, on both sides, of—taking them together—I should think, five hundred pages. It was held under advisement by the court before it was decided in conference for two or three months, up to the adjournment just previous to Christmas. It was then decided, and the opinion confided to one of the most careful, laborious, and able patent law judges of the United States. He kept that opinion from the week preceding Christmas until the last week of the session of the court, in March. It underwent, undoubtedly, a careful scrutiny and consideration in every branch of it. It is impossible, therefore, under these circumstances, to infer that all there was in the case did not receive the fullest and most careful consideration of the court. There is another thing that shows that it received the consideration of the court. It is possible, in a court like ours, where we are all of one opinion and at one time, that something may have escaped our attention; but two of the best patent lawyers in that court dissented from the opinion and judgment of the court, as appears by the record. The fact that these judges dissent shows that their objections must have been carefully considered in court, as they were in the conference, and rebuts any suggestion that there was any hasty or ill-advised action in the matter.

As regards the collusion: It is a sad thing to say that perhaps no class of cases coming before the courts have as much fraud, perjury, and wicked conduct generally, as patent cases. The vast amount involved in some of them, the conflicting interests, with a variety of people of all classes—the contest between patentees themselves, in which the sums involved are almost fabulous—lead to perjury and fraud of the grossest kind. It is the undoubted experience of the judges who are familiar with patent cases, that there is a large amount of false swearing and corruption in them. It is possible, therefore—our court has recognized the fact in two or three cases coming before it—that there may be a collusive suit brought to our court for the purpose of establishing a patent, in which the control of the litigation is all upon one side, though apparently there is an honest contest between two parties with regard to it. When, therefore, a proposition of that kind is made, it is to be considered. But there is no attempt here to establish a collusion by any affidavits or proof that either of the parties engaged in that case, in the supreme court of the United States, or in the

district court, were committing a fraud. There is no attempt, except from the character of the record itself, to show that there was anything but an honest contest in regard to it. The inference that it was a collusive suit is attempted to be drawn from the circumstances, which, I think, are not at all conclusive, and hardly persuasive. One of these is that the suit was suddenly brought, after the reissue of the patent, and speedily carried through the courts. But a reason for that is quite obvious in the nature of the transaction itself. The reissue, on which alone any of these suits are attempted to be sustained, was made at a time which left but five or six years of the patent to run. The parties owning the patent under it knew—it is now apparent, at least, on these affidavits before me—that it was generally known that the patent would be resisted by a very large and influential body of men. It was nothing, therefore, but sensible, reasonable, and proper that the patentee should select the nearest infringer of the patent, and get his case through the courts in a speedy manner, to decide whether he had such a claim, and that is what he did; and I see nothing indicative of fraud or collusion in the fact. If it could be shown that the defendants selected had no interest in the contest; that they were not actually engaged in milling at all; if it could be shown that they made any suspicious bargain with the plaintiff in that case, all these considerations would go to impeach the character of the case; but, with a single exception, that after the suit had been decided in favor of the defendants below, the parties agreed to some arrangement about the damages which might be recovered, or the mode of settling the amount of damages, if the plaintiff finally succeeded, there is nothing I can see in the case that justifies a suspicion of any collusion or fraud in the matter. I am, therefore, compelled to hold that that decision possesses all the validity, and is entitled to all the respect and consideration, and to all the weight which any other decision of the supreme court of the United States could have. And I am not aware—I do not believe—that any case exists or can be found in which an inferior court has held, on an application for a preliminary injunction, that the decision of the supreme court of the United States establishing the validity of a patent can be assailed in the court below. I do not myself go so far in this case as that. I do not say on this application it could not be shown that a patent was invalid if the evidence was strong enough to overcome the credit that is due to the judgment of the supreme court of the United States. But I say there is no precedent for holding that even that can be done; and I certainly am unwilling, myself, sitting here as a circuit judge, to hold that that decision is of no more weight and character than the decision of a circuit court, which is open to re-examination in the supreme court of the United

States, which might be carried up there and reversed, and which is made by only one of the judges of an inferior court.

Other considerations are brought to bear in this particular case, conceding the force to be given to that decision by this court, why the injunction in this case should not be granted. The first of these is a statement by counsel for the defendants, that no injunction can be granted unless there has been proof of previous user of the patent by plaintiff, or parties claiming under the same patent, and it is denied that there is any such proof here. If any very extensive evidence of previous user is an indispensable thing to the granting of an injunction, I am prepared to admit that it is not proven in this case. But I do not understand that previous user is an absolute and indispensable element of granting an injunction. I understand it stands only as one of the means or modes of satisfying the court of the right of the plaintiff to an injunction. It is to be presumed that when a party has used publicly and notoriously for any considerable length of time a patent, claiming exclusive right to it, the public have acquiesced in that claim, and against a man who comes to infringe it and to contest the rights of the plaintiff, there arises a presumption in consequence of that user, which is a very strong one; but does that user afford as strong a presumption as a deliberate contest in a suit through a circuit court and up to the supreme court of the United States, of the validity of the patent and the right of the plaintiff to its exclusive use? This is the thing to be established. This is the foundation. If this is conceded, or is established, the right to the injunction is clear, whether there is user or not; and to hold that no injunction can issue without several years previous user, is, in effect, to hold that if the public combine not to use a man's patent—the general public—or if he can't introduce it into use, or if he can't convince the public that it is a thing profitable to be used, and if it is (as it is in this case) of a thing that he can't, and probably will not, use himself, but is intended for the use of others, in a large measure, why it would follow, as a matter of course, that he never can get an injunction; and that his patent may run out and he never can get any value of it at all, because he has been unable to get anybody to use it. This is particularly applicable with reference to this process patent, because it is a patent, not for a machine, not for a product, not for an article, not for a patent medicine; it is a patent for a process or mode of doing a particular thing which is being done all over the world. How could he establish a user in this case unless he himself was able to own an extensive flouring mill, or to pay somebody to use his patent enough to make it a general user? I do not think there is anything in that question as applicable to

the present case, and especially in view of the fact which I shall now proceed to consider under the second objection, and that is laches. In other words, the argument of the defendants is that the plaintiff, having procured his patent in 1863, laid by and took no steps to enforce it against anybody until 1874 or 1875. That argument struck me at first as having a good deal of force in it, and it is founded, if it were true, and there is no excuse for it, in very strong principles; because if a man has a patent of that kind and he sees the world at large using it for eight or ten years, takes no steps to arrest it, sues nobody, sets up no claim, gives no warning, it is a very natural and strong reason why, under these circumstances, he should not be permitted to come subsequently and arrest everybody by process of injunction. In each and in every case that question depends upon its own facts.

However, it is apparent that in the original patents issued in 1863, there were defects in the specifications, which rendered them unavailable, in the estimation of the plaintiff, in a suit against anybody who was infringing them, for the reason that they really included the rights of the prior patentees, Cogswell & McKiernan. He, therefore, before he commenced any contest with these parties, who were very numerous and very powerful, was under the necessity of giving up his patents and asking a reissue, not that he might enlarge his claim, as so often is done to the detriment of the public, but, in point of fact, that he might diminish and limit his claims, which he did, being aware that he had to enter into a severe contest, and, therefore, equipped himself by casting off all that might embarrass him, and restricting his patents to that which he thought he could carry; and this he had a right to do, and in this he was wise. There was, therefore, no laches in that matter, unless, during all this time his patents, as they originally stood, were in general use, and in such use as to attract his notice and attention. The affidavits of the defendants remove that difficulty or objection, because, unless we consider the production of farina by a particular process as infringing the patent, the defendants themselves here show, by their own affidavits, that what is called the new process mill^{ing} commenced in this country about 1871 or 1872, and they assert that, and insist upon it in their own affidavits; so that, supposing the plaintiff in this case to have been vigilant, as vigilant as any man could expect him to be, it was only about 1871 or 1872 that there was any general attempt to use his patent or to infringe it, and then, if you will suppose him to have instituted his inquiries with a view to commence proceedings, it is no great length of time to allow him a year or two to see how far his patent covered those supposed infringements, and how far his patent, as it existed, could be enforced against them.

And so, up to the time that he got out his reissued patent, I see no reason to charge him with any laches or negligence in the matter; and it will hardly be pretended, I think, that laches could be imputed to him after that time, because since he got his reissue of the patent, he selected the nearest and quickest opportunity to bring it to the test of the courts.

The main difficulty and embarrassing part of this case, to me, and to my associate, is the next question that presents itself, and that is, the endeavor, by affidavits, and exhibits, and models, to show, in point of fact, that the patent of the plaintiff was anticipated—that it was not novel, and that it was, therefore, void. In other words, to show that the decision of the supreme court of the United States, holding that it was a valid patent, was an erroneous decision, and not, as counsel very courteously says, because it made a mistake in principle, but because there was a defect of the testimony in that case which is supplied in this.

That branch of the subject is embarrassing for two or three reasons. In the first place, I do not pretend—I cannot speak for my associate in that regard—that I am as competent to decide it as some other judges more conversant with patents and scientific principles. In the second place, I have no confidence myself in the impression produced by any number of ex parte affidavits of experts. My own experience, both in the local courts and in the supreme court of the United States, is that, whenever the matter in contest involves an immense sum in value, and where the question turns mainly upon opinions of experts, there is no difficulty in introducing any amount of them on either side; and yet this class of cases is one in which there is value to be attached to experts. But if I had time to sit down and examine, one by one, all of these affidavits, most of which, although they are supposed to be treating of patents, only amount, after all, to saying, each one of them, "as I understand it, such and such a thing was done," or "as I understand it, such and such a thing was not done," and, "as I understand it, such and such a patent involves such and such a principle, and others do not," all of which, after all, was only their opinion, although they state them as facts; I say if I had time (and that would require two or three weeks), I might possibly go into this thing and reach an opinion which would, at least, be satisfactory to me, whether that patent was anticipated, and is, therefore, invalid. But I do not feel at liberty, in the face of what the supreme court of the United States has decided, after five or six months deliberation, upon these ex parte affidavits, which I have not the time to examine fully, to hold, in reference to this temporary application, that this patent is invalid; and that is about all I will say on that subject, because it is all that is necessary to say, since the whole

subject will be fully investigated hereafter, when the defendants will have the fullest and fairest opportunity, after they have filed their answer and stated specifically upon what prior use, prior patents, or prior publications they intend to rely, after they have brought them to the test of depositions, witnesses cross-examined, models carefully looked into in the presence of the court, and explained; after all that they will have an opportunity to have full justice, and if they can show that this patent is invalid, as I hold it is not conclusively shown, they will have an opportunity to do it. But I do not now think that I would be discharging my duty to decide on this hasty hearing, that this class of affidavits, which, as I heard them read, and as I have looked into them in my private room, do not satisfy me of the proposition of the defendants, that I was at liberty, because of their number, to hold that this patent is an invalid patent.

There are two other reasons urged, not against this patent, not against the patent itself, but which, admitting the patent to be a valid patent, why the injunction should not be granted. The first of those is that there is actually no infringement proved; the infringement is denied by the affidavits, even conceding the patent to be valid. As to that, it is hardly necessary for me to say more than that the defendants themselves creditably and manfully rely upon impeaching the patent, and hardly venture to say that they have not used the process of the plaintiff. Their whole evidence goes to show that they have used, and they insist that they have used a machine which destroys the plaintiff's patent because it antedates it. They themselves have narrowed the question, then, not to one of infringement, but to the validity of the patent. It is manly in them to do so. I have no doubt myself that this is to be the test case, unless the one already decided is; and I take the liberty of saying that the cross-imputations of the gentlemen here, about fraudulent misconduct on both sides, seem to me utterly without foundation. The plaintiff has shown himself a worthy foe, and a manly one, through the whole of this contest. He prepared himself in proper panoply when he went to the supreme court of the United States and got his decision before he attempted to trouble the little mills all over the country. When he has got himself ready for the fight he selects the advance foe, the party who says, "I own the largest mill in the western world," and who has the assistance of all the other millers, with notice to come and defend his suit. Knowing that fact, the plaintiff selects that very party as the one upon whom he makes his first attack. If he had no faith in his patent, if he had intended to go around and blackmail the smaller manufacturers, he might have hunted up those who couldn't defend, in little out-of-the-way places. He has not

done it, and he makes an open battle. Defendants also make a manly defence. Although they say they don't think they have infringed, they come squarely up and say they mean to fight the validity of the patent. They have a right to do it, and they will have it under this decision. I hope this case will prove an exception to the fraudulent devices which have been practised, and that both parties will conduct this suit hereafter in that straightforward way which has characterized them both up to the present time.

The defendants also say that because they are of great ability and amply able to respond to any damages that may be obtained by the final decree, and because their operations are very extensive, and the issue of an injunction would interfere very largely with their business, would be productive of much more harm to them than the refusal of the injunction would be to the plaintiff, therefore the injunction ought not to be issued.

In regard to the issuing of an injunction, I do not think that the ability of the respondents to pay ultimate damages ought to be very much considered in this case. It is a matter worthy of very great consideration that the patent of the plaintiff will expire inside of three years from the date of this present application.

It is very easy for the defendants—very probably the defendants will contest this case so severely that no final decree will be obtained until the patent is exhausted, and it will remain a question of very grave doubt whether any decree rendered for damages after the expiration of the patent—unless some preliminary measure has been taken to give validity to it—would cover those damages. It is therefore important, it is absolutely necessary, if the plaintiff has any just claim, that the relief should be granted. It should be such as would enable it, if it finally got a decree, even if it was five or six years hence, to realize the benefit of this litigation. I am, therefore, of the opinion (in which my brother Nelson concurs), that it is our duty to grant the relief asked in this case, subject to a further provision, which has been well considered in previous cases, and which we have a right to apply, and which we propose to apply in this case. And in that view of it the responsibility and ability of the respondents is a great inducement to us to make the order which we propose to make, and that is an order granting the injunction, unless the defendants, within a reasonable time—say such time as convenient to my brother judge here, ten or twenty days—shall come in and give the bond which has often been required in such cases. In that view of the subject we think that nobody will be hurt. The defendants are amply able to give that bond.

The bond will be conditioned for the payment of any final decree for money in favor

of the plaintiff in this case, and conditioned for their keeping an accurate and faithful account of the amount of flour made by them in their mills with the machines which they admit they use, and for a report of that once every three months to the court, under oath.

I am very happy to be supported in nearly all that I have said, certainly in all that we have decided on this subject, by the case referred to by counsel for defendants, of *Forbush v. Bradford*, [Case No. 4,930.]

Judge Miller here read from this decision, and after hearing counsel in behalf of the respective parties, said: "Under all the circumstances of the case, we think that a bond for two hundred and fifty thousand dollars will be sufficient; we do not think that will be oppressive. That will be the order."

Ordered accordingly.

NOTE, [from original report.] The supreme court, in December, 1877, refused to set aside the decree in the *Deener Case*, the imputed collusion not being shown, but reserved the rights of other persons interested in the question of the validity of the *Cochrane patent*. [95 U. S. 355.] See *American Middlings Purifier Co. v. Atlantic Milling Co.*, [Case No. 305.]

Case No. 308.

AMERICAN MIDLINGS PURIFIER CO.
v. VAIL et al.

[15 Blatchf. 315; 4 Ban. & A. 1.]

Circuit Court, S. D. New York. Oct. 28, 1878.

PATENTS FOR INVENTIONS—INFRINGEMENT—INJUNCTION BY CONSENT—DECISION ON MERITS.

After a motion for a preliminary injunction in a suit in equity for the infringement of letters patent had been heard, and before it was decided, the defendants filed a paper withdrawing their opposition to the motion. Thereupon the court granted the injunction and refused to make any other decision on the motion, although the plaintiff insisted that the motion should be decided on the merits, with a view to other cases.

[In equity. Suit by the American Middlings Purifier Company against Daniel S. Vail and others, for infringement of letters patent Nos. 37,317 and 37,318. Plaintiff moves for a preliminary injunction. Granted.]

Charles F. Blake and Rodney Mason, for plaintiffs.

George Harding, for defendants.

BLATCHFORD, Circuit Judge. The motion for a preliminary injunction in this case was made in the regular way between the contesting parties, and was resisted with all the ability, research, and investigation that could well be brought to the defense of any action or proceeding. The matter ran

along for a considerable number of days, broken by other engagements of the judge, and finally, I think, it was finished when I was sitting here on the 23d day of July last, either that day or the next. The papers, however, were not in readiness for the court to take up the case for decision until a subsequent day, because my recollection is, that, after I left the city, I received a printed paper containing points or suggestions on the part of Mr. Harding; and I think I also received a similar paper from the other side. At all events, it was some time in the month of August before the papers were in a condition in which a judge could take them up for decision, in justice or good faith to the counsel who submitted them. The decision in the case was not delayed for any reason connected with anything in the case itself, but it was delayed because earlier cases had precedence. Up to this time, this case has not been reached by me in the regular order of decision.

This case is now in this position. The counsel for the defendants comes into court and files a paper, in which he sets forth that the defendants have become bankrupt, that they have ceased running their mill, and that, through their counsel, they withdraw their opposition to the motion. That paper was handed to me, and I put it upon the files of the court, with a memorandum on the back of it, that the plaintiffs might have an order reciting the contents of this paper, and stating that the motion, for that reason, is granted; that is, the plaintiffs could have such an order, if they pleased. If they do not wish to take such an order, they need not do so. There is no actual contest between the parties to the motion; and, according to well settled principles, laid down by the supreme court of the United States in many cases, this court cannot proceed to a decision of a motion on the merits. As has been said by judges of the supreme court in similar cases, the court must have a real contest before it. It cannot be employed as a moot court. The principles that underlie that doctrine are, in the first place, that it is manifestly not proper for courts to be employed for that purpose; and, in the second place, that the judicial mind cannot be in a proper state for deciding a case in which there is no real contest between the parties to it. These principles are well settled, and are applicable to a case of this kind. The very fact alleged on the part of the plaintiffs, that this decision is sought in order to affect other cases, is the very reason laid down by the supreme court why no such decision should be made. It is definitely laid down by that court, that, when there is no real contest between the parties to a suit, and a decision will affect third parties, the case will not be decided by the court. I will refer to a case in which that question is discussed by the supreme court. It is the case of *Lord v. Veazie*, 8 How. [49 U. S.]

[Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 1; and here republished by permission.]

251. That case had elements in it which are not in this case, but the same fact existed, that there was no real dispute between the parties. Chief Justice Taney, in delivering the opinion of the court in that case, says, that the court is satisfied that there is no real dispute between the plaintiff and defendant, that it is a case where their interests are not adverse, but that they have arrived at a point in the controversy where there is no real dispute between them. The court says: "In these proceedings the plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest opposed to that of other persons, who are not parties to this suit." It was an important case, and there was a large amount of property involved. The court goes on to say, that "an amicable action, in the sense in which these words are used in courts of justice, presupposes that there is a real dispute between the parties concerning some matter of right; and, in a case of that kind, it sometimes happens, that, for the purpose of obtaining a decision of the controversy without incurring needless expense and trouble, they agree to conduct the suit in an amicable manner; that is to say, that they will not embarrass each other" unnecessarily. "But there must be an actual controversy and adverse interests." And then the court says: "A judgment entered under such circumstances, and for such purposes, is a mere form."

There is a case in 1 Black, [66 U. S.] 419, the case of *Cleveland v. Chamberlain*, in which the court cites the case of *Lord v. Veazie*. Mr. Justice Grier delivered the opinion of the court, and he puts his decision upon the very ground that is urged here by the plaintiffs as a reason why the court should decide this motion, to wit, that the decision will affect third parties. He states that as the very ground why the court should not decide the case. He says, that the controversy is carried on "for the evident purpose of obtaining a decision injurious to the rights and interests of third parties. There is no material difference between this case and that of *Lord v. Veazie*, 8 How. [49 U. S.] 254, where the whole proceeding was justly rebuked by the court, as in contempt of the court, and highly reprehensible. * * * It is plain that this is no adversary proceeding, no controversy between the appellant and the nominal appellee." And then the court quotes from the case in 8 How. [49 U. S.] The order of the court in the case is very significant. It is as follows: "This cause came on to be argued on the transcript of the record from the circuit court of the United States for the district of Wisconsin, and, it appearing to the court here, from affidavits and other evidence filed in this case,

in behalf of persons not parties to this suit, that this appeal is not conducted by parties having adverse interests, but for the purpose of obtaining a decision of this court to affect the interest of persons not parties, it is, therefore, now here ordered and adjudged by this court, that the appeal in this case be and the same is hereby dismissed;" thus placing the dismissal upon the very ground that is urged here as a ground for deciding this motion on its merits.

If any authority were needed in support of the proposition that these defendants have a right to come into court at this time, and consent to this injunction, it is found in the case of *Latham's and Deming's Appeals*, 9 Wall. [76 U. S.] 145, where a party came into court with a stipulation asking to dismiss his own appeal. It was one of the legal tender cases. The court had fixed a day for the hearing, and every thing was in readiness. The attorney-general of the United States objected to the court receiving this dismissal by the party of his own appeal, and said that it was a surprise to him, and that he desired to argue the case. But the court said that the appellants had the right to dismiss their appeal. Upon precisely the same principle, these defendants have the absolute right to consent to this injunction. So far as the motion for an injunction is concerned, they have put an end to the suit, and this has become a case in which there is no contest between the parties to the motion. Consequently, it would be contrary to all precedent for this court to decide the merits of the motion. The plaintiffs are at liberty to take an order for an injunction, but the court, of course, will not force it upon them. They may take it or not, as they please.

In this case, in its present posture, the decision of the court is, that, because the defendants have withdrawn their opposition to the motion for an injunction, an injunction is granted for the reasons stated in the withdrawal paper which has been filed, and the court declines to make any other decision upon the motion.

[NOTE. Patent No. 37,317 was granted January 13, 1874, to William F. Cochrane, and reissued, No. 5,841, April 21, 1874. For other decisions involving this patent, see *Cochrane v. Deener*, 94 U. S. 781; *American Middlings Purifier Co. v. Atlantic Milling Co.*, Case No. 306; *Same v. Christian*, Id. 307; *Same v. Atlantic Milling Co.*, Id. 305; *Cochrane v. Deener*, 95 U. S. 355. [Patent No. 37,318 was granted January 13, 1863, to William F. Cochrane, and reissued, No. 6,030, August 25, 1874. For other decisions involving this patent, see authorities given above.]

AMERICAN MUT. INS. CO., (ADDERLY v.)
[See *Adderly v. American Mut. Ins. Co.*, Case No. 75.]

Case No. 309.

AMERICAN NICHOLSON PAVEMENT CO.
v. ELIZABETH et al.[1 Ban. & A. 439; 6 O. G. 764.]¹

Circuit Court, D. New Jersey. Sept., 1874.*

PATENTS FOR INVENTIONS—LIABILITY OF INFRINGER—LICENSES—ROYALTIES—EVIDENCE—BURDEN OF PROOF—ACCOUNTING—POWERS OF MASTER—INTEREST.

1. The rules, upon which the equitable accountability of an infringer is to be estimated and ascertained, considered. In general, the infringer is liable for the whole profits derived from the infringement, unless it be shown, that some portion of the profits were derived from the use of instrumentalities or improvements, not covered by the infringed patent, and which co-operated with the patented invention in producing the result from which the profits accrued.

[Cited in Buerk v. Imhaeuser, Case No. 2, 107.]

[See note at end of case.]

2. Under the circumstances of this case, the onus of proving that instrumentalities or improvements, not covered by the infringed patent, contributed, and the extent and value to which they contributed, to the defendants' profits, rested upon the defendants; and, as they failed to give affirmative proof thereof, before the master, they were properly charged with the whole amount of the profits which they derived. Citing Carter v. Baker, [Case No. 2, 472.]

3. The owner of a patent for a wooden pavement, granted the exclusive right to J. & M. to construct and lay, and license others to construct and lay, the patented pavement, within a specified territory, subject to an agreement, that if by reason of decisions of the courts, or otherwise, it should be found impracticable for J. & M. to obtain contracts to be made with them in any town or city in said territory, or the work of constructing such pavement should be required by law to be let under public lettings, open to general competition, then J. & M. were to grant to any such town or city desiring to lay the same, a license so to do, upon a license fee not to exceed thirty-one cents a square yard, or they were to publicly authorize any person or persons desiring to bid at such lettings, to lay the same upon the same terms, of which sum sixteen cents per yard were to be made payable to the assignor of the patent and the remainder to J. & M. A license was granted to the complainants by J. & M., subject to the above agreement, to construct and lay the patented pavement in the city of Elizabeth, the charter of which (Laws N. J. 1863, p. 156), required that all contracts for doing work or furnishing materials for any improvement should be advertised for three weeks in a newspaper printed and circulating in said city, and should, at all times, be given to the lowest bidder. The charter was amended in 1870, by act of the legislature, providing, that whenever, in any intended improvement, it was contemplated to use any patented process or materials, the owners of one half of the property, in running feet along the line of the intended improvement, should remonstrate in writing against the use of any specified patent, or petition for the use of any specified patent, or for the use of one, or two or more specified patents, and,

¹[Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

²[Affirmed by supreme court as to one defendant, but reversed as to the other two. City of Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126.]

thereupon, the contract for the said work should be awarded only in accordance with the request of such proportion of owners. The majority of the owners of property on certain of the streets in the city of Elizabeth, petitioned that those streets be paved by certain of the defendants, who, thereupon, obtained contracts therefor, and performed the work. The pavement laid by them was decided, in this suit, to be an infringement of the patent under which the complainant's rights exist. Upon the accounting before the master, under the decree in this suit, the defendants claimed that, as, under the charter, the complainant could not lay the pavements which had been awarded to defendants upon the application of the majority of the land-owners, its profits were limited to fifteen cents a square yard by the terms of its license: *Held*, that the defendants' accountability was not limited to the payment of the royalty reserved by the license.

[See note at end of case.]

4. Where, upon an accounting before a master, evidence is offered which is objected to, and which the master does not exclude, the objection, that the master erred in failing to exclude the evidence, does not properly come before the court upon exceptions to the master's ruling. The testimony should have been taken down, a note made of the objections of the opposing counsel, and the reasons for its incompetency, stated, and its admissibility determined by the court, on the argument, where the question would arise, upon a motion to strike out, by those objecting.

5. Evidence, before a master, upon an accounting under a decree in a suit for infringing a patent for wooden pavements, is incompetent to show that there were other forms of wooden pavement open to the public, which they might have used, and made the profits, or some portion of the profits, which had been realized in the use of complainant's invention.

[See note at end of case.]

6. The master, upon an accounting, charged the defendants with the gross profits, and allowed them the amount of an uncollectable balance of account against the city of Plainfield, included in the gross profits: *Held*, no error.

[See note at end of case.]

7. The master allowed to the defendant, the N. J. Wood Paving Co., \$7,000, as reasonable compensation for the services of its officers; it being shown, that the sole business of the corporation, was the business which involved the infringement of the complainant's patent, and that its contracts in said business had produced upward of \$300,000: *Held*, no error.

8. The master allowed \$6,107.50, for an "expense account," the items and vouchers for which were produced before him: *Held*, no error.

9. The master allowed the amount of royalties, reserved under a license, and paid by defendants to the owners of a patent for the pavement constructed by them, which is adjudged in this suit, to infringe complainant's patent. The infringing pavement appeared to contain a novel feature, alleged to have been an improvement over complainant's pavement, and patented. The license was to lay the pavement upon the payment of the royalties, and the same had been paid: *Held*, that as the complainant failed to show that the money thus expended was unnecessary or extravagant in amount, the court would not hold that the master erred in allowing the payment. It seems, that the onus was upon the complainant to show that the improvement did not contribute, so much as the amount of the royalties, toward the aggregate profits of the enterprise.

[Cited in La Baw v. Hawkins, Case No. 7, 961.]

10. The complainants are entitled to interest upon the profits, only from the date of the final decree. Citing *Mowry v. Whitney*, 14 Wall. [81 U. S.] 653.

[Cited in *Webster v. New Brunswick Carpet Co.*, Case No. 17,338.]

[In equity. Bill by the American Nicholson Pavement Company against the city of Elizabeth, N. J., George W. Tubbs, and the New Jersey Wood Paving Company, for an injunction and an account for the alleged infringement of patent No. 11,491. Motion for provisional injunction was denied, provided defendants give bond for a stated sum. *American Nicholson Pavement Co. v. City of Elizabeth*, Case No. 312. Upon the merits a decree was entered for complainant, (Id. 311,) and upon exceptions to the master's report a decree was entered for complainant for a specific amount. Defendants appealed to the supreme court, where this decree was reversed as to the city of Elizabeth and George W. Tubbs, but affirmed as to the New Jersey Wood Paving Company, the other defendant. *City of Elizabeth v. American Nicholson Pavement Co.*, 97 U. S. 126.

[For a report of hearing upon an application to determine the amount of security to be given on allowance of appeal to the supreme court, see Case No. 310.]

C. A. Seward, for complainant.
Keller & Blake, for defendants.

NIXON, District Judge. The case comes up on exceptions, filed by both parties, to the report of the master. By the decree of the court, entered March 26, 1872, the defendants were held to have infringed the letters patent of complainant, by making, using, and vending, in the city of Elizabeth, wooden pavements, containing the improvements described therein, and recited in the first and second claims, and were ordered to account for the damages, or use and profits, in consequence of said infringement.

A reference was made to William I. Magie, Esq., of Elizabeth, to take and report such account. He has reported substantially, that the defendant, the New Jersey Wood Pavement Company, has laid 72,042 8-10 square yards of the Brocklebank and Trainer pavement, as follows:

In the city of Plainfield	2,700	square yards.
In the city of Elizabeth:		
Grove and Garden streets.....	10,148 4-10	"
Newark avenue....	30,827 3-10	"
Sherman avenue....	4,958 1-10	"
Ninth [North ave.] ³ avenue.....	14,957	"
Grier avenue.....	3,449	"
Sherman avenue, outside of city limits.....	5,008	"
Total.....	72,042 8-10	"

³From 6 O. G. 765.

That it was entitled to receive, therefore, as the contract price for the work, the gross sum of \$346,934.83; that it had, in fact, re-

ceived from the city of Elizabeth \$310,198.29; from the city of Plainfield \$10,834.69, and in land, for paving Sherman avenue, outside of the city limits, taken at the contract price, of the value of \$22,513.50; that the gross profits of the defendants upon all the work, after deducting the actual cost of materials and labor (except such as, having been omitted in the account, were claimed as afterward stated), and assuming that the whole contract price of the Plainfield pavement could be collected, and that the lands given in payment of the Sherman avenue extension were worth the contract price—was \$123,610.78; that from these gross profits, admitted by the defendants, they claimed certain deductions, stated by the master, with his finding therein, as follows:

1. For profits on the various materials and the labor used and employed in the construction of said pavement, \$31,611.92; which he refused to allow.

2. For losses, arising from the impossibility of collecting the contract price of the Plainfield pavement, \$3,388.35; which he allowed.

3. For salaries of George W. Tubbs, William W. Crane, and Augustus C. Kellogg, officers of the defendant, the New Jersey Wood Paving Company, \$14,000; of which, he allowed \$7,000, the amount of said salaries for one year, during which the work was done.

4. For the rent of the premises, occupied by the defendant, \$6,000; of which he found and allowed \$3000, being the rent for one year, during the time the said work was done.

5. For wood, not charged in the cost of the work, and deemed to have been used as fuel in doing the same, \$570.93; which he allowed.

6. For \$2,675.09, claimed to have been expended, in erecting a dock on ground leased to said defendants; which he refused to allow.

7. For \$550, for red sand, and \$4,237.20, for levelling sand, claimed to have been used as materials in said work, and not deducted in making up the foregoing account of gross profits; which he allowed.

8. For machinery, claimed to be procured by defendant, and adapted to said work and then on hand, and of no value, \$4,893.22; which he allowed.

9. For an expense account, not included in the cost of labor and materials, entering into said account of gross profits, but claimed to be properly chargeable thereto, \$6,107.50; which he allowed.

10. For \$25,000, claimed to have been paid for an interest in the patent of Brocklebank & Trainer; which he refused to allow.

11. For an account called a "loss and gain account," not included in the statement of gross profits, \$156.76; which was allowed.

12. For profits claimed by said defendants upon other work, allowed to have been included in said contracts, \$6,572.75; which he refused to allow.

13. For \$13,808.42, the amount claimed to have been paid as royalty or license fee for laying the said pavements under the Brocklebank & Trainer patent; which he allowed.

14. For \$15,241.33, the sum claimed to have been paid by the defendants to stockholders and others, as a rebate upon pavement laid in front of their respective lands; which he refused to allow.

15. And for probable loss on the sale of lands, taken for the work done on the extension of Sherman avenue, the sum of \$5,003; which he allowed.

He further reported, that the aggregate amount of the allowances made by the master on these claims, was \$48,775.38, leaving the net profits of the defendants on said work \$74,835.40; upon which sum, the complainant was allowed interest, at the rate of seven per cent, from the 29th of August, 1870, the average date of the payments made by the city of Elizabeth, to the date of the report, amounting to \$16,538.51, making for net profits and interest the sum of \$91,423.91.

He further reported, that the counsel for the complainant conceded before him, that, inasmuch as the bill had been filed in the cause, prior to the passage of the act of July 8, 1870, authorizing damages as well as profits, to be assessed by the master, in equity cases, no damages could be assessed; and, that he had restricted his inquiry, solely, to the gains and profits of the defendants in the infringement specified in the decree.

To the report of the master, the complainant has filed six exceptions, and the defendants twelve; but, before these are considered, it is important to ascertain, if we can, the principle on which the complainant's profits for the illegal use of his patent are to be estimated. This obviously depends upon the character of the patented invention, and upon the mode in which the owner chooses to allow the public to use his monopoly, and upon the methods of procedure in the tribunal to which he appeals for redress. The subject occupied the attention of the supreme court in *Seymour v. McCormick*, 16 How. [37 U. S.] 489, and the difficulty in laying down a rule, applicable to all cases, was adverted to. Mr. Justice Grier, in delivering the opinion of the court—the case being a suit at law—observed, that: "It must be apparent to the most superficial observer * * * that there cannot, in the nature of things, be any one rule of damages, which will equally apply to all cases. The mode of ascertaining actual damages must necessarily depend on the peculiar nature of the monopoly granted. A man who invents or discovers a new composition of matter, such as vulcanized india rubber, or a valuable medicine, may find his profit to consist in a close monopoly, forbidding any one to compete with him in

the market, the patentee himself being able to supply the whole demand, at his own price. If he should grant licenses to all who might desire to manufacture his composition, mutual competition might destroy the value of each license. * * * If any person could use the invention or discovery, by paying what a jury might suppose to be the fair value of a license, it is plain that competition would destroy the whole value of the monopoly. In such cases, the profit of the infringer may be the only criterion of the actual damage of the patentee. But one who invents some improvement in the machinery of a mill, could not claim that the profits of the whole mill should be the measure of damages for the use of his improvement. And where the profit of the patentee consists neither in the exclusive use of the thing invented or discovered, nor in the monopoly of making it for others to use, it is evident that this rule could not apply.

* * * Where an inventor finds it profitable to exercise his monopoly by selling licenses to make or use his improvement, he has himself fixed the average of his actual damage, when his invention has been used without his license. If he claims anything above that amount, he is bound to substantiate his claim, by clear and distinct evidence. When he has himself established the market value of his improvement, as separate and distinct from the other machinery with which it is connected, he can have no claim in justice or equity to make the profits of the whole machine the measure of his demand. It is only where, from the peculiar circumstances of the case, no other rule can be found, that the defendant's profits become the criterion of the plaintiff's loss." But this is when the proceedings are at law, where the inquiry is about the actual damages, sustained by the patentee, from the infringement. Here we are in equity, and the question which concerns us is: For what profits should the infringer account for the unauthorized use of the invention?

It may be answered generally, that the patentee is entitled to a just compensation for the injury which he has sustained from the invasion of his rights. How this is to be ascertained, depends upon the facts and circumstances of each case. If the owner's profit consists in having a license fee paid to him, by all who use the invention, the amount of the license is his profit; and when that is paid, the injury done by the use without a license, is satisfied. If it consist in the exclusive use of the thing patented, or in the monopoly of making it for others to use, additional considerations are involved. We are then to inquire: What is the character of the invention? Is it a new machine, or manufacture, or composition of matter, whose entire value and usefulness result from the mechanism, combination, or constituents, which the genius of the patentee has originated, arranged, or produced? Or is it a

mere addition to, or improvement of, an existing machine, manufacture, or process, rendering them more valuable and profitable, but not necessary to their use, and which may be used in a less profitable way, without the addition or improvement? In other words, when profits have gone into an infringer's pocket, he is regarded as the holder of property not belonging to him, but which he must restore to the rightful owner. If the invention infringed cover the entire machine, manufacture, or combination used by the infringer, then the whole profits should go to the patentee. If it cover only a part, and there are other and different elements in the organism, contributing to make up the aggregate profits, then, only such proportion should go to him, as has sprung from his contribution toward the value of the whole.

In the case before us, the complainant is the licensee of the owners of Nicholson's extended patent. It has "the sole and exclusive right and license to construct and lay, and to authorize others to construct and lay, the (Nicholson) patented pavement, within the state of New Jersey, except Jersey City, during the entire extended term of said patent." It pays for the license a royalty of sixteen cents for every square yard of the pavement which shall be laid in the said territory, within thirty days after the completion of such pavement. Its profits arise from its exclusive use of the invention; from the monopoly, which it has, of constructing, or bargaining with others to construct, the pavement, upon agreed terms, anywhere in the state; except in certain cases, to which reference will hereafter be made, and in which it is bound, by covenants with its grantor, to grant a license for laying the pavement in a sum not exceeding thirty-one cents a square yard. That exclusive use or monopoly of the complainant has been interfered with by the defendants. They have laid its patented combination in the streets of Elizabeth, without its consent. The rule in equity seems to be settled, under such circumstances, that the measure of damages, due to the complainant, is the amount of profits made by the infringers, unless, as has been intimated, some portion of the profits have been derived from the use of constituents of the combination, not the property of the patentee, and, for the use of which, he is not entitled to compensation.

What, then, is the Nicholson pavement? What is the owner of the patent authorized to demand for the infringement of its distinguishing characteristics? It was held at the final hearing, that the defendants had infringed the first and second claims, to wit: 1. A continuous foundation or support, directly upon the roadway, having arranged thereon a series of blocks, with parallel sides, endwise in rows, so as to leave a continuous narrow groove, or channel way, between each row, and filling said grooves or

channel ways with broken stone, gravel and tar, or other materials. 2. The formation of a pavement, by laying a foundation directly upon the roadway, and then employing two sets of blocks, one a principal set, that shall form the under surface of the pavement when completed, and an auxiliary set of blocks or strips of board, which shall form no part of the surface, but determine the width of the groove between the principal blocks, and also the filling of said groove, when so formed, with broken stone, gravel and tar, or other like material. In the opinion, sustaining the novelty of the invention, American Nicholson Pavement Co. v. City of Elizabeth, [Case No. 311,] it was observed: "The complainant's patent is doubtless for a combination. The several parts that make up the structure, are: (1) A continuous foundation directly upon the roadway. (2) A series of blocks, with parallel sides, standing endwise in rows, that form the under surface of the pavement. (3) An auxiliary set of blocks or strips of board, which form no part of the surface, but determine the width of the grooves between the principal blocks. (4) The filling of the grooves, when so formed, between the principal blocks, with broken stone, gravel and tar, or other like material. It is not claimed that any one of these parts is new, but that, in their combination, they produce a new and useful result."

Now, what had the defendants done? In what did their infringement consist? They did not, as it is conceded they were authorized to do, take a portion of the ingredients or elements which constituted the combination, and add to them other ingredients or elements, that were newly discovered, and which were not equivalent for those left out, thus producing a new combination substantially different from the complainant's. They took the combination as Nicholson had formed it. They seized the whole of his invention. There is nothing in his patent, which is not contained in the Brocklebank & Trainer patent. But they did more than this. They added a new feature to the Nicholson combination. They rabbeted the blocks on one or both sides, in a dovetail or vertical form, and beveled the strips to suit the rabbets; which addition, it is claimed, made a mechanically different structure, and was an improvement, in that it guarded against the displacement of the strips or short blocks, and distributed the pressure upon the pavement over a larger surface.

We are inclined to believe that there is a good foundation for this claim of the defendants, whether we look for it in the evidence of the case, or, in the well-ascertained principles of mechanics; and that the Brocklebank & Trainer patent, by this addition, has improved upon the Nicholson combination.

We are then brought to the inquiry: What effect should the improvement of the defendants, have upon the question of com-

plainant's profits? It undoubtedly added to the expense of laying the pavement, and to that extent, diminished the profits of the whole work. If it had lessened the cost, it is quite evident that the amount, thus saved, ought to be credited to the improvement. Upon the same principle, why should not the sum expended, in consequence of the increased labor of the addition, be charged to it?

But without troubling ourselves further with this aspect of the case, it seems to us that the relative value of the defendants' addition to the complainant's invention, ought to have been the subject matter of evidence before the master, although neither party offered specific testimony in regard to it. And the burden of proof was obviously on the defendants. They had been adjudged infringers. They had appropriated the complainant's invention, and realized, from its use, large profits. Their books of account were produced, and exhibited the gross amount. From this, they asked the master to make deductions, and it was for them to show what deductions should be allowed. They had caused a mingling and a confusion of rights, by unlawfully adding an improvement of their own to the property of the complainant, and, it was their duty, and not the complainant's, to prove what proportion of the profits, if any, ought to be credited to the changes which they had made in the combination of the complainants. This proposition was warmly contested by the able counsel of the defendants, in the argument; but it seems to the court so clear, that it hardly needs authority to support it. If any be required, it will be found in *Carter v. Baker*, [Case No. 2,472,] where the learned judge of the ninth circuit, in charging the jury upon this precise question, said: "If the defendants have improved their machine, and if any of the profits are properly credited to defendants' improvement, they do not belong to the plaintiffs; but as the defendants have wrongfully connected the plaintiffs' improvement with their own, and they caused the confusion of rights, if any portion of the profits are properly to be credited to the defendants' improvements, the burden rests upon them to show affirmatively that fact, and how much of those profits ought to be credited to this improvement, and deducted from the profits of the sale of the whole machine as improved." As no affirmative proof was offered, the master made no apportionment of the profits to the defendants, for any speculative value added to the invention by Brocklebank & Trainer, unless we regard in that light the \$13,868 42-100, claimed by them, and allowed by the master, for the royalty, or license fee, paid for the use of that patent in laying the pavements, and to which we shall more particularly refer, when we come to consider the exceptions to his report. But incidental reference has already been made to another fact in

the case, which the counsel for the defendants claim, as a controlling one, in the estimation of the complainant's profits: to wit, that the complainant is limited, by the terms of its license, to the compensation or royalty of thirty-one cents per square yard; fifteen of which is payable to it, and sixteen to the owners of the extended patent.

It appears from the exhibits and testimony that Nicholson, the owner of the original patent, died January 6, 1868, and that George T. Bigelow was appointed the administrator of his estate; that the said Bigelow, as administrator, applied for and procured an extension of the patent for seven years from August 8, 1868, and conveyed the one third of the extended term to Edwin C. Larned and Stephen A. Goodwin; that Bigelow, Larned and Goodwin, entered into an agreement with Charles E. Jenkins and W. T. B. Milliken, on the 14th of August, 1868, wherein they granted to the said Jenkins and Milliken, the sole and exclusive right and license to construct and lay, or to authorize and license others to construct and lay, the patented pavement, in all the cities, towns and places of New Jersey, except Jersey City, upon certain terms, conditions and stipulations therein contained, one of which was as follows: "If it shall, by reason of decisions of the courts or otherwise, be found impracticable for the said parties of the second part to obtain contracts for laying said pavement, in any town or city in said territory, to be made with such parties of the second part; or the work of constructing such pavement is required by law to be let under public lettings, open to general competition, then the said parties of the second part agree, that they will grant to any such town or city desiring to lay the same, a license so to do, upon a license fee not to exceed the sum of thirty-one cents a square yard; or will publicly authorize any person or persons desiring to bid at such lettings to lay the same upon the same terms as above stated; of which sum, the sum of sixteen cents shall in every case be made payable to the said parties of the first part, as hereinbefore provided; but, for the fulfilment of any such contracts or licenses made or granted, as in this clause provided, the said parties of the second part shall be in no wise responsible."

The complainant's title was derived from Jenkins and Milliken, by license, dated September 5, 1868, and the license was taken upon, and subject to, the same terms, conditions, and stipulations, on which its grantors held the patent. By the 123d section of the act to revise and amend the charter of the city of Elizabeth, approved March 4, 1863 (Laws of N. J., p. 156,) it was enacted that all contracts for doing work or furnishing materials for any improvement provided under this act, exceeding \$100, shall be advertised for three weeks in a newspaper printed and circulating in the city, and shall

at all times be given to the lowest bidder. A supplement was passed February 9, 1870, which practically repealed the foregoing section, and was to the effect that, whenever the city council should determine to cause any improvement to be made, which contemplates the use of any patented process or materials, and the owners of one half of the property, in running feet, along the line of the intended improvement, should remonstrate in writing against the use of any specified patent, or petition for the use of any specified patent, or for the use of one, of two or more specified patents, in making such improvement, the city council should award the contract for the said work, only in accordance with the request of such proportion of owners. This was followed shortly afterward by the act to incorporate the New Jersey Wood Paving Company, approved March 17, 1870, in which George W. Tubbs, William W. Crane, A. C. Kellogg, and nine other named gentlemen, were constituted directors of the corporation, and authorized in their corporate name to construct and lay wooden pavements, and to purchase all materials, patents, and patent rights, that might be deemed of advantage to their business. By the 2d section, the capital stock was limited to \$250,000, but the company was prohibited from commencing business until \$10,000 were subscribed and paid in in cash. This little inconvenience was obviated, however, by the 4th section, in which the directors were authorized, in behalf of the company, to receive any patents or patent rights suitable for its purpose, at a valuation to be agreed upon, and in lieu of cash subscriptions for stock. The objects for which the company was formed may be readily inferred from the method of its organization. Mr. Tubbs, the president, on his cross-examination, at the final accounting, folio 243, tells the story as follows: "The nominal stock of the company was \$250,000. There never was anything paid in, in money, by the stockholders. The stock was issued, as paid up stock, for the license under the Brocklebank & Trainer patent, which was owned by Crane, myself, and A. C. Kellogg, under the firm of Crane, Tubbs & Co. The license covered New Jersey. I think all the stock was issued for the license. One half was transferred back to the company as working capital. I think the stock was issued to me and by me transferred. Of the other one half of the stock, issued for the license, the largest part went to Crane, Tubbs & Co. I think there were ten shares issued to each of the directors. Crane and myself received them as such directors; the shares were \$100 each, the twelve directors had 120 shares, and the balance of the 1,250 shares went to Tubbs & Co. Those directors who did not serve, did not take their stock."

It does not distinctly appear, how many of the twelve directors accepted the stock thus issued, but, as the Legislature of the State,

at the next session (Laws N. J. 1871, p. 312), reduced the number to seven, it is quite probable that some of the gentlemen declined or failed to accept. In any event, all that there was, or is, in the New Jersey Wood Paving Company, except the few shares of stock thus issued to the directors, belonged to Tubbs, Crane & Co., to wit, a license to use the Brocklebank & Trainer patent in laying wooden pavements in New Jersey, upon the payment of a royalty to the patentees of twenty cents for each square yard.

Previous to the time when the charter for the New Jersey Wood Paving Company was obtained, the complainant had entered into several agreements with the city of Elizabeth for laying the Nicholson pavement, one as early as December 4, 1868, for upward of 9,000 square yards on Broad street; another, July 1, 1869, for 1,620 square yards on Grove street; another, July 14, 1869, for 4,244 square yards on Cherry street and another November 15th of the same year, for 10,674 square yards on Grier avenue. Other contracts were made during 1870 and 1871, eight in number, upon as many different streets or avenues, measuring upward of 100,000 square yards. As these continued through a course of years, and largely outnumbered the contracts executed with the defendants, it must be assumed that other reasons than dissatisfaction with the Nicholson pavement constrained the city to enter into the latter, and these reasons are probably founded in the provisions of the supplement of February 9, 1870, which became a law, before any contract was made by the city, to lay the Brocklebank & Trainer pavement.

The first of these was entered into with George W. Tubbs, February 18, 1870, for the improvement of Garden street; the second, on March 18, 1870, for Newark avenue; the third, on April 20, 1870, for Grove street; the fourth, with the New Jersey Wood Paving Company, on July 12, 1870, for Ninth avenue; and the fifth and sixth, with George W. Tubbs, in the month of September, for Sherman and Grier avenues. The owners of half the property upon these streets and avenues had petitioned the common council of the city to contract for the Brocklebank & Trainer pavement, either because they preferred it, or were interested in it, or because the New Jersey Wood Paving Company, who controlled it, had agreed to refund to these gentlemen a portion of the money which should be paid by the taxpayers of the city for having it laid. On this point, the testimony of Geo. W. Tubbs before the master is quite suggestive. He says, p. 59, fol. 235: "There is an item of abatement to directors, amounting to \$14,709 66-100. That means, this: when the company was formed, and we were getting the charter, it was agreed with the parties who got the charter, that when we paved in front of their property they should have the bene-

fit of fifty cents a yard. That was deducted out, and thus this item arose. That amount was paid back to them." Statements of that sort rendered it unnecessary for the complainants to show, at whose instance, and for what purpose, the supplement was passed. Such is a detail of the facts of the situation, as derived from the evidence in the case. It is insisted by the counsel of the defendants, that, while this legislation existed, the complainant could not lay the pavements, which had been awarded to the defendants on the application of the majority of land-owners, and hence, that its profits were limited to fifteen cents a square yard by the express terms of its license. Neither branch of this proposition is true in the sense in which it is propounded. In the first place, a preliminary suggestion is, that it would not be quite becoming a court of equity to allow the defendants to profit by their own wrong, and it is that which they ask the court to do.

The improvement of certain streets, in the city of Elizabeth, was deemed desirable, and steps were taken to accomplish it. The Legislature of the state was applied to by certain gentlemen, who obtained the enactment of a law, that practically shut up the city to award the work to the licensees of the Brocklebank & Trainer patent; for, by its provisions, a majority of the land owners controlled the selection, and it was made their interest to demand the laying of that pavement, by having refunded to them a portion of the profits derived from the whole work. Large profits were realized by the licensees from these contracts, but, realized from the use of the complainant's invention. Will the court allow the bulk of these profits to be retained by the infringers, because the complainant could not be a competitor for the work, when it so clearly appears, that whatever disabilities existed in regard to competition, were produced by the infringers themselves?

Again, it is assumed, that the complainant could not lay these pavements, because the property owners had asked for the use of defendants,' and not the complainant's, patent. But is it altogether sure that the Brocklebank & Trainer patent would have been preferred, if it had not been, in fact, the Nicholson invention, with something added? And shall the defendants be allowed to accumulate large gains by using complainant's property, and afterwards, to retain them, upon the plea that complainant could not have made them? Is not this raising a new and false standard for the measure of complainant's damages? In estimating its profits, is it not changing the inquiry from what the defendants actually made, into what the complainant could or could not make? And is not this as remote from the real question, as the exploded inquisition into what the defendants might or might not have made? But, without following these sugges-

tions to their ultimate results, let us look a little closer into the matter, and ascertain whether any contingency arose, which limited the licensees of the Nicholson pavement to the sum of fifteen cents per square yard. Upon what conditions did the licensees, agree with the owner of the patent, to permit third parties to lay the pavement for thirty-one cents per square yard? These were two in number: (1) Where, by reason of the decision of the courts, or otherwise, it was found impracticable for the licensees to obtain contracts for laying it in any town or city of New Jersey; and (2) where the work of constructing the pavement was required by law to be let under public lettings, and open to general competition; neither of which existed in the present case.

Conclusive proof that it had not been found impracticable, by reason of any decisions of the courts or otherwise, for the complainant to obtain contracts to lay the Nicholson pavement in Elizabeth, is discovered in the fact that it entered into a number of contracts for laying such pavement, both before and after the dates of the contracts with the defendants. And after the supplement of February 9, 1870, there could be no public lettings, open to general competition, for street improvements, because that act concluded the city in regard to the patents to be used, by the expressed preference of a majority of land owners on the line of the street, and no one could bid for the work, except the owners or licensees of the particular patent, which the property holders had selected. But let it be admitted that these contingencies in fact existed, what, then, did the licensees agree to do? These two things: (1) "To grant to any town or city, desiring to lay the Nicholson pavement, a license so to do, upon a license fee not to exceed thirty-one cents per square yard." (2) "To publicly authorize any person or persons, desiring to bid at public lettings, to lay the Nicholson pavement" upon the same terms.

In reference to the first, did the city of Elizabeth ever express a desire to lay this pavement upon these streets? Was it not estopped, by the provisions of the law, from having a voice in the matter? Did not the 2d section of the act of 1870, make it the duty of its mayor to veto every contract that the city council should award, which was not in strict accordance with the expressed wishes of a majority of the property owners, in regard to the use of a specified patent? In reference to the second, there is no proof of any public lettings, nor of the existence of persons desiring to bid at them. There could be none, "open to general competition," in any proper sense, after the supplement of 1870; and, if there had been, no bids could have been received and considered for these streets, from persons who proposed to use the complainant's patent. But again, this covenant was between the owner and the licensees of the Nicholson extended patent,

and was imposed upon the latter for the benefit of the former. The owner's profit was a royalty of sixteen cents, for every square yard of pavement, laid; and it was their interest to secure the laying of as many square yards as possible, and to guard against the temptation, which such methods of compensation suggest, of putting down a small quantity of pavement, at a large profit, rather than a large quantity at a small profit.

The city of Elizabeth, under the circumstances mentioned in the covenant, could have required the complainant to lay the pavement, at the price limited therein, but did not. These defendants, under the like contingencies, could have bargained to use the complainant's patent, without being guilty of infringement, upon the payment of the prescribed consideration, but did not. On the contrary, in consequence of owning the property on certain streets, or from making it the interest of other property owners, by secret agreements, to pay them a portion of the profits, they secured a request for the laying of the Brocklebank & Trainer pavement, and entirely ignored any arrangements by which the taxpayers of the city might receive the economical advantages resulting to the public, from the terms on which the complainant held the Nicholson patent. Shall it now be said, that a court of equity ought to allow them to invoke, for their protection and immunity against the surrender of their unlawful gains, a covenant between other parties, executed for other purposes, and from the benefit of which they took all available means to exclude themselves and the city of Elizabeth?

It results from the foregoing views, and the court holds: 1. That if the defendants desired an allowance from their ascertained profits, for the benefits contributed to the complainant's invention, by the Brocklebank & Trainer addition, the burden of proof was on them to show to the master, approximately, at least, the extent of the advantages which were added, and the proportion of the profits which were made, by their improvement of the Nicholson combination. 2. That at this stage of the proceedings, where the only question before the master was the one of accounting for the profits realized from the infringement of the complainant's patent, there was no principle of justice or equity that limited the accountability of the defendants to the payment of certain royalties, which, under other circumstances, the complainant might have been compelled to accept as the proper measure of its loss.

We are now brought to the consideration of the exceptions filed to the findings of the master. Before looking at them, it is proper to premise, that there is nothing in the case, which authorizes the court, if it had the power, and were so disposed, to visit upon the defendants any consequences in the nature of a penalty. They were not wanton infringers. They were proceeding under an authority,

equal on its face, to that of the complainant, to wit, a patent from the government of the United States, and they had a right to assume, that it was valid until a competent tribunal decided to the contrary. They are not to be treated like another class of infringers—unhappily too large—who, without a pretext of right, seize upon the inventions or the property of others, and trust to the ignorance, or the poverty, or the kindheartedness of the owners, for immunity in retaining their piratical gains. All that the defendants should be required to do, in the present case, is to simply restore to the complainant the money, which the use of its property had enabled them to make.

We will first advert to the exceptions of the complainant.

1. The first is, that the master erred, in not excluding certain evidence, for the reasons assigned, when it was offered. The question which the counsel of the complainant seeks to raise, does not properly come up by exceptions to the master's ruling. His course was, in accordance with the prevailing practice in the circuits, to wit, taking down the testimony; noting the objections of the opposing counsel, and the reasons stated for its incompetency; leaving its admissibility to be determined by the court, on the argument, where the question would arise, on a motion to strike out, by those objecting. Whilst, therefore, we are not willing to say that the exception is well taken, and that the master erred in admitting the testimony and noting the objections, we have no hesitation in holding that, under the reference, the evidence was incompetent. It was offered by the defendants, to show that there were other forms of wooden pavement open to the public, which they might have used, and made the profits, or some portion of the profits, which had been realized in the use of the complainant's invention. It is a sufficient reply to such offer, to observe, that the defendants preferred and used the complainant's property, and made their gains therefrom; and that these gains no less belong to the complainant, because they might have realized other gains by the use of lawful methods.

2. The second objection is not well taken, and seems to misapprehend the action of the master. It alleges that he erred, in "allowing for losses arising from the impossibility of collecting the contract price of the Plainfield pavement, the sum of \$3,388.35, such loss being of prospective profits only." The master, in the account, charged the defendants with the whole sum to be received for laying said pavement, \$14,223.14. He states, in his report, that the gross profits, charged to defendants, amounted to \$123,610.78, only "by assuming that the whole contract price of the Plainfield pavement could be collected." The proof was (fol. 315), that they received on account of said contract \$9,273.24 in cash, and \$1,561.45 in mate-

rials not used, making the aggregate of \$10,834.69, and that the residue of the consideration could not be collected. The actual loss, therefore, to the defendants, upon this mode of accounting, was the difference between these amounts, to wit, \$3,388.35, which sum the master properly deducted.

3. The third exception objects to the master's allowance of \$7,000 to the officers of the New Jersey Wood Paving Company, as reasonable compensation for their services during the year in which the pavements were laid. The six contracts of the defendants, were assigned to, and completed in the name of The New Jersey Wood Paving Company, of which corporation, George W. Tubbs was president, and A. C. Kellogg and William W. Crane were successively treasurers, all of whom acted as general superintendents in the work of laying the pavements. The board of directors voted to these gentlemen, \$7,000 a year, as salaries during the time that they held the offices, and performed the labor of superintendence. As the company was engaged in very little other work while these pavements were being laid, the defendants claimed that two years' salary, amounting to \$14,000, was only a reasonable allowance to these officers, and that the sum ought to be deducted from the profits which their skill and vigilance had helped to earn. The master reported that all the work was completed within a year, and that one year's salary of \$7,000 was a proper compensation. The complainant insists that nothing should be allowed to infringers, from the profits, for personal services rendered, and quotes *Rubber Co. v. Goodyear*, 9 Wall. [76 U. S.] 788, to sustain this view of the law. But, an examination of that case, shows that, the contrary was held. In making up the account, the master there allowed, as deductions from the profits, "the usual salaries of the managing officers," but "refused to allow the extraordinary salaries, which, it appeared by the books, had been paid—being satisfied they were dividends of profit under another name, and put in that guise for concealment and delusion." His action was approved by the court, both as to the allowance and disallowance; and the principle to be extracted from that decision, is, that while courts will rebuke all attempts on the part of infringers to cover up or absorb gains and profits, under the names of salary, or compensation for personal service, yet, in those cases where defendants have not forfeited the favor of the court, by their naked piracy of the rights of others, a reasonable allowance will be made to them from the profits, for their care and skill in directing the execution of the work. As, in the present case, the work was of such magnitude and character that the contracts produced the gross sum of upwards of \$300,000, the amount of \$7,000 would not seem to be an unusual, or extraordinary remuneration to

three competent men for conducting and superintending it.

4. The fourth exception is to the allowance of \$6,107.50 for "an expense account," not included in the cost of labor and materials. The allegation, is that, there was no evidence before the master as to the constitution of such amount, or as to the nature of the application or expenditure thereof, or that the same was paid in good faith by the defendants, to other persons, for expenses. The testimony of S. S. Morse, the secretary of the company (fol. 303), was, that this charge was made up by numerous expense bills, for various items that could not be classified, and, therefore, went into the general expense account. He added: "I have an account of the various items, here, and the vouchers." The only cross-examination, on this subject, to which he was subjected, was at folio 341, where, he was asked to explain what he meant by expense account, and replied: "I mean for salaries and such things that I could not class and charge to a particular job." It must be assumed, under these circumstances, that the master was satisfied from an examination into the accounts and vouchers produced, that there was a proper foundation for the charge.

5. The fifth exception complains of the master for allowing \$156 76-100 for an account called "a loss and gain account." Such a vague charge demands explanation and none is given. It first appears, at the close of the accounting, in exhibit G, of defendants. We have examined the testimony, and can nowhere find an allusion to, or explanation of, the item. As it seems to be unsupported by evidence, the exception is sustained.

6. The last exception by the complainant is that the master erred in deducting \$13,868.42 as royalty, or license fee, paid for laying 69,342 square yards of pavement, under the Brocklebank & Trainer patent. Two reasons are assigned for objecting to the allowance: (1) Because, as to said sum, the defendants have no title as against the complainant. (2) Because the evidence before the master, affirmatively showed, that the same was not paid in good faith by the defendants to other persons for expenses. The defendants were the licensees of Brocklebank & Trainer, and had agreed to give to them, as the owners of the patent, a royalty of twenty cents, for every square yard of pavement, put down. The quantity paid [laid]³ amounted to the above sum, and Mr. Tubbs testified, that it was paid to Brocklebank & Trainer. Mr. Morse, on the other hand, says that the amount was in fact paid by the company, but that \$729.80 went to Michael Doyle, and the balance to Captain Tubbs. It does not concern the present inquiry, to whom the money was paid, if it was, in truth, a legitimate expense, to be

³[From 6 O. G. 771.]

deducted from the profits. The master makes the allowance, and gives his reason for it in the following words: "Defendant further claimed that there should be allowed, and deducted from the gross profits, \$13,868.42, claimed to have been paid as royalty or license fee for laying 69,342 square yards of said pavement, under the Brocklebank & Trainer patent. It appearing that said pavement, decreed in the cause to be an infringement of plaintiff's patent, contains a novel feature, alleged to have been an improvement, and patented, and that the license to lay the same was upon the payment of such license fee, and which has been paid, I find and allow the said sum etc., as a proper deduction."

We have already considered the question, whether the master ought to have made an allowance to the defendants as the licensees of the Brocklebank & Trainer patent, for their addition to the Nicholson invention, and have held that, in the absence of affirmative proof, on the part of the defendants, of its value, he was justified in giving no credit for such addition. But here we have a different question. The contracts on which the profits were realized, were for the use of the Brocklebank & Trainer pavement. No other could be put down. The defendants had bargained to pay the above sum to its owners, whenever they used the patent, and, so far as it appears, had made the bargain in good faith. It was an expense necessary to be incurred, in order to fulfil their contracts. They agreed to pay, and did in fact pay, twenty cents a square yard for the Brocklebank & Trainer improvement. Perhaps the improvement did not contribute, so much as that, towards the aggregate profits of the enterprise. It is difficult to apportion in such cases. But, if it did not, is not the burden of proof here shifted, and ought not the complainant, to have shown affirmatively, that the expenditure, thus made, was unnecessary, or extravagant in amount? This was evidently the view which the master took, and, in default of such proof, we are not prepared to affirm that he erred in allowing the payment as a deduction from the profits.

We have now reached the defendants' exceptions, but, as the principles upon which most of them rest, have been incidentally discussed in the foregoing opinion, it will not be necessary to allude to them in detail. It is sufficient to say, that they have all been carefully considered, and, in our judgment, must all be overruled, except the 9th, in regard to the allowance of interest by the master. Whatever might have been the opinion of the court, as to their action in this respect, if the question had been open, we are constrained to say, on the authority of *Mowry v. Whitney*, 14 Wall. [51 U. S.] 653, that the case before us, is not one where interest should be allowed, until after the final decree. However much that case dif-

fers from this, in regard to the contribution to the aggregate profits, by the use of constituents in the infringing process, not belonging to the patentee who complained of the infringement, it is the same in regard to the defendants' liability to interest on the profits; and the reasons assigned by the supreme court for sustaining the exceptions to the master's report, allowing interest there, are precisely applicable here. Mr. Justice Strong delivered the opinion, in the conclusion of which he said: "The defendant should not have been charged with interest before the final decree. The profits which are recoverable against an infringer of a patent, are, in fact, a compensation for the injury the patentee has sustained from the invasion of his right. They are the measure of his damages. Though called profits, they are really damages, and unliquidated, until the decree is made. Interest is not generally allowable upon unliquidated damages. We will not say, that in no possible case can interest be allowed. It is enough that the case in hand does not justify such an allowance. The defendant manufactured the wheels, of which the complaint is made, under the patent granted to him in 1861. His infringement of the complainant's patent was not wanton. He had before him the judgment of the patent office, that his process was not an invasion of the patent granted to the complainant, and though this does not protect him against responsibility for damage, it ought to relieve him from liability to interest on profit." There must be a decree for the complainant, for the amount reported due by the master, to wit; \$91,423.91, after first deducting therefrom \$16,538.51, the interest allowed by him, and adding thereto \$156.76, which he improperly deducted from the acknowledged gross profits.

[NOTE. An appeal was taken by the defendants to the supreme court, where the decree of the circuit court was affirmed so far as it affected the New Jersey Wood Paving Company, but reversed as to the other defendants, the city of Elizabeth and George W. Tubbs. The court held that a decree for an injunction should have been rendered to prevent them from constructing such pavement during the term of the patent, but that they could not be held accountable for profits, this bill having been filed before the passage of the act of July 8, 1870, (16 Stat. 198,) which first authorized courts of equity to allow damages in addition to profits. In considering this aspect of the case, Mr. Justice Bradley, in delivering the opinion of the court, said: "Though the defendant's business be ever so profitable, if the use of the invention has not contributed to the profits none can be recovered. The same result would seem to follow where it is impossible to show the profitable effect of using the invention upon the business results of the party infringing. * * * The party who made the profit by the construction of the pavement in question was the New Jersey Wood Paving Company. The city of Elizabeth made no profit at all. It paid the same for putting down the pavement in question that it was paying to the defendants in error for putting down the Nicholson; but damages are not sought, or, at

least, are not recoverable, in this suit. Profits only, as such, can be recovered therein." The court held that the evidence was that the city and Tubbs, whose only relation to the transaction was the salary he received for superintending the work, made no profits at all. As to the foreign patents relied upon by the defense, it was held that none of them combine the elements, or combination of elements, of Nicholson's, and therefore present no ground for invalidating his patents. As to the other defense, growing out of the alleged public use of Nicholson's pavement for six years before applying for a patent, it appeared that Nicholson, with the consent of the owners of a public road near Boston, had put down some of his new pavement at his own expense, and for experimental purposes only. The learned justice remarked that "the nature of a street pavement is such that it cannot be experimented upon satisfactorily, except on a highway, which is always public," and, further, that "had the city of Boston or other parties used the invention, by laying down the pavement in other streets and places, with Nicholson's consent and allowance, then, indeed, the invention itself would have been in public use, within the meaning of the law; but this was not the case. * * * Nicholson did not let it go beyond his control. He did nothing that indicated any intent to do so. He kept it under his own eyes, and never for a moment abandoned the intent to obtain a patent for it." *City of Elizabeth v. American Nicholson Pavement Co.*, 97 U. S. 126.]

[The patent involved in this litigation, No. 11,491, was granted August 8, 1854, to S. Nicholson, reissued December 1, 1865, No. 1,583, and August 20, 1867, No. 2,748. The first reissue was involved in *Nicholson Pavement Co. v. Hatch*, Case No. 10,251. The second reissue was involved in the case to which this note is appended, and in *Nicholson Pavement Co. v. Jenkins*, 14 Wall. (81 U. S.) 452; *Jenkins v. Nicholson Pavement Co.*, Case No. 7,273; *Bigelow v. City of Louisville*, Id. 1,400.]

Case No. 310.

AMERICAN NICHOLSON PAVEMENT CO. v. ELIZABETH et al.

[1 Ban. & A. 463; 6 O. G. 772.]

Circuit Court, D. New Jersey. Oct., 1874.

APPEAL TO SUPREME COURT—REQUISITES—AMOUNT OF BOND.

1. Where the decree is for recovery of money not otherwise secured, the practice of the court, upon an allowance of an appeal from the circuit to the supreme court, requiring a bond, with one or more sureties, for double the amount of the decree and costs, should not be departed from, except in cases where the appellee is made secure in other ways, and where such requirement, under some special circumstances, will operate as a hardship on the appellant.

2. The practice of requiring the bond to be in double the amount ought not always to be insisted on, as the law does not require that the security should be in any fixed proportion to the decree. It is only necessary that it should be sufficient.

3. The case of *Stafford v. Union Bank*, 16 How. [57 U. S.] 135, considered.

[In equity. Bill by the American Nicholson Pavement Company against the City of Elizabeth, George W. Tubbs, and the New

¹[Reported by Hubert R. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

Jersey Wood Paving Company, for an injunction restraining the infringement of patent No. 11,491, and its several reissues. Decree for complainant. *American Nicholson Pavement Co. v. City of Elizabeth*, Case No. 311; Id. 309. Heard on application to determine the amount of bond to be given upon allowance of appeal to the supreme court. The decree was subsequently affirmed by the supreme court. 97 U. S. 126.]

C. A. Seward, for complainant.
Keller & Blake, for defendants.

NIXON, District Judge. This is an application to the court to determine the amount of the bond and security to be given on the allowance of an appeal to the supreme court. The 56th section of the patent act of July 8, 1870, (16 Stat. 207,) allows a writ of error, on appeal to the supreme court from any judgment or decree of a circuit court, in any case at law or in equity, touching patent rights, in the same manner, and under the same circumstances, as in other judgments and decrees of such circuit courts, without regard to the value or sum in controversy. The 22d section of the judiciary act, (1 Stat. 73,) as modified by the 2d section of the act of March 3, 1803, (2 Stat. 244,) prescribes the conditions and circumstances under which writs of error and appeals may be brought, and enacts, that every justice or judge, signing a citation on any writ, shall take good and sufficient security, that the plaintiff in error, or appellant, shall prosecute his writ to effect, and answer all damages and costs, if he fail to make his plea good. By the act of December 12, 1794, (1 Stat. 404,) passed to amend and explain the above recited section, the security to be required and taken, on the signing of a citation, or any writ of error, which shall not be a supersedeas and stay execution, shall be only to such amount, as, in the opinion of the judge taking the same, shall be sufficient to answer all such costs, as, upon the affirmance of the judgment or decree, may be adjudged to the respondent in error.

In order that the writ may operate as a supersedeas, and stay the execution, it is necessary that a copy should be lodged for the adverse party in the clerk's office, where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of, and, also, that the bond, approved by the judge, allowing the writ, should be filed there. It is true, that by the 11th section of the act of June 1, 1872, (17 Stat. 198,) a supersedeas may be obtained, if security be given and the bond approved by the judge within sixty days after the rendition of the judgment or signing the decree; but, it has been held, that such a supersedeas stays the proceedings, only, after the filing of the bond, and, that all liens, previously acquired, remain. *Commissioners of Boise Co. v. Gorman*, [19 Wall. (86 U. S.) 661.] In furtherance of the objects of

the foregoing legislation, rule No. 29 of the supreme court, prescribes that: "Supersedeas bonds, in the circuit courts, must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ of appeal to effect, and answer all damages and costs, if he fail to make his plea good; such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay and costs and interest on the appeal."

A final decree was entered against all the defendants, The New Jersey Wood Paving Company, George W. Tubbs, and the city of Elizabeth, as joint trust-feasors or infringers, on the — day of —, A. D. 1874, for the sum of \$— and costs. No execution has been issued, and one of the objects to be gained by filing the bond, is to obtain a supersedeas, under the act of June 1, 1872. If this were not desirable, an appeal could be had by giving the bond in a sum sufficient to cover the costs that may be adjudged to the respondent in error, by virtue of the provisions of the act of December 12, 1794. In cases of this sort, where, in the language of the 29th rule, "the decree is for the recovery of money not otherwise secured," the practice of the court, heretofore, has been to require a bond, with one or more sureties, for double the amount of the decree and costs, and such practice should not be departed from, except in those cases where the appellee is made secure in other ways, and where such requirement, under some special circumstances, will operate as a hardship on the appellant. In the present case, the court is asked to approve of the bond of the defendants alone, not requiring any other security, and the application is based upon two conditions: First, because the decree, binding the real estate of the defendants, is itself a sufficient security; and, second, because the bond of one of the defendants, the city of Elizabeth, gives to the complainant all the indemnity which ought to be demanded.

The reply to the first is, that under the laws of the state of New Jersey (Nix. Dig. tit. "Executions," §§ 3, 4), the lien of the decree is liable to be divested by younger decrees or judgments, upon which executions may be issued. The reply to the second is, that if it be true, as was alleged by the counsel of the defendants, and, we doubt not, honestly, that the bond of one of the defendants is ample security for the whole decree, then sureties can be obtained without difficulty, as no pecuniary risk or damage is run by third persons in entering upon the bond; and, if it is not true, then justice to the complainant suggests that additional security should be required.

In *Stafford v. Union Bank*, 16 How. [57 U. S.] 135, it was this last consideration which seemed to have weight with the supreme court in its refusal to sanction the

diminution of the amount of the bond, because other security had been given. The case was this: A bill was filed in the district court of Texas for the foreclosure of a mortgage on certain slaves, then in the possession of parties who had hired their labor. The court appointed a receiver, to receive all sums of money accruing from their hire pendente lite, and required him to give bonds in the aggregate penalty of \$40,000, for the faithful discharge of his duties. The hirers of the slaves also executed bonds, in the penal sum of \$80,000 for the safe keeping and delivering of the slaves. A final decree was rendered February 25, 1854, by which it was directed, that the sums accruing from the hire of the slaves, in the custody of the receiver, amounting to \$25,379, should be paid by the receiver to the complainant, and credited on the total amount due from the defendants; and that, in case the defendants failed to pay the balance remaining due after such credit, amounting to \$39,877, on the 1st of July, 1854, they should be foreclosed of their equity of redemption, and the master should seize and sell the slaves at public auction, etc., and pay to the complainant, out of the proceeds of the sale, the foregoing sum of \$39,877, in satisfaction of the debt. On the tenth day after the entry of the said decree, the defendants prayed an appeal, which the court granted, upon the condition that they should enter into a bond, with sureties, in the penal sum of \$10,000, conditioned to prosecute their appeal with effect, and answer all damages and costs. Objections being interposed, by complainant, to the amount of the bond, the court overruled them, on the ground that the bonds of the receiver and of the hirers of the slaves, with good and sufficient sureties, in the aggregate sum of \$120,000, were, in fact, for the benefit of the complainant, and that the only additional security he ought to demand, was, for the special damages which might be imposed by the supreme court for the delay.

It was held that the court below erred in taking security for less than the whole amount of the decree, and that the two facts above named—first, that the receiver appointed by the court had given bonds for a large amount, and, second, that the persons, to whom the mortgaged property had been hired, had executed security for its safe keeping and delivery—did not relieve the judge from the obligation, under the law, of requiring security, on the appeal bond, equal to the amount of the decree. And Mr. Justice McLean, in delivering the opinion of the court, remarked: "The hardship of this rule," i. e., demanding of the appellant, a bond for the full amount of the decree. "is more imaginary, than real. * * * If the receiver has given security, in \$40,000, faithfully to pay over the money in his hands, and if those persons who employed the slaves have given bond in \$80,000 for the

safe keeping and delivery of them, and the sureties are good, the appellant can have no difficulty in giving the security on his appeal to the amount of the decree in the district court. It is true, the property is taken out of his possession and control, but it is in possession of persons who gave bonds for its safe keeping and delivery when required, a part of it, in payment of the decree, and the residue, to be sold in satisfaction of the balance of the decree. In this condition of the property, if the transaction be bona fide (and it may be presumed to be fair, as the arrangement was made under the order of the court,) the responsibility on the appeal bond can be little more than nominal."

The counsel for the defendants invited the attention of the court to the case of *Rubber Co. v. Goodyear*, 6 Wall. [73 U. S.] 153, where the supreme court seemed to depart from the principle of *Stafford v. Union Bank*, supra; but nothing was done in that case, which would sustain this court, in approving the bond of the defendants, without requiring any other security. There, the decree had been for \$310,753, and the judge of the circuit, following the usual practice, had demanded a bond in double the amount of the decree. Application was made to the supreme court for the reduction of the sum; and, it appearing to the court, that the defendants had given security, in part, by the deposit of the bond of the United States and other private bonds, in the sum of \$200,000, the appellant was allowed to withdraw the bond then on file, upon filing a bond, in lieu thereof, in the sum of \$225,000, with good and sufficient sureties. It will be observed, that the court founded its action, in that case, on the fact, first, that the appellant had already placed under the control of the court actual assets of the value of not less than \$200,000, for the benefit of the appellee, and, second, upon the further consideration that the substituted bond for \$225,000 should be executed with good and sufficient sureties. The chief justice, indeed, in delivering the opinion of the court, said, that the usual practice of requiring the bond in double the amount, ought not always to be insisted on, as the law did not require that the security should be in any fixed proportion to the decree. It was only necessary that it should be sufficient. Such a suggestion addresses itself to the reason of the court, especially, in those cases where the decree is for a large sum, and it was acted on, by this court, in the case of *New Jersey Zinc Co. v. Wetherill*, [Case No. 17,464,] in which the decree was for upward of \$300,000. We added to that, a sum, reckoned large enough, to cover all possible increase for interest, costs, and damages for delay, and directed that the bonds should be executed only for such amount. It was not doubted, in that case, but that the property of the appellant, bound by the decree, was more than sufficient to

pay the decree, interest, damages, and costs; and that the bond of the appellant, without other security, was ample for every probable liability arising from the affirmance of the decree on the appeal. Yet, it did not seem to occur, either to the counsel, or the court, that anything less, ought to be offered or accepted, than approved sureties in addition to the bond.

We do not think, in the present case, that the appellants should be required to give bond in double the amount of the decree. One hundred thousand dollars will entirely secure all that the appellee, under any conceivable circumstances, will be entitled to claim on affirmation of the decree of the circuit court, and, if all the defendants unite in a bond in that penalty, conditioned to prosecute their appeal to effect, and answer all damages and costs against either of the defendants, with good and sufficient sureties, it will be approved by the court.

[NOTE. For a note concerning the patent involved in this case, see *American Nicholson Pavement Co. v. City of Elizabeth*, Case No. 309.]

Case No. 311.

AMERICAN NICHOLSON PAVEMENT CO. v. ELIZABETH et al.

[6 Fish. Pat. Cas. 424; 3 O. G. 522.]

Circuit Court, D. New Jersey. May 13, 1873.*

PATENTS FOR INVENTIONS — DIFFERENT FORMS IN ONE PATENT—REISSUE—DILIGENCE—ABANDONMENT—INFRINGEMENT.

1. When the commissioner grants a reissue, the courts must assume that he has examined and found that all the necessary conditions existed which authorized him to perform the act, and that the invention described in the reissued letters patent is the same as the invention claimed in the original letters patent.

2. As the two forms of pavement described in Nicholson's letters patent are related to a like subject, and in their nature are connected together, and as the elements necessary for the construction of the one are substantially used in the other, no objections can be properly raised because both forms are included in the one patent.

3. Where the patentee, when he applied for his patent, evidently attached more importance to one form of his invention than the other, but afterwards changed his opinion and reissued, laying more stress on the second form, such modification of opinion on his part does not disturb the fact that both forms were described, though imperfectly, in his first specifications.

4. The question of diligence is not an absolute, but a relative one, and must be considered in reference to the subject-matter of the experiments.

5. In Nicholson's invention, in all calculations as to cost, which necessarily involved the fact of durability, long use and lapse of time were essential ingredients.

*[Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

†[Affirmed by supreme court as to one defendant, but reversed as to the other two, in *City of Elizabeth v. American Nicholson Pavement Co.*, 97 U. S. 126.]

6. Where the patentee allowed six years to elapse after putting down his pavement, before applying for a patent; *Held*, that in the absence of all intent, and in the face of a manifest contrary intent, the court will not infer, from the facts of the case, that there was any such public use of the invention, or any such dedication or abandonment, by the inventor, as would avoid the patent.

[See note to American Nicholson Pavement Co. v. City of Elizabeth, Case No. 309.]

7. The use of the invention described and claimed in letters patent for improved pavement, granted Brocklebank and Trainer, July 12, 1869, is an infringement of the first and second claims of complainant's patent.

8. If it is granted that these additions contained in this patent are valuable improvements, they are nevertheless grafted upon the Nicholson pavement, and cannot be used in connection with it without the consent of its owners.

[9. Cited in American Nicholson Pavement Co. v. City of Elizabeth, Case No. 309, to the point that a combination producing a new and useful result is patentable, although no one of its parts is new.]

[In equity. Bill by the American Nicholson Pavement Company against the city of Elizabeth, N. J., George W. Tubbs, and the New Jersey Wood Paving Company, for an injunction and an account for the alleged infringement of reissues of patent No. 11,491. Motion for provisional injunction was denied, provided defendants give bond for a stated sum. American Nicholson Pavement Co. v. City of Elizabeth, Case No. 312. Heard upon the merits. Decree for complainant. Subsequently, upon exceptions to the master's reports, a decree was entered for complainant for a specific amount. *Id.* 309. Defendants thereupon appealed to the supreme court, where that decree was reversed as to the city of Elizabeth and George W. Tubbs, but affirmed as to the New Jersey Wood Paving Company, the other defendant. *City of Elizabeth v. American Nicholson Pavement Co.*, 97 U. S. 126. For a report of hearing upon an application to determine the amount of security to be given an allowance of appeal to the supreme court, see *American Nicholson Pavement Co. v. City of Elizabeth*, Case No. 310.]

The claims of the reissue are as follows: "1. Placing a continuous foundation or support, as above described, directly upon the roadway; then arranging thereon a series of blocks, having parallel sides, endwise in rows, so as to leave a continuous narrow groove or channel-way between each row, and then filling said grooves or channel-ways with broken stone, gravel, and tar, or other like materials. 2. I claim the formation of a pavement by laying a foundation directly upon the roadway, substantially as described, and then employing two sets of blocks—one a principal set of blocks that shall form the wooden surface of the pavement when completed, and an auxiliary set of blocks or strips of board, which shall form no part of the surface of the pavement, but determine the width of the groove between the prin-

cipal blocks, and also the filling of said groove, when so formed between the principal blocks, with broken stone, gravel, and tar, or other like material. 3. Placing a continuous foundation or support, as above described, directly upon the roadway, and then arranging thereon a series of blocks having parallel sides endwise in a checkered manner, so as to leave a series of checkered spaces or cavities between said blocks, and then filling said checkered cavities with broken stone, gravel, and tar, or other like material. 4. I claim the formation of a pavement by laying a foundation directly upon the roadway, substantially as above described, and then employing two sets of blocks, viz.: One a principal set of blocks that shall form the wooden surface of the pavement, and an auxiliary set of blocks that shall form no part of the wooden surface of the pavement, but determine the dimensions of the tessellated cavities between the principal blocks, and then filling said tessellated cavities with broken stone, gravel, and tar, or other like material." The issues in the case and the material facts are fully set forth in the opinion of the court.

C. A. Seward and B. Williamson, for complainants.

C. F. Blake and C. M. Keller, for defendants.

NIXON, District Judge. This is a bill in equity for an injunction and an account, for an alleged infringement by the defendants of a patent granted to Samuel Nicholson, for an improvement in wooden pavements, on August 8, 1854. The bill set forth that the said Nicholson surrendered the original letters patent issued to him as aforesaid, and obtained a reissue upon corrected descriptions and specifications, December 1, 1863; that he afterward surrendered these reissued letters patent, and obtained another reissue on August 20, 1867; that he died intestate on January 6, 1868; and that letters of administration were duly issued to George T. Bigelow, who, as administrator, applied to the commissioner of patents, by petition, on July 7, 1868, for a renewal and extension of said patent, and that the same was renewed and extended for the period of seven years from August 8, 1868; that by mesne assignments in writing from the said Bigelow, administrator, etc., the complainant had become the sole owner of the said extended patent for the state of New Jersey, except so much of said state as is embraced within the corporate limits of Jersey City. The bill further alleges that the validity of the said original and reissued letters patent has been settled and established by long and extensive use and by public acquiescence, and also by judicial determination, and that the defendants have infringed the same by constructing and using a wooden pavement or pavements in the city of Elizabeth, embracing the invention or improvement contained

in the last reissued letters patent, or the substantial or material parts thereof.

The answer of the defendants sets up substantially these defenses:

1. They deny that Samuel Nicholson was the original and first inventor of the improved wooden pavement described in his letters patent.

2. They allege that the reissued letters patent are fraudulent and void, as covering and including many things not invented by Nicholson, and not described and claimed in his original letters patent.

3. That the complainant's patent is void for want of novelty.

4. That the alleged invention was in public use, with the knowledge and consent of Nicholson, long prior to his application for letters patent, and that such public use worked an abandonment and dedicated the invention to the public.

Admitting that they had constructed and laid, and were then constructing and laying, certain wooden pavements in the city of Elizabeth, under and in accordance with letters patent granted to the defendants, Brocklebank and Trainer, dated January 12, 1869, they deny that by so doing they have infringed upon the rights of complainants. I have examined the testimony taken by the parties, and have given to the arguments of counsel the attention which their marked ability and learning, and the large interests involved, seemed to demand; and I will briefly state the conclusions that I have reached, without stopping now to detail the reasons which led me to such conclusions.

The complainant's patent, if valid, is doubtless for a combination. The several parts that make up the structure are:

1. A continuous foundation directly upon the roadway.

2. A series of blocks, with parallel sides, standing endwise in rows, that form the wooden surface of the pavement.

3. An auxiliary set of blocks or strips of board, which form no part of the surface, but determine the width of the grooves between the principal blocks.

4. The filling of the grooves, when so formed, between the principal blocks with broken stone, gravel, and tar, or other like material.

It is not claimed that any one of these parts is new, but that in their combination they produce a new and useful result.

1. Was Nicholson the original and first inventor, or is the patent void for want of novelty? I have carefully examined the copies of specifications and the large number of models produced, representing the pavements described in eighteen English patents issued previous to the date of the Nicholson patent; and, while nearly all of them have one or more of its elements, I find that none of them, except perhaps the Hosking patent, to which I shall allude hereafter, suggests the combination which Nicholson has made.

There are strong presumptions in favor of the novelty of Nicholson's invention. The issue of the patent, its reissue, its extension by the commissioner, its long use and the public acquiescence, the judgment of competent legal tribunals, where the question of its novelty was directly involved—are all facts to be taken into the account. The burden is upon the defendants to rebut and overthrow these presumptions, which, in the opinion of the court, they have failed to do.

2. Are the reissued letters patent fraudulent and void because they cover and include more than Nicholson invented, described, and claimed in his original letters patent? The patent act authorized a surrender of the original letters and a reissue for the residue of the term, when the patent first granted should be inoperative or invalid by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention, more than he had a right to claim as new, if the error had arisen from inadvertency, accident, or mistake, and without any fraudulent or deceptive intention. It is an appeal to the judgment of the commissioner, and when he grants a reissue, the court must assume that he has examined and found that all the necessary conditions existed which authorized him to perform the act, and that the invention described in the reissued letters patent is the same as the invention claimed in the original letters patent. The only exceptions to such an inference are, where it appears upon the face of the patent itself that the commissioner has clearly exceeded his authority, or where the new patent has been procured by fraud or by collusion between the commissioner and the patentee. There is no proof of fraud or collusion, and a comparison of the specification and claim of the original patent with the corrected and amended description of the two reissues, establishes the fact, I think, beyond question, that he included nothing in the latter which was not fairly indicated and suggested in the former. The original patent was for improved wooden pavements. He specifies and claims therein the invention of a pavement which may be constructed in one of two forms—either by using the long and short blocks, or "by arranging the long blocks side by side and in rows transversely of the roadway, and with spaces between each two rows of them, in each of which spaces a strip of board may be introduced, the width of the board being equal to about half the length of the blocks." As these are related to a like subject, and in their nature are connected together, and as the elements necessary for the construction of the one are substantially used in the other, no objections can be properly raised, because both forms are included in the one patent. It is quite evident that when the first patent was applied for, and the first surrender and re-

issue made, the inventor attached more importance to, and expected greater results from, the former than from the latter mode of construction; but his experiments afterward changed his views in this respect, and in his reissue of August 20, 1867, his first and second claims are for the pavement with continuous transverse grooves made by the introduction of boards, for the infringement of which the present suit is brought. But such modification of opinion on his part as to their relative value, does not disturb the fact that both forms were described, although imperfectly, in his first specifications.

3. Has there been such a public use of the invention, such a dedication of it to the public, or such an abandonment by the patentee, as to void the patent? As these acts are closely related to each other in their essential qualities, and as the several questions grow out of one transaction, I shall consider them together. The transaction was this: The inventor was the treasurer of the Boston and Roxbury Mill Corporation—a private company chartered by the legislature of Massachusetts on June 14, 1814. The act incorporating it is made an exhibit in the case, and it appears from the third section that it was authorized to make and finish a dam from Charles street, in Boston, to the upland at Sewall's Point, in Brookline; to connect the different parts thereof by bridges and causeways so as to render the same a good and substantial road, suitable for the passing of men, loaded teams, and carriages of all kinds; and, when finished, railed at the sides and furnished with lamps, to receive tolls for passing over the same. It was a private road over the dam, about thirty feet in width and one mile in length, with two bridges, and all under the exclusive control of the corporation. There was a toll-gate and house on the southerly side of the road, near one of the bridges. Nicholson was appointed treasurer of the company in 1833, and while acting in that position—to wit, on August 4, 1847—he filed a caveat in the office of the commissioner of patents. His petition represents that "he has discovered or invented certain new and useful improvements in street or road pavements, and that he was then engaged in making experiments for the purpose of perfecting the same, preparatory for depositing at the patent office of the United States a correct specification thereof, in view to obtain letters patent therefor. He desires to obtain an exclusive property in his said invention or discovery, and prays that said caveat may be considered as the preliminary application or petition required by law to be made in order to obtain letters patent; and that his right in the said invention or discovery may be protected until he shall have matured the same." In the description annexed to the caveat, he states his invention or improvement to be as follows:

"Wooden blocks are cut from joists of about four inches square, one-half of which are cut eight inches long, the other half are cut four inches long. They are placed side by side on the prepared earth, the ends being upward, and in alternate position of long and short blocks, so that no two blocks of the same length will stand together, but so as to present a checkered surface. The lower ends being on a level, the upper will present alternate open squares of about four inches by four inches deep. Into said openings a small quantity of coarse salt is first put, then small broken stone is firmly rammed, so that the whole surface of the pavement is firm and level; then tar is poured over the whole surface, after which a sprinkling of sand or gravel. * * * Instead of broken stone and tar, used in the spaces above named, any other material or cement may answer as well, the design being to use something which will expand as the wood contracts, by which a hard surface prevents water from penetrating to rot the wood. * * * The earth may be prepared to receive the pavement, by covering the surface with paper saturated with tar or other preventive to moisture rising to rot the under surface of the blocks." The checkered pavement only is here specifically described, but the combination for which he afterward received his patent is suggested. And that this combination was in his mind, is proved by the fact that in the following summer, and as he stated to the witness Nutting, at his own expense, he caused to be laid on the dam opposite to the toll-house a piece of wooden pavement about seventy-five feet in length and of the width of the turnpike road, constructed in three different forms, to wit: 1. The checkered form, with long and short blocks. 2. The transverse channel form, with long blocks and strips, and with concrete filling. 3. The circular form, composed of small round logs of equal length set close together, with the intervening spaces filled with concrete. The foundation of a part was composed of boards or wood, and in other places it consisted of tar and sand. Both modes were used to ascertain, by experiment, which would best accomplish the desired results of an even, solid earth-bed, and a preventive of moisture being absorbed from the ground by the under blocks. Section 12 of the act of July 4, 1836, under which the foregoing caveat was filed, authorizes any person who shall have invented any new art, machine, or improvement thereof, and shall desire further time to mature the same, upon payment of twenty dollars, to file in the patent office a caveat, setting forth the design and purpose thereof, and its principal and distinguishing characteristics, and praying protection of his right till he shall have matured his invention. Such caveat is filed in the confidential archives of the office, and preserved in secrecy. The obvious design of this sec-

tion is to afford to inventors the opportunity of perfecting their discoveries and inventions. To prevent an abuse of the privilege, it is further provided that if an application is made by any other person, within one year from the time of filing the caveat, for a patent of any invention with which it may in any respect interfere, it shall be the duty of the commissioner to deposit the descriptions, specifications, drawings, and model in confidential archives of the office, and to give notice by mail to the person filing the caveat of such application, who shall, within three months after receiving the notice, if he would avail himself of the benefits of his caveat, file his description, specifications, drawings, and model. If no such application is made, the caveator has a reasonable time in which to mature his invention or discovery; and when his letters patent are issued, if he have used due diligence, he has the right to have his matured invention incorporated into his patent, and to supersede those that have intervened between the date of his first discovery and his subsequent taking out of the patent. Curt. Pat. § 270. It is impossible to read the testimony in reference to laying this section of the pavement upon the dam, and the conduct and declarations of Nicholson respecting it, without reaching the conclusion that he was making an honest experiment, and that the caveat was filed by him for protection while he was engaged in it. It was a private corporation, and the roadway was under his control as treasurer. It was a favorable spot to test the strength and durability of the pavement, because heavily laden teams stopped and started in front of the toll-gate. He was not exposing to the public the mode of its construction, because that could not be learned from the portion exposed to the public view, and no one had a right to disturb it. But he allowed six years to elapse after putting down the three forms of pavement before he applied for the patent. Was this using reasonable diligence? The question of diligence is not an absolute, but relative one, and must be considered in reference to the subject-matter of the experiments. Could the value and practical utility of such an invention be sooner ascertained? In all calculations as to cost, which necessarily involved the fact of durability, long use and lapse of time were essential ingredients. In the absence of all intent, and indeed in the face of a manifest contrary intent, I am not willing to infer from the facts of the case that there was any such public use of the invention, or any such dedication or abandonment, by the inventor, as would avoid the patent afterward issued to Nicholson. As the foregoing view of the legal effect of the caveat, and the experiments under it, and the patent afterward issued, carries the invention of Nicholson back to a period of time antedating the English patent of Hosking, it does not seem necessary for

me now to consider whether or not the former infringes the latter. It will hardly be contended that when Nicholson laid on the Milldam road his pavement, with long blocks and transverse slips and grooves, in the month of July, 1848, he derived his knowledge of such a combination of elements from a patent, the specifications of which were not enrolled in the foreign office until March, 1850.

4. The only question remaining is the one of infringement. The defendants acknowledge that they have constructed and laid, and are constructing and laying, the pavement in the city of Elizabeth, which the complainants, in their bill, allege infringes their patent, but justify under certain letters patent issued to two of the defendants, Brocklebank and Trainer, on January 12, 1869. I have examined this patent and the specifications and claim annexed to it, and, conceding all that the patentees claim for it, its use must be regarded as an infringement of the combination embraced in the complainant's patent. They state, in their schedule, that "the invention relates to improvements in wood pavements, and consists in an improved arrangement of the same, whereby the flooring is strengthened and adapted for the better securing of the vertical blocks to the flooring." They then describe the flooring, vertical blocks, strips between the blocks secured to the floor by nailing, and spaces between the blocks and above the strips filled with tar, gravel, cement, or other substance in the usual manner. Their claim is for "the combination of the bed, transverse strips, and vertical blocks, when the latter are rebated, either on one or both sides, and either with dovetail rebates or otherwise, and the said strips fitted to the rebates and secured to the bed, all substantially as and for the purpose specified." If you add to this the filling of the grooves, or spaces between the vertical blocks and above the strips, with some concrete substance, which must be done before the pavement is of any practical value, you have undoubtedly the Nicholson combination, having added to it, however, rebates upon one or both sides of the blocks of dovetail or vertical form, which addition, it is claimed, is an improvement, in more securely fastening to the flooring both the blocks and strips, and in the equalization of the pressure upon the pavement, and its distribution over a larger surface. If it be granted that these additions are valuable improvements, they are nevertheless merely grafted upon the Nicholson patent, and can not be used in connection with it without the consent of its owners. The affidavits of Brocklebank and Trainer, taken in 1868, to be used upon the application of the administrator of Nicholson for an extension of the Nicholson patent, and exhibited in this case, fully disclose the estimate in which the patent was held by these defendants. They not only recognize its

novelty, but are very extravagant in their praises of its utility and value. Not mentioning their specification of its merits in particular cases, they are of opinion that its general introduction into the streets of the cities and towns of the United States would save to the people in various ways, in the next seven years, from five to seven hundred millions of dollars. If it be commendable in them to strive to make it more useful by improvements, it is hardly just that they should seek to rob such a benefactor of his race of the glory of his invention, or deprive his legal representatives of the profits from the extension, which they did so much, I doubt not honestly, to obtain. I am of the opinion that the patent of the defendants infringes the first and second claims of the extended patent of the complainant, and that a decree should be entered according to the prayer of the bill.

[NOTE. For a note in reference to the patent involved in this case, see American Nicholson Pavement Co. v. City of Elizabeth, Case No. 309.]

Case No. 312.

AMERICAN NICHOLSON PAVEMENT CO. v. ELIZABETH et al.

[4 Fish. Pat. Cas. 189; 18 Pittsb. Leg. J. 85.]
Circuit Court, D. New Jersey. June, 1870.

PATENTS FOR INVENTIONS—PRELIMINARY INJUNCTION—FORMER JUDGMENT AND DECREE—INFRINGEMENT—PAVEMENT.

1. A former judgment and decree, although against other parties, raises a strong presumption that the patent is valid. A former decree, coupled with the fact that the right of the patentee has been extensively acknowledged, is sufficient to establish prima facie the title of the patentee, and justify a preliminary injunction against any clear infringement. It must be held as to all matters directly adjudicated by former decrees, that they make a prima facie case against the defendant.

[Cited in Page v. Holmes Burglar Alarm Tel. Co., 2 Fed. 337.]

2. A preliminary injunction is always an extraordinary exercise of judicial powers. Its purpose is to preserve the existing state of things until the rights of the parties can be fairly investigated. It is not to be used for any other purpose.

[Cited in Page v. Holmes Burglar Alarm Tel. Co., 2 Fed. 337; R. E. Dietz Co. v. C. T. Ham Manuf'g Co., 47 Fed. 322.]

3. A preliminary injunction looks forward to a trial, and when it is of no importance to preserve things as they are when the injunction is asked for, it will not be granted.

[Cited in Page v. Holmes Burglar Alarm Tel. Co., 2 Fed. 337.]

4. A preliminary injunction ought never to be issued unless the right of a patentee is an established or admitted one, and unless the alleged invasion of the right is proved beyond reasonable doubt.

[Cited in R. E. Dietz Co. v. C. T. Ham Manuf'g Co., 47 Fed. 322; Stahl v. Williams, 52 Fed. 651.]

5. There are cases in which change of form may destroy a combination, as those in which form is necessary to secure the beneficial result, and where a change of form of one or more of the things combined works a different result.

6. Upon a motion for a preliminary injunction, it is not without weight that experts differ in opinion respecting the matter.

7. A preliminary injunction against infringement can not be resorted to for the purpose of compelling a city to give a contract to the complainants rather than to their competitors, though the latter were the lowest bidders.

[8. Cited in Sargent Manuf'g Co. v. Woodruff, Case No. 12,368, to the point that a grant of letters patent raises a presumption that the invention patented is not an infringement of an earlier patent.]

[In equity. Bill by the American Nicholson Pavement Company against the city of Elizabeth, N. J., George W. Tubbs, and the New Jersey Wood Pavement Company, for an injunction and an account for the alleged infringement of patent No. 11,491. Heard on motion for a provisional injunction. Motion denied. Subsequently, upon the merits, decree was entered for complainant, (American Nicholson Pavement Co. v. City of Elizabeth, Case No. 311;) and, upon exceptions to the master's report, a decree was entered for complainant for a specific amount, (Id. 309.) Defendants appealed to the supreme court, where that decree was reversed as to the city of Elizabeth and George W. Tubbs, but affirmed as to the New Jersey Wood Pavement Company, the other defendant. City of Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126. For a report of hearing upon an application for the determination of the amount of security to be given on an allowance of an appeal to the supreme court, see American Nicholson Pavement Co. v. City of Elizabeth, Case No. 310.]

This was a motion for a provisional injunction to restrain the defendants from infringing letters patent for an "improved wooden pavement," granted to Samuel Nicholson, August 8, 1854, reissued December 1, 1863, again reissued August 20, 1867, and extended to the administrator of Nicholson for seven years from August 8, 1868, and assigned, for a portion of the state of New Jersey, to complainants. The claims of the original and first reissued patents will be found in the report of the case of Nicholson Pavement Co. v. Hatch, [Case No. 10,251.] The claims of the last reissue were as follows: "I. Placing a continuous foundation or support, as above described, directly upon the roadway, then arranging thereon a series of blocks having parallel sides, endwise in rows, so as to have a continuous narrow groove or channel-way between each row, and then filling said grooves or channel-ways with broken stone, gravel, and tar, or other like materials. II. The formation of a pavement by laying a foundation directly upon the road-way, substantially as

¹[Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

described, and then employing two sets of blocks, one a principal set of blocks, that shall form the wooden surface of the pavement when completed, and an auxiliary set of blocks or strips of board, which shall form no part of the surface of the pavement, but determine the width of the groove, between the principal blocks, and also the filling of said groove, when so formed between the principal blocks, with broken stone, gravel, and tar, or other like material. III. Placing a continuous foundation or support, as above described, directly upon the roadway, and then arranging thereon a series of blocks having parallel sides, endwise in a checkered manner, so as to leave a series of checkered spaces or cavities between said blocks, and then filling said checkered cavities with broken stone, gravel, and tar, or other like material. IV. The formation of a pavement by laying a foundation directly upon the road-way, substantially as above described, and then employing two sets of blocks, viz: one a principal set of blocks that shall form the wooden surface of the pavement; but determine the dimensions of the tasseled cavities between the principal blocks, and then filling said tasseled cavities with broken stone, gravel, and tar, or other like material."

B. Williamson and C. A Seward, for complainants.

A. Dutcher and Keller & Blake, for defendants.

Before STRONG, Circuit Justice, and McKENNAN, Circuit Judge.

STRONG, Circuit Justice. This is a motion for a preliminary injunction to restrain the defendants from making or constructing a wooden pavement containing the improvements and inventions described in a patent owned by the complainants, and set forth in their bill. The affidavits and exhibits presented in support of the motion show, that on August 8, 1854, a patent was granted to Samuel Nicholson for an improved wooden pavement; that in 1863 this patent was surrendered, and new letters patent were issued for the same invention; that in 1867 the reissued letters were surrendered, and other letters patent were issued for the remainder of the term of fourteen years; that the letters last mentioned were extended to the administrator of Nicholson for a period of seven years from August 8, 1868, and that the complainants have, by assignment, become the owners of the exclusive right to make, construct, and use, and to vend to others the right to make, construct, and use, the invention and the improved wooden pavement described in the original and reissued patents, during the extended term, in all the state of New Jersey, except within the corporate limits of Jersey City. It further appears that the improvement thus

patented has been exclusively used in numerous cities and towns in the United States, in subordination to the claim of Nicholson to an exclusive right in himself, and that the validity of the reissued patent of 1863 was established as against the city of Chicago, in a suit brought by Nicholson, in the northern district of Illinois, against said city for an alleged infringement, in which a final decree was entered January 7, 1867, in favor of the patentee, and against the defendants, for twenty-nine thousand seven hundred and thirty dollars and thirty cents. From this decree an appeal was taken to the supreme court of the United States, but the appeal was subsequently withdrawn. It further appears that after the reissue of 1867, Nicholson filed a bill in the circuit court against the defendants, viz: The city of Chicago, complaining of an infringement of that reissued patent, and that after issue had been joined on a denial of its validity, and after proof had been taken, a decree was made against the city, and subsequently the city accepted a license, agreeing to pay a royalty for all subsequent use of the improvement. Though these suits were against other parties, and though the defendants in this case are still at liberty to contest the validity of the patent, the judgment and the decree entered against the city of Chicago raise a strong presumption that the patent is valid. Coupled with the fact already noticed, that the right of the patentee has been extensively acknowledged, and that many pavements have been laid down in subordination to it, they are sufficient to establish, prima facie, the title of the patentee, and to justify a preliminary injunction against any clear infringement, unless it is made to appear that the title of Nicholson was not fairly in controversy in the suits wherein they were made, or that some material fact was not known when the cases were tried, and was not then considered. There is no reason to suspect that the judgment and decree were collusively obtained, and, therefore, they are entitled to all the weight that is usually attributed to decrees in such cases. It must be held that as to all matters directly adjudicated by them, they make a prima facie case against the defendants. But the validity of the patent is now assailed for a reason that was not urged when those decrees were obtained.

It now appears that in 1849, English letters patent were granted to John Hosking for an improved wooden pavement, which the complainants admit is substantially the same as that patented by Nicholson in 1854. True, the specifications of Hosking's pavement was not enrolled until March, 1850; but that was more than four years before the patent to Nicholson. The issue of this English patent was a fact not known when the litigation was in progress in the circuit court of Illinois, and its effect upon the plaintiff's claim has never been determined. Models of the Hos-

king and of the Nicholson pavements have been exhibited to us, and we can not doubt that if the form of the short block or strip between the long blocks, separating them and thus forming a groove, is not a substantial part of the Nicholson combination, and if it is not essential to that combination that the long block and short block, or strip, should have parallel sides throughout, with no rebate in the long blocks, the Hosking and the Nicholson pavement are the same in principle. And such is the evidence. It is not necessary, however, to enlarge upon this, for it is conceded that unless the right granted to Nicholson relates back to a time anterior to the Hosking patent, it must fail. To reach this, and to show that the invention of Nicholson was prior to the issue of the Hosking patent, the complainants have shown that Nicholson filed a caveat on May 2, 1847, in which he claimed that he was then engaged in perfecting an invention for wooden pavements, and filed with the caveat a description of his invention. This was seven years before his patent issued, but it is now insisted that the patent relates back to the caveat. We are not prepared to concede such an effect to Nicholson's caveat. On examining the description it gave of this alleged invention, we find that it mentioned only a pavement having a chequered surface, with alternate open spaces cubical in form, of about four inches by four. It makes no allusion to continuous channels or grooves, which, as well as cubical cells, are described in the specifications of the patent afterward issued, and which are described in the Hosking patent. Whether the two combinations, the one of long blocks and short blocks laid alternately so as to form cells, and the other of long blocks and short blocks, or strips, laid so as to form continuous channels or grooves, are substantially the same combination; whether they are one invention, so that a description of the first gives notice of the other, we are not prepared to determine. Nor are we willing, at this stage of the case, to decide what is the effect of long delay to apply for a patent after a caveat has been filed. Certainly, if the Hosking patent was granted before Nicholson invented the combination of a grooved pavement, such as was described in the patent issued to him in 1854, the complainant's title to the improvement, which they allege the defendants have infringed, is not clear. There is, however, evidence that Nicholson's invention of the grooved pavement was made as early as 1848, and consequently before the English patent to Hosking. It is found in a pamphlet issued by Nicholson, in 1857, in which he asserts that he laid down such a pavement in Boston early in July, 1848. This pamphlet we understand the defendants to have used for another purpose on the hearing of this motion. If the fact inserted in it be established, it may be very material to the inquiry whether the patent of 1854 is affected

at all by the earlier patents to Hosking. But we do not propose to enter at length upon this part of the case, for if it be assumed that nothing has been shown to rebut the prima facie case made out by the complainant's patent, the use under it, and the adjudications made in the circuit court of the United States for the northern district of Illinois; if the title of the complainants to the exclusive use of the thing patented to Nicholson is sufficiently established, we are still of opinion that the present motion ought to be overruled. A preliminary injunction is always an extraordinary exercise of judicial powers. Its purpose is to preserve the existing state of things until the rights of the parties can be fairly investigated. It is not to be used for any other purpose. It looks forward to a trial, and when it is of no importance to preserve things as they are when the injunction is asked for, it will not be granted. It ought never to be issued unless the right of a patentee is an established or admitted one, and unless the alleged invasion of the right is proved beyond reasonable doubt.

In *Parker v. Sears*, [Case No. 10,748,] it was laid down by Mr. Justice Grier that no interlocutory injunction should issue unless the complainant's title and the defendant's infringement are admitted, or are so palpable and clear that the court can entertain no doubt on the subject. His language was still more emphatic to the same effect in *Goodyear v. Dunbar*, [Id. 5,570.] We do not feel disposed to depart from the rule laid down in these cases, especially as it commends itself to our convictions of right. Applying it to the present case, we are to inquire whether, if the title of the complainant is unquestionable, the defendants are clearly guilty of an infringement. Is this made out so fully that we can say there is an undoubted infringement? The defendants are acting under a patent granted to Brocklebank & Trainor, January 12, 1869. It ought to be assumed that they are doing only what they believe they have a right to do. Whether this belief is well founded or not, whether the combination patented to Brocklebank & Trainor is, as they assert, a different combination from that invented by Nicholson, is a vital question upon which the parties are directly at issue. The grant of letters patent, in 1869, to Brocklebank & Trainor, was virtually a decision of the patent office that there is a substantive difference between their invention and that patented to Nicholson. It raises a presumption that building a pavement according to the claims of the later patentees, is not an infringement of the earlier patents. This presumption, though it may be overthrown, is not to be disregarded in considering a motion for a preliminary injunction. It is noticeable that the improvement claimed in the patent of 1869 is the entire combination that makes up a wooden pavement. The patent is not for an improvement on a combination

previously made. What is claimed is "the combination of the bed (foundation), transverse strips and vertical blocks, when the latter are rebated, on one or both sides, and either with dovetailed rebates or otherwise, and the said strips fitted to the rebates and secured to the bed for the purpose of forming the wooden pavement." Thus the patent is not for an addition, but for an entire combination. We are now asked to decide that the patent is only for a colorable change of the combination patented to Nicholson, and to decide this at the beginning of the case. It may be that is so; but that it is, can not be said to be clear. There is certainly a change of form of the constituents of the combination, if there is not a difference in the mode of arrangement. Doubtless, change of form of the constituents of a combination is often no substantial change. It may be only the substitution of an equivalent. The combination remains the same, though the form of the things combined greatly varies. But there are cases in which a change of form destroys the combination. They are those in which form is necessary to secure the beneficial result, and when, of course, a change of form of one or more of the things combined works a different result. There is considerable reason for the belief that Nicholson's combination demands blocks or strips of certain shapes or form, as essential to it, and that it contemplates blocks and strips having parallel sides throughout, without rebates in either. This was necessary to secure one of the avowed advantages of his invention—its cheapness of construction. Now it is very evident that the combination of the Brocklebank & Trainor patent works a different result in two important particulars from that obtained by the Nicholson combination. It distributes the pressure upon the surface of the pavement over a larger base, and it guards against a displacement of the strips or short blocks that separate the long blocks. This is effected by the defined forms of the constituents of the combination. The rebated long block and the strip, or short block, so fashioned as to be fitted to the rebate, are, perhaps, something more than mere equivalents.

It is true that the strip answers one of the purposes which the strip answers in the Nicholson pavement. It separates the long blocks, and thus forms a groove; but it is not necessarily for that reason substantially the same in the combination. In *Eames v. Godfrey*, 1 Wall. [68 U. S.] 78, which was an action for an infringement of a patent for a combination, it was ruled that the defendant had a right to use any of the parts of the patented combination if he did not use the whole, and that if he used all the parts but one, and for that substituted another mechanical structure substantially different in its construction and operation, but serving the same purpose, he was not guilty of an in-

fringement. So, in *Prouty v. Ruggles*, 16 Pet. [41 U. S.] 341, which was an action for an infringement of a patent for an improvement in the construction of a plow, use of all the parts of which the combination was made was held essential to constitute an infringement. The language of the court in that case is, in part at least, applicable here. There, as well as here, the combination only was claimed. It was composed of parts arranged with reference to each other in the manner described; and Chief Justice Taney said: "The use of any two or three parts only, or of two combined with a third, which is substantially different in form or in the manner of its arrangement and connection with the others," was not the use of the thing patented. The parts of Brocklebank & Trainor's improvement are different in form from those of Nicholson's; their arrangement is different, and so is their connection with each other. It is not, therefore, clear that in using the improvement the defendants are infringing any rights of the complainants. It is not without weight that experts differ in opinion respecting the matter. Mr. Treadwell testifies that in his opinion, and for reasons given by him, the Elizabeth pavement (that of which the complainants complain) is substantially different from the Nicholson pavement described in the last Nicholson reissue, and referred to in the first and second claims thereof. Other witnesses are of a different opinion, but it is manifest that we ought not now to decide the question summarily.

We come the more readily to this conclusion because the complainants can not be injured by our refusal to enjoin the defendants now, especially if the refusal be upon terms with which the defendants offer to comply. On the contrary, it may be for their interest that the pavement be laid. The proofs show that the Nicholson pavement can not be laid on Newark avenue. The law of the state and the action of the property holders on the line of the avenue forbid it. But, if in putting down the Brocklebank & Trainor pavement, the Nicholson improvement is used, as the complainants contend it will be, they may recover compensation for its use. We have said nothing of the appearance this motion has of being an attempt to compel the city of Elizabeth to give the contract for paving to the complainants rather than to their competitors in bidding for it, though the bid of their competitors was lowest. A preliminary injunction against infringement can not be resorted to for any such purpose.

The injunction will, therefore, be refused, if the defendants give a bond in the penal sum of thirty thousand dollars, conditioned for the payment of such sum (if any) as may be decreed in favor of the complainants on the final hearing of this cause. The bond to be filed with the clerk of the court, and to be approved by the clerk or by a judge of the

court within twenty days after notice of this order.

[NOTE. For a note in reference to the patents involved in this litigation, see *American Nicholson Pavement Co. v. City of Elizabeth*, Case No. 309.]

AMERICAN NICKEL PLATING WORKS,
(UNITED NICKEL CO. v.)

[See *United Nickel Co. v. American Nickel Plating Works*, Case No. 14,405.]

Case No. 313.

AMERICAN PIN CO. v. OAKVILLE CO.
et al.

[3 Blatchf. 190;¹ 3 Amer. Law Rev. 136.]

Circuit Court, D. Connecticut. Sept., 1854.

PATENTS FOR INVENTIONS — INFRINGEMENT — DIFFERENT MEANS TO PRODUCE SAME EFFECT.

1. The case of *O'Reilly v. Morse*, 15 How. [56 U. S.] 62, cited and applied, as to the extent of the rights secured to an inventor by letters patent.

2. Slocum's patent, of September 30th, 1841, for "a machine for sticking pins into paper," defined and construed.

3. Howe's patent, of February 24th, 1843, for an improvement on Slocum's machine, defined and construed.

4. A machine constructed according to Crosby's patent, of April 1st, 1851, does not infringe either Slocum's patent or Howe's patent.

5. The effect of a patent granted to a defendant, on the question as to whether the machine covered by it is, or is not, an infringement of a prior patent, considered.

[Cited in *Burden v. Corning*, Case No. 2,143; *Seymour v. Osborne*, Id. 12,683.]

[6. A patent secures to the patentee only the means specified to produce the effect; and a patented machine is not infringed by a machine which produces the same effect, but in which the means used are not substantially the same.]

In equity. This was a bill in equity, founded upon letters patent. [Nos. 2,275 and 2,970.] The facts are fully set forth in the opinion of the court:

Roger S. Baldwin and Charles M. Keller, for plaintiffs.

Ralph I. Ingersoll and Edwin W. Stoughton, for defendants.

Before NELSON, Circuit Justice, and INGERSOLL, District Judge.

INGERSOLL, District Judge. The plaintiffs, by their bill, seek to enjoin the defendants from using a machine to paper pins, the right to use which they claim to be exclusively vested in them. The foundation of their claim rests upon two certain patents, the right to which patents, with the privileges by such patents granted, they now have by virtue of assignments from the patentees. One of these patents was issued to Samuel

Slocum, and bears date the 30th of September, 1841, and was to run for fourteen years from the last-mentioned date. The other patent was issued to John J. Howe, and bears date the 24th of February, 1843, and was to run fourteen years from the 5th of December, 1852. The validity of these patents is not contested by the defendants. They admit that the plaintiffs have all the rights which these patents purport to grant. They admit further, that they are using a machine for papering pins; but they deny that, by such use, they have infringed upon any of the rights so granted by such patents.

The defendants claim a right to use the machine for the papering of pins which they are operating, upon the ground that, by such use, they do not infringe upon any rights granted by such patents, or either of them. They claim, also, that the right to use such machine, so operated by them, is exclusively vested in them, by virtue of a patent granted to Chauncey O. Crosby, and which last-mentioned patent they own, by virtue of an assignment from the patentee.

There has been heretofore, at times, some diversity of opinion as to the extent of the rights secured to an inventor or discoverer by the patent issued in his favor. The supreme court of the United States has, however, settled and determined what rights are so secured to the patentee; so, that now, there can be no diversity of opinion on the subject. In the case of *O'Reilly v. Morse*, 15 How. [56 U. S.] 62, the rule, as laid down by the chief justice, in giving the opinion of the court, is, in substance, as follows: "He who discovers that a certain useful result will be produced in any art, machine, manufacture, or composition of matter, by the use of certain means, is entitled to a patent for such discovery, provided he sets forth, in his specification, the means he uses to procure such useful result, in a manner so full and exact, that any one skilled in the art or business to which it appertains, can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he describes. And, if this cannot be done by the means he describes, the patent is void. And, if this can be done, then the patent confers on him the exclusive right to use the means he specifies, to produce the result or effect he describes, and nothing more. And it makes no difference, in this respect, whether the effect is produced by chemical agency or combination, or by the application of discoveries or principles in natural philosophy, known or unknown before his invention, or by machinery acting together upon mechanical principles. In either case, he must describe the manner and process, as above mentioned, and the end it accomplishes. And every one may lawfully accomplish the same end, and without infringing the patent, if he uses means substantially different from those described. But, if the means used to accomplish the same end, are

¹[Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

substantially like those which the patentee describes, the patent has been infringed, and the one using them must be responsible for such infringement."

The rules thus laid down must govern this case. The patent does not secure to the patentee the result or effect produced, but only the means described, by which such result or effect is produced. The means which he specifies, to produce the result or effect, are secured, and nothing more. And all other means to produce the same result or effect, and not patented to any one, are open to the public. A mere change in the form of the machinery, however, or the means specified, by which the result or effect described is produced, or an alteration in some of the unessential parts, or a substitution or use of known equivalent mechanical powers, not varying essentially the machine, or its mode of operation or organization, will not make the new machine a new invention. The patentee may, however, limit his claim, in his specification, to one particular form of machine, and thus exclude all other forms, though such other forms would embody his invention, and thereby not secure to himself the whole that he has invented. In such a case, he is secured only in the particular form claimed. The patent law was intended to secure to the inventor his whole invention or discovery, but not unless he claimed to be secured in the whole. And, if he claims only a part, or some particular form, such part, or particular form only, is secured to him. No more can be secured by the patent than has been invented or discovered; and no more can be secured than is claimed to be secured in the specification.

In the case of *Winans v. Denmead*, 15 How. [56 U. S.] 330, the substantial means used by the defendant to accomplish the object sought, were the same as those described and claimed in the specification of the plaintiff's patent. There was no other change than a slight change of form, not varying in substance the means used by the plaintiff, and set forth and described in the specification of his patent. And, as a mere change in the form of the machinery, or the means specified, by which the result is produced, not varying essentially the mode of operation of the thing patented, will not vary its organization, or be deemed a new or different invention, the defendant was deemed to have been an infringer of the plaintiff's rights secured to him by his patent.

The invention of Slocum, as described in his specification, is a "machine for sticking pins into paper" in a row. It consists of a horizontal plate, as described, with as many grooves as the number of pins intended to be stuck in a row, which grooves are of sufficient length and depth to receive one pin and one only; a sliding hopper, so constructed as to hold a number of pins, one directly over the other in a horizontal position, and so made to slide directly over the grooves,

as to deposit one of the pins in each groove by gravitation; and a sliding plate or follower, upon the front edge of which projects a system of points or wires corresponding with the grooves, so that, when the sliding plate or follower is driven forward, the wires enter the grooves in which the pins are separated, and drive forward the pins which are thus made to perforate the previously adjusted folds of a folded and crimped paper, which is held between clamps. And, in the specification, Slocum claims, as his invention, the plate with grooves, as described, for separating the pins, the sliding hopper, which deposits the pins in the grooves, as described, and the sliding plate or follower, with the wires attached thereto, in combination with the grooved plate, as described, and also these in combination with the hopper, as described.

The invention of Howe, as described in his specification, is for an improvement on Slocum's machine for sheeting pins, that is, for sticking pins in rows into sheets of paper. The machine of Slocum did not crimp the paper. But the paper was crimped in the old way, by a separate operation, and then taken out of the crimping apparatus, and placed in clamps, and, while in such clamps, and out of the clamping jaws, the pins perforated through the crimps previously formed, and in that way were sheeted. The improvement of Howe upon the machine of Slocum, crimped the paper, and the pins were stuck in rows into the paper, while the paper was within and held by the crimping apparatus. This improvement consisted of transverse notches made in the crimping jaws of the old crimping apparatus, so that the pins could enter at proper distances between the crimping jaws, and perforate the paper, while the same was being crimped. Before this improvement, no method was known by which the pins could be made to penetrate the paper, and thus be sheeted, while the paper was under the process of being crimped. The old mode was to stick the pins after the paper had been crimped. Howe's improvement was, by means of these transverse notches, to stick the pins while the paper was in the crimping process, and while the crimper, which crimped the paper, held the paper in the form in which it was crimped. It was not to sheet the pins after the paper had gone through the crimping process, and had passed out of the crimping jaws. He, in substance, took the old English crimping bar, and made transverse notches in it, at suitable distances between the jaws, so that the pins could penetrate through these notches, into and through the crimps of the paper, while the paper was within the crimping jaws, and in the process of being crimped.

The patent which was granted to Crosby, bears date the 1st day of April, 1851. The machine which the defendants are operating, is constructed substantially according to

the specification annexed to that patent. Crosby, in his specification, claims to be the inventor of "a new and useful machine for sticking pins," and the patent is granted to him, according to his claim, for "a new and useful improved machine for sticking pins on paper." The specification and claim are not for an improvement on Slocum's machine, or on Howe's machine, for sticking pins; but for an independent machine, governed by different principles; for a machine to produce a result by means substantially different from the means secured to either Slocum or Howe to produce a like result, to wit, the "sticking of pins on paper." The patent is prima facie evidence that Crosby has an exclusive right to that which the patent purports to grant; that he is the first inventor of the machine specified and described in his specification; and that he is the first inventor of an independent machine, governed by different principles, and using means substantially different from the means used by either Slocum or Howe to produce the like result. *Corning v. Burden*, 15 How. [56 U. S.] 252. The patent to Crosby affords prima facie evidence, therefore, that the means described by him, in his specification, to produce the result of sticking pins on paper, are substantially different from the means described by either Slocum or Howe to produce the like result. And the plaintiffs, to succeed in the case, must counteract this prima facie evidence by sufficient countervailing testimony.

The object of Crosby's machine, is to stick pins in a fillet of paper, across the strip of paper, the crimps being lengthwise of the paper; and to crimp the paper in that way, and coil the fillet, when stuck, into a roll of any convenient size, so that the heads of the pins will be presented on the disc of the roll, and all by one continuous operation. The essential parts of the machine, as operated by the defendants, or the substantial means by which the desired result of sticking the pins on paper is produced, are crimping rollers, by which the paper is crimped; an inclined channel-way, formed by two bars, by which the pins are made to slide down, in a vertical position, hanging by their heads, between the two bars; a revolving screw, one end of which is placed at the bottom of the channel-way, and which, by revolving, is made, at each revolution, to take, in its thread, from the bottom of this channel-way, one pin from the body of pins in the channel-way, separate the same from the body of pins, carry it, by the mechanical force of the revolution of the separating screw, to the other end of the screw, change the pin from a vertical to a horizontal position, and, at the end of the screw to which the pin is carried, cause it to drop, in a horizontal position, into a groove-channel; and a punch at the head of the pin, as it is dropped into the groove-channel, which is made, by machinery, to drive the pins for-

ward at regular intervals, as fast as they drop into the groove-channel, into the crimped paper, after it has passed out of the jaws of the crimping rollers. When the paper is stuck, it has, in the place where it is being stuck, passed out of the crimping jaws; and, during this operation of sticking, one end of the paper is held in a rigid state by the crimping rollers, and the other end by the coiling roller. The paper is stuck on its passage from the crimping rollers to the coiling roller; and, as the paper is stuck, it is coiled into a roll. The machine is automatic, while other machines known before were not so.

The object of Slocum was to paper the pins at given specified distances apart. And, for that purpose, he uses a plate, with a certain number of grooves in it, into which the pins are placed by certain machinery, and through which grooves the pins are pushed into the paper. The distances apart at which the pins are pushed into the paper, are regulated and controlled by the distances apart of the grooves in the plate, and by those distances only. And his machine is so organized as to regulate the distances at which the pins shall be separated and stuck into the paper, by the distances apart of the grooves in the plate. This is a mechanical law of the machine. There is no such mechanical law in the defendants' machine. As, in the machine of Crosby, there is only one groove, through which the pins are pushed, one at a time, into the paper, the distances apart at which they are pushed into the paper by his machine, cannot be regulated by any such mechanical law. These distances are dependent, therefore, upon upon some other mechanical rule—upon some other mechanical organization. In Slocum's machine, these distances are regulated by one organization. In Crosby's machine they are regulated by another and different organization. In Slocum's machine, the distances apart of the grooves in the plate control the manner in which the pins are placed in the paper. In Crosby's machine, an entirely different organization of the machine controls the manner in which the pins are placed in the paper.

Before the invention of Slocum, grooves or channels had been used, in which to place the pins, with the view to push them into paper, and they had been pushed in in various ways. The grooves used by him as the channels to push the pins into the paper are also used to separate the pins—as channels to deposit the pins in, one by one, one in each groove, as they drop from the hopper, when the hopper passes over the plate. Previous to his invention, the separation had been made by hand, and he invented a particular mode of separation, other than by hand, and sets forth, in his specification, the particular means he uses to produce the result. The plate with grooves, as he describes it, for separating the pins, he claims

as his invention. He also claims the sliding hopper, which passes over the plate, and deposits a pin in each groove, as his invention. He also claims the sliding plate or follower, with the series of wires attached thereto, as described by him, in combination with his groove-plate, as described; and these also in combination with the sliding hopper, as described. This is all he does claim. Grooves, as such merely, through which the pins are pushed into the paper, he does not claim. The object of his machine is, to separate the pins from a pile or mass of pins, and place them in channels, at suitable distances apart to be pushed into the paper, and then, by means of the plate, with the series of wires attached, as described, to push them into the paper.

The instrumentalities, or substantial means, in Slocum's machine, by which the pins are separated from a pile or column, preparatory to being pushed into the paper, are a hopper, and a bed containing grooves of the exact size of the barrel of the pin. And, to effect this separation, the hopper must either slide over the plate with grooves, or the grooved plate must slide or otherwise pass under the hopper. And, to enable the pin to be separated, it must be in the hopper in a horizontal position, or nearly so. The separation cannot be accomplished by that machine, unless the hopper slides over the plate, or the plate slides, or in some other way passes, under the hopper. Without one of these operations, the machine, for this purpose, is useless. One of these operations is essential to it. It is not a Slocum machine for separating, without one of these operations.

Neither of these operations can be found, either in form or in substance, in the Crosby machine. There is no hopper in Crosby's machine, unless the inclined channel-way, in which the pins hang by their heads in a vertical position, be considered as a hopper. That, if it be considered as a hopper, does not move. It is stationary. Of course, it neither slides nor passes over anything. From the lower extremity of the inclined channel-way, the pins are taken, one by one, by the thread of a screw, while it is revolving, and while the pin is vertical, and, by force of mechanical power, the pin is carried, in the thread of the screw, to the other end of the screw, and is there deposited by the screw, in a horizontal position, in a groove-channel. The screw, while operating, has no motion but a revolving motion. During the whole time, it remains in the same space. It neither moves forward nor back. There is, then, nothing in the machine, which, either in form or in substance, has any resemblance or similitude to a sliding hopper, sliding or passing over recesses in a plate, to receive the pins as they drop from a hopper, or to recesses for receiving pins, sliding or passing under a hopper. In Slocum's machine, one of these processes must take place; and,

without one of them, a machine for this purpose cannot be a Slocum machine.

In the Slocum machine, the recess in the plate, which receives the pin from the hopper, must be of the exact size of the barrel of the pin. In the Crosby machine, the recess in the thread of the screw, which receives the pin, and by which it is transported to the other end of the screw, and which, it is claimed, is a mechanical equivalent for the recess in the plate with grooves in Slocum's machine, need not be of the exact depth or breadth of the barrel of the pin. It may be of any size, provided it is not sufficiently large to permit the head of the pin to fall through. The essential means used in Crosby's machine to bring about the result, to wit, a separation of the pins from the pile or column, are, therefore, substantially different from the means used in Slocum's machine to produce the same result. In this respect, the two machines operate differently, and depend upon distinct organizations. The same substantial means are not used in each.

The mode in which the pins are pushed into the paper by the defendants' machine, is by a punch applied to the head of the pins, after they are deposited by the screw in the groove-channel, by which the pins are made one by one to penetrate the paper through the crimps. Slocum does not claim, as his invention or discovery, the mode generally of pushing pins through a grooved channel into paper, by means of a punch applied to the head of the pin. The state of the arts, as shown to exist prior to the time of his invention, shows that he could not with success have made any such claim. His claim is for his plate, with a series of wires attached, in combination with the grooved plate, as described by him, by which combination a row of pins is stuck by one operation. The mode adopted by the defendants in their machine is, therefore, not embraced in Slocum's claim. They have a right, therefore, to use it, notwithstanding the patent granted to him.

From the descriptions already given of the Howe machine and of the Crosby machine, and from the working of the machines, as exhibited on the hearing, it appears manifest, that the mode of operation of Crosby's, as it respects the improvement or invention claimed by Howe, is different from the mode of operation of Howe's. Howe's invention is but an alteration of the old English crimping bar, by the cutting of transverse notches through the bar, where the two jaws meet, to enable the pins to pass through these notches, and thereby stick the paper, while it is within the crimping jaws, and while it is being crimped. Notches or apertures of some kind are an essential means to effect the result which Howe designed by his invention. Without them his improvement does not exist. There are no notches or apertures in Crosby's crimping rollers, and nothing

which bears any resemblance or similitude to them. The pins are stuck, not when the paper is within the crimping jaws, but after it has passed out of them. The device of Crosby is essentially different from that of Howe. The pins are stuck, by Howe's invention, while the paper is within the crimping jaws, by means of notches or apertures in the crimping bars. No such means are used by Crosby. The principles of the two machines, in their modes of operation, and in the means used by each to effect the result accomplished, are different. Therefore, they are not identical. One is not an infringement upon the other. With this view of the case, the decree must be that the plaintiffs' bill be dismissed, with costs to the defendants.

NELSON, Circuit Justice, concurs.

[NOTE. There are no other cases reported prior to 1880 known to involve these patents.]

Case No. 314.

In re AMERICAN PLATE GLASS, etc., INS. CO.

[12 N. B. R. 56.]

District Court, D. New Jersey.

BANKRUPTCY—CONTINGENT LIABILITIES—FIRE INSURANCE POLICY.

[A fire insurance policy is a "contingent liability," within the meaning of section 19, cl. 4, of the bankruptcy act of 1867; and on the bankruptcy of the insurance company the assured is entitled to share in the dividends to the extent of any loss occurring before the order for the final dividend.]

In bankruptcy.

NIXON, District Judge. The question presented to the court under the proceedings in this case is, whether a claim against a bankrupt fire insurance company is provable for the amount of a loss on a policy of insurance, which occurred after the proceedings in bankruptcy had commenced. This depends obviously on the construction to be given to the fourth clause of the 19th section of the bankrupt act, to wit:—"In all cases of contingent debts and contingent liabilities, contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend." When we have ascertained what is here meant by "contingent debts and contingent liabilities," there is nothing left in the clause for construction. Is a policy of fire insurance a contingent debt, or contingent liability of the party which issues it? It certainly is not a debt in any proper sense of the term. It is a contract—an agreement of indemnity, on the part of the insurer, to make good the insured against loss from fire, of certain property described in the policy. It does

not become a debt until the contingency happens on which a demand for indemnity can be made, and the amount of the loss is ascertained. But it is, as certainly, a contingent liability. The party accepting the consideration and issuing the policy becomes liable for the payment of a sum of money upon the happening of an uncertain event. A careful examination of the American and English cases, shows that debts payable on a contingency, and contingent liabilities, which may never become due, are not provable against a bankrupt estate; because, whilst they exist in that condition, they are not susceptible of valuation. But the reason ceases in the case of a policy of insurance as soon as the contingency or loss happens, on which a demand for payment can be based.

An express provision for a claim of this sort was made in the 39th section of the bankrupt act of April 4, 1800, where it was enacted that "the assured in any policy of insurance shall be admitted to claim, and after the contingency or loss, to prove the debt thereon, in the like manner as if the same had happened before the issuing the commission; and the bankrupt shall be discharged, as if such money had been due and payable before the time of his or her becoming bankrupt." The 5th section of the bankrupt act of August 19th, 1841, was probably intended to have a broader scope. It provided that "all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, indorsers, bail, or other persons having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right when their debts and claims become absolute, to have the same allowed them." It was accordingly held by the supreme court in *Mace v. Wells*, 7 How. [48 U. S.] 272, that under this section, the surety of the bankrupt on a promissory note, had a right, in consequence of his mere liability to pay, to prove the demand against the maker, who had become bankrupt; and that his failure to make such proof did not entitle him to recover the money subsequently paid by him, although he did not make the payment until after the bankrupt's discharge. The principle of the decision undoubtedly was, that the amount of the demand was capable of being ascertained, and hence became provable within the provisions of the law. It was afterwards held in *Riggin v. Magwire*, 15 Wall. [52 U. S.] 549, that under the same section, so long as it remained wholly uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable.

The 19th section of the present bankrupt act, after providing for the proof of all debts due and payable from the bankrupt at the commencement of proceedings against him, and all debts then existing, but not payable until a future day; and for all claims against him as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or other contract, or for any debt of another person, although his liability did not become absolute until after adjudication, then authorizes a creditor to make his claim for any other contingent liability, and accords to him the right to share in the dividends of the estate, if the contingency upon which the same becomes payable happens before the final dividend. I do not see any reason to doubt that this clause means what it says, and that under it a policy holder may claim for the full amount of his policy against the bankrupt company before any loss occurs. The claim thus put in is not susceptible of valuation, and all payment upon it must be postponed until the loss occurs. If none occur before the final dividend, nothing becomes due upon it. But if the contingency happen, to wit, a loss on the insured property before that date, the claimant is permitted to participate in the dividends of the estate, in the aggregate of his loss, whether total or partial, limited only by the amount of his policy.

It is, therefore, the opinion of the court that the claimant in this case is not excluded from proving his claim, from the fact that the loss occurred after adjudication, but before the final dividend.

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AMERICAN POPULAR LIFE INS. CO.,
(MORRISON v.)

[See Morrison v. American Popular Life Ins. Co., Case No. 9,841.]

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Case No. 315.

AMERICAN SADDLE CO. v. HOGG.

[Holmes, 133; Merw. Pat. Inv. 340; 2 O. G. 59; 5 Fish. Pat. Cas. 353.]

Circuit Court, D. Massachusetts. March 22, 1872.

PATENTS FOR INVENTIONS—PATENTABILITY—ANTICIPATION—PAD FOR HARNESS SADDLES—ACTION FOR INFRINGEMENT—EVIDENCE.

1. An invention of a pad for harness-saddles, having, as its distinguishing feature, an impervious bearing surface of vulcanized rubber or gutta-percha, is not anticipated by previous use of harness-saddle pads having bearing surfaces of other materials than vulcanized rubber, or rubber-cloth, or gutta-percha.

2. In a suit in equity to restrain infringement of a patent, a prior patent not mentioned in the defendant's answer is admissible only as evidence of the state of the art at the date of the

invention claimed in the complainant's patent. If seasonable objection is taken, it is not admissible to show want of novelty in that invention.

In equity. Bill in equity for an injunction to restrain alleged infringement of letters-patent for an improved harness-saddle pad, granted R. C. Sturges Jan. 19, 1869, [No. 86,112,] and for an account of profits. The case is stated in the opinion. Decree for complainants.

P. H. Hutchinson, for complainant.

S. E. Ireson and J. H. Bradley, for defendant.

SHEPLEY, Circuit Judge. The complainant is the patentee under letters-patent of the United States, issued on the nineteenth day of January, 1869, as assignee of R. C. Sturges, for a new and useful improved harness-saddle pad.

The inventor claimed as the distinguishing feature of his improved pad an impervious bearing surface of vulcanized rubber or gutta-percha. The principal advantage claimed for this bearing surface was not only that it protected the stuffing of the pad from animal exudations, and remained clean, smooth, and soft, but also that the effect of the vulcanized rubber surface was to prevent galls upon the back of an animal working under one of these pads, and that the sulphur used in the process of vulcanization had certain curative properties when the pads were used upon horses or mules whose backs had become galled when working under other pads. His claim was for an improved pad for harness-saddles, the distinguishing feature of which is an impervious bearing surface of vulcanized rubber combined with the other portions of the pad, substantially as set forth in his specification.

The answer of the defendant puts in issue the novelty of the invention, and gives the names and residences of five different parties alleged by the defendant to have used and sold the substantial and material parts, claimed as new, before the invention thereof by the complainant's assignor.

The evidence in the record only proves the manufacture and use by the persons specified, or some of them, of a saddle pad constructed substantially in the same manner as those described in the complainant's specification, with a bearing surface of material other than vulcanized rubber or rubber-cloth. This evidence does not affect the novelty of the invention claimed by Sturges, the distinguishing feature claimed for which was the combination, with such pads as were previously made, of a new impervious bearing surface of vulcanized rubber.

Letters-patent of the United States, granted to William Leonard on the third day of September, 1867, have been introduced in evidence, and are admissible as showing the state of the art prior to Sturges's invention.

[Reported by Jabez S. Holmes, Esq., and here reprinted by permission. Partially reported in Merw. Pat. Inv. 340.]

Their competency for any other purpose is objected to by the complainant, defendant not having given any notice in the answer that he should rely upon these letters-patent, or the invention described therein, as showing prior knowledge or use.

The patent was for a1 improvement in horse-collars. The patentee described his invention as relating to the construction of the collar, with reference to the employment of vulcanized rubber, or its compounds, for the bearing surfaces thereof. "The object," he states, "of employing the rubber is to prevent absorption of perspiration from the body of the animal by and into the stuffing of the collar, and to obviate the formation of permanent wrinkles in that surface of the collar which comes in contact with the skin of the animal; and I consider the rubber beneficial for the cure of skin galls, by reason of the healing influence of the sulphur contained in the vulcanized material."

In Leonard's patent, as in the complainant's, reference is made to a mode of securing to the edge of the rubber a strip of some stronger material, by which to secure the rubber to the remaining portions of the pad. It thus appears that the Leonard patent embodies, in the form of a horse-collar, substantially, if not identically, the same points of invention which in the complainant's patent are embodied in the form of a harness-saddle pad.

If this point of defence were open, therefore, to the defendant by the introduction of the Leonard patent, of which no previous notice was given in the defendant's answer, we might have been compelled to decide that the complainant was not entitled to a patent for applying a bearing surface of vulcanized rubber to that part of a harness which comes in contact with the back of an animal, when the same application of the same bearing surface for the same purposes to that part of the harness which comes in contact with the horse's neck had been previously patented; for it is [would have been]² difficult to discover any thing new and material, either in principle, in combination, or in the mode of operation, in order to adapt it to its new [and analogous]² use. But the Leonard patent is not set up in defence in the answer; the objection to its introduction in evidence was seasonably taken, and clearly it cannot be admitted in evidence to supersede the invention of the assignor to the complainant, as that would operate as a surprise upon the complainant. *Howe v. Williams*, [Case No. 6,778.]

²[From 5 Fish. Pat. Cas. 353.]

The case of *Vance v. Campbell*, 1 Black, [66 U. S.] 427, relied upon by the defendant, decides only that no notice is necessary in order to justify the admission of evidence, for the purpose of showing the state of the art in respect to improvements existing at the date of the complainant's invention, in the class of articles to which it belongs.

In reference to the state of the art prior to the inventions of Leonard and Sturges, the use of a vulcanized rubber bearing surface for the purposes set forth by Leonard and by Sturges was new and patentable. Whether the invention of Leonard anticipated and superseded that of Sturges is a question not raised by the pleadings in this case, and respecting which no competent evidence is to be found in the record.

[No use can be made by the court of the Leonard patent, in the view entertained by the court of the respective inventions described and claimed by Leonard and Sturges, to limit or define the claim in the Sturges patent, except one which would render the Sturges patent void, by reason of a prior invention by Leonard, of all the material and substantial parts of the invention claimed by Sturges. Such a use of the Leonard patent the court is not authorized to make in this case. If that issue had been made in the pleadings, and notice had been given to the complainants that the respondent relied upon Leonard's patent as anticipating the invention of Sturges, the court can not know that complainants would not have met that issue, if presented, by proof that, although Leonard's patent antedated the patent of Sturges, the invention of Sturges antedated Leonard's.]²

Treating the complainant's patent, as upon the evidence in this case the court is bound to treat it, as a good and valid patent, it is unnecessary to say any thing further upon the subject of infringement than that Exhibit E, one of the saddle pads made by the defendant, is so manifestly identical with Exhibit D, the saddle pad manufactured under complainant's patent, that it differs from it in no respect, except the addition of an elastic loop to attach it to the saddle.

The defendant's patent, if valid, is only so for the combination with the pad of his elastic loop, as distinguished from non-elastic loops previously used. There is no pretence that this gives him any right to use the invention of the complainant, or of any [other]² person, to which his elastic band or loop may be applied.

Decree for complainants.

²[From 5 Fish. Pat. Cas. 353.]

Case No. 316.

AMERICAN SADDLE CO. v. HOGG.

[Holmes, 177; 2 O. G. 595; 6 Fish. Pat. Cas. 67.]

Circuit Court, D. Massachusetts. Oct. 29, 1872.

PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—EVIDENCE—DISAGREEMENT OF COUNSEL—WAIVER OF OBJECTIONS.

1. The court will not so far take notice of an alleged parol agreement of counsel made out of court, as to undertake, where there is a conflict of opinion between the respective counsel as to the terms of the agreement, or a difference of recollection as to its existence or meaning, to decide the question of accuracy of recollection or construction.

2. A waiver of an objection entered on the record of a suit in equity, should also be entered on the record.

In equity. Petition by the defendant for rehearing of a cause in equity between the same parties, previously decided in favor of the complainant. The grounds on which the petition was based are stated in the opinion. Petition denied.

P. H. Hutchinson, for complainant.

S. E. Ireson and J. H. Bradley, for defendant.

SHEP-LEY, Circuit Judge. The grounds of the petition for rehearing are; that the court decided that a certain patent, which had been granted to one William Leonard for certain improvements in horse-collars (although introduced in evidence and properly in the case for the purpose of showing to the court the state of the art), could not be used by the defendant to show that the patentee was not the first and original inventor of any material and substantial part of the thing patented; the defendant having given no notice of such a defence in his answer, or stated therein the name of Leonard as patentee, or the date of his patent, and when granted, or the names or residences of any persons alleged to have had prior knowledge of the thing patented, or where or by whom it was used.

The defendant alleges further, that he gave the complainant a notice in writing, more than thirty days before the hearing, that he should offer the Leonard patent in evidence; and that also, during the time of taking testimony before the examiner, he produced and offered the Leonard patent in evidence; and that when objection was made to its admissibility on the ground that no such defence was set up in the answer, and no notice had been given, the counsel for defendant claimed that complainant had previously agreed "to waive all objections to the admission of said Leonard patent in evidence for want of notice of the same;" and stated that, unless complainant's counsel adhered to his former agreement, he should ask to

suspend the further taking of testimony in the cause until he had moved the court for leave to amend the answer filed in the cause, by pleading the Leonard patent therein; that thereupon complainant's counsel renewed his agreement not to object to the admission of said Leonard patent for want of notice of the same; and that, upon the said agreement being so made and renewed, the taking of said testimony was continued.

At the hearing of the cause the objection was insisted upon; and it appeared by the report of the examiner to have been duly taken and insisted upon when the testimony was produced before the examiner; nor was any record made of any waiver of the same, or agreement to waive the objection, at the hearing. When the objection was insisted on at the hearing, defendant's counsel insisted on the admissibility of the evidence, but did not then claim or state to the court that any agreement existed to waive the objection, nor claim that he was surprised by the objection being taken. Counsel claims to have forgotten at the hearing the fact that a written notice had been given, but does not claim to have forgotten the verbal agreement which he now contends was made at the time testimony was produced before the examiner.

By reference to the letter of defendant's counsel of Jan. 27, 1871, it will be seen that no notice is therein given of any intention to introduce the Leonard patent in evidence as proof of prior invention; and, in fact, the letter does not in any respect comply with the provisions of the statute in relation to notice of prior knowledge or use, or with the practice at that time in courts of equity, requiring like notice in equity proceedings.

The defendant's case for a rehearing must therefore depend entirely upon his claim that there was a verbal agreement between the counsel that complainant's counsel would waive his objection to the use of the patent in evidence, based upon the want of any allegation in the answer or other notice of such a defence.

The record in the cause shows that the objection was not waived, but insisted upon, when the evidence was offered before the examiner. Counsel for defendant offers affidavits tending to show that such an agreement was made; complainant's counsel introduces his own affidavit that he never made any agreement to waive the objection, and never intended to waive it, and never did waive it.

The court will not so far take notice of parol agreements of counsel, made or alleged to be made out of court, as to undertake, when there is a conflict of opinion between the respective counsel as to the terms of the agreement, or a difference of recollection as to its existence or meaning, to decide the question of comparative accuracy of recollection or construction, and determine, first, whether such a parol agreement

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existed; and, secondly, what were its terms; and, thirdly, whether the court would enforce it against the objections of counsel or parties.

Especially in a case like the present, where, if such an agreement to waive the objection was made at the hearing before the examiner, it was in the power of the parties, and it was their duty, to have the waiver entered upon the same record on which the objection appeared. But with the full knowledge that the record showed the objection would be insisted upon, counsel proceeded to put on record the testimony objected to, without any record of any waiver of, or agreement to waive, the objection. The objection was insisted on at the hearing of the cause, and no application was made then for delay, or any intimation given to the court that counsel were surprised that an objection was insisted upon, which the printed record, which had long been in the hands of counsel, notified the counsel would be raised at the hearing. Under such circumstances, it is too late for an infringer to ask to have the case reopened to allow him to interpose a defence which he did not set up in his answer, and to give the requisite notices. A patentee is entitled to the presumptions arising from the grant of his patent; and in general, where infringers rely upon a defence which attacks the validity of the patent itself, they should be apprised of that defence themselves, and give the patentee notice of it before the hearing of the cause. Motion for rehearing denied.

Case No. 317.

AMERICAN SHOE-TIP CO. v. NATIONAL SHOE-TOE PROTECTOR CO.

[2 Ban. & A. 551; 11 O. G. 740.]

Circuit Court, D. New Jersey. March 27, 1877.

PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—INJUNCTION — REASONABLE DOUBT AS TO VALIDITY—PRIORITY—REISSUE—DISCLAIMER.

1. Where an application for a preliminary injunction is founded upon long public acquiescence in the complainant's patent, and on adjudications in other courts in favor of its validity, the existence of these facts is, *prima facie*, a sufficient reason for the court to grant an injunction pending the litigation, only in those cases where the infringement is palpable.

2. But, if any reasonable doubt exists as to the validity of the patent, and where the defendant is acting under the authority of another patent, the court should not grant an injunction until after the examination and decision in regard to the claims of the conflicting patents, upon the merits of the case.

[See *Crowell v. Harlow*, Case No. 3,444; *Burleigh Rock-Drill Co. v. Lobdell*, Id. 2,166.]

3. Priority having been declared in favor of the invention described and claimed in the complainant's patent, in an interference proceeding

with the inventor of the invention described and claimed in the patent under which the defendants act: *Held*, that after long public acquiescence as was shown in this case, it is too late to open the inquiry as to priority on a motion for a preliminary injunction.

4. A patent may be reissued so as to include features of the invention disclaimed in the original, where the disclaimer was the result of an error or mistake on the part of the patent office.

[See *Poppenhusen v. Falke*, Case No. 11,279.]

[In equity. Bill by the American Shoe-Tip Company against the National Shoe-Toe Protector Company for infringement of patent No. 26,329. Heard on motion for preliminary injunction. Motion granted.]

Dickerson & Beaman, for complainant.
George Harding, for defendants.

NIXON, District Judge. The application in this case is for a preliminary injunction; and it is founded upon long public acquiescence in the complainant's patent, and on adjudication in other courts in favor of its validity. The existence of these facts is, *prima facie*, a sufficient reason for the court to interfere, by the injunction, pending the litigation, only in those cases where the infringement is palpable. If any reasonable doubt exists upon that point, and especially if the defendant is acting under the authority of a patent, there should be no interference by the court until after the examination and decision in regard to the claims of the conflicting patents, upon the merits of the case.

Much controversy was had on the argument concerning the scope of the invention owned by the complainant. The original patent, No. 26,329, was for a new article of manufacture, and was granted to James M. Allen, the assignee of Newman Silverthorn, the inventor, on the 29th of November, 1859, for an "improved boot and shoe tip." In the specification and claims it was limited to a shoe-tip made of manufactured rubber or gutta-percha. The inventor expressly disclaims leather tips or metallic tips, and he enters into a long argument to show why the rubber tips are different, and how they are superior. "I am aware," he says, "that the leather tips have been known and used for a long time; and that metallic tips have been made and patented. I lay no claim to either of these things. I make a tip that is more ornamental than the leather, which it resembles very much, and much more durable than leather. Both the leather and the metal are difficult to crimp, fashion, or form, so as to make a neat covering for the toe of the shoe. But the prepared rubber may be moulded, fashioned or formed with great care and perfection, and with a finish equal to the best patent leather. So also may the gutta-percha be moulded into form, the nature of the materials of which my tips are composed being such that it can be readily put into any form or shape, and retain its enduring properties, while they admit of a high degree of

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polish, that adds greater market value to the shoe than the leather or metal tips do. 'Patent leather,' as it is termed, is exceedingly difficult to crimp or tree into shape for a boot or shoe tip; but a prepared rubber or gutta-percha tip can be moulded or formed into the required shape with the greatest facility, and finished to bear the greatest resemblance to patent leather, while it is much cheaper, more enduring, and much more readily secured to the boot or shoe—thus, in every essential making a better article than either the leather or metal tips heretofore used." The complainants insist, that notwithstanding this broad disclaimer of leather and metal tips, the invention of Silverthorn, in fact, covers them, and that the disclaimer was the result of a mistake or error in the officers of the patent office, which was subsequently corrected.

It appears from a record submitted on the argument, that on the 16th of May, 1856, Silverthorn filed a caveat in the confidential archives of the office, claiming that he had "made certain improvements in the mode of constructing boots and shoes," and was then "engaged in making experiments for the perfecting the same, preparatory to his applying for letters patent therefor." He therein describes the nature of his invention to consist—"In providing the upper on the toes of boots and shoes with fenders of copper, brass, india-rubber, gutta-percha, or any other substance, for the purpose of protecting against grasses, etc., cutting or wearing out the uppers on the toes of boots and shoes, which fender is required to be made so as to fit upon the toe, previous to putting on the outsole, and to extend beneath the outsole far enough to receive the pegs, which are to fasten it on, etc." He claimed as his invention: "The application to the toe of boots and shoes, in the manner" therein "described, of any substance that would protect the upper from being cut or worn out by the long grasses, etc., as herein described."

With this caveat pending, on the 16th of December following, one George A. Mitchell filed an application for letters patent for a metallic tip. After describing the mode of making and attaching it to the boot and shoe, he claimed as his invention: "The application of a thin plate to the toes of children's, boys', and men's boots and shoes, so as to prevent them from wearing out; using for that purpose the aforesaid metal, or compounds, or any other, substantially the same, which will produce the intended effect."

An interference being declared between them, a large amount of testimony was taken, and the commissioner of patents, on the 6th of November, 1857, decided in favor of the priority of the Mitchell invention, and granted to him letters patent for the same. Silverthorn then withdrew his application, with the condition, however, annexed, that he should not be debarred at any future time from testing the validity of the

patent granted to Mitchell. On the 7th of December, 1858, Mitchell, having surrendered his patent, obtained a reissue with an additional claim for the metallic tip, described in his specification as a "new article of manufacture." On the 13th of July, 1859, the application of Silverthorn was renewed, limiting the claim to a shoe-tip of india-rubber or gutta-percha, disclaiming the metallic tip; and the above-recited letters patent No. 26,329, dated November 29th, 1859, were issued to James M. Allen, his assignee. On the 12th of December, 1860, Mitchell surrendered his reissue patent, and applied for a reissue thereof under the broad claim for a protecting tip of any materials for the toes of boots and shoes. The commissioner allowed the claim, and ordered the reissue, but, before it was taken from the patent office, Silverthorn's assignee surrendered his patent, and on the 14th of February, 1861, applied for a reissue, with a claim as broad as Mitchell's, and in direct conflict therewith.

An interference being again declared, the controversy between the applicants went from the examiners to the commissioner, who again decided in favor of Mitchell. The assignee of Silverthorn appealed to the supreme court of the District of Columbia. [Silverthorn's Assignee v. Mitchell, Case No. 12,859.] The court, on the 4th of August, 1862, by Chief Justice Dunlop, reversed the decision of the commissioner of patents, and held (1) that the two surrenders and applications for reissues opened the claims of both parties for re-examination, as if they had been original applicants, and enabled the former errors in the patent to be corrected; (2) that Silverthorn was the original and first inventor of the invention claimed; (3) that the design of congress in authorizing a reissue was to confer on inventors the full benefit and extent of their whole invention; and (4) that the assignee of Silverthorn should have reissued to him the letters patent for the shoe-tip, as claimed.

A reissue was accordingly made on the 2d of September, 1862, to George Goodyear, who has become the assignee of Allen in letters patent No. 1,339, which, being assigned to the complainant corporation, was again surrendered and reissued August 4, 1868, by letters patent No. 3,070. The patent expiring November 29, 1873, the commissioner extended the same, and the suit is brought on these extended letters patent. Having described the invention, in the specification of the last reissued patent, it is stated: "That the claim of the invention is not confined to the particular material of which the tip is or may be made; nor yet to the manner or process by which the same is or may be produced or applied, but what is claimed as the invention of the said Newman Silverthorn is, a formed tip, substantially as described, as an article of manufacture."

The controversy between Silverthorn and

Mitchell as to the priority of the invention of the boot-tip generally, as an article of manufacture, closed more than fourteen years ago, and, so far as the knowledge of the court extends, the public has generally acquiesced in the decision in favor of Silverthorn. It is too late to open the inquiry on a motion for a preliminary injunction, and if the shoe-tip, as an article of manufacture, which the defendants acknowledge to have made and sold, infringes the claim of the Silverthorn patent, a prima facie case is revealed that warrants and demands the interference of the court until the final hearing.

The defendants frankly produce the article of which complaint is made, and describe the process of manufacturing it.

It is a very ingenious and useful contrivance, and it has some features, I am inclined to believe, which render it more valuable than the complainant's device. But it is a formed shoe-tip, nevertheless, and is an article of manufacture made and sold separate from the shoe. It is a toe-protector, and although it does not cover the upper leather of the boot, it is inverted and fastened around the toe, substantially as the complainant's tip, and performs the same useful functions of protecting it against wear. I do not see how it can be used without infringing the central idea of the complainant's patent, to wit, the protection of the toe of the boot or shoe; and although it may be an improvement, it is nevertheless an infringement; and an injunction must be ordered to restrain the defendants until the further order of the court, and it is ordered accordingly.

[NOTE. So far as ascertained, this patent has not been involved in any other reported cases prior to 1880.]

AMERICAN STEAM GAUGE CO., (UNITED STATES STEAM GAUGE CO. v.)

[See United States Steam Gauge Co. v. American Steam Gauge Co., Case No. 16,794.]

AMERICAN STEAMSHIP CO., (BRADY v.)

[See The Pennsylvania, Case No. 10,951.]

AMERICAN STEAMSHIP CO., (COSTELLO v.)

[See Costello v. American Steamship Co., Case No. 3,263.]

AMERICAN STEAMSHIP CO., (DOUGHERTY v.)

[See Dougherty v. American Steamship Co., Case No. 4,023.]

AMERICAN STEAMSHIP CO., (KIRKPATRICK v.)

[See Kirkpatrick v. American Steamship Co., Case No. 7,846.]

AMERICAN STEAMSHIP CO., (KNEE v.)

[See Knee v. American Steamship Co., Case No. 7,877.]

AMERICAN TOOL & MACH. CO., (AMERICAN HIDE & LEATHER SPLITTING & DRESSING MACH. CO. v.)

[See American Hide & Leather Splitting & Dressing Mach. Co. v. American Tool & Mach. Co., Case No. 302.]

AMERICAN TRANSP. CO., (KING v.)

[See King v. American Transp. Co., Case No. 7,787.]

AMERICAN UNION TEL. CO., (WESTERN UNION TEL. CO. v.)

[See Western Union Tel. Co. v. American Union Tel. Co., Case No. 17,444.]

Case No. 318.

In re AMERICAN WATER-PROOF CLOTH CO.

[1 Ben. 526; 3 N. B. R. 285, (Quarto, 74.)]¹
District Court, E. D. New York. Oct., 1867.

APPOINTMENT OF TRUSTEES BY CREDITORS—PRACTICE ON MOVING CONFIRMATION.

Where creditors of a bankrupt had adopted a resolution appointing trustees under section forty-three of the bankruptcy act, the confirmation of which was opposed; *Held*, That the parties desiring the confirmation of the resolution were the moving parties, and should serve their papers on the opposing parties that they might answer them.

In bankruptcy. In this case, the creditors had adopted a resolution, under section forty-three of the bankrupt act, appointing trustees, and the matter of confirming the resolution came up before the court. Some of the parties interested contested the confirmation of the resolution, and the question of the practice in such a case was discussed.

BENEDICT, District Judge, held that the parties desiring the confirmation of the resolution should be considered the moving parties, and directed that they should, within a week, file and serve such papers as they saw fit in support of their motion, and that the opposing parties have two weeks to file and serve papers in opposition thereto.

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Case No. 319.

AMERICAN WHIP CO. v. LOMBARD.

[4 Cliff. 495; 3 Ban. & A. 598; 14 O. G. 900.]

Circuit Court, D. Massachusetts. Oct. 9, 1878.

PATENTS FOR INVENTIONS—INFRINGEMENT—EQUIVALENT FOR COMBINATION—MACHINE FOR SHAPING WHIP STOCKS.

1. Patent No. 53,003, to L. Hull, for gauge-lathe, and reissue of same, No. 7,262, construed and sustained. It is now well settled that the patentee or owner of a patent for a combination is as much entitled to equivalents as the patentee or owner of any other class of inventions. By an equivalent, in such a case, it is meant that the element or ingredient substituted for the one withdrawn performs the same function as the other, and that it was well known at the date of the patent in question as a proper substitute for the one omitted in the patented combination.

2. The invention, consisting chiefly in the combination, in a machine for shaping whip-stocks, of a holding and feeding mechanism, with revolving cutters having their axis of rotation at right angles, or nearly so, to the axis of the stocks, and of guides for directing and controlling the action of the cutters, as described in the specification and shown in the drawings, is infringed by a machine in which numerous blades are substituted for the burrs of the patentee, and where a formal change merely is made in the clamping and advancing mechanism by combining the two in one apparatus instead of performing the operation by two separate devices.

In equity. Bill in equity upon the alleged infringement of reissued letters-patent No. 7,262, dated Aug. 15, 1876, to the complainant, as assignee of Liverus Hull, for improvement in gauge lathes. The original patent was No. 53,003, and was dated March 6, 1866. [Decree for complainant for an account and for an injunction.]

Gillett & Stevens and S. J. Gordon, for complainant.

Brief of S. J. Gordon.

The view the complainants take of this invention and patent is, that inasmuch as, according to the state of the art, this invention was the first of its kind, which is not controverted, to embody successfully any holding, guiding, and reducing devices to round whip-stocks, Hull's patent covers all holding, guiding, and reducing devices, acting together substantially as his devices act together, and effecting the same result. Or, in other words, that under a patent holding such a place in the art to which it belongs, it is of no manner of importance whether the clamping devices to hold the whip-stock are of one form or another, so long as the stock is held; or whether the advancing and rotating devices are of one or another description, so long as they do advance and rotate the whip-stock; or whether the guides are of the same pattern or not, so long as they do guide and present the whip-stock properly to the cutters; or whether the cutters are burrs or

blades or files, especially if they act alike, to scrape "off fine particles of rattan and whalebone," for it must be remembered it will not do to shave or whittle whalebone when advanced and rotated simultaneously in a machine. Mr. Hull says: "I have tried it many times and seen it tried by others, but in every case it was a total failure to accomplish any good result." Upon examining the Lombard or defendant's machine, it is found, and the testimony of all the experts and parties is in substantial accord on this point, that it contains and is dependent for its success upon its clamping or whip-stock-holding devices, its advancing and rotating devices, its guiding and reducing devices. Those effects have all to be produced by his mechanism to get the desired result, just as Mr. Hull had to produce them by his mechanism,—no more and no less. Mr. Lombard knew all about Hull's machine, was familiar with it, as was every one engaged in whip-manufacture in Westfield for the last eight years. He was alive to the manufacturing advantages which the old and leading company in that business had long possessed by using Hull's patented invention. If a rival machine could be built that did not interfere with the Hull patent, it would place other companies on a par with the complainants, and be likely to bring a handsome return to its ingenious constructor. As before said, Lombard had to take the precise steps of holding, presenting, advancing, revolving, and reducing, that Hull had taken. His problem was to take them, if possible, by different mechanical devices—by equivalent devices—getting as far away from Hull as he could, but producing the same effects. How does he do it? What differences of construction has his ingenuity been able to devise? He must rotate his cutters; he must use two cutters set as Hull's are; he must have guides; he must advance the whip-stock; he must rotate the whip-stock; he must clamp or hold the whip-stock to advance, rotate, and present it to the action of the cutters.

It is all summed up in this: He makes changes in two of those necessary devices,—the cutters and the clamps. Instead of burrs to scrape off the enamel of the rattan and the whalebone, he uses one hundred and twenty blades that act as burrs to scrape it off, the same things Hull used before he adopted burrs, and discarded as inferior. It is not necessary to enlarge upon that. The work and finish of the blades are coarser and less perfect. They are a mere evasion—the substitution of one common and well-known wood-working implement for another. The refuse, made by Hull's burrs and Lombard's one hundred and twenty blades, is hardly distinguishable. Far more cunning was the evasion of the clamping and advancing mechanisms by combining them in one; by making the rotating clamps also advance the stock—that is, making the clamps carry along the stock. One device is made to do two

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things, instead of having the two things done by separate instruments. Hull clamps his stock to a carriage, and moves the carriage. Lombard makes the clamps also serve as the propelling instrumentality. The fallacy of thinking a beneficent patent can be so escaped is here; not in knowing or not remembering what an invention is. It is not the precise, particular, defined mechanical instrumentalities that co-act in the result, for they may be embodied in a hundred forms; but it is the grand idea, the underlying principle, in obedience to which the mechanical instrumentalities act. Mr. Hull's invention was not conical burrs, or travelling carriage, or confining clamps, or revolving gears. But it was the comprehension of the steps to be taken to round a whip-stock by machinery; conceiving the plan to take mechanically those steps, one by one, or together, as necessity demanded. When those had been conceived and completely projected in his mind, the invention was made; and no matter in what form it was reduced to practice, no matter which of the various mechanical means, familiar to the craft, his taste or experiments led him to select in embodying his invention, it would not change it. It is just as much within the broad plan or principle upon which the machine is constructed, whether the whip-stock to be operated upon is fixed between two points, and then the points progressed, while the stock is revolved and its surface regularly reduced, or whether the stock, after being fixed between the points, is pushed along over them, or by them, while it is revolved, and its surface reduced. Both alike present it fitly to the reducing mechanism—which is the great thing to be done, the consummation of the details. If Mr. Hull occupied Lombard's place in the art, and was a mere alleged improver on prior patentees, it would be different. Then he would be held to his devices; for the whole scope of his invention would be found in his devices. But Mr. Hull was the founder of the art of rounding whip-stocks by machinery, as Elias Howe, Jr., was of sewing by machinery, between whose case and that of Mr. Hull's there is a striking parallelism. Both had an old, abandoned, worthless, impracticable machine, or attempt at a machine, made before they began, set up by infringers to rob them of the honor and profit of their achievements. Both required holding mechanism, advancing mechanisms, and mechanisms to operate upon fabrics, and in both cases those operations were the all-essential, the vital, salient features of the inventions. Both clamped the fabrics to be operated upon to a carriage, and then propelled that carriage. The successors of Howe liberated the fabric from the carriage, and made the clamps feed the fabric. The successor of Hull has done just that—liberated the whip-stock from the carriage, and made the clamps feed it along. But there was a vast difference in the results of the

changes made by their respective successors. The improvers upon Howe put his invention into almost every house on the face of the globe. The improver upon Hull has not practically advanced the art at all. The followers of Mr. Howe fought desperately to escape his patent upon just that ground, that they did not hold and carry as he did. But court after court, beginning here, said No, gentlemen, that will not do; you clamp and carry, and you must clamp and carry, or you can never make a seam; and, therefore, you are within the sweep of the great principle he conceived and worked out. Your pieces of metal may be different from his, but, measured by what they do, their purpose and aim, and they are embraced by his discovery, because without some mechanical devices to perform these functions, nothing can be accomplished; and the first organizer of a machine to do what machinery never did before covers all mechanical devices and equivalents that take his steps to his result.

Hezekiah Lombard, respondent, pro se.

The bill is brought upon reissued patent, granted to the complainants as assignees of Liverus Hull, for a new and useful machine for dressing whip handles or stocks, alleging an infringement of the same by the defendant, and praying an injunction and an account of damages. The answer denies any infringement of said patent, and alleges that said Liverus Hull was not the inventor of the improvement in gauge lathes described and claimed in said letters-patent, and that the alleged invention of said Hull was known and used by John O. Griffin, James P. Whipple, and others, before the time of the alleged invention of said Hull. The complainants produce John Boyd Elliot, a mechanical expert, who affirms that the first two claims only of their patent are infringed by the defendant. A model of a machine is introduced by the defendant, which John O. Griffin and James P. Whipple affirm to be a correct representation of a machine made and used by them previous to 1860, six or eight years before the invention of Liverus Hull. Said machine does not contain all the devices of the Hull machine, but contains all the devices referred to in the first two claims of the complainants' patent and substantially in the same combination. The evidence shows that the clamps in the Sacket machine are substantially the same and combined the same, with the same device and for the same purpose as in the Hull machines. That the guides for holding the stock are substantially the same, and for the same purpose, and in the same combination with cutters and clamps as in the Hull machine. That the cutters are substantially the same and in the same combination with the same devices as in the Hull machine. And the evidence shows that there are no clamps in the machines used by the defendant substantially like the clamps described in the complain-

ants' patent, and claimed in the first and second claims thereof, nor no clamps whatever. And the evidence further shows that the clamps in the complainants' patent are only fastenings to hold the whip to the rotating mandrels, and have no other office or use. The evidence shows further that the feed rollers in the machines used by the defendant perform the office of rotating the whips and carrying it in the direction of its length without any carriage and without moving with the whip. That they do not operate as clamps. That they are not adjustable for the same purpose as the clamps in the complainants' patent. That they are not adjustable at all. That the feed rolls have no function whatever that the clamps have. That there are no cutters in defendant's machine whose axis of rotation is at right angles to the stock, or substantially so, nor that have substantially the same action on the stock, or perform substantially the same office in dressing the stock as the cutters do and are claimed to do and have in the complainants' patent. That there are no guides in the defendant's machine for firmly holding the stock in one position relative to its axis whilst being dressed by the cutters, nor for any other purpose for which the guides in the complainants' patent are specified to be used for. That the evidence further shows that there are no guides needed in the defendant's machine for the same purpose as described in the complainants' patent; that the guides used in the defendant's machines are for another and different purpose and have different functions from those used in the complainants' patent. That the state of the art at the time of the said invention, was such that the patentee is not entitled to the principle. That the complainants' patent is for a combination.

CLIFFORD, Circuit Justice. Power to grant letters-patent is conferred by an act of congress, and when that power has been lawfully exercised and a patent has been duly granted, it is of itself prima facie evidence that the patentee is the original and first inventor of that which is therein described and secured to him as his invention. Defective patents may in certain cases be surrendered and reissued for the same invention in a corrected form, and when that is done in conformity with the requirements of law, the same prima facie presumption arises in favor of the patentee as that which arose in his favor from the original patent before it was surrendered. Sufficient appears to show that the assignor of the complainants became and was the inventor of a new and useful improvement in gauge lathes, and that letters-patent were granted to him, as such inventor, for the same; that the patentee, for due cause shown, surrendered the original patent, and that a new patent, with an amended specification, was subsequently issued to the complainants for the

same invention, which is the subject of the present controversy. Service was made, and the respondent appeared and filed an answer. Such defences only as were pressed at the argument will be noticed, of which the following are the most material:—

1. That the assignor of the complainants was not the original and first inventor of the patented improvement.

2. That the charge of infringement is not proved, that the respondent never made, used, or sold the patented improvement, and never in any way infringed the rights of the complainants under their patent.

Applicants for a patent are required by the patent act to give a short title or description of the invention or discovery, correctly indicating its nature and design, and pursuant to that requirement the original patentee stated in the specification that he had invented a new and useful machine for dressing whip-handles or stocks, or other articles of a like nature, adding thereto that the object of his invention was to properly round and shape the handles or stocks of whips, and other articles of like character.

Important explanations are superadded substantially as follows: that to accomplish the work correctly, the stock must travel longitudinally towards the cutting devices, or vice versa, in order that the material removed from the stock may be stripped or cut lengthwise of the same instead of around it, or transversely, so that the surface of the stock will be left smooth; and he adds that the proper form or shape must be given to the stock at the same time that its surface is being finished, and consequently that the cutting apparatus must be controlled by a guide corresponding to the taper or form of the stock or handle of the whip. Preceding, as those explanations do, the statement of the claims of the patentee, they show in concise terms the true nature and character of the organized machine, and it is obvious that he intended by those explanations to illustrate in a general way the mode of operation by which the several devices, when combined, will accomplish the described new and useful result.

Strong support to that proposition is found in the paragraph which follows those explanations, in which the patentee states that the invention consists chiefly in the combination of a holding and feeding mechanism, and revolving cutters having their axis of rotation at right angles, or nearly so, to the axis of the stock, meaning the whip-handle to be rounded and shaped, and the described guides for controlling the action of the cutters, meaning the described cutting apparatus of the machine, as fully explained in the specification and drawings. Machines of the kind must of course have a frame of a suitable form to support the other parts of the machine, as shown in the drawings. The machine in this case has a carriage mounted upon the frame, the carriage

being arranged to travel on guides or rails, for the purpose of giving a longitudinal motion to the stock. Standards are also mounted upon the carriage for supporting the mandrels which hold the stock in proper position to be guided to the cutters.

Devices of the kind for holding the stock are indispensable, and the specification shows that they are rotated by suitable gearing in such a manner as to keep the stock constantly revolving while it is under the action of the cutting apparatus. Means of attaching the stock to the mandrels are also shown, which is accompanied by clasping each end between a pair of levers, pivoted on a device called a head, mounted on the inner ends of the mandrels, which serves as a fulcrum to the levers and also causes them to revolve. Between the outer end of each pair of the levers there is arranged a cone, which can be longitudinally adjusted by a screw formed on the mandrels in a way to spread or release the outer ends of the levers, so as to close or open their inner ends, between which the opposite ends of the stock are held in proper position to the cutters. Suffice it to say, without entering further into the details, that every element of the machine, and its mode of operation, is given in the specification, confirming the remarks previously made, that the invention consists in the combination of the described mechanism for rounding and shaping stocks or handles for whips, or other articles of a like nature, including the described holding and feeding mechanism, together with the cutting apparatus, having its axis of rotation at right angles, or nearly so, to the axis of the stock, with the described guides for controlling and regulating the action of the cutters with their entire apparatus, as shown in the specification and drawings.

Five claims are annexed to the specification, the first two of which only will be reproduced, as it is not now claimed that the other three have been infringed:—

1. The combination, in a machine for shaping whip-stocks, of two rotating and adjustable clamps for holding the whip-stock, with revolving cutters, whose axis of rotation is at right angles to the axis of the stock, substantially as described for the object set forth.

2. The combination, in a machine for shaping whip-stocks, of revolving cutters, the adjustable and rotating clamps for holding and revolving whip-stocks, and the guides through which the stock is passed for firmly holding the stock while being dressed by the cutters as described.

Whip-handles or stocks are constructed in the rough before they are in a suitable condition to be dressed and smoothed, or rounded and shaped, by the machine described in the complainants' patent, which is true, also, of the whip-stocks manufactured by the respondent.

Undressed whip-stocks of the kind in con-

troversy are described by the respondent as composed of eleven pieces, as follows:—

1. A middle piece of wood, or rattan, called a wedge, to which is attached a spike at one end and a piece of whalebone at the other.

2. On this central core, or wedge, are laid four other pieces of rattan called sidings, which are half round, with one edge planed off so as to allow them to fit the wedge or centre piece.

3. Then there are four other pieces of rattan called chinks, shaped so as to fit the pieces of siding, to fill up the crevices between the siding pieces, and make the handle large enough for a whip-stock.

4. All these pieces being thus prepared, they are then glued or cemented together before the stock is in a suitable condition to be dressed and finished in the machine.

Stocks of the kind are composed of rattan, whalebone, and glue, besides the spike at butt-end. When constructed in the rough they are not fit for the market.

Four things are required of the machine in order to dress the rough stock, and make it salable as a finished article:—

1. It must have means for holding the stock during the operation of dressing the article.

2. It must have means of advancing and rotating the article at the same time.

3. Means of guiding the rough article must be furnished, so as to preserve its shape during the operation.

4. It must have a cutting apparatus, to reduce the circumference of the rough article from butt to tip, as it is advanced and rotated.

By referring to the specification, it appears that the patentee adopted for holding devices two standards, to support two mandrels having a pair of levers which clasp each end of the whip-stock. Having devised means to hold the article, his next step was to provide an apparatus to advance the stock and cause it to rotate at the same time, which he accomplishes by a carriage travelling on rails and by a gearing causing the mandrels to revolve as the apparatus advances. Two notched plates are provided for guiding devices, sliding upon each other, so that when the stock is in the notches of the plates and between them, "they close upon the stock, and steady it under the cutting action." Two upright revolving steel burr-cylinders are provided as reducing devices, and it must be admitted that they are admirably adapted to the accomplishment of the function, without risk of injury even to the most slender part of the stock.

Argument to show that the patented invention is one of merit and of a highly useful character is quite unnecessary, as the remarks already made are amply sufficient to demonstrate that proposition to every impartial and well-informed mind; but it must be remembered that it is not a patent for

the result, nor can it receive a construction which will shut out all other improvements. None of the elements or devices of the patent are claimed, nor do either of the claims, which it is alleged the respondent has infringed, warrant the construction that the original patentee was the original and first inventor of the entire machine. Instead of that, both the first and the second claims plainly proceed upon the ground that the invention is for a combination of old elements, and the words of the specification afford persuasive and convincing proof that such is the true theory of the patent, whether the question is tested by the specification or the claims which it is alleged have been infringed. Viewed in the light of these suggestions, it is clear that the invention consists chiefly in the combination of a holding and feeding mechanism, with revolving cutters, having their axis of rotation at right angles, or nearly so, to the axis of the stock, and of guides for directing and controlling the action of the cutters, as described in the specification and shown in the drawings.

Suppose that is so, still it is contended by the complainants, and well contended, that the patentee or owner of a patent for a combination is as much entitled to equivalents as the patentee or owner of any other class of inventions. Doubts at one time existed as to the correctness of that proposition, but it is now well settled in accordance with the views of the complainants. *Gould v. Rees*, 15 Wall. [82 U. S.] 194; *Gill v. Wells*, 22 Wall. [89 U. S.] 28.

Questions of the kind usually arise in comparing the machine of the defendant with that of the plaintiff, and the rule is, that if the defendant omits entirely one of the elements or ingredients of the patented combination without substituting any other in its place, he does not infringe the plaintiff's patent; and if he substitutes another in place of the one omitted, which is new, or which performs a substantially different function, or, even if it is old, was not known at the date of the plaintiff's patent as a proper substitute for the omitted element or ingredient, then the charge of infringement is not maintained. By an equivalent in such a case, it is meant that the element or ingredient, substituted for the one withdrawn performs the same function as the other, and that it was well known at the date of the patent in question as a proper substitute for the one omitted in the patented combination. Hence it follows that a party who merely substitutes another old element or ingredient for one of the elements or ingredients of a patented combination is an infringer, if the substitute performs the same function as the one omitted, and was well known at the date of the patent as a proper substitute for the element or ingredient employed in the patented combination. *Roberts v. Harnden*, [Case No. 11,903.] Mere formal alterations of a combination in

letters-patent do not constitute any defence to the charge of infringement, as the inventor of such an improvement is as much entitled to suppress every other combination of the same devices to produce the same result as the inventor of any other patented process or product. Examples of the kind frequently arise in suits for infringement, as where a spring is substituted for a lever to produce power, or where a weight is substituted for a spring to produce pressure, and many others, where the same rule may be applied.

Much discussion of the first defence is not required, as it is obvious that the evidence introduced by the respondent is insufficient to overcome the prima facie presumption arising from the patent that the assignor of the complainants was the original and first inventor of the improvement. Incomplete as the evidence is in respect to the Sacket machine, it is clear beyond all doubt that it cannot be held to support that defence. Taken as a whole, the evidence fails to satisfy the court that the supposed invention was ever completed as an operative machine. Nor is the evidence sufficiently full and explicit to enable the court to understand what its construction was, or its precise mode of operation. Persistent efforts appear to have been made by the supposed inventor, to induce manufacturers in his neighborhood to adopt it, without success, and the proof is, that, in almost every instance in which it was tried, it split the whalebone, and that when it did not, it left it in a worse shape to finish by hand than it was before the stock was put into the machine.

These efforts to introduce the machine were made twenty years ago, and have not since been renewed, showing, to the satisfaction of the court, that it was a mere experiment, and that it was finally abandoned. Such a defence requires better evidence to support it, and, in the absence of such evidence, the defence must be overruled. Grant that, and still the respondent denies that he has ever made, used, or sold the patented improvement, which, in the view of the court, is the principal issue between the parties. Questions of the kind, where the invention is embodied in a machine, are usually best determined by a comparison of the machine made by the respondent with the mechanism described in the specification and drawings of the complainants' patent. Very material aid in making that comparison has been derived in this case from the testimony of the expert witness examined by the complainants.

Nothing can be plainer than the proposition that it was the object of the assignor of the complainants to construct a machine that would round and shape undressed whipstocks and other similar articles with greater facility and with less expense than it could be accomplished by hand, all of which

he effected by the devices of the machine described in the specification and shown in the drawing, and it is equally certain that the respondent desired to accomplish the same thing and nothing more, unless it was to change the form of the devices so as to avoid the charge of infringement. He knew what the devices were which were employed by the assignor of the complainants, and he was entirely familiar with the patented machine and its mode of operation. Years of experience had proved its utility and adaptation to accomplish the object for which it was constructed and patented. Beyond all question, it embodies a particular plan, and the evidence satisfies the court that the respondent borrowed every feature of his plan from the patented machine.

All agree that such a machine, to be successful, must have a holding and feeding mechanism, that it must have means to cause the stock to revolve as it advances, and that it must have revolving cutters with axis of rotation at right angles, or nearly so, to the axis of the stock, and that it must be provided with guides for controlling and regulating the cutters in order to keep the stock constantly revolving, while it is subjected to the cutting or rasping operation. Proof of conclusive character is found in the record that the object of the respondent in constructing his machine was the same as that of the assignor of the complainants, and the court is of the opinion that he accomplishes it by substantially the same means. Decided support to that proposition is derived from a comparison of the two machines and from the testimony of the expert witnesses.

Enough appears to show that the respondent adopted the same combination as that adopted by the assignor of the complainants, that is, that he provided means for holding, presenting, advancing, rotating and reducing the undressed stock, as is described in the specification and drawings of the patent. Changes were made by him in two of the necessary devices. Instead of burrs to scrape off the enamel of the rattans and whalebone, he uses numerous blades, sometimes as many as a hundred and twenty, that perform the same function as the burrs in the patented machine. Blades of the kind were first adopted by the original patentee, but he soon discarded them and substituted the burrs, which are much to be preferred. Formal change is also made in the clamping and advancing mechanism, by combining the two in one apparatus, that is, the respondent's device is made to do two things instead of having the two things done by separate devices, the difference being that the assignor of the complainants clamps his stocks to a carriage and moves the carriage, whereas the respondent makes the clamps also serve as the propelling instrumentality. Suffice it to say that the

expert examined by the complainants states that he finds in the model of the respondent what he regards as substantially the same combination of devices and for precisely the same purpose as those specified and claimed in the first and second claims of the complainants' patent. Extended reasons are given by the witness in support of the conclusion, but it is unnecessary to reproduce his testimony. It is fully corroborated by a comparison of the alleged infringing exhibit with the patented improvement. Nor is it necessary to examine into the extent of the infringement, as that will fall within the province of the master. Decree for the complainants for an account and for an injunction.

[NOTE. So far as ascertained, there are no other reported cases directly involving this patent prior to 1880.]

Case No. 320.

AMERICAN WOOD-PAPER CO v. FIBRE DISINTEGRATING CO.

[3 Fish. Pat. Cas. 362; 6 Blatchf. 27.]

Circuit Court, E. D. New York. Jan. 7, 1868.*

PATENTS FOR INVENTIONS — PATENTABILITY—NOVELTY—EXTENT OF CLAIM—"SIMILAR SUBSTANCE"—INFRINGEMENT—PROCESS—COMBINATION—OMISSION OF MATERIAL PARTS—PRIOR ADJUDICATION.

1. A decision of a court of equity upon final hearing, in relation to the validity of letters patent, furnishes an authority for the action of courts of co-ordinate jurisdiction.

[Cited in Goodyear Dental Vulcanite Co. v. Willis, Case No. 5,603; Willis v. Oregon Ry. & Nav. Co., 15 Fed. 570.]

2. It appears impossible to consider that to be a new material, patentable as a new product, which is simply a substance long well-known to exist in wood and other substances, left in a state nearly pure, and consequently, fit for the manufacture of paper on being bleached by the removal from it of the intercellulose with which it is found to be combined in wood.

[See note at end of case.]

3. The last clause of the claim of the letters patent of Mellier is not such a formal summing up and defining of the limits of the invention, as to restrict the patent to the single substance there mentioned, "other vegetable fibrous materials," having been referred to in the body of the specification.

4. Upon the question whether wood is a "similar substance" to straw in the manufacture of paper: *Held*: That as wood is a fibrous vegetable substance requiring the like treatment with straw, treated by the respondents in the same way and for the same purpose, it must be held to be a "similar substance" within the meaning of the Mellier patent.

5. The principle which Mellier discovered was, that the effect of a solution of pure caustic soda on certain vegetable substances could be increased by it, under pressure, at a temperature of not less than 310°, so as to result in the production of nearly pure fiber without resort to any other chemical process; thereby saving both alkali and time.

*[Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

†[Affirmed by supreme court. 23 Wall. (90 U. S.) 566.]

6. If the defendants used a process, involving the same principle, to produce the same result in substantially the same way, they can not escape the patent by a previous shivering of the material into shreds, or by a previous boiling it in an open vessel in spent alkali, or by putting it through a beating engine, and then calling the Mellier patent a "one-stage process," and the defendants' a "two-stage process."

[See note at end of case.]

7. The pressure of seventy pounds, as spoken of in the Mellier patent, means seventy pounds according to the French tables from which one atmosphere must be deducted to obtain the pressure indicated upon the steam gauge.

8. The patent No. 25,418, granted to Keen, is for a combination of which the stirrers described are a material part. If no stirrers are used by the defendants, there can be no infringement.

9. The second patent No. 38,901 is for a combination of which the diaphragm and well are material parts, and as the defendants charge their boiler below the diaphragm, and use no well, they do not infringe.

[In equity. Bill by the American Wood-Paper Company against the Fibre Disintegrating Company to restrain the infringement of patents Nos. 11,343, 17,387, 25,418, and 38,901. Decree for complainant. An appeal was subsequently taken to the supreme court, and this decree was affirmed. *American Wood-Paper Co. v. Fibre Disintegrating Co.*, 23 Wall. (90 U. S.) 566.]

The facts of the case are substantially the same as those set forth in *American Wood-Paper Co. v. Heft*, [Case No. 322.]

Thomas A. Jenckes, for complainants.
George Gifford, for defendants.

BENEDICT, District Judge. This is a suit in equity founded upon five different patents relating to the production of pulp fit for the manufacture of paper, which patents, it is alleged, the respondents have infringed. The questions raised in the case are so similar to those already considered in other actions founded upon the same patents, and especially in an action brought by the same complainants in the circuit court for the eastern district of Pennsylvania, [*American Wood-Paper Co. v. Heft*, Case No. 322,] and there decided since the commencement of the present suit, that I feel relieved of much of the responsibility which I should otherwise feel in disposing of questions of this character. In the light of these decisions, my way to a correct determination is not obscure.

As to two of the patents sued on, the patents reissued to Watt & Burgess, numbered 1448 and 1449, the determination of the court in the case referred to furnishes an authority from which I should not feel at liberty, had I the inclination, to dissent. In accordance with that authority, it must here be held that the Watt & Burgess patent, No. 1448, which is for a pulp suitable for the manufacture of paper, made from wood or other vegetable substances by boiling the wood or other substances in an alkali, under pressure, as de-

scribed, can not be sustained as a valid patent for a new product. Aside from that authority, I should feel bound to say that it appears impossible to consider that to be a new material, patentable as a new product, which is simply a substance long well-known to exist in wood and other substances, left in a state "nearly pure," and consequently fit for the manufacture of paper on being bleached by the removal from it of the intercellulose with which it is found to be combined in wood. The patent No. 1448, is for such a material as a new product, in the production of which, under the patent, if there be anything new, it is, as it seems to me, the process, not the product. The same authority must also dispose of the complainants' case, so far as it rests upon the Watt & Burgess patent No. 1449, which is for the process of producing this material from wood and other vegetable substances as described.

As regards this patent, the learned judge of the district court who took part in the decision of the Pennsylvania case, in his opinion, as delivered, makes the case turn upon the question of fact whether the process described in the reissued patent was invented by Watt & Burgess prior to the issue of their original patent in 1853, and he finds upon evidence, in substance the same as the evidence before me in this case, that this process had not then been invented by Watt & Burgess. Such is also my conclusion; and I am also of the opinion that the reissued patent is for a process substantially different from any described in the original patent. So far, then, as the bill rests upon the two Watt & Burgess patents 1448 and 1449, it must fail. But the complainants have not based their action upon the Watt & Burgess patents alone; they have also averred and proved the ownership of a patent issued to one Mellier on August 7, 1857, and numbered 17,387. This patent is for the use of a vessel of a peculiar description for heating the material in the manufacture of paper pulp, and also for a process of disintegrating vegetable matter for the purpose of producing pure cellulose fit for the manufacture of paper. It is the latter claim alone which is called in question here. This patent also was brought to the consideration of the court in the Pennsylvania case referred to, where the judges differed in opinion respecting it. It has likewise been considered and passed upon by the circuit court of this circuit, in the case of *Buchanan v. Howland*, decided in Albany, March 23, 1863, Hall, J., [Case No. 2,074.]

To the claim based upon the patent of Mellier, the first ground of defense taken here is, that the evidence does not show Mellier to have been the first inventor of the process described in his patent. The same point was taken in the Pennsylvania case referred to, and there Judge Cadwalader held with the complainant and Mr. Justice Grier to the

contrary. In the Albany case, however, the patent was sustained by the court as for a new and useful process described by Mellier. The evidence before me upon the point in question differs somewhat from the evidence presented in the Albany case, but is substantially the same as that offered in the Pennsylvania case. I have considered it with care, and see nothing in it which should lead to a different conclusion from that arrived at by those experienced judges who have heretofore sustained the patent.

The next ground of defense is, that the Mellier patent is for a method of treating straw, and does not cover bamboo, which is the material mostly used by the respondents. This point I can not consider to be free from doubt. In the opinion delivered by Judge Hall in the Albany case, the patent is always spoken of as a patent relating to straw; but in that case the infringement proved was in regard to straw, and the court had no occasion to consider, and expressed no opinion as to whether the patent extended to any other substance. In the Pennsylvania case the point was fairly raised, and upon it Judge Cadwalader expressed the opinion that the patent would cover any fibrous vegetable substance requiring like treatment with straw for the purpose in view, and that wood was within its scope, while Mr. Justice Grier considered the patent to be confined to straw et similia. It appears to me quite manifest, from the language of the specification, that the patentee considered his process as applicable and beneficial in the treatment, not only of straw, but also of other vegetable substances. He uses throughout, the phrase "straw and other vegetable fibrous materials requiring like treatment." His description of his process nowhere limits it to the single article of straw, and his patent is for his process as described; but he does, in the last clause of his specification, say: "I also claim the within process for bleaching straw, consisting, etc. * * * substantially as described." Now, his process described is not a process for bleaching, in the ordinary acceptance of that term, nor is it a process for treating straw alone. No person looking at the whole paper would fail to see that the patented discovery related to other material as well as straw; and in view of the peculiar phraseology of the last clause, which is called the claim, and of the intention manifest elsewhere in the instrument, I incline to the opinion that, according to the principles applicable in the construction of the patent, the last clause should not be held to be such a formal summing up and defining of the limits of the invention as to restrict the patents to the single substance there mentioned, and this must have been the conclusion of Mr. Justice Grier, as well as of Judge Cadwalader. If, then, the patent extends to any other substance than straw, in the common and limited signification of the

word, the respondents are within its scope by reason of their treatment of bamboo. They appear at times to have treated common straw, but their principal article is bamboo, which they use for the purpose of producing from it the desired pulp for the manufacture of paper, the stalks of this plant, which is the gigantic grass of the tropics, belonging to the same botanical order as wheat, oats, etc. The defendants, by means of a peculiar process of their own, shiver the bamboo into a mass of tendril-like shreds or strips very like a mass of straw, which they then boil in caustic alkali, under pressure, sometimes having previously boiled it in spirit alkali, in open vessels, and sometimes not. It is certainly a fibrous vegetable substance requiring like treatment for the purpose in question. It was treated by the respondents in the same way that they treated straw, and for the same purpose, and is in form and substance so very like to the common straw, that it must, in my opinion, be held to be within the scope of the Mellier patent. But again, it is said that the Mellier patent is claimed to a patent for a single-stage chemical process resulting in the production of pulp fit for paper, in which case the respondents do not infringe it, because their treatment is a two-stage process.

The principle of the Mellier discovery was that the effect of a solution of pure caustic soda upon certain vegetable substances could be increased by the use of it, under pressure, at a temperature not less than about 310°, so as to result in the production of nearly pure fiber without resort to any other chemical process, thereby saving both alkali and time. The final process used by the defendants is, as I understand the evidence, a process which invokes the same principle to produce the same result, and in substantially the same way. If this be so, they do not escape the patent by a previous shivering of the material into shreds, or by a previous boiling it in an open vessel in spent alkali, or by putting it through a beating engine. The material so previously treated, is still a fibrous vegetable substance, requiring to be treated by the Mellier process to produce the pulp desired; and when the defendants apply that process to it they infringe. But the respondents insist that they do not infringe the Mellier patent because they use a pressure lower than the minimum pressure required by the Mellier process, which they claim to be the pressure represented by seventy pounds upon the steam gauge. Upon this point I concur with Judge Cadwalader, in the opinion that the minimum pressure of the Mellier patent is the pressure indicated by fifty-five pounds upon the steam gauge instead of seventy pounds. It is true that the patent designated seventy pounds, but it says internal pressure, and gives 310° Fahrenheit as the corresponding temperature. Now, 310° Fah-

renheit is not a temperature corresponding with seventy pounds, as indicated by the steam gauge; and it is quite evident, I think, that the patentee, in mentioning seventy pounds, had in his mind the French tables, which differ from the American tables, and according to which the weight of one atmosphere, 14.7, must be deducted to give the gauge-pressure intended to be indicated. Nor does the statement in the specification that "a steam gauge properly fixed will enable one to ascertain when the pressure had attained the required degree," appear to me to be inconsistent with this construction. Any skillful person must see from the specification that the internal pressure was to be considered, and that pressure he would ascertain by adding an atmosphere to the reading of the gauge. According to the evidence, the respondents have, at times, used an external pressure of sixty pounds, equivalent to an internal pressure of seventy-five pounds, running down, it is true, at times as low as forty pounds; but their claim is to the right to any rate of pressure, which, according to the views here expressed, is untenable. So, too, in regard to the strength of caustic alkali used. The respondent must be considered within the Mellier patent which designated for straw a strength of from 2° to 3° Beaume. The testimony of the respondents' witness as explained by the respondents, gives a strength of less than 3½° Beaume, and used by them, which would bring them fairly enough within the scope of the patent in question.

I have thus considered the principal objection made to the complainants' demand as based upon the Mellier patent, and my conclusion is, that the decree must be in favor of complainants, so far as that portion of their claim is concerned.

• There remains to be considered the two boiler patents which are set out in the bill as to which it seems sufficient to say that the first boiler patent of Keen, No. 25,418, is for a combination of which the stirrers described are a material part; the evidence, however, shows that the stirrers are not used by the respondents; not using the complainant's combination, they do not infringe his patent. The second boiler patent of 1863, No. 38,901, is also for a combination of which the diaphragm and well are material parts. The respondents use no well with the diaphragm, but charge their boiler below the diaphragm. There is, then, no use of the defendants' combination secured by the patent. So far as the complainants' case rests upon these two boiler patents, it must fail.

The decree must accordingly be in favor of the complainants, the terms of which may

be settled on notice to the opposite party, when I will also dispose of the question of costs.

[NOTE. This decree was affirmed by the supreme court. Mr. Justice Strong delivered the opinion, of which he also prepared the following syllabus:

"[1. A manufacture or a product of a process may be no novelty, and therefore unpatentable, while the process or agency by which it is produced may be both new and useful.

"[2. In cases of chemical inventions, when the manufacture claimed as novel is not a new composition of matter, but an extract obtained by the decomposition or disintegration of material substances, it is of no importance, in considering its patentability, to inquire from what it has been extracted.

"[3. When the substance of two articles produced by different processes is the same, and their uses are the same, they cannot be considered different manufactures.

"[4. Paper pulp extracted from wood by chemical agencies alone is not a different manufacture from paper pulp obtained from vegetable substances by chemical and mechanical processes.

"[5. The reissued patent granted to Ladd & Keene, April 7, 1863, for a pulp suitable for the manufacture of paper, made from wood or other vegetable substances, is void for want of novelty.

"[6. The patent granted to Watt & Burgess, July 18, 1854, was for a process, consisting of three stages, for obtaining paper pulp from wood. The reissue to Ladd & Keene, dated April 7, 1863, is for a single stage process. It is not, therefore, for the same invention; hence the reissue is void.

"[7. Construction of the two boiler patents granted to Morris L. Keene, the one dated September 13, 1850, and the other June 16, 1863, both held to be for combinations.

"[8. A construction of the patent granted May 26, 1857, to Marie Amedee Mellier.

"[(A) The patent covers the process claimed when applied to wood, as well as when applied to straw.

"[(B) The 'internal pressure,' as described in the specification, is to be ascertained by deducting from the pressure marked by the steam gauge the weight of one atmosphere."

[American Wood-Paper Co. v. Fibre Disintegrating Co., 23 Wall. (90 U. S.) 566.]

[The patents involved in this case have also been involved in other suits, as follows:

[No. 17,387, granted to M. A. C. Mellier, May 26, 1857, was sustained in American Wood-Paper Co. v. Glens Falls Paper Co., Case No. 321; Same v. Heft, Id. 322; Buchanan v. Howland, Id. 2,074; Anthony v. Carroll, Id. 487.

[No. 25,418, granted to M. L. Keen, September 13, 1850, was passed upon in American Wood-Paper Co. v. Heft, Id. 322.

[No. 38,901, granted to M. L. Keen, June 16, 1863, was also passed upon in American Wood-Paper Co. v. Heft, Id. 322.

[Reissues Nos. 1,448 and 1,449, to Watt & Burgess, April 7, 1863, were for patent No. 11,343, which had been granted July 18, 1854. The first reissue was for the product of a paper pulp manufacture, and was held void for want of novelty in American Wood-Paper Co. v. Heft, supra, and in Same v. Fibre Disintegrating Co., 23 Wall. (90 U. S.) 566. The second reissue was for the process, and it was also held void in the same cases.]

Case No. 321.

AMERICAN WOOD-PAPER CO. v. GLEN'S FALLS PAPER CO.

[8 Blatchf. 513; 4 Fish. Pat. Cas. 324, 561.]

Circuit Court, N. D. New York. June, 1870.

PATENTS FOR INVENTIONS — EXTENSION BY COMMISSIONER — PAPER PULP — EXTENT OF CLAIM — IMPROVEMENTS IN PROCESS.

1. The extension of a patent by the commissioner of patents is a judicial act, not to be impeached, except in some direct proceeding duly instituted for that purpose.

2. The letters patent granted to Marie Amedie Charles Mellier, May 26th, 1857, for fourteen years from August 7th, 1854, for an "improvement in making paper pulp," are valid, Mellier was the original and first inventor of the process claimed therein, and his invention is useful.

3. The first claim of that patent being for "the use of a solution of caustic soda, (Na O,) in a compartment of a rotary vessel, separate from that which contains the steam heat, substantially as described," semble, that the mere substitution of heated air, or fire heat, instead of steam, would be an evasion of the patent, involving no substantial difference in the operation.

4. As to the second claim of that patent, which is for "the within described process for bleaching straw, consisting in boiling it in a solution of pure caustic soda, (Na O,) from two to three degrees Baume, at a temperature of not less than 310 degrees Fahrenheit, after it has been soaked and cleansed, and before submitting it to the action of a solution of chloride of lime, from one to one and a half degrees, substantially as described," the patentee is not confined to so exact and literal an interpretation of that claim, that, by abating a trifling degree of heat, countervailed by extending the process a fraction of time, or other departures not substantially different, the liability for infringement may be avoided; and, in respect of heat, the use of the precise amount is not limited, so as not to include higher degrees.

5. *Held*, that, if the defendants had made any improvements on Mellier's process, they had not thereby changed its substantial character, or acquired the right to use it.

[In equity. Bill by the American Wood-Paper Company against the Glen's Falls Paper Company for an accounting, and for an injunction restraining the infringement of patent No. 17,387, and reissues Nos. 1,448 and 1,449 of patent No. 11,343. Decree for plaintiff. A rehearing was subsequently granted, and is reported under same title. American Wood-Paper Co. v. Glen's Falls Paper Co., Case No. 321a.]

Re-issued letters patent Nos. 1,448 and 1,449 were granted to William F. Ladd and Morris L. Keen, as assignees of Charles Watt and Hugh Burgess, April 7th, 1863, for "improvements in pulping and disintegrating vegetable substances." The original letters patent [No. 11,343] were granted, as a single patent, to Watt and Burgess, July 18th, 1854, for fourteen years from August 10th, 1853, and were re-issued to Ladd and Keen, October 5th, 1858, and again re-issued to them, in two parts, April 7th, 1863. The claims of

these two re-issues are set forth in American Wood-Paper Co. v. Heft, [Case No. 322.] This suit was brought, in part, also, on letters patent granted to Marie Amedie Charles Mellier, May 26th, 1857, for fourteen years from August 7th, 1854, for an "improvement in making paper pulp." The specification and claims of this patent are set forth in Buchanan v. Howland, [Id. 2,074.] The claims were as follows: "(1.) The use of a solution of caustic soda, (Na O,) in a compartment of a rotary vessel, separate from that which contains the steam heat, substantially as described. (2.) The within described process for bleaching straw, consisting in boiling it in a solution of pure caustic soda, (Na O,) from two to three degrees Baume, at a temperature of not less than 310 degrees Fahrenheit, after it has been soaked and cleansed, and before submitting it to the action of a solution of chloride of lime, from one to one and a half degrees, substantially as described." This suit was brought in 1867. The Mellier patent having expired during its pendency, a supplemental bill was filed, alleging that the patent was duly extended on the 24th of July, 1868, for seven years from the 7th of August, 1868. The defendant in this case was manufacturing paper from straw alone. The case was heard on pleadings and proofs, and decided in June, 1870.

Thomas A. Jenckes, for plaintiff.

Henry R. Selden and Joel Tiffany, for defendant.

WOODRUFF, Circuit Judge. The time required for the reading, study, and comparison of the mass of evidence, oral and documentary, and the pleadings, exhibits, arguments of counsel and other documents submitted in this cause, forbids that I should, with numerous other cases before me requiring examination, devote much time to the labor of writing an opinion. To discuss the case upon all the evidence, would require time which is demanded of me by other parties for the consideration of their cases. I have examined with great care the pleadings, proofs, and arguments, and cases referred to, and confine myself to a very brief statement of my conclusions without discussion or elaboration.

In the first place, as to the objection founded upon an alleged irregularity in the extension of the patent held by the complainants. This objection goes only to the measure of the relief to be granted if the complainants sustain their bill in other respects. It would limit the period of accounting and forbid the granting of injunctions. I regard the objection, however, as unavailing. First. Because I think no fraud was practiced by the applicant for the extension; and if the reference, made in the order extending the time to file proofs, to rule 74, in distinct terms and making such

¹[Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

extension subject thereto, did not per se prevent the claim that the time to file arguments was also extended, it is nevertheless only an irregularity. The extension of the time for closing testimony to July 16 (i. e. for fifteen days), was made expressly under the conditions prescribed by the seventy-fourth rule. That rule forbids a postponement of the hearing so as to cause risk of preventing a decision in season. To have allowed after the 16th, twenty days for the reception of arguments, would have extended the time till the 5th day of August, in a case in which the patent sought to be extended would expire on the 7th.

It seems quite clear that a misunderstanding existed on the subject in the mind of the contestants and that there was an oral arrangement between Mr. Stoughton, on behalf of the applicant, and the attorney for the contestants, that the arguments might be submitted by the 30th and 31st of July. But it is not shown that the commissioner made any such order. The existence of this arrangement, notwithstanding the present denial of Mr. Stoughton's authority to make it on behalf of the applicant, may have been sufficient ground for opening the case, if the power existed, and if it was practicable to do so, and obtain a decision before the patent expired. I am not satisfied that upon the proofs I could pronounce the extension void if the matter was open to consideration as a ground of defense.²

Second, I regard the opinion of the supreme court, delivered by Mr. Justice Swayne, in *Rubber Co. v. Goodyear*, 9 Wall. [76 U. S.] 788, as conclusive on this subject, and that the extension of the Mellier patent by the commissioner must be treated as a judicial act, not to be impeached, except in some direct proceeding duly instituted for that purpose. In the language of that opinion: "His decision must be held conclusive until the patent is impeached in a proceeding had directly for that purpose, according to the rules which define the remedy, as shown by the precedents and authorities upon the subject. We are not, therefore, at liberty to enter upon the examination of the evidences of fraud to which we have been invited by the counsel for the appellants. The door to that inquiry in this case is closed upon us by the hand of the law." See, also, *Foley v. Harrison*, 15 How. [56 U. S.] 433, 448. As to the merits of the case made by the complainant, it is sufficient for the decision of this case to say, that I concur in the opinion of Judge Hall, (*Buchanan v. Howland*, [Case No. 2,074,]) wherein he says: "We think the patent of Mellier is valid; that he is the original and first inventor of the process claimed therein; that his invention is useful." And I concur in the reasons for this conclusion fully stated in his opinion.

²[From 4 Fish. Pat. Cas. 324.]

It is not necessary to consider the first claim made in that patent, for two reasons: The validity of the patent in respect to the second claim, establishes the complainant's right, for the purposes of this case; and I do not understand that the defendant is using vessels of the description mentioned in the first claim. Nevertheless, if the difference consisted simply in the substitution of heated air (or fire heat) instead of steam, I should strongly incline to hold that the substitution was an evasion, involving no substantial difference in the operation which the patent was designed to protect.

Upon a most painstaking consideration of the proofs, I think the defendant has not withdrawn this case from the operation of the views expressed by Judge Hall in the case referred to. I am constrained, by the proofs given by the defendant itself to find, that the invention by Mellier and his process, substantially described in the patent, are the grand inventions that have brought into practical use the art of converting woody substances into useful pulp for the manufacture of paper, in a manner convenient and economical; and that, without them, all the experience of chemists, inventors, and manufacturers prior thereto, was unavailing, (the inventions of Watt and Burgess, perhaps, excepted.) The testimony of the various witnesses called to attack the process of Mellier, (themselves mainly connected with rival manufactories, alleged to be infringing the patent,) shows slight departures, in some details, from the exact letter of Mellier's description, some in one direction and some in the opposite, each declaring that his own is the best and most useful, efficient or economical, thus contradicting each other, and showing, to my mind, most conclusively, that the process of Mellier is the true and effective one, around which these opposing opinions gather, throwing doubt not upon that, but upon the usefulness and materiality of the respective deviations therefrom. Concurring as I do with Judge Hall, that the patentee is not confined to so exact and literal an interpretation of his claim, that, by abating a trifling degree of heat, counterbalanced by extending the process a fraction of time, or other departures not substantially different, the liability for infringement may be avoided, and that, in respect of heat, the use of the precise amount is not limited, so as not to include higher degrees, I regard the variations by the defendant as immaterial departures from his description. If the defendant, or any of its witnesses, have made any improvements upon this process, by adding salt, or grease, or petroleum, they have not thereby changed its substantial character, nor acquired the right to use it. But, as to all these points, the proofs on behalf of the complainant seem to me to fully sustain its claim.

As to infringement by the defendant, what I have said leaves but one result. My in-

ference from all the testimony is, that, since the value of this patent has become known and appreciated, manufacturers of paper, and experimenters upon wood and straw, have been industrious, and, I might doubtless say, ingenious, in their endeavors to evade it, by colorable departures therefrom, and by suggesting some useless additions, therein repeating the history of all important inventions, and the experience of useful inventors since patents were granted. I find, therefore, that the process used by the defendant is, in substance, Mellier's process, and that the complainant is entitled to a decree.

I forbear discussing the title of the complainants under the patents of Watt and Burgess, or expressing any opinion thereon, because I do not deem it essential to the decision which I make. To hold that the complainant is not entitled to maintain its bill as assignee of the Watt and Burgess patents, would not conflict with my view of its right under the Mellier patent; while, if the Watt and Burgess patents are also infringed, its title to recover would be no less. A decree must be entered directing an account in the usual form, and awarding an injunction restraining the defendant from using the process of Mellier, or that it is now using, which is adjudged an infringement, or any process substantially the same, with other proper incidental and usual details, with costs.

[NOTE. A rehearing was granted in this case, and is reported under same title. American Wood-Paper Co. v. Glen's Falls Paper Co., Case No. 321a. For a reference to other cases involving the patents and reissues passed upon in this case, see note to American Wood-Paper Co. v. Fibre Disintegrating Co., Id. 320.]

Case No. 321a.

AMERICAN WOOD-PAPER CO. v. GLEN'S FALLS PAPER CO.

[4 Fish. Pat. Cas. 561; 8 Blatchf. 513.]

Circuit Court, N. D. New York. June, 1871.

LAW—RETROSPECTIVE LAWS—VACANCIES IN GOVERNMENT SERVICE—TIME AN ACT TAKES EFFECT—DATE OF A DECISION—PROVISIONAL JUDGMENT.

1. The act of July 23, 1868, "to authorize the temporary supplying of vacancies in the executive departments," applied as well to existing as to future vacancies caused by death or resignation.

2. A vacancy existed in the office of commissioner of patents at the time of the passage of the act, and the chief clerk was, by virtue of section 2 of the act of 1836, acting commissioner. The act of 1868 contained a proviso that "in case of the death, resignation, absence, or sickness of the commissioner of patents, the duties of said commissioner * * * shall devolve upon the examiner in chief in said office, oldest in length of commission." *Held*, that this act, from the time it took effect as a law, operated to deprive the chief clerk of the patent office of power and jurisdiction to extend a patent.

¹[Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

3. The date of a decision is the time when it is finally settled and approved, and ready to be promulgated.

4. The idea of a judgment or decision, in its nature judicial, being made provisionally, while the question whether any or what judgment should be pronounced, was kept open to await argument, would be a novelty.

[Cited in *Re Boston, H. & E. R. Co.*, Case No. 1,678.]

5. Whether the making of the decision which is indorsed upon the file wrapper of an application for an extension, even though it be deemed to establish the right of the applicant to an extension, is the official act which operates as a legal extension of the patent, *quaere*.

6. An act of congress, depriving the chief clerk of authority to act as commissioner of patents, bore the signature of the president, and the words, "approved July 23, 1868." It was transmitted to the office of the secretary of state and received there about four o'clock in the afternoon of July 21. Between the hours of seven and eleven o'clock in the evening of the 24th, the chief clerk, acting as commissioner, signed the order for the extension of the patent in question. *Held*, that under any hypothesis, as to the time when the act of congress took effect, the order of the chief clerk was a nullity.

[Cited in *U. S. v. Chong Sam*, 47 Fed. 833.]

[See *The Ann*, Case No. 397.]

7. Some inquiries suggested as to the time when an act of congress takes effect.

[8. Cited in *Atwood v. Portland Co.*, 10 Fed. 284, as an instance in which a bill was upheld, and an accounting decreed although the patent had expired before the decree was rendered.]

[In equity. Bill by the American Wood-Paper Company against the Glen's Falls Paper Company for an accounting, and for an injunction restraining the infringement of patent No. 17,387, and reissues Nos. 1,148 and 1,449 of patent No. 11,343. Decree for plaintiff. American Wood-Paper Co. v. Fibre Disintegrating Co., Case No. 320. On rehearing the decree was for the plaintiff, except as to the injunction prayed for.]

[The circumstances under which the rehearing was granted, and the facts involved, are fully set forth in the following statement of the case prepared by the court:] "This suit was brought in 1867, to restrain the infringement, by the defendant, of certain patents held by the complainant as assignee, and especially a patent granted to Marie Amedie Charles Mellier, for fourteen years from August 7, 1854, and which having expired pending this suit, was, by a supplemental bill, alleged to have been duly extended on July 24, 1868, for the period of seven years from the expiration of the term thereof. Upon the hearings of the cause, upon the pleadings and proofs, a decree of this court is made, at the June term of this court, in 1870, sustaining the title of the plaintiff, under the patent and the extension thereof, ordering an injunction and an account of profits, etc., with costs, against the defendant. At that time the counsel for the defendant (Mr. Tiffany) was not aware of the provisions of section 3 of an act of congress, passed in July, 1868, which is now claimed to render the extension

of the Mellier patent wholly void, and the attention of the court was not called to that act on the hearing, nor until counsel obtained information thereof, after the entry of the decree. At the next term, to wit: the October term (in December as of October term), the defendant having theretofore obtained a stay of proceedings, applied to the court for a rehearing, and the application was granted, with leave to each party to produce further proofs in relation to the time of the passage of the act of congress, and to the time when the extension of the patent was made. Upon such further proofs the case has been heard, and is now to be decided. By section 2 of the act approved July 4, 1836, (5 Stat. 117,) a chief clerk of the patent office is to be appointed, "who, in all cases during the necessary absence of the commissioner, or when the said principal office shall become vacant, shall have the charge and custody of the seal and of the records, books, papers, machines, models, and all other things belonging to the said office, and shall perform the duties of commissioner during such vacancy."

In January, 1868, by the resignation of the commissioner of patents, a vacancy in the office was created, and, by virtue of the act above referred to, A. M. Stout assumed the performance of the duties of commissioner, and continued to act as commissioner down to July 24, 1868, and including that day. Chapter 227 of the Acts of 1868, entitled "An act to authorize the temporary supplying of vacancies in the executive departments," contains a proviso, "that in case of the death, resignation, absence, or sickness of the commissioner of patents, the duties of said commissioner, until a successor be appointed, or such absence or sickness shall cease, shall devolve upon the examiner in chief, in said office, oldest in length of commission;" and by section 4 of the act it was enacted, "that all acts heretofore passed on the subject of temporarily supplying vacancies in the executive departments * * * and all laws inconsistent with the provisions of this act be, and the same are, hereby repealed." This enactment bears the signature of the president, with the words, "approved July 23, 1868." 15 Stat. 168, 169.

On what is called the file wrapper of the papers relating to the extension of the Mellier patent is indorsed: "July 24, 1868. It is ordered that this patent be extended for seven years from date of expiration (no argument filed for the contestants). Written opinion to be filed. A. M. Stout, Acting Commissioner." And a certificate of extension is in evidence signed by "A. M. Stout, Acting Commissioner," bearing date July 24, 1868, which recites that he "did on that day decide that the said patent ought to be extended," and proceeds: "Now, therefore, I, Alexander M. Stout, acting commissioner of patents, by virtue, etc., * * * do renew and extend said patent, and certify that the

same is hereby extended, for the term of seven years from the expiration of the first term, viz: from August 7, 1868; which certificate, being duly entered of record in the patent office, the said patent has now the same effect in law as though the same had been originally granted for the term of twenty-one years. In testimony," etc. The extension of patents in certain cases was provided for by section 18 of the act of 1836, above referred to, and although the power of extending patents was vested in the commissioner by the act of May 27, 1848, (9 Stat. 231,) the provisions of the said section 18 are still deemed important. It provides that if it appear to the board thereby constituted that it is just and proper that the term of the patent should be extended * * * "it should be the duty of the commissioner to renew and extend the patent, by making a certificate thereon of such extension, for the term of seven years from and after the expiration of the first term, which certificate, with a certificate of said board of their judgment and opinion aforesaid, shall be entered of record in the patent office; and thereupon the said patent shall have the same effect in law as though it had been originally granted for the term of twenty-one years."

Proofs were produced, on the part of the plaintiff, tending to show that a contest had been had before the acting commissioner, and a report on the subject was received from the examiner, adverse to an extension of the patent, on July 20, 1868, and an ex parte hearing had thereupon on that or the following day, but the case awaited the appearance and filing or presentation of an argument by the contestants who had been active in resisting the extension, and the testimony of the acting commissioner, Stout, expresses a strong belief in these terms: "I feel sure I read the evidence * * * on or before July 20, and then made up my mind that I would grant the extension, unless my mind should be changed by some other evidence or argument than such as I had seen." * * * "I have a strong conviction, with scarcely a doubt, that I indorsed my order for the extension on that day as it now appears, except that it bore date July 20, instead of the 24th, and that I held the case up for the chance of a claim to be heard on the part of the contestants, or to meet the chance of the counsel on the side of the affirmative appearing and claiming to be heard; and on the 24th, I made a figure 4 over the 0, so that it would appear to have not been decided till that day, but I cannot state this positively, because I can not distinctly call to mind the doing of these two acts." Other of his testimony shows that he was aware of the pendency of the bill of July, 1868, above cited, and of the probability of its becoming a law, and of his ceasing to hold the position of acting commissioner, and he says: "As I had made the decision, I wanted

it to stand subject to the coming in of the contestants, as before stated; the indorsement having been made, the patent would be extended, unless I should change it." This expectation that an argument from the contestants would be presented at a future day, was indicated further by some of the proofs originally taken in the cause, but the witness testifies with much positiveness that he actually made the said order on the file wrapper before July 25, 1868. The plaintiff also gave evidence tending to show that the act of congress in question remained in the hands of the president until the afternoon of July 24, and was then sent by him to the office of the secretary of state, and there filed, at or not long before four o'clock of that day, the office hours at that office then being from nine o'clock A. M. to four o'clock P. M.

The defendant, on the other hand, has produced testimony tending to show that the indorsement on the file wrapper of the order "that the patent be extended for seven years, etc.," was not delivered or made final by the acting commissioner until the evening of the 24th of July, after seven o'clock, and that until that time the subject of the extension was held open by the acting commissioner, and was the subject of actual discussion, and until then undetermined. That the certificate of extension was not in fact drawn and signed until after that day. And that neither the decision of the acting commissioner nor the certificate of extension were entered in the records of the patent office until on or after July 25. The defendant claims that by force of the act of July, 1868, all power of A. M. Stout, chief clerk, to act as commissioner, ceased on July 23, 1868, the day of the date of the signature of the president of the United States to that bill. That on the approval of an act of congress by the president it becomes a law, citing article 1, § 7, of the constitution of the United States. *Marbury v. Madison*, 1 Cranch, [5 U. S.] 137; *In re Welman*, 20 Vt. 653; *U. S. v. Williams*, [Case No. 16,723;] *Arnold v. U. S.*, 9 Cranch, [13 U. S.] 104; *Matthews v. Zane*, 7 Wheat. [20 U. S.] 211; *Gardner v. The Collector*, 6 Wall. [73 U. S.] 499. That the date of the approval of the bill by the president is that date by himself thereto affixed, or at all events, that date is prima facie evidence that he did on that day approve and sign the bill. And there is in this case no evidence to the contrary. That, even if it were conceded that an act took effect from the reception thereof from the president by the secretary of state, the act did take effect on the 24th of July on the plaintiff's own showing. And that the law recognizes no fraction of a day, and therefore the act is to be deemed in full operation during the whole of that day, and whatever was done by Stout, as acting commissioner, on the 24th of July, was without authority and void. That, in

fact, if fractions of a day can be taken into account, whatever Stout did touching the extension of this patent on the 24th of July was done after the act, approved and signed by the president, had been received from him, and filed in the office of the secretary of state. That nothing done by Stout, before the 24th of July, was an extension of the patent, or had any legal operation. That his mental conclusion to extend the patent, if cause to the contrary was not shown, or his provisional indorsement on the file wrapper—if indeed the belief he expresses in his testimony be assumed to be well founded—can not have any legal effect to extend the patent. And that the order itself made on the file wrapper was a mere decision that the patent ought to be extended, and though made on the 24th of July, was not, per se, a legal extension of the patent. That even if it were conceded that it would have been the proper ground of an extension to be made, upon which, if his acts done on the 24th of July are recognized as valid, the officer succeeding to the duties of commissioner might legally have extended the patent, the mere decision or order did not extend the patent. And hence the certificate of extension made after that day by Stout has no validity. That by terms of the statute, the certificate of extension is to be indorsed on the patent, and such certificate and the decision are to be entered of record; and it is "thereupon," and not until then, that the patent is as matter of law extended. That if the operation of the act of 1868 did not work a total repeal of section 2 of the act of 1836, so far as that section gave to the chief clerk the powers of the commissioner when he was absent, or the principal office vacant, and therefore if there were neither commissioner nor an examiner in chief, such clerk might act; such qualification of the act of 1868 can not avail the plaintiffs here, because there was at all times during the 24th and 25th of July, and afterward until a commissioner was appointed, an examiner in chief, and the oldest of such examiners in term of office, in actual attendance at the patent office.

For the plaintiff it is insisted: "That the act of July, 1868, did not operate to repeal, but only to modify for the future the law of 1868, by interposing certain other officers, who might act as commissioner, and so render a total vacancy less probable. That whatever its operation, it was wholly prospective, and it could have no effect until a commissioner of patents should be appointed, and death, absence, resignation, or sickness should thereafter occur, and therefore the powers of the chief clerk, under the act of 1836, remained unimpaired until a commissioner was appointed. That the act of granting an extension was judicial in its character, and therefore all the presumptions are in favor of its validity. *Rubber Co. v. Good-*

year, 9 Wall. [76 U. S.] 788, 797, 798; Kempe's Lessee v. Kennedy, 5 Cranch, [9 U. S.] 173; Polk's Lessee v. Wendal, 9 Cranch, [13 U. S.] 98; Ex parte Watkins, 3 Pet. [28 U. S.] 193; Bagnell v. Broderick, [13 Pet. (38 U. S.)] 450; Voorhees v. Bank of U. S., 10 Pet. [35 U. S.] 449; Grignon's Lessee v. Astor, 2 How. [43 U. S.] 319; Minter v. Crommelin, 18 How. [59 U. S.] 87. That the acts of Stout as acting commissioner on July 24, 1868, are valid acts. He was then in the rightful discharge of the duties of commissioner. That the date affixed by the president to his approval, July 23, 1868, is not conclusive, the affixing of a date by the president not being required by law. That the approval of the president has no operation so long as he retains the bill in his possession. He could legally strike it out if he finally determined to withhold his approval. Such approval does not take effect until it is promulgated, and the appropriate and only mode of giving it final effect is the delivery thereof to the secretary of state, on the reception of which, and not before, the act became the law of the land. That the time a bill is received from the president is in law the time when approval by him becomes effective, and is 'to be resorted to whenever the time a law goes into operation becomes the subject of inquiry. Gardner v. The Collector, 6 Wall. [73 U. S.] 499. That otherwise a statute might have operated upon the acts and rights of citizens, and affect them civilly and criminally, while the act is in the president's drawer, and knowledge of its existence as the law of the land impossible. That whenever the rights of the citizen are to be affected by an inquiry into the precise time a law took effect, it is not to be adjudged that it was in force during the whole of the day on which it became a law, but parts of a day are to be recognized and considered by the courts of the United States. In re Ankrim, [Case No. 395;] In re Richardson, [Id. 11,777;] In re Wynne, [Id. 18,117.] That it is for the defendant to show affirmatively that the granting of the extension was after the act was received by the secretary of state, and that the power and jurisdiction of Stout to act as commissioner had ceased when he made the order for the extension, and this has not been done. That the plaintiff has shown affirmatively that the act was not received by the secretary of state until four o'clock of the 24th of July, and that the defendants have not shown that the order for the extension was made after that hour. That Stout was in the actual and legal performance of the duties of commissioner until Hodges, the senior examiner, assumed their discharge on the 25th of July; and the defendants have not shown that the order for the extension and the certificate of extension were not made and signed by Stout, and the record thereof made before Hodges assumed the duties of acting commissioner.

"That the rights of the patentee were complete and finally vested when the order for

the extension was made. That in law the record is taken to be made at and from the moment when the duty to record the extension arose, whether the actual writing of the record in the book of record was done on that or on a subsequent day."

Thomas A. Jenckes, for complainant.
Samuel S. Fisher, for defendant.

WOODRUFF, Circuit Judge. A rehearing was ordered in this case for the mere purpose of bringing under consideration the effect of the act of July, 1868, entitled "an act to authorize the temporary supplying of vacancies in the executive department," upon the rights of the parties. It was not intended to consider further the questions of fact or law which were raised and discussed on the original hearing of the cause upon the pleadings and the proofs then taken. On the face of the statute, as it appears in the authorized publication thereof, and as it now seems on the act as received from the president of the United States by the secretary of state, it appeared that the act was approved on July 23, 1868, and prima facie at least, it was to be deemed to have become operative as the law of the land on that day. And, as the proofs then stood, the extension of the patent on which the plaintiff relies in his supplemental bill was made after that date, and when, by force of the act, as construed by the defendant, the power of the chief clerk of the patent office by whom the extension was made had ceased. If the alleged extension was invalid, then, although the original patent to Mellier was valid, and the defendant was found to have infringed it, the plaintiff was not entitled to an injunction on the final decree, because the original patent expired on August 7, 1868, and the plaintiff was not entitled, by reason of the defendant's infringement, to an account of profits, except so far as profits arose out of a use made of the patented invention prior to the last-named day.

On the application for a rehearing, the plaintiff not only insisted that the act of July, 1868, did not (even though it became a law on the 23d of July) impair the validity of the extension of the patent, but the right was claimed to produce proofs from which it would result, by legal consequence, that the act did not take effect as law until July 24, 1868; that the authority of the chief clerk was in full force when the extension was made, and that the extension was in every view of the subject valid. It seemed to me just to permit both parties to produce further proofs to the end that the actual facts might appear, and that all legal questions, whether of the propriety of inquiring beyond what appeared on the act itself as the date of approval, or of the effect of the facts developed on such inquiry, might be raised and appear by the record to have been presented for consideration. Numerous in-

teresting and delicate questions of great importance to these parties, and some of them of moment to the citizens of the United States, are now suggested. Among them are the questions, whether an act of congress becomes the law of the land eo instante the president puts his name thereto; whether during the ten days, for which by the constitution he is at liberty to retain a bill for consideration, the bill is so far under his control that, notwithstanding he may have first affixed his signature, he may, if subsequent information or subsequent reflection lead him to disapprove, erase such signature and return the bill with his objections; whether if he have affixed his name at his residence or in the executive chamber, and the bill remains in his drawer, it is nevertheless operative as a law; whether during the whole number of ten days it is entirely under his control, so that he may approve or disapprove, his signature only operating when he surrenders the possession of the bill; whether the act of September 15, 1789 (1 Stat. 68), providing that whenever a bill having been approved and signed shall become a law or take effect, it shall forthwith thereafter be received by the secretary of state from the president, and, as soon as conveniently may be, published, has or can have any effect to determine when the president has lost control of the question, or when his approval has legal operation (as matter of appropriate legal evidence); or whether such act imports, or can constitutionally import, that delivery to the secretary of state must be made before the law can operate; and whether any promulgation whatever is necessary to make an act of congress or the president's approval thereof operative? These questions, or multiplied forms of substantially the same question, are of great interest. So, also, whether when a statute takes effect on a given day, it is to be deemed in operation during the whole of that day, so as to affect the validity of acts done on the same day but at an hour prior to the actual enactment; and whether the court may recognize fractions of a day in declaring the effect, and inquire at what hour of the day the statute became operative; and if so, what are the sources of evidence; if the statute takes effect from the signing by the president, may the hour at which his signature was affixed be proved by parol, and the effect of the statute so be made to depend upon proofs necessarily somewhat unreliable.

These and other kindred questions discussed herein are of general interest. In more immediate relation to the subject of the extension of patents, it is of some interest to inquire what in law amounts to an extension. Is it the written decision or order of the commissioner, or is it the executed certificate of extension, or is the record of such decision and certificate an essential prerequisite? My conclusions upon the case, as now developed, render it unnecessary that I

should express an opinion upon these various questions above stated. The legal effect of the act of 1868 upon the rights of the parties, if it was in operation when Mr. Stout, chief clerk, made the extension; whether any thing done before July 24, 1868, operated as a legal extension of the patent; and whether, assuming that the plaintiffs are right in their claim that the act had no legal operation until the president had signed and delivered the bill to the secretary of state, the extension was made after that time, are questions which, whatever may be my opinion on the other questions, may be decisive of the present case. ✓

On these last-named questions I state my conclusions very briefly.

1. The act of 1868, from the time it took effect as a law, operated to deprive the chief clerk of the patent office of power and jurisdiction to extend a patent. Looking to the object of the act, and the repeal of all existing acts on the subject of supplying vacancies, it is to my mind clear that the act, in all its principal provisions, must apply to existing vacancies caused by death or resignation. It embraces heads of departments, chiefs of bureaus, and other officers thereof, and if the authority conferred did not reach existing vacancies, then the repeal of all prior laws on the subject of temporarily supplying vacancies, left such vacancies unfilled, and without authority in any person to perform the duties, and the functions of the office could be discharged by no one. The reason for the enactment applied with the same force to an existing vacancy as to one which should thereafter occur. The words, "in case of death, resignation, absence, or sickness" of an officer, are as appropriate to describe existing facts as those which may occur in the future, and no reason occurs to me for confining it to the latter class. It may not be of much importance, but it is not impertinent to observe that this construction of the act was contemporaneously given to it by congress and by the patent office itself.

2. It is entirely clear that upon the pleadings and the proofs, in this case, it must be held that nothing done by Mr. Stout, the chief clerk, as acting commissioner, before the 24th of July, operated as a legal extension of the patent. The plaintiff in his bill relies upon an extension of the patent made on the 24th of July, and he has not averred any thing as a ground of claim that any prior act, decision, or adjudication gave him any right beyond the term of the original patent. The proofs place him in no different situation if he were not concluded by the pleadings; the certificate of extension relied upon bears date on the 24th of July, and was certainly not executed before that day. I think the proofs show that it was signed after that day. The decision or order entered upon the file wrapper (as the disposition of the contest touching the extension), as finally settled and approved by Mr. Stout, as acting

commissioner, bears the deliberate and final date of the 24th July. The apparent endeavor to give it earlier effect, through the testimony of Mr. Stout to his belief or conviction that he wrote it on the 20th, having made up his mind to grant the extension unless his mind should be changed, will not avail. It is manifest, from the proofs in the cause, that there had been a vigorous contest, and that the acting commissioner expected to receive an argument from the contestants. The rules of the patent office provided for it. I have already held in this case that I could not go into any inquiry touching the validity of the patent founded on any irregularity, or failure, to conform to those rules. But this reference to the rules conforms to, and confirms what the witness in substance states, that nothing was done prior to the 24th, which was either understood to be, or was intended to be, conclusive as a decision. The idea of a judgment or decision in its nature judicial, being made provisionally, while the question whether any, or what judgment, should be pronounced, was kept open to await argument, would be a novelty. The entry, if made on the 20th, may have been a minute of views the acting commissioner then entertained; but he says himself that they were not promulgated, and that he did not intend to promulgate them until the 24th, when he thinks he made the date "24th," for the purpose of giving the decision some effect. I add what his testimony fairly imports, that the applicant was almost daily urging a decision; the acting commissioner was waiting for the appearance of the counsel for the contestants, and the final decision was withheld, he "retaining his power over it," until the 24th, when, under the influence of apprehension that his power would cease by force of the act then already passed both houses of congress, and known to have been laid before the president, and a desire to have the extension made, which he thought the applicant justly entitled to, he made his decision final on that day.

3. Having reached a conclusion that the patent was a valid patent; that the defendants are infringers of that patent; having no reason to doubt that the decision of the acting commissioner that the applicant was entitled to an extension was just and proper, I have come to the examination of the question of fact, as to when the extension was actually made, without impulse or possible prejudice unfavorable to the plaintiff. I trust, also, without any impression on my mind unfavorable to a just view of the evidence. If, then, the claims of the plaintiff as to the time when or the event upon which an act of congress becomes operative as the law of the land be conceded, and be fixed at the time when the act is received by the secretary of state, and the extension of a patent be held to create a vested right in the applicant not to be defeated by any retroactive legislation, by legal fiction or

otherwise, even for an hour or other part of a day, the question of fact remains, when was the act in question, with the approval of the president, delivered and received by the secretary of state? And when, in fact, was the patent extended by the chief clerk as acting commissioner. On the first of these questions the proof is entirely convincing, and there is no contradiction to this extent, viz: it was not later than four o'clock in the afternoon. Although one of the witnesses ventures the opinion that the message to the senate, announcing the approval of the bill, did not reach the senate before half-past four, the grounds of his opinion are not very obvious, and if a mere opinion founded on the business done in that body after that message was received, and before five o'clock, is of any moment, I think the inference that it arrived there earlier much better warranted. And the fact that the bill sent by another messenger was filed in the office of the secretary of state on that day, and that the office hours were from nine to four, ought to be deemed to settle that question.

On the other question, it is pertinent to say that I deem it doubtful that the making of the decision which is indorsed on the file wrapper, is the official act which operates as a legal extension of the patent, even though it be deemed to establish his right to such extension. It may be a final decision, and if made while the chief clerk had jurisdiction and power to make it, might perhaps be conclusive upon his successor in the discharge of the duties of commissioner. Whether even the certificate of extension grounded thereon had not such relation back to that decision that it might be signed by such chief clerk after his power had ceased, the same being treated simply as the embodiment of that decision in proper form as evidence of the title of applicant, I express no opinion. Taking all this most favorably to the claim of the plaintiff, when was the decision, in fact, made? The testimony satisfies me, and I must, therefore, find that it was made between seven and eleven o'clock in the evening of the 24th of July, and, therefore, after the act of congress had been approved, signed, and filed in the office of the secretary of state. On the 20th or 21st, Hay (administrator of Mellier), the applicant, had been heard upon the subject of the granting of his application. The matter was kept open to enable the counsel for contestant to be heard under the rules. Those rules contemplated the giving of even more time to the contestants. Hay was nevertheless "almost daily urging a decision." An apprehension had arisen that the act of congress, taking away the power of the chief clerk, would be signed by the president. On that evening, between seven and eleven o'clock, Hay and others were present in the office. Hay had no business there "but to urge the extension of this patent." Mr. Stout was devoting his attention to the

papers in the application for such extension. One of the clerks in the office was present, and read to him some papers connected with the case. He also devoted some attention to another application for an extension of a patent. That he decided adversely to the applicant under the same date, July 24, and as to that it is obvious there was no occasion for further attention if he had already, at an earlier hour of the day, actually made an adverse decision, for that terminated his duties in relation thereto. A rumor reached the office in the course of the evening that the act of congress above referred to had been signed by the president, and some one volunteered to go to the capitol to inquire. One witness thinks he returned with a confirmation of the rumor, but the witness, Pennebacker, testifies that he himself volunteered to go, and went, and was told that the persons inquired of had no notice of such signing, and that he returned and delivered the message. Mr. Stout is quite positive that he did not know of such signing until the next day. This would leave him at liberty to act in the matter of the extension. And all these circumstances indicate most strongly that it was then and there that his decision was made and intended to be operative and final.

This conclusion renders an opinion upon most of the questions discussed unnecessary, and therefore I do not inquire further whether the act is, as matter of law, to be deemed the law of the land during all the 24th day of July, or on whom is the burden of showing whether the decision was before or after the time at which the bill was filed in the office of the secretary of state, if that be the hour and moment when it took effect. Nor whether the operation of an act of congress shall be made to depend upon evidence in parol to matters lying in the memory of witnesses, and not in the record. Notwithstanding my conclusion, the case may, perhaps, illustrate the uncertainty attending such inquiries touching the law of the land, and often, it may be, when very grave consequences will flow from the opening of such a question to parol proof. It may be argued, with some force at least, that a law enacted by congress, approved and signed by the president, is to be taken as the expression of what is wisest and best, and that if an official act in contravention of its provisions or requirements be insisted upon, he who relies upon such act as valid, should, if he be permitted to divide the day of enactment into portions, show on his part, by very clear evidence, that the official act relied upon preceded the enactment of the law. The plaintiff must have a decree herein in conformity with the former decision, so far as it affirms the validity of the original patent and the infringement thereof, and directs an account of profits down to August 7, 1868, when that original patent expired, but no injunction restraining the de-

endants in the future use of the invention in question should be granted.

[NOTE. For reference to other cases involving the patents and reissues passed upon in this case, see note to American Wood-Paper Co. v. Fibre Disintegrating Co., Case No. 320.]

Case No. 322.

AMERICAN WOOD-PAPER CO. v. HEFT
et al.

[3 Fish. Pat. Cas. 316.]¹

Circuit Court, E. D. Pennsylvania. Nov.
1867.

PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—VALIDITY OF REISSUES—WOOD PAPER—PROCESS—EQUITY PRACTICE.

1. The two reissues granted to Ladd & Keen, April 7, 1863, of original patent granted to Watt & Burgess, July 18, 1854, for improvement in manufacture of paper pulp from wood, are illegal and void.—Grier, J.

2. The letters patent granted to M. A. C. Mellier, May 26, 1857, for improvement in manufacture of paper from straw, is intended for straw alone, et similia.—Grier, J.

3. Mellier was not the first to succeed in the enterprise of making paper from straw.—Grier, J.

4. Mellier's patent must be construed by taking a view of all its parts.—Grier, J.

5. Mellier says his invention consists in subjecting straw to a pressure of at least seventy pounds to a square inch—prefers eighty. The process used by defendants does not come up to the minimum claimed by Mellier.—Grier, J.

6. The letters patent granted Morris L. Keen, September, 13, 1859, is for a combination of devices which is not used by defendants.—Grier, J.

7. The letters patent granted Morris L. Keen, June 16, 1863, claims a perforated diaphragm of which he was not the inventor.—Grier, J.

8. The arrangement of a discharge pipe, with stop-cock, is what every one using a vertical boiler might use without invention, and was not open to be monopolized by Keen.—Grier, J.

9. The phrase "preparatory process," as applied to the process of Watt & Burgess, is satisfied by a process which although finishing the pulp for making brown paper, requires the further process of bleaching to make the pulp suitable for white paper.—Cadwalader, J.

10. If it were otherwise, the objection to the use of this phrase might be removed by a disclaimer.—Cadwalader, J.

11. The legal question under a reissue is not what the patentee intended to patent, but what he had, in fact, invented.—Cadwalader, J.

12. The invention of Watt & Burgess, described in the reissues of 1863, not having been made in 1854, when the original patent was granted, the reissues are void.—Cadwalader, J.

13. The patent of Mellier is maintainable for wood as well as straw.—Cadwalader, J.

14. Where the complainants filed a bill on five patents, and the court found for the defend-

¹[Reported by William Hubbell Fisher, Esq., and here reprinted by permission.]

ants on four, but the judges disagreed as to the fifth: *Held*: That the bill must be dismissed, but without costs.—Cadwalader, J.

15. If the decree had been for the complainants on the fifth patent, it should have been without costs.—Cadwalader, J.

In equity. This was a bill in equity filed [by the American Wood-Paper Company against J. D. Heft and others] to restrain the defendants from infringing the following letters patent, which had been assigned to complainants:

I. Letters patent for "Improvements in pulping and disintegrating vegetable substances," granted to Charles Watt and Hugh Burgess, July 18, 1854, [No. 11,343,] for fourteen years from August 10, 1853, when the same invention was patented in England, assigned to William F. Ladd and Morris L. Keen, reissued to them October 5, 1858, and again reissued to them, April 7, 1863. This invention, as described in the original patents, was substantially as follows: The wood was reduced to shavings (the finer the better), boiled in a solution of caustic alkali (time and strength to suit the wood), washed and pressed, and exposed to the action of chlorine, or any composition of chlorine and oxygen, either gaseous or aqueous, washed and pressed again, using occasionally mechanical aid, and then placed in a weak solution of caustic alkali, when it will assume the form of a brown pulp. The latter is freed from alkali by washing, and then bleached in the usual way.

The claim of the original patent was as follows: "The pulping and disintegrating of shavings of wood, and other similar vegetable matter for making paper, by treating them with caustic alkali, chlorine, simple or its compound with oxygen and alkali, in the order substantially as described."

The claim of the two reissues, Nos. 1448 and 1449, granted April 7, 1863, were as follows:

Reissue No. 1448: "A pulp suitable for the manufacture of paper, made from wood or other vegetable substances by boiling the wood or other vegetable substance in an alkali under pressure, substantially as described."

Reissue No. 1449: "First, the process of treating wood or other vegetable substance by boiling in an alkali under pressure, as a process, or preparatory process, for making pulp for the manufacture of paper from such woods or other vegetable substances substantially as described. Second, the process of treating resinous woods by boiling in an alkali under pressure, and treating the product with chlorine and its compounds with oxygen, for making white pulp for the manufacture of paper from such woods, substantially as described."

II. Letters patent for "improvement in making paper pulp," granted to Marie Amedie Charles Mellier, May 26, 1857, [No. 17,387,] for fourteen years from August 7,

1854, when the same invention was patented in France. The specification of this patent is given in full in the report of the case of Buchanan v. Howland, [Case No. 2,074.] The invention had "for its object a peculiar process for the treating of straw and other vegetable fibrous materials requiring like treatment, preparatory to the use of such fibers in the manufacture of paper; and the improvement consists in subjecting straw, or such other fibrous materials, to a pressure of at least seventy pounds on the square inch, when boiling such fibrous matters in a solution of caustic alkali."

The disclaimer and claims of the patent were as follows: "Having thus described the nature of my said invention and the manner of performing the same, I would have it understood that I do not claim the general use of caustic alkaline solution, nor the employment generally of a close boiler for boiling straw, or other vegetable fibrous substances. But what I claim as my invention, and desire to secure by letters patent, is the use of a solution of caustic soda (N a O) in a compartment of a rotary vessel separate from that which contains the steam heat, substantially as described. I also claim the within described process for bleaching straw, consisting in boiling it in a solution of pure caustic soda (N a O) from two to three degrees Beaume, at a temperature of not less than three hundred and ten degrees Fahrenheit; after it has been soaked and cleansed, and before submitting it to the action of a solution of chloride of lime, from one to one and a half degrees, substantially as described."

III. Letters patent for "improvement in boilers for making paper pulp from wood," granted to Morris L. Keen, September 13, 1859, [No. 25,418.]

The claim of this patent was as follows: "A boiler for boiling under pressure wood and ligneous materials for making paper pulp, constructed with an expansion chamber, stirrers, and discharge valve or cock, arranged for the purposes and in the manner substantially as stated."

IV. Letters patent for "Improved boiler for making paper pulp," granted to Morris L. Keen, June 16, 1863, [No. 33,901.]

The claims of this patent were as follows: "First, a boiler provided with a perforated diaphragm and well, or their substantial equivalents, arranged in the manner and for the purpose described. Also, in combination with the boiler, the arrangement of the discharge pipe and valve, for the purpose of blowing out or discharging the contents of the boiler under pressure, substantially as and for the purpose set forth."

The defendants relied upon the invalidity of the reissues of the Watt & Burgess patent, insisting that they were not for the same invention as the original. They also insisted that Mellier's patent was limited to the use of caustic soda at a temperature due

to a pressure of seventy pounds, claiming that the patentee had repeatedly stated in his specification that a pressure of seventy pounds was equivalent to 310° Fahrenheit. The defendants used a pressure not exceeding sixty pounds.

[Complainants' bill was dismissed, with costs, and an appeal was taken to the supreme court by complainants, but was dismissed on a question not affecting the merits. See *The American Wood-Paper Co. v. Heft*, 8 Wall. (75 U. S.) 333.]

Thomas A. Jenckes, for complainants.
George Harding, for defendants.

Before GRIER, Circuit Justice, and CADWALADER, District Judge.

GRIER, Circuit Justice. That the reissued patents of 1863 are illegal and void requires no further reasons than those alleged in the answer and clearly substantiated by the evidence.

Mellier's patent is intended for straw alone, et similia.

He was not the first to succeed in this enterprise.

His patent must be construed by taking a view of all its parts.

He says his invention consists in subjecting straw to a pressure of at least seventy pounds to the square inch—prefers eighty.

"I have found by experiment that it is essential that a temperature equivalent to seventy pounds must be employed."

The only practical method of determining the temperature of the liquid is by noting the pressure on the boiler—testimony of Burgess.

Accordingly the patentee describes seventy pounds as synonymous with 310° Fahrenheit. Again, he describes it at seventy to eighty-four pounds. The claim uses the term not less than 310° Fahrenheit which he has before defined by seventy pounds to the square inch.

The claim of this patent was sustained only against those who went beyond the seventy pounds in New York.

The process used by defendants does not come up to the minimum claimed by Mellier.

The defendants do not use over sixty pounds to the square inch.

There is no proof that defendants infringe either of Keen's boiler patents, that of 1859 or 1863.

Keen's patent of 1859 is for a combination of devices which is not used by defendants.

His patent of 1863 claims a perforated diaphragm of which he was not the inventor—see *Martin Nixon's patent*, 1853.

Nor was he first to use a discharge pipe and valve for the purpose of blowing out or discharging the contents of the boiler under pressure.

The arrangement of a discharge pipe, with stop-cock, is what every one using a vertical

boiler might use without invention, and is not open to be monopolized by Keen.

The combination of devices in defendants' Dixon patent has more claim to originality and invention, and does not infringe either of Keen's patents. The bill ought to be dismissed.

CADWALADER, District Judge. As to the patents for alleged improvements in the boiler, or its appendages, it may suffice it to say, that so far as the alleged inventions may have been patentable and new, they have not been infringed. The other patents on which the bill is founded require careful consideration. I regret that the early departure of the circuit judge for Washington renders a decision so soon after the argument necessary.

Watt & Burgess, practical chemists, on August 19, 1853, obtained a patent in England. On July 18, 1854, they obtained one from the United States, for the same alleged invention, for fourteen years from the date of their English patent. The patent from the United States, and a reissued patent which was substituted for it, have been successively surrendered, and a second reissue has been obtained. This reissue was in two patents, dated April 7, 1863, Nos. 1448 and 1449. Each describes a process for boiling fine shavings, or cuttings of wood, or other vegetable substances, in a solution of caustic alkali, in a close vessel, under a high pressure, in order to obtain a pulp fit for making paper, the length of the time of boiling, and the strength and heat of the solution graduated respectively to one another, and to the more or less refractory nature of the vegetable substance to be thus treated; the duration of such boiling from four hours to twelve; the strength of the solution from 17° to 12° or 10° T. (corresponding with 12° to 8½° or 7¼° Beaume); and the heat ordinarily "at near or above" 300° Fahrenheit, which might, however, be raised to 500°. This means a minimum heat, not much below that indicated on the steam-gauge as due to a pressure of fifty pounds to the square inch, which heat might be increased as required. The pressure appears, from the evidence, to be no further useful than as the required heat of the liquid above 212° can not be imparted except under pressure, nor measured otherwise than by the degree of pressure, as indicated on the steam-gauge. The specification implies, that the graduation of the heat, the strength, and the duration were to depend, in a great measure, upon experience, not restricted within any narrow limits. Their graduation to the nature of the vegetable substance, whatever it might be, is expressly required in the specification. Their adjustment or graduation to one another, as occasion might require, though not expressed, is obviously implied.

The claim in the specification of No. 1448

is of the invention of a pulp suitable for the manufacture of paper made from wood, or other vegetable substances, by boiling in an alkali, under pressure substantially as described. The claim in the specification of No. 1449 is the invention of treating wood, or other vegetable substances, by boiling in an alkali, under pressure, as a process, or preparatory process, for making pulp for the manufacture of paper substantially as described. The invention claimed in these two patents, whether that of a product, or that of a process, depends wholly upon boiling in an alkaline solution in a close vessel, with such graduation of heat, strength, and time to one another, and to the refractoriness of the material, as may produce a suitable pulp at one operation. The question is whether Watt & Burgess invented either the product or the process at or before the date of their English patent of August 19, 1853, to which the American patents relate. Before this date, and before any maturity of their previous experiments, a pulp fit for making paper had been obtained by others from such fibrous substances as wood and straw, through the use of different processes for disintegration of the fibers. In every such case, the process had been one of successive stages. The substances had been boiled in an alkali, strong or weak, in open vessels and in close ones, under pressure and without pressure. The process had never been such as to produce the pulp at one operation. In some cases the boiling itself had been repeated. In all of them, there had, besides mere soaking and cleansing, been a succession of mechanical or of chemical treatments, or of both, with applications of heat. But, as I have already said, a suitable pulp, that is to say, cellulose approximately pure, had, through some of these former processes, been obtained from both wood and straw. It is thus very clear that Watt & Burgess did not, nor did either of them, invent or discover the product as distinguished from the process.

As to the process, it was, on the part of the defendants, assumed that the case must be decided upon the patent No. 1449 alone; and, independently of the question whether the process in itself was new, the argument was urged that this patent was invalid because it claimed too much. The claim in it is for the invention of a process, or preparatory process. The novelty, if there was any, consisting wholly in the singleness of the process, it could not, according to the argument, be considered new as a preparatory process. Perhaps the phrase preparatory process, in the specification of this patent, has not precisely the meaning which this argument attributes to it. Pulp which is already fit for making brown paper, requires bleaching, in order to render it suitable for making white paper. If no further treatment than suffices to whiten the pulp is required for the latter purpose, the same pro-

cess which suffices to finish the pulp for making brown paper, is thus, in a relative sense, preparatory as to white paper. If this were otherwise, the objection to the patent could be removed by a disclaimer, as was done in Morse's Case, 15 How. [56 U. S.] 120, 121. It is therefore unnecessary to inquire whether the difficulty might not also be avoided by recurring to the patent No. 1448, which is not simply for a product, but for the product as made by the single process described.

The specification will therefore be considered as including a legally-sufficient claim of the invention of the process of boiling in an alkaline solution in a close vessel with such a graduation and adjustment of heat, strength, and time as will produce the pulp at a single operation. That the process thus claimed, if actually invented by Watt & Burgess at any time not later than the date of their English patent, was new, is, I think, on the evidence, unquestionable. Therefore, if they had invented it by August 19, 1853, the reissued patent must be sustained.

The evidence upon the question of fact as to the alleged invention of this date, consists of the testimony of Mr. Burgess, and his manuscripts, which have been preserved; the specifications of the English patent, and of the first patent obtained from the United States; the correspondence and other papers on file in the patent office, and the specimens deposited there. Let us consider first the documentary evidence, and afterward the testimony of Mr. Burgess.

It is quite clear, from all the writings which are not of date subsequent to the American patent of July, 1854, that what was patented, and what it was intended to patent in 1853 and 1854, was an alleged invention of a process of successive stages, one of which was boiling in an alkali, and that such boiling might be under pressure, but that it was optional. The patentees did not intend to describe, or to claim, any process completed at one operation, to which boiling under pressure was indispensable. It may be said that there is, nevertheless, no absolute impossibility that they had invented such a process; and that the legal question under the reissue is not what they had intended to patent, but what they had, in fact, invented. This, in the abstract, is true. But its mere legal truth does not lessen the immense improbability that they had, in fact, invented or discovered the process.

Nor is this improbability diminished by the testimony of Mr. Burgess, that economical considerations may have influenced the patentees to suppress, at the time, a part of their supposed invention. His testimony, as given to this effect at this late day, does not go, by any means, to the extent assumed in the argument for the complainants. If the matured invention had been fully conceived by him, it is probable that motives of econ-

omy would, on the contrary, have suggested the idea of elevating the temperature in order to reduce the quantity of alkali used. The experiments of Watt & Burgess, in England, were begun in 1851, and there is nothing in the testimony of Mr. Burgess to induce a belief that by August 19, 1853, either of them had made any experiment with a view to such a simultaneous graduation of the time of boiling, and graduation of the heat and of the strength of the solution, as was required for a process of only a single stage. He testifies that in a laboratory in 1852 he produced a pure pulp by boiling in a caustic alkaline solution. But how long it was boiled, he does not state, nor of what strength was the liquid. He says that he had not the means at his disposal for determining the pressure used. How many, or what were the stages of the process, he does not mention. He left England for the United States in the early part of 1854. The single previous experiment in which he made a pulp at one operation occupied only about twenty minutes, when he was alone in the laboratory. On this occasion he put about a pound of pine wood into a wrought iron mercury bottle of the size of about fourteen by six or eight inches. He could not recollect the strength of the solution, and had no means of determining the pressure. There was no ascertainment or estimate of strength, or heat, or time, much less graduation or adjustment of them; nor was there any attempt at either, unless it consisted in the simple use of extreme heat. From the shortness of the time, the pressure must (if the material was crude) have been very high, far above the extreme of tension for any working purpose. He does not appear to have had any mental conception of such a practical process as the patents of 1863 describe.

Great care in referring the different parts of his testimony to the proper periods must be observed, or it may be misapplied. In 1854, after the American patent of July in that year, he recommenced experiments in this country, and before the end of the same year had approximately matured them. Whether he then attained a sufficient knowledge of the process afterward described in the reissued patents of 1863 can not be material. If such was the fact, and if Mellier had not obtained his patent in the mean time, it would be the misfortune of the complainants that Mr. Burgess did not apply for an independent patent in the latter part of 1854, instead of referring his new invention, by the reissues, to the patent of August, 1853. But the misfortune could not be judicially remedied. No such invention had been made at that time, and consequently the bill, so far as it rests upon the patents of reissue, must be dismissed.

The remaining question is, whether the bill can be maintained on the patent to Mellier, which is also vested in the complainants. A patent granted to Ladet, in France, on Au-

gust 7, 1854, appears to have been obtained by him for this Mellier. The patent from the United States was obtained by Mellier himself on May 26, 1857, for fourteen years from the former date, August 7, 1854. He had, in the meantime, 1855, obtained a patent in England. The first claim and many parts of the specification of his American patent are applicable to the subject which is here of no importance. Hereafter, when his claim is mentioned, it will be understood as the second claim. He describes the invention as a process for the treating of straw and other vegetable fibrous materials requiring like treatment preparatory to the use of such fibers in the manufacture of paper. The improvement, he says, consists in subjecting straw or such other fibrous materials to a pressure of at least seventy pounds on the square inch, when boiling such fibrous matters in a solution of caustic alkali. For this purpose the straw or fibrous matters are cut, soaked, and cleaned, and then placed in a suitable boiler. He prefers a temperature to produce at or above eighty pounds on the square inch in the boiler containing the fibrous materials; but says that so high a temperature is not absolutely necessary, for he has found by experiment a temperature equivalent to seventy pounds on the square inch essential. The quantity of alkali used is at the rate of about sixteen per cent. of the straw or fibrous substance under treatment. In describing the details of the process, he says that the heat is to be raised to such a degree as to attain and maintain for a time an internal pressure equal to, or exceeding, seventy pounds on the square inch, that is, about 310° Fahrenheit, by which a considerable saving of alkali, as well as time and fuel, results, as compared with former means of using a caustic alkali, in preparing straw and other fibers for paper makers. He adds, that by submitting the straw or similar fibrous materials to a pressure of between seventy and eighty-four pounds on the square inch inside of the boiler, he can reduce considerably the proportion of alkali, and that the solution which he preferred to use was to be from 2° to 3° Beaume, and at the rate of about seventy gallons to each hundred weight of straw or other fibrous vegetable matters requiring like treatment; and that he found it desirable to keep up the heat and pressure during about three hours after the above pressure obtained. After further washing, the straw or fiber may, he says, be bleached in the ordinary manner, and this will be found to be accomplished by a comparatively small quantity of chloride of lime.

He declared that he did not claim the general use of caustic alkaline solutions, nor the employment generally of a close boiler for boiling straw or other vegetable fibrous substances, but claimed the process for bleaching straw consisting in boiling it in a solution of pure caustic soda from 2° to 3° Beaume, at a temperature not less than

310° Fahrenheit, after it has been soaked and cleaned, and before submitting it to the action of a solution of chloride of lime from 1° to 1½° substantially as described. In this claim and in the body of the patent, the word bleaching is used with applications chemically the same, but practically somewhat different, through difference in degree. The word signifies, in the claim, a disintegrating, and in the body of the patent a mere whitening process.

The reason for giving so full an abstract, almost a transcript, of the material parts of the specification, with some of its repetitions of the same phrases, will appear as we proceed. In the mean time, we may remark that whenever the number of pounds of pressure is mentioned by Mellier, he means the internal pressure, exceeding by fourteen and seven-tenths pounds, the pressure as indicated on the steam-gauges here in use, the difference being the weight of the atmosphere. This difference must always be considered in comparing this French expression of the measure with the usual expression of it in this country. Thus the measure of seventy pounds in the specification of Mellier corresponds with about fifty-five pounds on the steam-gauge here in use. His French patent mentions a pressure of five or six atmospheres. From the less extreme, five atmospheres, the deduction of one for this difference leaves the minimum four atmospheres, not quite fifty-nine pounds. An observation of less importance is that the tables used by him, according to which the degrees of heat are tested by the pressures, must have been somewhat inaccurate. Thus, in the specification of his American patent, he gives seventy pounds, or, as indicated on our steam-gauges, about fifty-five pounds as the pressure due to a heat of 310° Fahrenheit. The pressure due to such a heat should have been stated as internally about seventy-four pounds, or, as indicated on the steam-gauges, about fifty-nine pounds. So, in his English patent, he mentions eighty pounds on the square inch as the pressure due to a heat of about 322° Fahrenheit, whereas the internal pressure due to such a heat is about eighty-seven pounds, and the pressure as indicated on our steam-gauges about seventy-two pounds. These comparisons are facilitated by the tables annexed to Dr. Rand's testimony.

It is argued for the defendant that the process described in this patent applies to straw alone, or is limited to it by the claim; that the patentee was not the first person who succeeded in applying the process even to straw, and that if he was, the claim is limited to the use of a temperature not below 310° Fahrenheit, which he defines as seventy pounds to the square inch, internal pressure (corresponding with a pressure of about fifty-five pounds as indicated on the steam-gauge); that the pressure used by the defendants is below this, and that conse-

quently they do not infringe the patent. I do not think any part of this argument maintainable. As I understand the specification, it describes, in substance, the process afterward claimed in the reissued patents of 1863, as the invention of Watt & Burgess. If so, Mellier would appear to have been the first person who discovered that the temperature and strength of the solution, and the duration of the boiling, could, in practice, be so graduated and adjusted as to produce the pulp at one operation. The claim does not, in the apparent purpose of that part of it which mentions straw, resemble in all respects the claims ordinarily found at the foot of specifications of patents. If it did, it would limit the application of this patent to straw alone. But there is, in this respect, very little resemblance to such ordinary claims. The intended subjects of the process patented are explicitly and repeatedly designated in the specification as straw and other fibrous vegetable substances requiring like treatment, for the purpose in view. This treatment is exemplified with the requisite descriptive precision in the type case of straw. The description of this application of the treatment suffices to enable a skillful person to apply it to other substances requiring like treatment. Such a person ought to know, and if he did not, passages in the specification would instruct him, that with a crude fibrous vegetable substance, more refractory than straw, a stronger alkali, or a greater heat, or a longer time of boiling, would be necessary. In the application of the treatment to such a substance, the proportions which were as yet untaught by science, would be tested by future experience. The case of straw best exemplified the "considerable saving of alkali as well as time," etc., which the specification mentions. But a solution in which, at a certain temperature, straw could be made into a pulp in a certain time, would, if the strength were increased, and the time of boiling prolonged, serve to make wood into pulp, in the same close vessel, with, or perhaps without, an elevation of temperature. With an elevation of temperature the wood might be made into a pulp in the same time as the straw, or in a time somewhat longer, and, perhaps, in a solution of somewhat greater strength. Experience would furnish and test the standards.

The substances must, indeed, be such as require like treatment with straw for the purpose in view. But what is this purpose? It is to obtain cellulose approximately pure, by disintegration. A fibrous vegetable substance which is ligneous, is not the less an object of this purpose because it is ligneous, if the treatment of it should be similar, and differing only in graduation and adjustment.

That the treatment required for straw and for wood are not otherwise different, appears beyond a doubt, from the answers of the defendants in this case, and from the sworn

report of the viewers who witnessed the processes at the defendants' manufactory. Their answer describes the process then and previously used by them in making pulp for paper from wood, and also in making it from straw. They at first treated wood with a solution of caustic alkali of the strength of 12° Beaume; but afterward found a strength from 4° to 6°, say 5°, to answer best. For straw they state that they have used a strength of about 3° Beaume. For both wood and straw they state the pressure as between fifty and sixty pounds, not exceeding sixty pounds. In the subsequent experiments at the manufactory, they used a pressure generally somewhat lower, but with a more than corresponding increase in the strength of the solutions.

The claim of Mellier sums up in the specification so far as it had exemplified the application of the general process in the specific treatment of straw, which, when boiled in a solution of only 2° or 3° Beaume, requires a temperature of at least 310° Fahrenheit, if this heat of the liquid is to be maintained, as he suggests, for only three hours. But in a solution of greater strength, like that used by the defendants for straw, with a cooking process continued for a longer time, as theirs was in the experiments witnessed by the viewers, the specification implies that a lower temperature would suffice. In Mellier's French patent the time of boiling mentioned is, instead of three, six or eight hours, and the strength of the solution, instead of 2° or 3°, is 3° or 4° Beaume. The French patent described the process as consisting in the production of a pulp, either white or of a color fit for the manufacture of paper from straw or other fibrous vegetable matters; and, in describing the details, occasionally mentioned straw without mentioning other materials.

Independently of recurrence to Mellier's French patent, I think his patent from the United States maintainable as to both wood and straw. I also think that the defendants have infringed as to each, and that if the patent were limited to straw, there should be still a decree for the complainants. But I am not of opinion that such an absolute restriction is within the fair import of the specification. The difference of opinion upon the bench applies to this patent only. But it prevents a decree for the complainants. Their bill must be dismissed in order that they may be enabled to appeal. The dismissal should be without costs. If the decree had been in their favor, it should, I think, have been without costs.

[NOTE. For a reference to the other cases involving the same patents, see note to American Wood-Paper Co. v. Fibre Disintegrating Co., Case No. 320. An appeal was afterwards taken to the supreme court by the American Wood-Paper Co., but the appeal was dismissed, on the ground that the complainants owned and controlled both sides of the litigation. American Wood-Paper Co. v. Heft, 8 Wall. (75 U. S.) 333.]

Case No. 323.

Ex parte AMES.

In re McKAY et al.

[1 Lowell, 561; 7 N. B. R. 230.]

District Court, D. Massachusetts. April, 1871.

BANKRUPTCY—PREFERENCES—CHATTEL MORTGAGE
—FUTURE ADVANCES—SECURITY.

1. An insolvent trader may mortgage his stock and tools for present and future advances with the actual and honest intent to raise money to continue his business. It seems, that such a mortgage would not necessarily be fraudulent though a part of the consideration were an existing debt.

2. Where the honest intent was clear, and the mortgage was made for past as well as future advances, but mainly for the latter, and it appeared that the past advances were already secured upon property reasonably believed to be fully adequate, the mortgage was upheld although it turned out that the former security had not been quite sufficient.

3. A chattel mortgage of machinery and other things which would be trade fixtures as between landlord and tenant, will give the mortgagee a valid lien as against the assignee in bankruptcy, although as against a prior mortgagee of the realty the fixtures would be real estate, if it appears that such prior mortgagee makes no claim to the fixtures.

4. Where a mortgage was given to indemnify the mortgagee for his advances, and he lent his acceptances to the mortgagor, and after the bankruptcy of the latter bought up the paper at a discount, *held*, that he could charge against the mortgaged property only what he had paid in cash to take up the acceptances.

5. Where a mortgage is made in Massachusetts of an unfinished locomotive, the mortgagee will hold the additions afterwards made to the article by the mortgagor before his bankruptcy, by accretion; but a mere mortgage of materials would not, it seems, give him the right to new articles manufactured from those materials.

6. A mortgage given in pursuance of a parol agreement to give security, if required, will not hold against the assignee in bankruptcy, if the act of giving the mortgage would have been a preference at the time it was given, but for the agreement.

[Cited in *Strain v. Gourdin*, Case No. 13,521.]

7. Whether or not a written promise to convey certain definite property as security, given when the debt was contracted, would save the mortgage afterwards given from being a preference, *quaere*?

[Cited in *Re Jackson Iron Manuf'g Co.*, Case No. 7,153.]

8. Advances made in good faith while a mortgage is being prepared, and as part of the money agreed to be secured by it, will be protected, though there should be a change of the debtor's circumstances after the money was advanced, and before the deed was delivered.

[Cited in *Lloyd v. Strobbridge*, Case No. 8,435; In re *Jackson Iron Manuf'g Co.*, *Id.* 7,153. Distinguished in *Smith v. Craft*, 17 Fed. 706.]

In Bankruptcy.

B. F. Thomas and J. D. Ball, for petitioner.

T. K. Lothrop, for assignees.

[Reported by Hon. John Lowell LL. D., District Judge, and here reprinted by permission.]

LOWELL, District Judge. The petitioner, as trustee for himself and his partner holds a mortgage upon nearly all the stock, tools, and other movable property of the bankrupt, and it was to be expected that the general creditors should look upon the transaction with suspicion, and inquire carefully into its consideration. The advances were all made after the nineteenth of September; the mortgage was made on the seventeenth of October, and McKay & Aldus stopped payment in the latter part of November of the same year, 1868. A mortgage of all the property of a trader, or of so much as will make him insolvent, when given for a pre-existing debt is, by the law of England, conclusively presumed to be a fraud upon the bankrupt act: *Worseley v. Demattos*, 1 Burrows, 467; *Dutton v. Morrison*, 17 Ves. 199; *Lindon v. Sharp*, 6 Man. & G. 895; *Stewart v. Moody*, 1 Cromp. M. & R. 777; and although our law does not deal in conclusive presumptions, yet the result is much the same, for it would be almost impossible to explain away such an apparent preference. It is not so with security given for present or future advances, which if made in good faith and without notice of any fraudulent intent on the part of the trader, cannot be acts of bankruptcy, for the reason that a fair exchange of equivalents injures no one. Unless, therefore, the mortgagee is party or privy to some fraud or preference, as in the case of *Ex parte Mendell*, (*Re Butler*,) [Case No. 9,418,] he may hold his security against the assignee however insolvent the mortgagor may have been at the time: *Hutton v. Cruttwell*, 1 El. & Bl. 15; *Bittlestone v. Cooke*, 6 El. & Bl. 296; *Harris v. Rickett*, 4 Hurl. & N. 1. In cases of a mixed character, where security for a past debt is coupled with a further advance, the law of England is thus stated by the latest text writer: "It does not appear to be formally settled whether the assignment by a debtor of the whole of his effects, in consideration partly of an existing debt and partly of an advance, is or is not an act of bankruptcy." After citing the authorities on both sides, he adds: "The weight of authority would seem to be in favor of a transaction of this sort not being an act of bankruptcy where the advance is made bona fide to enable the debtor to meet his engagements and carry on his business. Such an act may be and in fact often is the wisest course a trader can take to promote the interest of his creditors." *Rob. Bankr.* 110, citing *In re Colemere*, 1 Ch. App. 128; *Allen v. Bonnett*, 21 Law T. (N. S.) 578.

I am inclined to think that the test proposed by Mr. Robson is the true one under our law. It is not every insolvent who can be made bankrupt by his creditors, though every insolvent can petition in his own behalf. Congress has carefully refrained from saying that a state of insolvency is equiv-

alent to an act of bankruptcy, though hopeless insolvency as proved by certain tests is so. For instance, a trader whose paper lies over for fourteen days has become bankrupt; but if his credit is sufficient to enable him to obtain a renewal within thirteen days, he cannot be proceeded against as a bankrupt on that ground. The question being in each case whether there was an intent to prefer, there may be many in which the evidence of a real and honest intention not to stop payment may make valid a security which was partly given for money previously advanced, if coupled with sufficient present advantages to the debtor to relieve the case of any fraudulent appearance. And there may even be cases where the purpose and expectation to keep on are so manifest that no intent to prefer can be found, though the insolvency was well known to both parties. The present case, however, is not one which calls for any critical examination into the boundary lines of the domain of preference. The history of the dealings between these parties from the 19th of September onward fails to show any intended fraud on the act. Indeed I understand it to be admitted that there was no such intent at first; but the assignees think they can discover a point where good faith ends and preference begins. They argue that the lenders advanced more money than they had intended or more than they had security for, and when they found this out determined to take the mortgage at any risk, to cover their advances and secure themselves if possible. The evidence lends no aid to this theory, but sets out a continuing course of dealing in which loans and security were contemporaneous throughout. I find it to be fully established that the firm of McKay & Aldus hoped and intended to continue their business, and made the mortgage with that view, and that their representations to the petitioner were calculated to make him believe not only that such was their hope, but that it was one that might be reasonably entertained. A mortgage made under such circumstances and for such a purpose cannot be successfully assailed if it is given for present and future advances only. It is argued, however, very strongly that this mortgage was intended mainly for past loans. No doubt it reads so on its face; but the proof is that many of the acceptances recited in it, although some of them are dated back a few days, so that all should not fall due at once, were given on the credit of this mortgage, and were not in fact delivered until the security itself was delivered. Our law of preference sets aside all payments and conveyances made with intent to prefer one creditor over the rest, whatever motives may have been brought to bear on the debtor by threat, entreaty, or legal coercion. And with us it is perhaps not the law, as it is in England, that a general promise of security given at the time the debt is con-

tracted, may be executed after the debtor has become insolvent. Such a promise will not save the act from being a preference, if it would have been one without the promise. This, I have more than once ruled to the jury, and there are reported cases for it: *Arnold v. Maynard*, [Case No. 561;] *Graham v. Stark*, [Id. 5676;] *Blodgett v. Hildreth*, 11 Cush. 311. I have been accustomed to say that such an agreement merely amounts to an agreement to give a preference if one should become necessary. But I have always ruled that security fairly given, as part of the same transaction as the loan, could not be invalidated by a change of the borrower's situation *re infecta*, as if the money were advanced while the mortgage was in course of preparation, and the debtor fails in the mean time. I have not seen or known of any case which brings up the somewhat nicer question, argued here, whether specific and definite security, unconditionally stipulated for in writing, may be given after a lapse of time and a change of circumstances. This may depend on whether the contract is one that a court of law or equity would enforce *in invitum*; for I apprehend and have often decided subject to a correction that has not yet been made, that the assignee stands no better than the bankrupt in all matters of title, excepting where there is actual or constructive fraud. The petitioner insists that the letter of McKay & Aldus to him, of 21 September, if acted on and if the money was advanced on the faith of it, would give him an equitable lien which would prevail against the assignee. I shall not examine the point of law, because the facts negative any illegal intent, so that I must uphold the mortgage whether it was a mere continuation of the written promise or was a new contract. The petitioner advanced money from time to time and took security for each advance, and when the mortgage was ordered and was being drawn up, he had what appeared to be ample security for his then existing advances. It has turned out that one piece of property which he then held is of much less value than was supposed, and one other of somewhat less value, but there was no reason to suspect this at the time, and the difference even now is but trifling compared with the whole amount at issue, and I cannot find as a fact that this mortgage was given with any intent to prefer, or with any fear that the existing advances were not amply secured. The conduct of both parties before and after and at the time show as clearly as does all the rest of the evidence that the mortgage was intended for a legitimate business transaction, having relation to the continuance and not the stopping of the trade, and that the advances made at and after the time were the sole moving consideration for the mortgage. Under these circumstances I do not feel justified in avoiding the mortgage even to the extent of the few thousand

dollars that are said not to have been already fully secured of the advances made in September. I do not undertake to recapitulate evidence, but I may say here that considering the dates, I doubt whether there is even a small balance of the earlier advances left to be paid out of the property embraced in the mortgage; because I think it will be found that acceptances for at least four or five thousand dollars were advanced while the mortgage was in preparation, and these would be protected by it if such was the agreement of the parties when they were given.

The mortgage being valid, it becomes a question of importance to the parties to decide what property is lawfully conveyed by it. It purports to grant "all the lathes, planers, drills, shafting, belting, pulleys, steam engines, boilers, and all the other machinery, tools, implements, furniture, locomotives, and other machinery and machines, whether finished, &c., and all the iron, steel, and other materials," on or about the land and buildings of the mortgagors' works at East Boston. There was an earlier mortgage on the land held by the Lowell Institution for Savings, to secure the payment of \$60,000. The assignees maintained and still maintain that many of the things claimed by the petitioner under his conveyance were in fact a part of the realty, and held by the savings bank. They sold the equity of redemption of the real estate, after due notice, and after making a written agreement with the petitioner that the sale should not prejudice his rights, but that the disputed fixtures should be considered as worth their appraised value so far as the present controversy is concerned. The equity brought a large sum over the incumbrance of the savings bank. It is not seriously questioned by either party that certain steam engines, boilers, belting, and shafting, at least, are of the character of trade fixtures, which if put in by a tenant for years or at will, might be removed by him during his term: *Wall v. Hinds*, 4 Gray, 270; *Whiting v. Brastow*, 4 Pick. 310; *Gaffield v. Hapgood*, 17 Pick. 192. And it is no less certain that as against the savings bank, holding a prior mortgage of the land, they became a part of the realty, which neither the mortgagors nor any one claiming under them could remove: *Winslow v. Merchants' Ins. Co.*, 4 Metc. [Mass.] 306; *Butler v. Page*, 7 Metc. [Mass.] 40; *Bliss v. Whitney*, 9 Allen, 114; *Lynde v. Rowe*, 12 Allen, 100; *Richardson v. Copeland*, 6 Gray, 536. The petitioner contends, and I think with reason, that the assignees having received for the equity of redemption a sum equal to the value of these fixtures must be considered to have received it for the fixtures clear of the mortgage. This distinguishes the case from *Richardson v. Copeland*, where the mortgagees of the realty applied to the insolvent court to have the estate sold, and for leave to prove for any deficiency, so that the defendant in that

case derived title under the mortgagees, and is so treated throughout the case. Here the first mortgagee has no interest in the controversy; the assignees do not hold under him, and cannot set up his title. The rights of these parties are the same as if the estate had been sold free of all incumbrances, and the first mortgagee had been paid off, and a surplus was remaining in the registry of the court to be paid to such persons as could make a title. The late case of *Hunt v. Bay State Iron Co.*, 97 Mass. 279, decides that by an agreement between the vendors of iron rails and a railway company, the rails may remain the chattels of the vendor, after they are affixed to the realty; that the vendor's property in them cannot be asserted against prior incumbrancers, nor against subsequent bona fide incumbrancers or purchasers without notice, but will hold good against purchasers with notice. That case seems to me decisive of this, because an assignee in bankruptcy takes with notice: *Mitchell v. Winslow*, [Case No. 9,673;] *Winsor v. McLellan*, [Id. 17,887;] *Mitford v. Mitford*, 9 Ves. 87; *In re Atkinson*, 2 De Gex, M. & G. 140; *In re Barr's Trusts*, 4 Kay & J. 219.

It is argued on behalf of the assignees that a contract to treat fixtures as chattels, whether it be express or implied, must be made before they are actually affixed to the realty; and for this some remarks of Dewey, J., delivering the opinion of the court in *Gibbs v. Estey*, 15 Gray, 587, are quoted. But those remarks appear to be intended only for parol agreements concerning buildings and fixtures annexed by a stranger, and to mean that such a parol agreement or license cannot change real into personal estate after its character has been once established. So if the question here were between the petitioner and the savings bank, no mere oral license of the latter, given after the engines were set up, could be shown. Growing wood or crops may be sold by parol, with a parol license to sever them; and I am much inclined to think that trade fixtures might be. At all events there can be no doubt that the owner can in writing and for a valuable consideration convey severable chattels in such a way as to bind himself and his assignee in bankruptcy by estoppel at least. The discussions of the question whether fixtures have passed by a deed or mortgage all assume, and many of them express that if the owner chooses to except the fixtures out of his conveyance of the fee, he may lawfully do so. Two or three decisions in England, which are thought to state the law too strongly against mortgagees, are yet supported on the ground that the particular conveyances may be construed

as including or excluding the fixtures as the case may be. See *Waterfall v. Penistone*, 6 Bl. & Bl. 876; *Trappes v. Harter*, 2 Crompt. & M. 153; *Cullwick v. Swindell*, L. R. 3 Eq. 249; *Colegrave v. Dias Santos*, 2 Barn. & C. 76; *Harlan v. Harlan*, 20 Pa. St. 303. So in *Richardson v. Copeland*, 6 Gray, 538, the chief justice says: "No title to these articles passed to the mortgagees which they could assert against a third party," referring, no doubt, to a prior incumbrancer or an innocent purchaser of the land, as in *Hunt v. Bay State Iron Co.*, and as the defendant in the case then before the court seems to have been in effect. The assignee is not a third party, in this sense.

By the insolvent law of Massachusetts the assignee took whatever any creditor might have taken on execution against the insolvent, and this included some things which do not pass to an assignee in bankruptcy, such as real estate which had been attached as the property of the bankrupt and afterwards sold by him subject to the incumbrance.

I am of opinion that the conveyance to the petitioner, under these circumstances, no question arising between him and the earlier mortgagee of the realty, passed a title which is good against the assignees. Some of the articles mentioned in the argument do not appear to be described in the petitioner's mortgage, and do not pass. Such are the gas, steam, air, and water pipes, and the benches and closets, unless they are tools, implements, or machinery, and it hardly seems to me that they are either of these. I do not understand that it is important to settle each particular of this kind, because the money realized is sufficient to pay the mortgage debt in full if the principal fixtures are held to be included.

I agree with the assignees that any saying that the petitioner has made by buying up his own acceptances must be credited to the estate, because the mortgage was for indemnity only, and not for a sum certain; and if he could have got rid of the acceptances without payment there would have been a right to redeem on repayment of the cash advances. If any locomotives were in course of manufacture when the mortgage was given, the additions to them would pass by accretion up to the time of the bankruptcy, even if the materials were not included in the mortgage, which I suppose most of them were. But I apprehend that a mere mortgage of materials would not convey new articles made out of those materials. See *Harding v. Coburn*, 12 Metc. [Mass.] 333. Let a decree be drawn in conformity with this opinion.

Case No. 324.

AMES et al. v. COLORADO CENT. R. CO.

[4 Dill. 251;¹ 9 Chi. Leg. News, 132; 3 Cent. Law J. 815.]

Circuit Court, D. Colorado. Dec. 6, 1876.

ADMISSION OF COLORADO AS A STATE AND ITS EFFECT UPON THE TERRITORIAL COURTS AND UPON CAUSES PENDING THEREIN AT THE TIME OF SUCH ADMISSION — CONSTRUCTION OF ENABLING ACT (18 STAT. 474) AND ACT JUNE 26, 1876, CREATING FEDERAL COURTS IN COLORADO.

1. The effect of the admission of the territory of Colorado as a state, and the erection of federal courts therein (Laws Cong. 1875-76, p. 61), and the extension of the laws of the United States over the same, was, ipso facto, to extinguish the territorial government and the territorial courts as courts of the general government.

[Cited in *Ames v. Colorado Cent. R. Co.*, Case No. 325; *Sargent v. Kindred*, 49 Fed. 487.]

2. By special provisions in the enabling act and the constitution of the state, the territorial courts, on the admission of the state, became the provisional and temporary courts of the state.

3. The above mentioned act of June 26th, 1876, makes provision for the disposition of all cases pending in the territorial courts at the time of the admission of Colorado into the Union; cases of federal character are transferred to the proper federal court; other cases to the state courts.

4. The federal character of the cause must appear in the pleadings or of record; if it does not thus appear, the state court may lawfully proceed therein, and its action will be valid.

5. Where the federal jurisdiction depended on citizenship, and the requisite citizenship to give federal jurisdiction did not appear of record, the party who does not reveal such citizenship, but after the admission of the state proceeded actively in a cause pending in the local courts, was held to have made his election under the act of June 26th, 1876, to remain in the state court. Whether such election would preclude the party from taking a transfer of the cause under the general removal acts, quære?

In equity. This cause came before the circuit judge on a motion by the plaintiffs for an order on the clerk of the United States circuit court for Colorado to docket the cause (the original files from the territorial court accompanying said motion, as also a certified transcript), and for a further order on the said clerk to issue a writ of assistance in said cause to the United States marshal of Colorado, to put the receiver heretofore appointed by the judge of the local court in possession of the road and property of the defendant company. This motion is resisted by the railroad company. The files and records submitted show the following facts, stated in the order of their occurrence: June 21st, 1876, the bill in this case was filed in the district court of the United States of the late territory of Colorado, for the county of Boulder, by Ames and Duff, the trustees of a mortgage made by the defendant company, dated June 1st, 1872, upon the railroad

property, tolls, income, and franchises of the company, to secure bonds to the amount of one million two hundred and twelve thousand dollars, with coupons payable semi-annually, alleging default in payment of interest due December 1st, 1872, to and including June, 1876, and praying an injunction (for reasons stated), restraining the company from disposing of or encumbering its property, or increasing its capital stock, for a receiver, and a foreclosure of the mortgage. The railroad company is the only defendant. That is the general nature of the bill which was filed in the local court on the 21st of June of the current year. July 13th, 1876, the company filed a plea to the jurisdiction of the Boulder district court, which, on July 18th, was overruled. July 22d, 1876, the company filed an answer to the merits, and on July 24th a replication was filed by the plaintiffs. The motion for the appointment of a receiver was resisted and not finally determined until early in August, when the district court of Boulder county appointed a receiver. The receiver was unable to obtain possession, and on August 12th, 1876, the judge of said court ordered out a writ of assistance to put the receiver in possession. While the application for a receiver was pending, and before it was decided, namely, August 1st, 1876, the proclamation of the president was issued for the admission of Colorado as a state. The pleadings show that the defendant company is a corporation created by the late territory of Colorado, but the citizenship of the plaintiffs (Ames and Duff) is not shown by the bill of complaint, except by the following averment:

"Humbly complaining, Fred. L. Ames, of Easton, Massachusetts, and John R. Duff, of the city of Boston, and state of Massachusetts, state that they are trustees," etc.

There is no distinct averment that they are citizens of the state of Massachusetts. October 24th, 1876, an affidavit, sworn to October 23d, 1876, was filed with the clerk of the Boulder district court (the court not being in session) by one of the plaintiffs' solicitors, stating that "the said Ames and Duff, complainants in said suit, are citizens of the state of Massachusetts, and the Colorado Central Railroad Company is a corporation," etc., containing no statement as to the citizenship of the plaintiffs at the time when the suit was commenced in the territorial court, though in the disposition finally made of it that is not very material; but in other cases it is certainly desirable, if not necessary, that there should be shown citizenship at the time when the suit was commenced, and the said clerk was at the same time notified in writing by the said solicitors that, "upon the filing of the affidavit, the above entitled cause becomes transferred to the circuit court of the United States for this circuit, and transmit the files and cer-

¹[Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

tified copy of the record entries in said cause to the said circuit court." That is, in brief, the state of the cause in the local court.

Now, as to the legislation applicable to this cause. March 3d, 1875, the enabling act in respect to Colorado was passed. [18 Stat. 474.] March 14th, the constitution of Colorado was framed. June 26th, 1876, the act of congress "to further the administration of justice in the state of Colorado," and creating the federal courts therein, was passed. July 1st, 1876, an election was held, at which the constitution was adopted. August 1st, 1876, the proclamation of the president declaring Colorado admitted as a state, was issued. The enabling act, aforementioned, contains the following: "Sec. 1. That the inhabitants of the territory of Colorado are hereby authorized to form for themselves, out of said territory, a state government, with the name of the state of Colorado, which state, when formed, shall be admitted into the Union upon an equal footing with the original states in all respects whatever, as hereinafter provided." The fifth section provides that if a majority sanctions that constitution, the president, without any further action, may issue his proclamation, and thereupon the state becomes admitted without any action whatever on the part of congress. Then follows a provision as to senators and representatives, and the one supposed to be material, in these words: "And until said state officers are elected and qualified under the provisions of the constitution, the territorial officers shall continue to discharge the duties of their respective offices." That is the enabling act. The above mentioned act of congress of June 26th, 1876, as to the federal courts in Colorado, contains the following: "That when the state shall be admitted into the Union, according to the provisions of the act approved March 3d, 1875, the laws of the United States not legally inapplicable shall have the same force and effect within the said state as elsewhere within the United States; and said state shall constitute one judicial district, to be called the district of Colorado, and for said district a district judge, a marshal, and a district attorney of the United States shall be appointed by the president, by and with the advice and consent of the senate, with the same rights, powers, and duties provided by law for similar officers in the other states, except as herein otherwise provided; and said district of Colorado shall be attached to, and constitute a part of, the eighth judicial circuit; and a term of the circuit court and district court for said district, shall be held at Denver, in said state, on the first Tuesday in July and on the first Tuesday in December in each year." Sections 5 and 8 are material. Section 5 contains a provision in respect to the disposition of pending cases in the supreme court of the United States, on writs of error or appeal from the supreme

court of the territory of Colorado, and that such cases "may be heard and determined by the supreme court of the United States, and the remand of execution or of further proceedings shall be directed by the supreme court of the United States to the circuit or district courts of the district of Colorado, or to the supreme court of the state of Colorado, as the nature of the case may require; and each of said last mentioned courts shall be the successor of the supreme court of Colorado territory, as to all such cases, with full power to proceed with the same, and to award the mesne of final process therein." Section 8, which is the section in relation to pending cases in the territorial courts: "That in respect of all cases, proceedings, and matters pending in the supreme or district courts of the territory of Colorado, at the time of the admission of said state into the Union, whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States, had said courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of the supreme and district courts of said territory, and all the files, records, and proceedings relating thereto shall be transferred to said circuit and district courts respectively, and the same shall be proceeded with therein in due course of law."

This is all there is in the acts of congress relating to this cause. In the constitution of the state of Colorado, are the following provisions: Article 8, § 7, provides for the general election to be held on the first Tuesday in October, and at that election state officers, including judges, were elected by the people. In the fifth section of the schedule is this provision: "Whenever any two of the judges of the supreme court of the state, elected or appointed under the provisions of this constitution, shall have qualified in their office, the causes theretofore pending in the supreme court of the territory, and the papers, records, and proceedings of said court, and the seal and other property pertaining thereto, shall pass into the jurisdiction and possession of the supreme court of the state, and, until so superseded, the supreme court of the territory and the judges thereof shall continue with like power and jurisdiction as if this constitution had not been adopted. Whenever the judge of the district court of any district, elected or appointed under the provisions of this constitution, shall have qualified in his office, the several causes theretofore pending in the district court of the territory within any county in such district, and the records, papers, and proceedings of said district court, and the seal and other property pertaining thereto, shall pass into the jurisdiction and possession of the district court of the state for such county, and, until the district courts of the territory shall be superseded in man-

ner aforesaid, the said courts and the judges thereof shall continue with the same jurisdictions and powers to be exercised in the same judicial districts, respectively, as heretofore constituted under the laws of the territory."

[The motion to docket the case was denied. For a subsequent hearing, see Ames v. Colorado Cent. R. Co., Case No. 325.]

Mr. Poppleton, for the motion.
Smith & Hall, opposed.

DILLON, Circuit Judge. The motion here presented, namely, to docket this cause in the federal court, and for a writ of assistance, derives its importance not only for the large interests involved in the particular cause, but from the fact that the principles upon which it must be determined necessarily fix the status, as respects federal or state jurisdiction, of all other causes pending in the courts of the late territory of Colorado at the time of its admission, August 1st, 1876, into the Union as a state. These considerations have induced me to submit the conclusions at which I have arrived to the justice of the supreme court allotted to the circuit, for his judgment thereon.

In examining the question here arising, the legislation of congress in respect to the admission of other territories as states, and establishing federal courts therein on their admission, has been examined, as well, also, as the several judgments of the supreme court as to the effect of such legislation. Florida: 5 Stat. 742, 788, construed in the leading case of *Benner v. Porter*, 9 How. [50 U. S.] 235; *Hunt v. Palao*, 4 How. [45 U. S.] 589. Iowa: *Webster v. Reid*, 11 How. [52 U. S.] 437. Texas: 9 Stat. 1108, construed in *Calkin v. Cocke*, 14 How. [55 U. S.] 227. Wisconsin: 9 Stat. 567, 233, construed in *McNulty v. Batty*, 10 How. [51 U. S.] 72. Nevada: 13 Stat. 30, 440, construed in *Freeborn v. Smith*, 2 Wall. [69 U. S.] 160. Nebraska: *Express Co. v. Kountze*, 8 Wall. [75 U. S.] 342.

It is not deemed necessary to refer to this legislation, and to these cases, at any considerable length. They demonstrate the absolute necessity, on the erection of a territory into a state, and the admission of the latter into the Union, of legislative provisions by congress and the state as to causes pending in the territorial courts at the time of such admission.

The effect, judicially declared, of the unconditional admission of a territory as a state, and the erection of federal courts therein, and the extension of the laws of the United States over the same, is ipso facto to extinguish the territorial government, and with it the existence of the territorial courts of the general government. In the Florida case *Benner v. Porter*, 9 How. [50 U. S.] 235, 241, there was a provision in the constitution of the state, as there is in the

constitution of Colorado, to the effect that all "territorial officers should hold and exercise their respective offices and appointments until superseded under this constitution." This was considered by the supreme court as being done to prevent an interregnum, and to have that effect, not by continuing even sub modo the territorial existence, but by making these officers, by the force of the state constitution, and the assent of congress to the admission of the state into the Union, state officers for the time being.

The territorial courts cease, on the admission of the state, to be courts of the territory, for the territorial government is displaced and abrogated; but, by adoption on the part of the state, with the consent of congress, these courts become the provisional and temporary courts of the state.

The act of congress of June 26th, 1876, in respect to the administration of justice in Colorado, unmistakably proceeds upon this view. It declares that the laws of the United States shall have force and effect immediately on the admission of the state. It created and established at once federal courts in the state, and makes more specific and careful provisions as to the disposition of pending cases, whether in the supreme court of the United States or in the supreme and district courts of the territory, than had been done by congress in any other instance in providing for a change from territorial existence to that of a state. That act determines what shall be done with "all cases" pending in all the territorial courts, "at the time of the admission of said state into the Union." Pending cases which might have been brought in the federal courts established by the act, had such courts existed when the cases were commenced, are transferred to the proper federal court, which is declared to be the "successor" of the territorial courts, a term which implies that these courts cease to exist as courts of the general government. All other cases remain and belong to the courts adopted or established by the constitution of the state. Cases of federal jurisdiction may be such by reason of parties, as where the United States or a federal corporation is a party, or because they arise under the constitution and laws of the United States, or because of citizenship, without respect to subject matter.

The federal character of a case must appear in the pleadings, or of record. If the federal character of a case pending at the time of the admission of Colorado thus appears, it belongs to the federal courts, if the case be such, as to subject matter or parties and amount, as that it might have been brought in such federal court if it had been in existence when the suit was commenced. If the federal character of a pending cause does not thus appear, the court in which it is pending may rightfully proceed therein

after the admission of the state, at least until it is shown to the court that it is one of federal cognizance.

In the present cause the pleadings did not show that it was one of federal character, as there was no averment in the bill of complaint of the citizenship of the plaintiffs. As the cause was in the court and the court was in existence, and the federal character of the cause did not appear, it follows that the court had jurisdiction to act therein after the admission of the state.

It is contended by the defendant company that the complainants have elected to remain in the state court, and that, having done so, they are bound thereby, in virtue of the common law principle that an election once deliberately made is binding and irreversible. In other words, after the 1st day of August, the plaintiffs could have taken steps to show the federal character of the cause, and arrested all further action of that court. Instead of doing this, they invoked the continued exercise of the jurisdiction and powers of that court, and obtained on August [17]² an order appointing a receiver, and subsequently [August 21]² procured an order for a writ of assistance, which was issued. After having, with knowledge of all the facts as to jurisdiction, done this, can they afterwards change the forum, and if so, what limitation in point of time exists, and can it be exercised down to the time of final hearing? It is my judgment, in a case whose federal character does not appear of record, that the party who, with knowledge of all the facts, wishes the case to go to the federal court under section 8 of the act of June 26th, 1876, must take his election before voluntarily invoking the action and power of the court; otherwise he is concluded from afterwards electing to reveal its federal character, and have a transfer by virtue of the last mentioned act.

The case, by his consent and action, has become one belonging to the local court, and can only be removed therefrom, if at all, under the removal acts applicable generally to the transfer of causes from the state to the federal courts. It may be true that the plaintiff can, like other suitors elsewhere, have the benefit of the removal acts, if he can bring his case within them, but it is not necessary to determine this point.

The result of these views is that, as the plaintiffs, after the admission of the state, not only voluntarily submitted to the action of the local court, but invoked it and obtained it, they could not afterwards transfer the cause on affidavits filed with the clerk of that court, in the manner here attempted. The motion to docket the cause in the circuit court must therefore be denied.

MILLER, Circuit Justice. I concur in this opinion—in the first part of it, fully; in the

latter part of it, on the ground that the party now seeking to docket the case in the circuit court took active steps in the case after he had the right to have it docketed in the circuit court. But, in the future application of the rule, I should not accept silence or passive inaction in the state courts as conclusive against a party of his election between the two courts. Motion denied.

Case No. 325.

AMES v. COLORADO CENT. R. CO.

[4 Dill. 260; 4 Cent. Law J. 199.]

Circuit Court, D. Colorado. 1877.

REMOVAL OF CAUSES—ACT OF MARCH 3, 1875—
TIME.

1. The act of March 3, 1875, [18 Stat. 470. § 2.] which provides that any suit "now pending or hereafter brought in any state court" of the description therein specified, may be removed into a federal court, is not applicable to a suit brought in a territorial court, although, on the admission of the territory as a state, such suit passed into the jurisdiction of a state court.

[Cited in *Dunton v. Muth*, 45 Fed. 390.]

2. Under that act, application to remove a cause must be made to the state court at or before the term in which, according to the local law and practice of the court, the cause could have been finally heard. Accordingly, where issue was joined nearly one month before the end of a term of the state court, and it does not appear but that a final hearing could have been had at that term, an application thereafter made to remove the cause under the act of 1875 will be denied. See, on this point, *Scott v. Clinton & S. R. Co.*, [Case No. 12,527.]

[Cited in *McLean v. St. Paul & C. Ry. Co.*, Case No. 8,893; *Chester v. Wellford*, Id. 2,062; *Forrest v. Edwin Forrest Home*, Id. Fed. 463; *Wheeler v. Liverpool, London & Globe Ins. Co.*, 8 Fed. 198; *Meyer v. Norton*, 9 Fed. 435; *Johnson v. Johnson*, 13 Fed. 193; *Cramer v. Mack*, 12 Fed. 804.]

In equity. Bill to foreclose a mortgage. A very full history of this case is given in connection with the opinion of the circuit judge on the motion to docket under the act of June 26, 1876, which was announced at this term. 4 Dill. 251, [*Ames v. Colorado Cent. R. Co.*, Case No. 324.] For convenience, it may be well to state the following again: The bill was filed in the district court of Boulder county, June 21, 1876; issue was joined July 24, 1876; the territory of Colorado became a state by proclamation of the president, August 1, 1876, and the last order made at the July term of the Boulder court was entered August 21, 1876. After the motion to docket the case in this court was denied [Id.,] and on the 7th of December, 1876, plaintiffs filed in the state court a petition alleging that they are citizens of Massachusetts, and defendant is a corporation created by a law of the territory of Colorado, and other facts, substantially as required by the act of 1875 concerning the removal

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²From 9 Chi. Leg. News, 132.]

of causes from state to federal courts. A bond was also filed, with conditions as required by that act, the sufficiency of which was not questioned in this court. Afterwards (December 9, 1876), plaintiffs filed in this court a transcript of the files, record, and proceedings in the Boulder court, and sought to have the cause removed. Thereupon, December 11, defendant moved to dismiss, which is here treated as a motion to remand.

E. L. Smith, for the motion.

A. J. Poppleton and J. I. Redick, contra.

Before DILLON, Circuit Judge, and HALLET, District Judge.

HALLET, District Judge. This suit was brought in the district court of Boulder county, under the late territorial government, and the question here presented is, whether it may be removed into this court under the act of congress of March 3, 1875. In terms, that act extends to cases then pending or thereafter to be brought in any state court. This suit was not then pending in any court, nor was it afterwards brought in a state court, although it came into such a court by operation of law on the admission of the state, sometime after it was begun.

It was ingeniously urged in the argument at the bar that, by assenting to the jurisdiction of the state court, plaintiffs did in fact bring the suit in that court; but this will not bear examination. The bringing of a suit is understood to mean the institution or commencement of it, and so the language is in Revised Statutes, section 639, on the same subject. This occurred in this instance in a territorial, not a state court. Pending the suit the character of the court was changed into a state court, and there being nothing in the record to show its federal character, the court retained jurisdiction of it. 4 Dill. 251, [Ames v. Colorado Cent. R. Co., Case No. 324.]²

Plaintiffs did not in any sense bring the suit in or into the state court. They found it there, where the law had left it in the transition from a territorial to a state government, and they consented to go on with it in that jurisdiction. In that way they consented [elected]³ to remain in the state court; but they did not, in any reasonable construction of the act of 1875, bring the suit in that court. This view is enforced by the circumstance that congress has provided a special way of transferring causes on the admission of a state by general law (Rev. St. §§ 567, 569, 704), and also in this instance by the act establishing this court, June 26, 1876. This legislation, relating to a particular class of cases and designed to carry out the general purpose of the removal acts, seems to proceed on the theory that the

latter are not applicable to cases which originate in a territorial court. If congress had consigned all federal cases to the state courts, plaintiffs would be within the reason, if not the letter, of the removal acts. But this was not done; and that which was done does not in any way tend to prove that the removal acts are by construction to be extended to cases like this—i. e., to cases not within their terms. If, however, this reasoning is unsound, there is another obstacle to the removal of the cause.

Accepting the act of 1875 as applicable to the case, by the third section it is provided that the petition for removal shall be filed in the state court "before or at the term at which said cause could be first tried, and before the trial thereof." "The term here referred to appears to be that at which the cause may be tried or heard on the merits, according to the practice of the court, without regard to the special circumstances of the case, as whether the parties are ready for trial, and the like.

Certainly we cannot, in determining a question of this kind, enter into every circumstance that may delay or facilitate the progress of a cause, as whether there are nice points to be decided, which require time for consideration, whether the court was otherwise occupied, and so on. Such an investigation would be in every way embarrassing and uncertain as to the result, and therefore it may be dismissed as impracticable. We are, then, to inquire whether, according to the practice of the court, this suit could have been finally heard at the July term of the Boulder court, without reference to any of those circumstances that have been mentioned as likely to retard its progress. It appears that issue was joined on the 24th day of July, 1876, and the court remained in session for a period of twenty-eight days thereafter.

No time was allowed, by rule of court or otherwise, for taking testimony, and we cannot assume that any specific time was necessary. It was claimed at the bar that our rule, 69, should govern, but that rule was not in force in the Boulder court. *Palmer v. Cowdrey*, 2 Colo. 1. So far as the record shows, the cause could have been brought on at any time within the twenty-eight days which remained of the term after issue was joined. If the writer may speak from his own knowledge of the course of practice in the territorial courts, he feels bound to declare that it was entirely regular to bring a cause to hearing at the term in which issue was joined, and this was often done, especially in foreclosure suits. It is true that important suits often went over the term; but this was owing to the press of business, or other extraneous cause, and not to any rule of practice. It seems, therefore, that the application to remove the cause was not in apt time, not being made at the term when a hearing could have been had. For these

²[S. C. 3 Cent. Law. J. 815.]

³[From 4 Cent. Law J 199.]

reasons, the motion to remand will be allowed, with costs.

DILLON, Circuit Judge. I concur. I am inclined to think the first ground sound; but if, under the local law and practice, the case could have been finally heard at the July term, then I am clear that the application for removal should have been made at that term, assuming that the act of March 3, 1875, applies to the case. Motion sustained.

[NOTE. Gaffney v. Gillette, Case No. 5,168, was published as a note to the above in 4 Dill. 264.]

AMES, (DWIGHT v.)

[See Dwight v. Ames, Case No. 4,214.]

AMES, (FOSTER v.)

[See Foster v. Ames, Case No. 4,965.]

Case No. 326.

AMES v. HOWARD et al.

[1 Sumn. 482; 1 Robb, Pat. Cas. 689.]

Circuit Court, D. Massachusetts. Oct. Term, 1833.

PATENTS FOR INVENTIONS — CONSTRUCTION — SURPRISE — APPEAL — OBJECTIONS WAIVED — NEW TRIAL.

1. Patents and specifications annexed thereto should be construed fairly and liberally, and not subjected to any over-nice or critical refinements.

[Cited in Davoll v. Brown, Case No. 3,662; Wilson v. Rousseau, 4 How. (45 U. S.) 708; Aiken v. Bemis, Case No. 109; Hogg v. Emerson, 6 How. (47 U. S.) 486; Winans v. Denmead, 15 How. (56 U. S.) 341; Good-year Dental Vulcanite Co. v. Gardiner, Case No. 5,591; Hamilton v. Ives, Id. 5,982; Milligan Glue Co. v. Upton, Id. 9,607; Thomas v. Shoe Mach. Manuf'g Co., Id. 13,911.]

See Ryan v. Goodwin, [Case No. 12,186; Blanchard v. Sprague, [Id. 1,513.]

2. Where an invention is so loosely and inaccurately described in the specification, that the court cannot, without resorting to conjecture, gather what it is, then the patent is void; but if the court can clearly see the nature and extent of the claim, however imperfectly and inartificially it may be expressed, the patent is good.

3. A patent contained the following words in the description of the invention: "I do not claim the felting, vats, rollers, presses, wire-cloth, or any separate parts of the above described machinery or apparatus, as my invention; what I do claim as new, and as my invention, is the construction and use of the peculiar cylinder above described, and the several parts thereof in combination for the purpose aforesaid." *Held*, that it is not the cylinder alone, or its several parts, which are claimed per se, but they are claimed in their actual combination with the other machinery, to make paper.

[Cited in Davoll v. Brown, Case No. 3,662; Wilson v. Rousseau, 4 How. (45 U. S.) 708;

[Reported by Hon. Charles Sumner.]

Hovey v. Stevens, Case No. 6,746; Hogg v. Emerson, 6 How. (47 U. S.) 486; Brooks v. Fiske, 15 How. (56 U. S.) 223; Stover v. Halsted, Case No. 13,509.]

See Prouty v. Ruggles, 16 Pet. [41 U. S.] 336; Ryan v. Goodwin, [Case No. 12,186; Prouty v. Draper, [Id. 11,446; Pitts v. Whitman, [Id. 11,196; Washburn v. Gould, [Id. 17,214.]

4. Semble, that no previous notice or claim of a right to the exclusive use of an invention is necessary, to enable a patentee to maintain an action for an alleged violation of his patent-right.

[Cited in Brown v. Piper, 91 U. S. 41.]

5. It is the practice of this court, in all cases of surprise at the trial, by new matter proving a ground material to either party, and clearly made out by affidavit, to postpone or continue the cause. If the party interested, however, elects to go on with the cause, relying upon other matters, he is understood to waive the matter of surprise, and he cannot take his chance with the jury, and, if unsuccessful, then move the matter as a ground for a new trial.

6. A new trial is not granted upon mere cumulative evidence.

[Cited in Wiggin v. Coffin, Case No. 17,624; Aiken v. Bemis, Id. 109.]

7. The defendants cannot put in new rebutting evidence to affidavits of the plaintiff, offered in reply to those first offered by the defendants.

[8. Cited in Smith v. Downing, Case No. 13,036, to the point that "the avoidance of patents for claiming too much is of frequent occurrence, and needs no explanation as to the reasons for it, when an applicant is so improvident or unjust to others as to claim for himself more than he invented, and the credit or profit of which belongs to others rather than to himself."]

[9. Cited in Brown v. Piper, 91 U. S. 41, to the point that it is fatal to a patent that it consists in the application of an old process to a new subject, without any exercise of the inventive faculty, and without the development of any new or original idea.]

[10. Cited in Seymour v. Osborne, 11 Wall. (78 U. S.) 555, to the point that a combination of two or more old elements in a machine, producing a new and useful result, is patentable.]

At law. Case [of John Ames against Charles Howard and others] for an infringement of a patent-right for a new and useful improvement in the machinery for making paper. The specification annexed to the patent contained the following summary of the invention, as claimed by the patentee: "The drawing hereto annexed is to be taken and considered as a part of this specification. But it is to be understood, that I do not claim the felting, vats, rollers, presses, wire-cloth, or any separate parts of the above described machinery or apparatus, as my invention. And I hereby declare, that what I claim, as new and as my invention, is the construction and use of the peculiar kind of cylinder above described, and the several parts thereof in combination for the purposes aforesaid." The cylinder here referred to is particularly described in the specification, and it is there stated to be partly immersed and used in the vat containing the paper pulp, "having one end of the cylinder

close to the side of the vat, which forms a covering therefor." And in another part of the specification it is stated: "One end of the cylinder thus formed is to be covered, and made water-tight by a copper or other sufficient covering, and the other end, uncovered, is to be brought and kept in close contact with the side of the vat or reservoir aforesaid, which is to be so adapted to it, as to form a covering water-tight for that end of the cylinder, which while it revolves is below the top of the vat or reservoir." The specification then proceeds to describe the mode in which the water, draining through the cylinder, is to be conducted off through a hole in the side of the vat, which covers the open end of the cylinder. It was not disputed at the trial, that the cylinder was not capable of, nor intended for, any distinct use separate from the vat; and that to make paper on it, it was indispensable, that it should be placed in the vat in the manner above described. Plea, the general issue, with notice of special matter.

At the trial it was contended by the defendants, that the true construction of the patent was, that the plaintiff claimed only the cylinder, and the several parts thereof, in combination with each other, as his peculiar invention. The court thought otherwise; and declared to the jury, "that the patent is for the construction and use of the peculiar kind of cylinder, and the several parts thereof, in combination with the other parts of the machinery, for the purpose of making paper. It is for the combination, and not for the separate parts thereof. It is not for the peculiar structure and use of the cylinder alone, as the invention of the plaintiff; but it is for it in, and as a part of, the combination. Nor is it alone for the several parts of the cylinder, in actual combination by themselves with each other; but in the combination with other parts of the machinery to produce paper."

At the trial the cause was argued by William Bliss and Rand for the plaintiff, and by George Bliss and Fletcher for the defendants. The jury found a verdict for the plaintiff, for \$412.50 single damages.

A motion was afterwards made by the defendants for a new trial, the grounds of which appear in the opinion of the court, and was argued by Rand for the plaintiff, who cited *Smith v. Brush*, 8 Johns. 84; *Pike v. Evans*, 15 Johns. 210; *Williams v. Baldwin*, 18 Johns. 489; *Spong v. Hog*, 2 W. Bl. 802; *Ford v. Tilly*, 2 Salk. 653; *Watson v. Sutton*, 1 Salk. 272; *Cooke v. Berry*, 1 Wils. 98; *Gist v. Mason*, 1 Term R. 84; *Standen v. Edwards*, 1 Ves. Jr. 134.

Fletcher, for defendants, cited *Smith v. Brush*, 8 Johns. 84; *Pike v. Evans*, 15 Johns. 213; *Guyott v. Butts*, 4 Wend. 579; *Warren v. Hope*, 6 Greenl. 480.

STORY, Circuit Justice. The first ground of the motion is on account of a supposed

misconstruction of the patent of the plaintiff by the court. And the question now is, whether the direction of the court was right in point of law. Patents for inventions are not to be treated as mere monopolies odious in the eyes of the law, and therefore not to be favored; nor are they to be construed with the utmost rigor, as *strictissimi juris*. The constitution of the United States, in giving authority to congress to grant such patents for a limited period, declares the object to be to promote the progress of science and useful arts, an object as truly national, and meritorious, and well founded in public policy, as any which can possibly be within the scope of national protection. Hence it has always been the course of the American courts, (and it has latterly become that of the English courts also,) to construe these patents fairly and liberally, and not to subject them to any over-nice and critical refinements. The object is to ascertain, what, from the fair sense of the words of the specification, is the nature and extent of the invention claimed by the party; and when the nature and extent of that claim are apparent, not to fritter away his rights upon formal or subtle objections of a purely technical character.

Now, let us see, what is the invention, as claimed by the plaintiff in the specification in this case. I agree, that if he has left it wholly ambiguous and uncertain, so loosely defined, and so inaccurately expressed, that the court cannot upon fair interpretation of the words, and without resorting to mere vague conjecture of intention, gather what it is, then the patent is void for this defect. But if the court can clearly see, what is the nature and extent of the claim, by a reasonable use of the means of interpretation of the language used, then the plaintiff is entitled to the benefit of it, however imperfectly and inartificially he may have expressed himself. And for this purpose we are not to single out particular phrases standing alone, but to take the whole in connexion. The plaintiff begins by stating negatively, what he does not claim as his invention; and this may well help us to ascertain, what he does claim. He says he does not claim "the felting, vats, rollers, presses, wire-cloth, or any separate parts of the above described machinery or apparatus," as his invention. Now, among the above described machinery is the cylinder, and the several parts thereof. The cylinder therefore may fairly be deemed a separate part of the machinery, for it constitutes a part separable in its nature, and distinct in its formation, though adapted to a particular mode of use. He then proceeds to say, "What I do claim, as new and as my invention, is the construction and use of the peculiar cylinder above described, and the several parts thereof in combination for the purpose aforesaid." Now the defendants read this language, as if the words were, I claim the construction and

use of this peculiar cylinder, and I claim the several parts thereof in combination with each other to form a cylinder for the purpose of making paper. Let us see, whether this is consistent with giving a due effect to all the words used, and with the antecedent negative declarations of the plaintiff. He before has said, that he does not claim, as his invention, any of the separate parts of the machinery; therefore it is very clear, that he does not claim the separate parts of the cylinder. But then, it is said, he claims these parts in combination with each other. But these parts in combination with each other constitute neither more nor less than the cylinder itself; so that upon this construction the words, "and the several parts thereof in combination," are mere repetition and tautology, and have no distinct meaning. The claim is read exactly, as if these words were struck out. Certainly no court of justice is at liberty to strike out any words, which are sensible in the place, where they occur, and are capable of a distinct application. We are to give, if practicable, effect to all the words, as containing a distinct expression of the intention of the party. Besides; upon this interpretation of the language, the party does not claim the construction and use of the cylinder as his own, but the application of it to a particular purpose, as his own. It requires no commentary to establish, that the application of an old thing to a new use, without any other invention, is not a patentable contrivance. A man, who should use a common coffee-mill for the first time to grind peas, could hardly maintain a patent for it. A man, who should for the first time card wool on a common cotton carding-machine, would find it difficult to establish an exclusive right to the use of it for such a purpose. So that this construction of the words of the specification could hardly be presumed to express the intention of the party; for then he would not claim the thing, but a particular use of the thing for a particular purpose. The plaintiff in the present case claims more than a mere use; he claims the construction of this peculiar cylinder, and the several parts of it. And how does he claim them "in combination"? In what manner? In combination with each other? No; but "in combination for the purpose aforesaid;" that is, for the purpose of making paper. The grammatical connexion of the passage, then, requires that we should read it, that he claims, as his invention, the cylinder itself, (as well as the several parts thereof,) in combination for the purpose of making paper. It is not then the cylinder alone, or its several parts, which are claimed per se; but they are claimed in their actual combination with the other machinery to make paper. In this view of the clause full effect is given to all the words, and the sense is at once natural and consistent. My judgment, therefore, is, that the construc-

tion given by the court at the trial is correct; and that, as matter of law, there is no error in it.

The next objection is necessarily out of the case; for the comment attributed to the court was, upon a suggestion of the defendants' counsel, immediately withdrawn from the jury by the court; and the whole matter of fact contained in Gilpin's deposition, as well as its credibility, was left entirely open and free to the jury. I cannot say, that they have misunderstood it; or that they have not drawn the right conclusion deducible from it. It was a matter peculiarly within their province; and the ample comments on Gilpin's testimony, at the trial, by the counsel on both sides, sufficiently evinced, that it was in some parts confused and unsatisfactory, and susceptible of different interpretations.

The next objection is, that in point of law the plaintiff is not entitled, without some previous notice, or claim, to maintain this action under his patent against the defendants, for continuing the use of the machines erected and put in use by them before the patent issued. This objection cannot prevail. I am by no means prepared to say, that any notice is in cases of this sort ever necessary to any party, who is actually using a machine in violation of a patent-right. But it is very clear, that in this case enough was established in evidence to show, that the defendants had the most ample knowledge of the original patent taken out by the plaintiff in 1822, and of which the present is only a continuation, being grounded upon a surrender of the first for mere defects in the original specification. Whoever erects or uses a patented machine, does it at his peril. He takes upon himself all the chances of its being originally valid; or of its being afterwards made so by a surrender of it, and the grant of a new patent, which may cure any defects, and is grantable according to the principles of law. That this new patent was so grantable is clear, as well from the decision of the supreme court in *Grant v. Raymond*, 6 Pet. [31 U. S.] 218, as from the act of congress of the 3d of July, 1833, c. 162. There is no pretence to say that the defendants were bona fide purchasers without any knowledge or notice of any adverse claim of the plaintiff under this original patent; and the damages were by the court expressly limited to damages, which accrued to the plaintiff by the use of the machine after the new patent was granted to the plaintiff. Without doubt the jury conformed in their verdict to this direction of the court.

The other original objections may be passed over without notice, and indeed are insupportable in point of law. But another ground for a new trial has been since filed, founded partly upon surprise at the trial, and partly upon the discovery of new evidence applicable to the point, stated at the

trial, which constitutes the matter of surprise. It came out in evidence on the trial, in the course of the cross examinations, that the original cylinder constructed by the plaintiff had bars of wood, instead of brass; and one or more of the witnesses asserted, that the brass bars were substituted for wood after the grant of the original patent in 1822. This was explicitly denied by other witnesses on behalf of the plaintiff, who asserted, that the brass bars were substituted before the patent. Upon this point the parties were at issue at the trial; and it was made a strong ground of defence. No application was made to the court by the defendants for a postponement or continuance of the cause for the purpose of a more full and thorough examination of the point, or to search for farther testimony. The uniform practice of this court is, in all cases of surprise at the trial by new matters, forming a ground important to either party, and clearly made out by affidavit, to postpone or continue the cause. And if the party interested makes no such application, but elects to go on with the cause, relying upon his other strength to sustain his claim or defence, he is understood to waive the matter of surprise; and he cannot be permitted to take his chance with the jury, and, if unsuccessful, then to move the matter, as a ground for a new trial. The purposes of justice would be defeated and not advanced by any different course. And courts, which adopt a different rule, act upon the ground, that in their own modes of trial and practice the party has no opportunity to postpone or continue the cause; but is compellable to proceed in the trial. Upon this short ground, therefore, the objection of surprise is removed from the case. But it is by no means clear, that the matter so waived was, in point of law, a good ground of defence to the action. That depended upon the fact, whether the plaintiff made it by his specification a constituent part of his invention, that the bars should be of brass, and not of wood; for if they might be made of either, consistently with his general claim, then there was no objection to the patent in this respect. Now, the court was by no means satisfied at the trial, that such was in fact the claim of the plaintiff. But, for the purposes of the trial, the evidence was left to the jury, as if it constituted a complete ground of defence. The jury so acted upon it; and, having decided against it, as matter of fact, it would be a strong ground for the court to interfere now upon a mere doubt, whether the plaintiff's claim had in point of law such an extent or not. I do not state this with any other view, than to say, that it is a matter still sub judice, upon which my mind is not so clear, as to induce me to grant a new trial, merely with a view to open anew the discussion of it. But, then, as to the new evidence offered, what is its

nature? It is merely cumulative; and the settled practice of this court is never to grant a new trial upon mere cumulative evidence, where there is no other ground of objection to the verdict. That point has been fully considered in the case of *Alsop v. Commercial Ins. Co.*, at this term, [Case No. 262.] But it has been long since established in the habitual course of proceedings of the court. The counter affidavits, however, offered on behalf of the plaintiff, go to establish strong cumulative proofs the other way. And under such circumstances, the court will always decline to interfere; because it will not undertake to measure the weight of the new testimony on either side, or send the parties again to litigation upon the chances of a verdict, upon new conflicting evidence. The defendants have asked, if they may put in new rebutting evidence to the affidavits of the plaintiff, offered in reply to those first offered by themselves. Certainly not. They must present their whole case at once to the court; and not lead it on through a series of confirming and rebutting proofs, thus protracting the cause to an unreasonable extent.

There is another view, which may properly be taken of this point. The special written notice of defence by the defendants actually includes within its reach the very matter now set up as a surprise. It states, that the invention claimed by the plaintiff by his patent in 1832, "is according to the specification thereof wholly different and distinct" from the pretended invention mentioned in the patent of 1822. Of course this notice covers the whole claim of each patent; and it puts in controversy every part of the last patent, which is distinguishable from the first, and does not constitute a part of the invention claimed in the first. The defendant, therefore, was by his own special notice of defence, bound to institute all proper inquiries into the nature and actual structure of the original machine, and all the differences between that and the structure of the machine described in the patent of 1832. If he had used ordinary diligence, it is now manifest, that he might have obtained full evidence to any point, which could properly sustain the defence. He came to the trial, content with the preparation and the points, to which his evidence actually led him; and there can be no reason for letting him into a new trial, merely because he could now, upon farther reflection and farther lights, have made a fuller or a better defence. "*Interest reipublicae ut finis esset litium,*" is an old maxim, deeply fixed in the fundamentals of the common law. And Voet beautifully expressed its true reason, when he said, "*Ne autem lites immortales essent, dum litigantes mortales sint.*" The motion for a new trial is therefore overruled.

Motion overruled.

AMES, (KRAUSKOPP v.)

[See Krauskopp v. Ames, Case No. 7,931.]

Case No. 327.

AMES et al. v. LE RUE.

[2 McLean, 216.]

Circuit Court, D. Michigan. Oct. Term. 1840.

PLEADING—DECLARATION—RECOVERY UNDER COMMON COUNTS—EVIDENCE—LIMITATIONS.

1. If the plaintiff fails to prove the special contract stated in his declaration, or the contract has been performed on his part, and a duty imposed on the defendant to pay, in money, the amount due, the plaintiff may recover on the general counts.

[See Stanley v. Whipple, Case No. 13,286.]

2. If the special contract be barred by the statute of limitations, and the plaintiff can show an express promise to pay, since which the statute has not run, he may recover on such promise.

3. And, in such case, the facts of the special contract may be gone into, to show the balance due.

4. It has been held that a note payable in specific articles is admissible in evidence, under the money counts.

[See note at end of case.]

[At law. Assumpsit by Ames and Ames against Le Rue. Judgment for plaintiffs.]

Jones & Williams, for plaintiffs.

Mr. Frazer, for defendant.

OPINION OF THE COURT. This is an action of assumpsit, brought to recover the price of a paper machine, sold by the plaintiffs to the defendant. The declaration set out the special contract, and the common counts were added. Defendant pleaded the general issue, and the statute of limitations. In support of the first count in the declaration a receipt was offered in evidence, from the defendant to the plaintiffs, in which the defendant stipulated to pay two hundred dollars in three months, two hundred in six months, and two hundred dollars in nine months, to be paid in wrapping paper, and these payments being made the machine was to be the defendant's. This contract was dated in 1826. A part of the wrapping paper, of an inferior quality, was delivered; and, after some years of delay, the defendant expressly promised to pay the residue of the debt, or provide for the payment of it.

It is contended that the sale of the machine was conditional, and not absolute; and that no action will lie upon the contract. By the contract the seller had a lien upon the machine for the purchase money. When paid for it was to be the property of the purchaser. But the payments were to be made in the manner, and at the times, prescribed; and, if not so made, the defendant was liable to be sued for a breach of the contract. The statute of limitations, it is insisted, bars a recovery on the special contract. And here a

question is made, whether the case comes under the statute of the state where the contract was made, or where it is sought to be enforced. The statute of limitations of the state where the suit is brought must govern. It is the law of the forum, and applies in all cases where the jurisdiction of the forum is invoked.

The statute of Michigan does bar all remedy upon the special contract. Since the breach of the contract, and before the commencement of this suit, the limitation of the statute has run, and, consequently, the bar is complete. But after the delivery of the wrapping paper, in part, and before the statute had run, the defendant, as appears from the written evidence, promised to pay the balance due. And this promise, if valid, is not barred by the statute. It is contended that this promise, at most, could only relate to the former contract, and the mode of payment therein provided. But is this the true construction of the promise? The payments, in wrapping paper, were all to be made in nine months. After this period the plaintiffs were under no obligations to receive the paper, nor could the defendant expect to pay it. And, on being called on for payment by the plaintiffs, several years after the nine months had expired, and threatened that, unless he paid the balance, the machine would be taken from him, he promised to pay it. That there was a valuable consideration for this promise will not be denied. And that the promise was to pay in money is equally obvious. The special contract, in regard to the sale of the machine, is properly shown as the consideration of the express promise; and as this promise was to pay money, we think it is evidence for the jury, under the count, for the sale of the machine.

The plaintiffs, it is alleged, has failed to prove the special contract as laid in the declaration. This, if admitted, would give them a right to go on the general count. And we think the plaintiffs have a right to recover on the express assumpsit, since which the statute has not run, and that the whole circumstances of the case may be gone into to show the amount due. The case is clearly within the rule that, where the contract has been performed by the plaintiff, and a duty is imposed on the defendant to pay the amount due, in money, a recovery may be had on the general count, although there was a special contract. *Chesapeake & O. Canal Co. v. Knapp*, 9 Pet. [34 U. S.] 541. On the authority of *Smith v. Smith*, 2 Johns. 235, *Pierce v. Crafts*, 12 Johns. 90, the court held, in the case of *Crandal v. Bradley*, 7 Wend. 311, that a note payable in specific articles was admissible in evidence under the money counts. This was a departure from the English rule. The jury found for the plaintiffs the balance due. Judgment.

[NOTE. The statute of limitations appertains to the remedy, not to the original debt, and consequently it is the lex for: which governs, in-

¹[Reported by Hon. John McLean, Circuit Justice.]

stead of the *lex loci*. *Townsend v. Jemison*, 9 *Flow.* (50 U. S.) 407; *McCluny v. Silliman*, 3 *Pet.* (28 U. S.) 270; *Walsh v. Mayer*, 111 U. S. 31, 4 *Sup. Ct.* 260; *McElmoyle v. Cohen*, 13 *Pet.* (38 U. S.) 312; *Igberts v. Dibble*, Case No. 4,307; *Jones v. Hays*, *Id.* 7,467; *Le Roy v. Crowninshield*, *Id.* 8,269; *Randolph v. King*, *Id.* 11,560.]

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Case No. 328.

AMES v. MANHATTAN LIFE INS. CO.

1879.

[Cited in *Smith v. Mutual Life Ins. Co. of New York*, 5 *Fed.* 584. Nowhere reported; opinion not now accessible.]

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Case No. 329.

AMES v. NEW ORLEANS, M. & T. R. CO.
 et al.

[2 *Woods*, 206.]¹

Circuit Court, D. Louisiana. April Term, 1876.

RAILROAD COMPANIES—BONDS AND MORTGAGES—
 SUBSTITUTION OF NEW BONDS FOR THOSE SE-
 CURED BY THE MORTGAGE—FORECLOSURE.

1. The modification of a mortgage does not extinguish it, nor is its lien affected by the substitution of a new note or bond for the original note or bond secured by it.

2. A railroad company having executed a mortgage to secure a limited number of bonds, afterwards executed another mortgage on the same property to secure a larger number of bonds, which recited that the holders of the bonds secured by the original mortgage had agreed to surrender the same, and receive in substitution therefor new bonds, to be secured by the original mortgage as modified by the second mortgage. All the bonds secured by the first mortgage, except twenty, were exchanged for bonds secured by the second. *Held*, that the holders of said twenty bonds were not entitled to be paid out of the proceeds of the mortgaged property in preference to the holders of the substituted bonds; but that they could not be prejudiced by the increase of the number of bonds secured by the second mortgage, but were entitled to the same proportion of the proceeds of the mortgaged property as if the second mortgage had not been executed.

[Cited in *Barry v. Missouri, K. & T. Ry. Co.*, 34 *Fed.* 832.]

3. There is nothing in the jurisprudence of Louisiana contrary to the doctrine of this case.

Heard on petition of Arphaxad Loomis and others.

W. W. Howe, for petitioners.

John A. Campbell, contra.

WOODS, Circuit Judge. The bill in this case was filed for the foreclosure of a mortgage executed by the principal defendant on its property and road west of the Mississippi river, in the state of Louisiana. It appears from an agreed statement of facts that on the 15th of March, 1870, the railroad corporation, then known as the New Orleans, Mobile & Chattanooga Railroad Company, conveyed by a deed of that date all its es-

tate and property in Louisiana and Texas west of the Mississippi river, to secure bonds, to be issued at the rate of \$12,500 per mile of the main line of road from New Orleans to the Sabine river, and \$25,000 per mile from the Sabine to Houston, in Texas, making the entire amount that might be issued under this deed of trust to be \$5,562,000, and no more. There were issued, in fact, under the deed of trust, \$2,825,000 only. This deed of trust provided that no bonds whatever should be issued on branch roads till they were constructed and their tracks laid. On the first of January, 1872, the railroad company, its name in the meantime having been changed by act of the legislature to the New Orleans, Mobile & Texas Railroad Company, executed a new deed of trust of that date on the same property as that conveyed by the deed of March 15, 1870. The purpose of this deed was to change the limit of the amount of the bonds of the company to be issued under said deed of trust of March 15, 1870, so as to allow besides the bonds already issued an additional issue of \$25,000 per mile of bonds for each mile of a branch road to be constructed from Brashear City to Vermillionville, but not to exceed the sum of \$1,625,000. This deed of trust recited that it had been arranged and agreed that the holders of the outstanding bonds under the original mortgage and deed of trust should surrender the same for cancellation and receive in substitution therefor bonds to the like amount executed in the name of the New Orleans, Mobile & Texas Railroad Company. This project was so far carried out that all the holders of bonds, secured by the original mortgage and deed of trust of March 15, 1870, except Arphaxad Loomis, and the other petitioners, surrendered their bonds, and received in their stead new bonds issued under and secured by the original mortgage and deed of trust as modified and limited by the deed of January 1, 1872. Loomis and the other petitioners are the holders of twenty of the original bonds. They claim to have a priority over all the new bonds issued to take up the original bonds, and pray for a decree which shall recognize this priority, and declare their bonds to be a first lien on the property conveyed by the trust deed of March 15, 1870, and that their bonds be paid by preference out of the proceeds of the sale of the railroad property when a sale is made.

The theory upon which the prayer of this petition is based is, that those bonds dated January 1, 1872, issued in lieu of the original bonds dated March 15, 1870, are in no way secured by the original trust deed, but have a lien on the railroad property by virtue only of the deed of January 1, 1872. An inspection of this latter trust deed will show that this theory is not founded on fact. The trust deed of 1872 states the fact of the execution of the deed of March 15, 1870, and the inscription thereof, etc., and the purpose

¹[Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

of the railroad company to change the limit of the amount of bonds to be issued and secured under the original trust deed; recites that the holders of the outstanding bonds issued under the original trust deed have agreed to surrender the same, "and receive in substitution therefor new bonds for a like amount executed by the New Orleans, Mobile & Texas Railroad Company, to be issued under and secured by said mortgage or deed of trust (the deed of March 15, 1870) as the same is modified and limited by this instrument." The deed of January 1, 1872, further declares, that "the parties hereto, in consideration of the premises, etc., have covenanted, granted and agreed and do hereby covenant, grant and agree to and with each other, that the stipulations and provisions of the above mentioned mortgage or deed of trust of March 15, 1870, shall be and are hereby modified and limited in the manner and to the effect following, with like effect as if such mortgage or deed of trust had originally contained such modifying and limiting provisions which are herein contained," etc. The deed of January 1, 1872, further declares that "the said party of the first part (the railroad company) in consideration of the premises and of one dollar, etc., in order to secure the payment of the principal and interest of its said first mortgage bonds to be issued in the form and of the tenor and to the effect herein above described in that behalf, according to the tenor and effect of said bonds and the accompanying coupons, and for further assurance and confirmation of the estates and interest conveyed in mortgage by the said original mortgage or trust deed of March 15, 1870, as hereby modified, hath granted, bargained and sold." etc.

These provisions of the deed of January 1, 1872, clearly reveal the purpose of the parties thereto, that the bondholders, surrendering their original bonds for the new ones should not lose any right or estate granted by the first deed of trust, save as the same were modified by the second. It was upon this express condition, thrice repeated in the trust deed of January 1, 1872, that the bondholders consented to give up their old bonds and take the new ones.

It clearly appears that there was to be no cancellation of the mortgage of 1870; all the bonds were designed to be secured by it. The new bonds correspond with the old in amount, interest, time of payment, and only differ in date, and the name of the company, which had been changed since the old bonds were issued.

The modification of the mortgage does not extinguish it, nor is its lien affected by the substitution of a new note for the old one. *Watkins v. Hill*, 8 Pick. 522; *Pomroy v. Rice*, 16 Pick. 22; *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65; *Dana v. Binney*, 7 Vt. 501;

Chase v. Abbott, 20 Iowa, 154; *Conner v. Banks*, 18 Ala. 42; *Cullum v. Branch Bank at Mobile*, 23 Ala. 798. The petitioners claim, however, that the question must be governed by the law of Louisiana, and cite the case of *Bell v. Murphy*, 2 La. Ann. 765, as authority to show what the jurisprudence of this state is upon the question in hand. In that case a mortgage was given to secure the mortgagee for a particular indorsement made by him for the accommodation of the mortgagor. The note thus indorsed was partly paid by the mortgagor, and a new note given for the remainder due, which the mortgagee indorsed. The court held that the mortgage did not indemnify the mortgagee for this latter indorsement. The reason given was that the mortgage was not a general one to secure the plaintiff for indorsements. It was given as security against the indorsement of a specific note, which the evidence showed had been subsequently novated and extinguished. That case differs from this in this most material particular, that in this case there was an express understanding that the original mortgage should stand for the benefit of the new bonds, and it was upon that condition that the substitution was made. The court is asked to step in between the parties and annul this contract. The law does not annul contracts made by the parties unless they are fraudulent or against public policy. No reason can be given why the contract made between the railroad company and its bondholders should not be enforced.

A very instructive case upon the question presented by this petition, is *Stevens v. Mid-Hants Ry. Co.*, 7 Eng. R. 555, reported also in 8 Ch. App. 1064. In my judgment, the petitioners are not entitled to be paid the full amount of their bonds in preference to the holders of the substituted and other bonds issued under the deed of trust of January 1, 1872. The most that petitioners can claim is that they shall not be prejudiced by any change made in the terms of the deed of March 15, 1870, by the deed of January 1, 1872. They are entitled to have their rights preserved under the original trust deed. This may be done by giving them such part of the proceeds of the sale as they would have been entitled to if the new bonds and new trust deed had never been executed. In other words, as only 2,825 bonds, of one thousand dollars each, were issued under the original trust deed, of which the petitioners hold twenty, they are entitled to twenty 2,825ths of the proceeds of the sale, and no more.

AMES v. NINE HUNDRED AND FIVE
PACKAGES OF TOBACCO.

[See *United States ex rel. Ames v. Nine Hundred and Five Packages of Tobacco*, Case No. 15,831.]

AMES v. TWO HUNDRED AND SEVENTY-FIVE CADDIES OF TOBACCO.

[See United States ex rel. Ames v. Nine Hundred and Five Packages of Tobacco, Case No. 15,381.]

AMES, (UNITED STATES v.)

[See United States v. Ames, Case No. 14,440.]

AMESBURY NAIL FACTORY, (ODIORNE v.)

[See Odiorne v. Amesbury Nail Factory, Case No. 10,430.]

Case No. 330.

The AMETHYST.

[2 Ware, (Dav. 20), 28, 2 N. Y. Leg. Obs. 312.]

District Court, D. Maine. Jan. 21, 1840.

SALVAGE—DERELICT—JOINT SALVORS—AWARD.

1. When property is left derelict on the high seas, those who first find and take possession of it, with the intention of saving it, acquire a right to the exclusive possession, which others, who afterwards discover it, have no right to disturb.

[Cited in *The W. D. B.*, Case No. 17,306.]

2. The right of property, in goods thus abandoned from necessity, is not lost to the owners, and those who find and undertake to save them are bound in good faith to consult the interest of the owners as well as their own. If they have not sufficient force to effect the salvage without great risk of the loss of the goods, they cannot, consistently with the good faith which they owe to the owners, refuse the assistance of others, who offer their aid, and who may thus become entitled as joint salvors to a share in the reward.

[Cited in *The Chickasaw*, 41 Fed. 636.]

[See *The Cairnmore*, 20 Fed. 519; *The Ida L. Howard*, Case No. 6,999.]

In admiralty. This was a case of salvage. The Amethyst, a British vessel, sailed from Boston to St. John, in New Brunswick, May 1. On the 3d, at 5 o'clock A. M., she was struck by a heavy squall, and upset. Of twelve persons on board, including passengers, ten saved themselves by hanging to the wreck until 11 o'clock A. M., when they were taken off by the schooner Compeer, of Ellsworth. Two were drowned, and their bodies subsequently found on board the wreck. On the 7th of May, the schooners May Flower, Ocean, and Wave sailed from Boothbay on a fishing voyage, and fell in with the wreck just before sunset. She was boarded from one of the schooners that evening, and the skippers of the three schooners agreed to lie by during the night, and tow her into port next day. She then lay about fifteen or twenty miles south-east of the

[Reported by Edward H. Daveiss, Esq.]

island of Monhegan. The three schooners hoisted signal lights, and lay by in company through the night, and remained so near the wreck that she was seen at 10 and at 12 o'clock. One was so near as to be in danger of coming in collision with her. At daylight the wreck was seen at the distance of a mile or a mile and a half from the schooners, according to the testimony of the crews. Another vessel was at the same time seen bearing down on the wreck. They manned their boats for the purpose of resuming the possession, but when they arrived, they found that she had been boarded from the stranger vessel, which had then come up with her, and which proved to be the Only Son, from St. Andrews, New Brunswick, bound to Boston. When the parties met, a controversy arose between them, each party claiming the right of prior possession. That of the three schooners, said that they had discovered and boarded her the night before; the crew of the Only Son claimed the right as having the actual possession. Hard words and threats passed between them; the party from the schooners cut the lines, which were made fast to the wreck, from the Only Son, and being superior in numbers, maintained their possession. The crew of the latter vessel, during the dispute, took from her an anchor, and secured it on board their own vessel, and then were compelled to abandon the prize to their adversaries. The schooners then made fast to her with their cables, one before the other, and proceeded with her in tow to Boothbay harbor. On the morning of the 8th, the weather was pleasant and the sea calm; but in the latter part of the day the wind arose and increased to a storm, so that before they got into the harbor, the schooners, one after another, parted their cables from the wreck, which was driven on a dangerous reef of rocks, and the schooners with some difficulty saved themselves from the same danger. The next lay hands were procured to assist in saving the property. The principal direction of the business, which was attended with serious difficulties of different kinds, was taken by Mr. McClintock, who appears to have conducted with spirit, prudence, and good faith. The vessel lay anchored to the sea, and the waves ran high; the labor was severe, and the risk of life not inconsiderable in getting the cargo from the wreck; and, after it was landed, it was necessary to employ men to guard and protect the property from persons who were prowling around for the purpose of plunder. [Decree for libellants.]

A claim was interposed by J. T. Sherwood, her Britannic majesty's consul, for the owner, and the case was argued by Deblois, for the claimants, and Howard, for the libellants.

WARE, District Judge. This is a case of salvage of a vessel and cargo, found derelict

and saved, under circumstances of considerable peril and severe labor; and it cannot be doubted that a liberal reward ought to be allowed, unless the claim of the salvors has been forfeited or impaired by misconduct on their part. It is contended that there has been such misconduct as ought justly to go either in diminution or to a forfeiture of their claims. The fact relied upon, as impairing their merits, is their refusal to accept the aid of the *Only Son*, in saving and securing the property, in consequence of which, it is argued that the vessel was finally lost upon the rocks, when the additional strength of another vessel might have saved her and brought her into port. It is contended that the master and crew of the *Only Son* being on the spot with their vessel, and ready to assist in the salvage, the libellants were bound to accept their assistance, and admit them as joint salvors; and they have in fact appeared and filed a claim for a share of the salvage.

As to the claim of the master and crew of the *Only Son*, it is to be remarked, that in the controversy that arose between the parties, they did not claim nor ask to be admitted as joint salvors. They claimed the sole and exclusive possession of the wreck, as being first in discovering and taking possession of it. Their avowed purpose was to exclude the libellants entirely, and take her into port themselves.

It is clear, upon the evidence, that when the *Only Son* discovered the wreck, it was in the legal possession of the libellants. The proof is that they discovered and boarded it on the evening of the 7th of May. They left no hands on board, it is true, to retain the actual and corporeal possession during the night, nor could men have remained on board during the night, without some risk of life. But they lay by in company, near the wreck, for the purpose of taking her in tow the next morning. The title which is acquired to property by finding, is a species of occupation; and it is laid down as a rule of law, by the civilians, that the mere discovery or sight of the thing is not sufficient to vest in the finder a right of property in the thing found. Pothier, *Traite, de la Propriete*, No. 63. His title is acquired by possession, and this must be an actual possession. He cannot take and keep possession by an act of the will, *oculis et affectu*, as he may when property is transferred by contract, and the possession given by a symbolical delivery. To consummate his title, there must be a corporeal prehension of the thing. Though it is said that it is established by custom (*moribus receptum est*) and that such was the ancient law of the Romans, when two are near together, or in company, where the thing is found, that the title is acquired in common. Pothier, *Pandects*, 41, 1, 8; Heineccius, *Recitationes in Instit.*, § 350; Voet ad *Pandect*, 41, 1, 9. Upon these principles, the discovery of the wreck left dere-

lict, by the three schooners, and the boarding her from one of them, was sufficient to give them the right of possession. The three which were in company when she was discovered were entitled to share equally in the good fortune, though she was boarded and the actual possession taken by only one, for those who boarded took possession for the benefit of all. [See note at end of case.]

The right of possession having become perfect, was not lost by temporarily leaving the wreck, without the intention of ultimately abandoning it, but with the purpose of returning and resuming the actual possession, and carrying her to a place of safety the next morning. Things being once in our possession remain so, while they are subject to our custody, and are so situated that we can resume the actual possession at pleasure; and this principle is equally applicable whether the right of dominion is acquired by finding or by an onerous title. Pothier, *Traite de la Possession*, No. 79; Vinnius. In *Just. Inst.* lib. 2, 1, 18. When, therefore, the wreck was discovered by the *Only Son*, on the morning of the 8th, the fishermen, though not in the actual possession, *pedis positione*, had that kind of possession that preserved all the possessory rights which they acquired the night before. Having discovered and taken the property into their hands, they had a right to retain it for the purpose of carrying it to a place of safety, and entitling themselves to the reward allowed in such cases, and to exclude all others from interfering with their possession. They had not only acquired rights, but had come under obligations with respect to the property. The finder of property, left derelict at sea, does not acquire the dominion or the absolute property in what is found. He acquires the right of possession only, with a title to a reasonable reward for his services, when the property is brought to a place of safety. The finders were, therefore, bound, unless they chose to abandon it, to exert themselves with all due care, fidelity, and vigilance, to preserve and protect the residuary interest remaining in the true owners. The master and crew of the *Only Son*, although they doubtless supposed that they were the first discoverers of the wreck, had no right to disturb the possession of the libellants; and as they were not in sight when the schooners first discovered and took possession of it, they have no just grounds for claiming to be admitted as joint salvors.

But although the libellants may have had the right of exclusive possession, they were bound to use every reasonable precaution to insure the safety of the property, for the benefit of the owners, and it is argued, therefore, that it was their duty to accept the aid of the *Only Son*, though they might thereby diminish their share of the salvage. It is true that salvors are bound to act with good faith towards the owners, and this obliges

them to use all reasonable and available means to insure the safety of the property. They are influenced, primarily, in engaging in the service, by the expectation of reward. But when once they have engaged in the business, their own interest is not alone involved. When the goods are rescued from danger and brought to a place of safety, they are saved for the owner, after deducting a just and proper compensation for the salvors. A person undertaking to save derelict goods stands, in relation to the owner, somewhat in the character of a negotiorum gestor of the Roman law, that of a voluntary agent who interferences in the affairs of another without a mandate or authority, and he is bound to act for the interest of the owner as well as his own. Generally the interest of both will be the same, that of conveying the goods to a place of safety without loss and expense; but if it is otherwise, it would be a violation of good faith for a salvor to look solely to the enhancing of his reward at the expense of the owner. The golden rule, of dealing with others as we would have others deal with us, is a principle of social duty, deeply laid in morals and in the constitution of human nature; and in these cases of providential calamity, it is a rule of law as well as of morals. If the finder cannot, with his own force, convey the property to a place of safety, without imminent risk of a total or material loss, he cannot, consistently with his obligations to the owner, refuse the assistance of other persons proffering their aid, or exclude them from rendering it, under the pretext that he was the first finder and had thus gained a right to the exclusive possession. The principles of good faith are of universal obligation, and binding in all cases in which the interests of others are involved.

Upon this part of the argument the question is, whether the three schooners with their own crews, constituted a force apparently sufficient for the service, under the circumstances of the case. For if the force was manifestly inadequate, so that the attempt to save the wreck, without other assistance, would be exposing the property to great hazard, then it was their duty not merely to accept, but to solicit aid, and not expose the property of the owner to a total loss, in their eagerness to enhance their own reward. The Amethyst was a vessel of 93 tons; the schooners were smaller, one being of 60, one of 55, and one of 45 tons; but each was manned with a full crew of fishermen, amounting in the whole to eighteen men. The weather was calm, and the wreck lay about fifteen miles from the island of Monhegan, in which there is no harbor, and about double that distance from the safe harbor of Boothbay. To one not versed in nautical affairs this would appear to be a sufficient force to tow the wreck into port, with ordinarily favorable weather, and the prospect of the morning was that of good

weather. The prudence and propriety of men's actions are not to be judged by the event, but by the circumstances under which they act. If they conduct with reasonable prudence and good judgment, they are not to be made responsible because the event, from causes which could not be foreseen nor reasonably anticipated, has disappointed their expectations. The schooners took the wreck in tow, and had, without difficulty, carried her nearly to a place of safety, when, the weather having become boisterous, the cables broke, one after another, from the violence of the tempest, from their holdings, and at last from the wreck, and she was carried by the waves on a dangerous reef of rocks, so that the vessel was nearly a total loss. Now it is not apparent how another vessel, of about the same tonnage as the fishermen, would prevent this calamity. If the weather had continued favorable, the three were sufficient; and in the storm which arose, it is not probable that the presence of the Only Son would have insured, or could have contributed much towards, her safety. On the facts proved, it does not appear that the libellants would have been chargeable with any fault which would impair their claims for salvage, by declining to admit their participation in the service, if it had been offered. But in point of fact it was not offered.

The whole mass of property saved in this case is small; the value, after deducting expenses, amounting only to \$841.12, the largest part of one moiety of which is exhausted by the necessary expenses of getting the property ashore and securing it, after the wreck went on the rocks. So that leaving but a pittance for the owners, the compensation of the salvors will scarcely amount to a quantum meruit, for the laborious and dangerous service of rescuing the goods from the waves, and I may add, saving them from pillage from the piratical shoresmen, after they were landed. I shall allow \$400 salvage, leaving the cost and expenses a charge on the residue.

Decree: This case came on to be heard upon the libel, answer, depositions, and exhibits in the cause, and was argued by counsel; upon consideration whereof it is ordered, adjudged, and decreed, that there be allowed, out of the proceeds of the sale of the savings of the wreck of the vessel and the cargo now in the registry, the sum of \$400 as salvage. And it is further ordered, adjudged, and decreed, that of said sum of \$400 there be allowed and paid to—

The owners of the schooner Ocean.....	\$40
The owners of the schooner Wave.....	40
The owners of the schooner May Flower.....	40
	\$120

—and that the residue of the said sum of \$400, to wit: the sum of \$280, be divided into twenty shares, and that there be allowed and paid to—

Samuel M'Clintock, who superintended the landing of the goods, etc.,	1 share, \$14	
Moses Lewis, skipper of schooner Ocean,	2 do.	28
George Brewer, skipper of schooner Wave,	2 do.	28
John Hotten, skipper of schooner		
May Flower,	2 do.	28
Benjamin Orchard,	1 do.	14
James Lowry,	1 do.	14
John Knowles,	1 do.	14
Morrill Thompson,	1 do.	14
—, cook,	1 do.	14
Benjamin Gray, boy,	1/2 do.	7
Freeman Reed,	1 do.	14
James C. Auld,	1 do.	14
Samuel Brewer,	1 do.	14
Caleb S. Reed,	1 do.	14
Ira Quimby,	1 do.	14
James Gould,	1 do.	14
William Huff, boy,	1/2 do.	7
Samuel Montgomery, do.	1/2 do.	7
William Hotten, do.	1/2 do.	7
	20	280
		120
		\$400

And it is further ordered, that all costs and expenses be charged on the residue of the proceeds of the sale remaining in the registry, amounting to \$441.12, and after deducting the same that the remaining sum be paid to Joseph T. Sherwood, Esq., her Britannic majesty's consul, and the authorized attorney of the claimants, for their use. And it is further ordered, inat the sum of thirty dollars, found on the person of — —, a passenger found on board the vessel, drowned, now in the hands of Thomas Cunningham, coroner, after deducting ten dollars to be paid Samuel M'Clintock for the expenses of his interment, be paid to the said Joseph T. Sherwood, for the use of the legal heirs of the deceased.

NOTE, [from original report.] It is, says Pothier, an ancient pretension, that of claiming a part of a thing found, on the pretext of having seen it at the same time; we find it in Plautus, in Rudente, act 4, scene 3. Trachalio claimed a share in a valise which Gripus had fished up from the sea. On this demand, Gripus asks, "Quemne ego excepi e mari?" Trachalio coolly replies, "Et ego inspectavi e littore." Phaedrus commemorates the same pretension in a dispute between two bald men for a comb,— "Invenit calvus forte in trivio pectinem; Accessit alter aequo defectus pilis; Eia, inquit, in commune quodcumque est lucri;"—this is a windfall for both of us.

Case No. 331.

The AMIABLE NANCY.

[1 Paine, 111.]¹

Circuit Court, D. New York. Sept. Term, 1817.²

ADMIRALTY—JURISDICTION—MARINE TRESPASS OR TORT—PRIZE—DAMAGE BY PRIVATEERSMAN—MEASURE OF DAMAGES.

1. The district courts possessing all the powers of courts of admiralty, whether considered

¹[Reported by Elijah Paine, Jr., Esq.]

²[Reversing an unreported decree of the district court.]

as instance or prize courts, have jurisdiction of all cases of marine trespass or tort.

[Cited in American Ins. Co. v. Johnson, Case No. 303; U. S. v. New Bedford Bridge. Id. 15,867; Waring v. Clarke, 5 How. (46 U. S.) 473; The Merchant, Case No. 9,434.]

[See note to U. S. v. Wiltberger, 5 Wheat. (18 U. S.) 106 et seq.]

2. If the master or crew of a privateer exceed their authority, and in the performance of legitimate acts commit an outrage, the owners are liable.

[Cited in New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 435; The Mulhouse, Case No. 9,910.]

3. Where a neutral vessel was plundered of her papers by a privateer, in consequence of which she was seized by another belligerent, and proceeded against as prize, but made a compromise with her captors and paid a ransom and costs: Holden, that the owners of the privateer were not liable for those items, (there being no privity to the compromise,) nor for any other injurious consequences flowing from the compromise.

[Cited in The Mulhouse, Case No. 9,910.]

4. The rule of damages, in cases of marine trespass, is the full value of the property injured or destroyed. A claim for loss of voyage rejected.

5. Vindictive damages not allowable against the owners of a privateer, for trespasses committed by the crew. Whether the owners are liable at all for trespasses on the person? Quere.

[6. Cited in The Stephen Allen, Case No. 13,361, to the point that the jurisdiction of the court of the United States in admiralty is not limited by the rules of common law; Borden v. Hiern, Id. 1,655, to the point that an admiralty suit may embrace causes of action arising ex contractu and those arising ex delicto.]

[In admiralty. Libel by Peter Joseph Mervault, owner of the schooner Amiable Nancy, and by the master, mate, supercargo, and one of the mariners, against the private armed brig the Scourge, for illegal detention and search. Decree for libelants.² Defendant appeals. Amount of the decree reduced. The libelants appealed to the supreme court, where the decree of the circuit court was modified by adding some items to the allowance. See The Amiable Nancy, 3 Wheat. (18 U. S.) 546.]

D. B. Ogden and C. D. Golden, for appellants.

T. A. Emmet, J. Wells, and J. O. Hoffman, for respondents.

Before LIVINGSTON, Circuit Justice, and VAN NESS, District Judge.

LIVINGSTON, Circuit Justice. This was a libel for damages in the district court for the southern district of New York, by the owner of the schooner the Amiable Nancy and her cargo, and by the master, mate, supercargo, and one of the mariners, against the appellants, as owners of the private armed brig the Scourge.

The facts were in brief as follows: The

²[Opinion not reported, and not now accessible.]

Amiable Nancy, a neutral vessel, on a voyage from Port-au-Prince to Bermuda, but steering, at the time of capture, for Antigua, was boarded in the year eighteen hundred and fourteen by a crew sent for the purpose of search and examination, by the commander of the Scourge. Having ascertained her neutral character, and the regularity of her papers, which employed about ten minutes, the crew of the Scourge, instead of returning to their own vessel, continued two hours on board of the Nancy; during which time they plundered the libellants of property valued by themselves at five hundred and seventy-nine dollars, and took away some articles belonging to the vessel, worth about twenty-five dollars. They also destroyed or carried away the schooner's papers, and beat and otherwise ill treated the supercargo and mariners. The schooner being abandoned by the boarding crew, pursued her course for Antigua, where she arrived the fourth day after her detention as aforesaid, and was there seized by his Britannic majesty's guard brig the Spider, in whose possession she remained about a fortnight. She was then libeled in the vice-admiralty of Antigua, and a condemnation expected, as is alleged, on the ground of her not being furnished with any papers. No counsel was employed, but a condemnation was suffered to pass by default, on a previous agreement between the captors and supercargo, entered into by the advice of the merchant who acted as consignee, that immediately after the condemnation, the schooner and cargo should be delivered to the supercargo, on his paying one thousand dollars to the captors, and all law and court charges. The supercargo, was obliged to take away the balance in specie, he being allowed to put no cargo on board in consequence of the condemnation. This sum of one thousand dollars was accordingly paid to the captors, as also five hundred and forty-two dollars and twenty-one cents for court and law charges; to raise which, in specie, as no other money would be received, and also specie to take away with him, it became necessary to sell at a great discount the bills which had been given in payment of the schooner's cargo, which occasioned a further loss of five hundred and thirty-six dollars and forty-four cents. The whole sum disbursed for the items already mentioned, and for sundries supplied the schooner during her detention, amounted to two thousand one hundred and twenty-seven dollars and forty cents. The cargo, at the time of the plunder, consisted of 312½ barrels of corn, and one of arrow root, the invoice price of which at Port-au-Prince, exclusive of some charges, was sixteen hundred and twenty-one dollars and fifty-six cents. The corn was sold at Antigua, but before permission could be obtained for that purpose, the price of this article had fallen a dollar per bushel. Some of the corn was injured by the Spider's crew, who had

mixed damaged with good corn, which caused a fermentation, that rendered it unfit for use; and it was in consequence thrown overboard, which produced a loss of twelve hundred dollars; at least the corn sold, which was 944½ bushels, netted two thousand six hundred and one dollars and nine cents. The maintenance of the master and supercargo while at Antigua, twenty-five tons stone ballast, the charge for protest, and allowing fifteen dollars per day for the expense of the schooner, while lying at Antigua, amounted to four hundred and fourteen dollars. The cargo might have been sold at Antigua (but for the interruption of the Spider,) for rum, and the probable amount of sales in that case would have been three thousand eight hundred and fifty dollars. This rum, it is stated might have been sold at St. Bartholomews, where it is said the schooner would have gone, had she not been captured by the Spider, and would have there produced probably more than four thousand dollars. It appears further, that the original plan of the voyage was to sell the cargo at Bermuda. The price of corn at which place is not mentioned, except it is stated to be very high. At Bermuda eight hundred muskets were to be taken in, which had already been contracted for at three dollars each, and for which the Haytien government was under agreement (which however is not produced,) to pay sixteen dollars a piece. From Antigua the schooner proceeded to St. Bartholomews, where she took in sundry articles, which sold, at an average, at the enormous profit of about three hundred per cent. at Port-au-Prince. Some of the parties concerned in the plunder of this schooner, have been tried by a naval court martial and punished for their misconduct.

On this evidence, the district court ordered the clerk to associate to himself two respectable merchants, and with them to estimate the damages sustained by the libellants by reason of the capture, and detention of the Amiable Nancy.

1. Those arising from the destruction of and taking and carrying away property from on board the said vessel.

2. All the expenses incurred at Antigua, including the loss on the corn and wages of the crew.

3. Interest on the amount of damages thus arising, from the time of the vessel's leaving Antigua.

4. A reasonable allowance for coming to the United States to prosecute this claim, collect testimony, &c.

5. The court further ordered, that the claim for damages, for personal injuries, and counsel fees, be allowed; but that the assessment of the same be made by the court on the filing and confirmation of the clerk's report.

In obedience to this order the clerk, and merchants as associated with him reported,

that they had assessed the damages as follows:

Monies paid for redeeming vessel and cargo at Antigua after condemnation.....	\$2,127 60	
Loss sustained on the sales of the cargo of corn at Antigua in consequence of the capture.....	1,200 00	
Detention, wages of the crew at Antigua in consequence of the Spider brig, occasioned by the loss of ship's papers.....	414 00	
Articles of plunder from the schooner.....	25 00	
Money and effects plundered from Mr. Roux, the supercargo.....	470 00	
from the master.....	100 00	
from the mate.....	80 00	
from four of the mariners.....	124 00	
Losses sustained in consequence of the expenses occasioned by the seizure and condemnation in Antigua, growing out of the schooner having been deprived of her papers by the crew of the Scourge, as proved by the deposition of Samuel Dawson and T. Lavand of Port-au-Prince.....	3,500 00	
Interest on this sum from 1st January, 1815, to 1st July, 1817, at 6 per cent. per annum.....	1,206 07	
Allowance for Mr. Roux's expenses to and from Port-au-Prince, Antigua, Boston, &c. detention in New York, loss of time, and other incidental expenses, procuring evidence, and attending the trial.....	1,500 00	
		\$10,746 67

This report was filed and confirmed on the 30th June, 1817, when the court further decreed, that there be paid to the libellants for personal injuries the following sums:

To the supercargo.....	\$ 500
To the captain.....	100
To the mate.....	100
To the martner, Elia Lenar.....	50
To the supercargo for commission.....	1,000
For counsel fees, proctor's fees, and the costs of court.....	750
	<u>2,500 00</u>
	\$13,246 67

making a sum total to be paid by the appellants of \$13,246.67.

From this decree the owners of the Scourge have appealed to this court, and contend,

1. That the district court had no jurisdiction of the cause.

This court will not stop to inquire whether it be too late to urge this objection to the decree, because, which is one answer given to it by the respondent, no plea to the jurisdiction was interposed below; for it entertains no doubt that the libel was properly filed in that court, and that error would have been committed if it had been dismissed on that ground. Some doubts were

expressed whether, if such cases be cognizable in the district court, they are so in virtue of the powers which it possesses as a prize, or of those which exercise it as an instance court; and it was supposed, or at least intimated, by one of the appellant's counsel, that if cases of this kind were to be regarded as appendages of its prize jurisdiction, the present suit could not be sustained, in as much as the district court possessed no such jurisdiction, without some special act of congress conferring it. In support of this position, the practice of Great Britain was referred to. It is true that a court of admiralty in England, merely as such, has no jurisdiction over prizes; but that to constitute such an authority in it, or to call it forth at the breaking out of hostilities, a commission under the great seal issues to the lord high admiral to enjoin it on the court of admiralty to proceed on all cases of captures, &c. and to hear and determine according to the course of the admiralty and the law of nations. Such is undoubtedly the practice of Great Britain, introduced probably from a silence on this subject in the commission by which a judge of the admiralty is appointed, which enumerates particularly every object of his jurisdiction, but says nothing of prizes. It is not known that this is the practice of any other nation, but it is believed that their courts of admiralty, are regarded as the national and proper tribunals for taking cognizance of captures in time of war, without any special delegation from the sovereign for that purpose, on every commencement of hostilities. If so, and the district court by its act of organization has exclusive original cognizance of "all civil causes of admiralty and maritime jurisdiction," why should it be restricted in its cognizance to such cases as belong to the English courts of admiralty as instance courts, more than those of any other nation? Civil causes, it is said, do not embrace cases of prize, which arise out of and are determined by the jus belli, and not by the civil or municipal law. But it cannot be necessary to pursue this inquiry farther; for as early as the year 1794 [Penhallow v. Doane,] 3 Dall, [3 U. S.] 61, the supreme court of the United States unanimously decided, that every district court of the United States possessed all the powers of a court of admiralty, whether considered as an instance or as a prize court; so that, if the present case belongs to the admiralty at all, which is not denied, it is unimportant in the present inquiry to determine under what particular branch of its jurisdiction it be cognizable, as it must have a right to inquire into and to ascertain the quantum of damages and costs in all cases of marine trespass or tort.

But admitting the jurisdiction of the district court, it is denied by the appellants, that they are liable at all for the injuries enumerated in the libel. After so many and such

direct authorities on this point, it is matter of some surprise that a question of this kind should be made. It has long been regarded as a general principle of maritime law, and not resulting from any special contract, that owners of a privateer are liable for torts committed by captains whom they may employ; and whatever doubt may have once existed as to the extent of this responsibility, it is now well settled, that it is not limited by the value of the privateer, which would often prove a very inadequate compensation, but that they are personally accountable for the whole of the injury committed. This is not only the uniform language of elementary writers, who have treated of the subject, but is one of the points decided by the supreme court in the case already referred to. It is there declared, "that the owners of a privateer are responsible for the conduct of their agents, the officers and crew, to all the world, and that the measure of such responsibility is the full value of the property injured or destroyed." The only exception to this rule, or rather the only case which is supposed not to fall within it, is where the master is guilty of a tort in matters totally foreign to his authority; and this is supposed to be the case before the court. The authority of the boarding crew extended, it is said, to the making of a search, and to capture, if circumstances should justify it, but not to rob and ill treat the crew of a friendly vessel.

Admitting this to have been their authority, if they were acting under it, as was the case when they committed the outrage, the owners are liable, although the outrage itself was not intended to have been sanctioned by it. "If the captain of a privateer," says Browne, "emissus ad praedandum perperam proedetur, if commissioned to cruise against an enemy, he plunders a friend, the owner is responsible;" and assigns as a reason, that his agent was then acting within his province when the wrong was perpetrated. So the owners were held liable by the supreme court of the United States in the case of *Del Col v. Arnold*, 3 Dall. [3 U. S.] 333, for any spoliation or damage done to the property, which was not considered as authorized or excused by a right to seize and bring in a vessel for further examination.

The court being of opinion that the owners in this case are responsible to the libellants, will proceed to inquire to what extent the latter can ask a compensation at their hands; and whether the district court has not erred in the principles which it adopted in fixing on this remuneration. The court cannot refrain from remarking, before it proceeds, that it is impossible not to be struck with the very large amount which has been assessed for damages, when compared with the actual injury sustained. The whole of the property plundered was not worth, in the opinion of the libellants themselves, who cannot be suspected of an under-valuation, more than six hundred dollars, or thereabouts, and

the appellants have been decreed to pay for this outrage, connected with some personal injury, very improper indeed, but not very serious, and for which seven hundred and fifty dollars was deemed an adequate recompense, the large sum of thirteen thousand two hundred and forty-six dollars and forty-six cents; that is, more than twenty times the extent of the articles plundered, and more than four times the value of the schooner and the whole of the cargo, although the vessel remained with the owner, and no part of the cargo was touched. It may well, therefore, be supposed, that some mistake has been made; as such damages for such an injury are, probably, without example in any court, of whose decisions we have any information.

The appellants say, that the respondents are entitled to nothing more than an indemnity for the property taken, and to a reasonable remuneration for personal injuries. Believing this to be the proper and only safe rule of damage, they insist that they are entitled to be relieved here against the sums allowed for redeeming the vessel at Antigua, after the condemnation, for the loss sustained on the sales of the cargo at that place; and for the loss sustained in consequence of the schooner's not completing her voyage to Bermuda, and returning from thence to Port-au-Prince. These are not exactly the terms in which this loss is expressed; but it is very clear that the report, by referring to the testimony of Dawson and Lavand, intended the allowance of three thousand five hundred dollars, as a compensation for the loss of the voyage. The interest on these items, and the commission of the supercargo, are also objected to by the appellants. These sums form an aggregate of nine thousand thirty-three dollars and sixty-seven cents. All these allowances were made on a supposition, that the losses for which they were intended as a compensation, were produced by the destruction of the schooner's papers.

It is not possible to express in language sufficiently strong, the indignant feelings which are excited by this wanton act on the part of the boarding crew; but we must not indulge these feelings so far as to prevent a dispassionate consideration of the conduct of the supercargo, and whether it has justly involved the appellants in the very extensive responsibilities which, it is alleged, have grown out of it. Without determining what consequence or liability might have attached to the owners of the privateer, if a condemnation after a full defence had been pronounced for the want of papers, the court will inquire, whether they can be liable for any damage occasioned by the compromise that was made. To render this act of the supercargo binding on the appellants, so far as to create in them a responsibility for any of its consequences, it ought to have been made not only in good faith, but it should

be one which might be fairly justified by the circumstances of the case, and above all, there should be some privity between those making and those who are to be affected by it. The bona fides of this transaction the court is not disposed to call in question, although it would have been more satisfactorily made out, if the supercargo, instead of relying on the advice of his consignee, who was not a professional gentleman, had submitted the case to a proctor in the island of Antigua, and had acted under his directions.

But however fair the conduct of the supercargo may have been in this transaction, this court is of opinion, that the circumstances in which the schooner and cargo were found at Antigua, did not call for any such sacrifice, as was agreed to by the supercargo. If it be true, that the only cause alleged for proceeding against them as a prize of war, was a want of papers, it would be a libel on the court of vice-admiralty of that island, or any other court, to entertain a moment's doubt of their acquittal and restoration, as soon as it appeared, as it would by the answers to the standing interrogatories, that such destitution was occasioned by a robbery or plunder on the high seas. Nor is it to be believed, if that fact was satisfactorily made out, that the captors would think of an appeal. The apprehensions, therefore, of great delay and a heavy expense, were altogether visionary. But if the compromise were proper, and made in good faith, there is such a total absence of all privity between the parties making it, and those who are now to be charged with it, that it must be considered as altogether at the peril of the former. A compromise with captors in time of war, respecting property under insurance, is binding upon underwriters, because by capture a technical total loss takes place, upon which the master becomes an agent for all the parties in interest, and it is therefore reasonable that his acts should bind those whom he represents. But in the case before the court, there is no contract or agency expressed or implied. A trespass can never create such a relation between those who commit the tort and those who are injured by it, as to constitute the latter the attorneys or agents of the former.

None of the consequences therefore flowing from the compromise are chargeable on the appellants. This however, is not the only ground for rejecting many of the allowances which were made by the district court. If the compromise were binding on the appellants, they have been rendered answerable for damages, either not necessarily consequent on it, or too uncertain. If they are to form a proper charge against the owners of the Scourge. To this objection the charge of three thousand five hundred dollars for loss of voyage, is peculiarly liable, which is also a departure

from the rule prescribed for the assessment of damages, in cases of this kind, by the supreme court of the United States. By that rule, the measure of responsibility, "is the full value of the property injured or destroyed."

Damages for the loss of voyage, are by much too contingent and uncertain, to form the basis of any satisfactory calculations; for if it be adopted as a rule, it must apply to long as well as to short voyages. Every one will at once perceive the injustice of such an allowance in an India voyage, where a capture and plunder of all her specie might take place, the very day after the vessel's leaving port; and in less than a fortnight she might be on a second voyage with a new supply of dollars. Why, in such a case, should the profits be paid by the captors? And here, who can say, although the voyage be shorter, that the Amiable Nancy would ever have arrived at Bermuda, or what might have been the state of the market there, or whether the muskets would have been delivered according to contract? Or if so, whether the vessel would have reached Port-au-Prince in safety, and found the government of Hayti disposed to pay for them, at what is now alleged to have been the stipulated price? Or who can say, if it be conceded that the original voyage was frustrated by the irregular conduct of the crew of the privateer, (which may well be doubted, as the schooner was bound to Antigua when she was boarded,) that another voyage equally, or more profitable, might not have been projected at Antigua?

It is a fact in this cause, that a very enormous profit, approaching to three hundred per cent., was made on the cargo shipped at St. Bartholomews, and sold at Port-au-Prince, which, it is true, was not very large; but if the appellants be liable for any loss occasioned by not going to Bermuda, some deduction should be made for the gains actually made on the voyage from St. Bartholomews to Port-au-Prince. The nature of this action, however, is relied on as justifying a mode of assessing damages different from the one which is applied to ordinary cases of trespass. It is taken for granted, that vindictive damages are to be recovered, and that in such cases a court will not be very particular as to the limits within which it will circumscribe a defendant's liability. But why assess vindictive damages? Have the appellants committed the outrage, or ordered it, or in any way sanctioned it? Or have they divided the plunder, or derived any benefit whatever from it? They were employing their vessel in a way permitted and encouraged by the government of their country, and under the securities prescribed by law. It is true, they have had the misfortune, which is but too common in this business, of employing men who have disgraced the flag under which they acted.

Unless this misfortune be attributed to them as a crime, they are innocent of any actual or intentional injury, and perhaps more entitled to the protection of the court than those who are generally defendants in actions of trespass.

However desirable it may be, in the opinion of many, to put a stop to this mode of warfare, no court has a right to throw obstacles in its way, or to discourage it, by imposing excessive and extravagant penalties for every irregularity, however trifling, so long as government think proper to furnish public and private vessels with commissions of this kind. If the rule of vindictive damage, which has been pressed upon the court, were adopted, it might amount to a total prohibition of privateering; which no court, mindful of its duty, will think it has any right to effect in this way. Nor will such mode of assessing damages add much, while the practice is continued, to the security which neutrals already have, against occasional trespasses on their property. If the fear of a forfeiture of wages and corporal punishment, to both of which some of this crew have been sentenced by a naval court martial for their improper conduct, will not restrain mariners, who engage in this service, within proper limits, it is not probable that they will be influenced by any apprehensions of laying on their employers an onerous responsibility. But if such a rule is to be resorted to, as a means of exciting those who engage in this species of warfare to greater circumspection in the choice of seamen, it is believed that every expectation of that kind will prove fallacious. It will not be easy, whatever care or diligence be used, to make any discrimination on which much dependence can be placed. Seamen for this purpose would continue to be selected more for their bodily strength, their personal courage and seamanship, than from any regard to their moral character; about which it would be much more difficult to acquire information, than concerning the other qualifications which have been mentioned.

There are other objections to such an arbitrary measure of damages. It places too much in the discretion of a judge, who, under the influence of the angry feelings which such irregularities are well calculated to call forth, would often award an immoderate compensation without reflecting, that the person who is to make it, may be as innocent as those to whom it is to be paid, and may hold in as great detestation as the court itself the violation or wrong that has been perpetrated. Such heavy assessments, and which are scarcely reducible to any rule, will also prevent compromises between the parties. No offer of compensation by the owner of a privateer, however fair, and although fully commensurate with the loss that has been sustained, will satisfy the extravagant pretensions of the injured party, which such a rule will prompt him to set up.

Neither is the loss on the corn, from the damage occasioned by the conduct of the Spider's crew, to be thrown on the appellants. This would render them liable, not only for the illegal acts of their own mariners, but of those in whose choice they could have no agency.

The supercargo's commission must also be deducted; for besides the objection to it, that its loss was occasioned, if at all, by his own compromise, it is liable to a further difficulty. It does not appear what remuneration he was to receive, but by scarcely any possibility could his commission on the sales of the outward cargo, to which it must be restricted, have amounted to any thing like the sum which has been allowed. There is nothing indeed in the evidence to render it very clear, that his commission has not been earned and paid.

The interest on these items will, of course, be deducted, and indeed if these sums were allowed, it would hardly be proper, after so liberal an assessment of damages, to have calculated any interest on them.

Little or no objection has been made to the compensation allowed for the personal wrongs inflicted on some of the respondents, which therefore will not be disturbed; but I cannot suppress my surprise, that for injuries of this nature, which are often produced by some intemperate language of the party claiming a recompense, the owners should ever have been considered as answerable.

Considering that seven hundred and fifty dollars has been allowed for counsel fees, and the proctor's costs, and the costs of court, the further sum of fifteen hundred dollars, given to Mr. Roux for his expenses in producing evidences, attending the trial, &c., is too much, and must be reduced one half, especially as the greater part of the testimony has been collected for the purpose of rendering the appellants liable for charges, which, in the opinion of this court, cannot be recovered of them.

This court reverses the sentence of the district court, and allows as follows:

To the owners of the schooner for expenses during the detention at Antigua, according to the estimate of the consignee.....	\$300 00	
For the expenses of mate and supercargo while there, and according to the estimate of the same witness	70 00	
For articles plundered from schooner.....	25 00	
Interest on these sums at ten per cent. from 1st January, 1815, to 1st September, 1817, two years and eight months..	103 94	
		\$ 498 94
To the master of the schooner for articles taken from him...	100 00	
The same interest.....	26 66	
For personal injuries.....	100 00	
		226 66
		725 60

Amount brought forward	\$725 60	
To the supercargo,		
For articles taken from him	470 00	
The same interest	114 32	
For personal wrongs	500 00	
For his expenses in collecting testimony at Antigua, Port- au-Prince, &c., and attending trial	750 00	
	1,864 32	
To the mate,		
For property lost by him	80 00	
The like interest	21 32	
For the injury to his person	100 00	
	201 32	
To Lenar, the sailor,		
For property taken from him	54 00	
The like interest	14 40	
For his personal injury	50 00	
	118 40	
	\$2,909 64	

It is therefore ordered, adjudged, and decreed, that the sentence of the district court be reversed, and that there be paid by the appellants to the respondents and libellants, the said sum of two thousand nine hundred and nine dollars and sixty-four cents, in the manner following, that is to say: To the libellant, Peter Joseph Merault, owner of the schooner and cargo, the sum of four hundred and ninety-eight dollars ninety-four cents: To the libellant, Gallien Aneil, master of the schooner, the sum of two hundred and twenty-six dollars sixty-six cents: To the libellant, Frederick Roux, the supercargo, the sum of eighteen hundred and sixty-four dollars thirty-two cents: To the libellant, Anthony Moasset, the mate, the sum of two hundred and one dollars thirty-two cents; and to the libellant, Elia Lenar, one of the mariners, the sum of one hundred and eighteen dollars forty cents. And it is further ordered, adjudged, and decreed, that the appellants pay to the libellants the further sum of seven hundred and fifty dollars for counsel fees, and also the proctor's costs, and the costs of the district court, to be taxed; and it is further ordered, that each party pay his own costs in this court.

[NOTE. On appeal to the supreme court, the point embraced in the first paragraph of the syllabus was affirmed; and it was further held that, in the event of an illegal seizure, the wrongdoers are responsible in case of wanton outrage, though the owners of the privateer are not bound to the extent of vindictive damages. The item for deterioration of cargo was rejected, because it was not occasioned by the improper conduct of the captors. The measure of damages is the cost or value of the property lost, and, in case of injury, the diminution in value by reason thereof, with interest; but no allowance should be made for possible profits of an unfinished voyage. The items for ransom were rejected, but allowance for court and other expenses, amounting to \$774.21, was added to the decree of the circuit court. The *Amiable Nancy*, 3 Wheat. (16 U. S.) 546.]

AMINHISOR, (UNITED STATES v.)

[See United States v. Aminhisor, Case No. 14,442.]

Case No. 332.

The AMISIA.

[10 Adm. Rec. 254.]

District Court, S D. Florida. Sept. 2, 1872.

SALVAGE—REMOVAL OF CARGO TO SAVE VESSEL.

[Libel for Salvage by Frederick Roberts and others against the materials and stores of the brig *Amisia*. There is no opinion accessible.]

[Cited in *The El Dorado*, 50 Fed. 958, to the point that property which has to be removed in order to save the ship is in as great danger as if the ship were lost; and the fact that she was finally saved is immaterial.]

AMITY, The. (MOODIE v.)

[See *Moodie v. The Amity*, Case No. 9,741.]

Case No. 333.

AMORY v. AMORY.

[18 Int. Rev. Rec. 149; 12 Amer. Law Reg. (N. S.) 585.]

Circuit Court, E. D. Wisconsin. 1873.

CIRCUIT COURTS—JURISDICTION—ENJOINING ACTS BY EXECUTORS—SETTING ASIDE JUDGMENT OF STATE COURT—FRAUD—CONSTITUTIONAL LAW—LEGISLATIVE POWERS.

[1. Mrs. A. brought suit against A. for divorce in New York, where a decree was entered against her declaring that she had never been legally married to A. Thereafter A. died, and his will was admitted to probate in Wisconsin. Mrs. A. contested the probating of the will, and appealed to the circuit court of the county, where she alleged that the decree against her in the divorce case had been obtained by the fraud of her attorney. From a judgment in her favor in that court, the executors appealed to the state supreme court, which decided that the New York decree must be taken as conclusive as to her status, and that her appeal must be dismissed. *Held*, that Mrs. A. could maintain in a federal circuit court (diverse citizenship being shown) a bill in equity to restrain the executors from setting up or using the will to defeat her legal rights as A.'s widow. *Amory v. Amory*, Case No. 334, overruled.]

[See note at end of case.]

[2. The decree of the New York court was not conclusive as to the marriage, but Mrs. A. could get rid of it by showing it to have been fraudulently obtained, without having it vacated in New York. *Amory v. Amory*, Case No. 334, overruled.]

[Cited in *U. S. v. Norsch*, 42 Fed. 418. Distinguished in *Osborn v. Michigan Air-Line R. Co.*, Case No. 10,594.]

[See note at end of case.]

This was a bill in equity, originally filed in the circuit court of Fond Du Lac, and transferred thence to the circuit court of the United States, praying for an injunction to restrain the executors of the last will and testament of James Amory from setting up or using the said will to defeat the legal rights of the complainant. The judges of the circuit court were divided in opinion as to whether a demurrer to the bill should be sustained.

J. M. Gillet, for complainant.
S. W. Pinney, for respondent.

Before DRUMMOND, Circuit Judge, and MILLER, District Judge.

DRUMMOND, Circuit Judge. On the 16th of August, 1861, James Amory died at Fond Du Lac, in this state, possessed of considerable personal and real estate, part of which was in Wisconsin. In September following Samuel B. Amory and John Amory, the brothers of James, presented in the county court of Fond Du Lac county a will, and asked that it be probated. Some time afterwards the present plaintiff appeared by counsel in that court, claiming to be the widow and heir of James Amory, and objected to the probate of the will, and asked for time to show that it was not the will of James Amory, and should not be probated. The case was continued from time to time until the 18th of December, when a further application was made by her for a postponement, but it was refused, and the will was admitted to probate by the county judge. Thereupon she appealed to the circuit court of the county, and the case went up to that court, and in the circuit court the executors of the will claimed that she had no right to appeal, on the ground that she had not been the wife of James Amory, and therefore had no interest in the estate, and for the purpose of establishing that, they introduced a record from the state of New York of proceedings in divorce, in which she had made an application against James Amory for a divorce on various grounds, and in which it appeared that one of the questions made in the case was whether in point of fact she was the wife of James Amory, it being alleged that at the time she was married to James Amory, in March, 1846, she had a husband living, and the court found the fact to be so, and for that reason, as it appears, the divorce was not granted and the bill was dismissed. This, of course, if true, shows that she had no interest in the property, but that she was a stranger, and had no right to appear or interfere with the estate of James Amory. She then alleged that the decree introduced from New York was obtained by the fraud of her attorney, and she asked that the question should be submitted to a jury, whether or not it was a fraudulent decree.

The circuit court ordered the issue of fact to be submitted to a jury, and then refused to dismiss the appeal, denying in other words the application of the executors. Thereupon, under the practice which prevails in this state, the executors took an appeal from the order of the court refusing to dismiss the appeal to the supreme court of the state. The case remains just as it was with the application on the part of the plaintiff for a trial by jury, granted by the court with various affidavits that were filed, and everything connected with the case as it was; the only question taken to the supreme court being whether the appeal should

have been dismissed. The supreme court decided that the circuit court ought to have dismissed the appeal on the ground that the record from New York was conclusive that she never was the wife of James Amory, and therefore that she had no interest in the estate, and directed the circuit court to dismiss the appeal. The case was then remitted to the circuit court, and, in compliance with the order of the supreme court, the circuit court dismissed the appeal. Shortly after the present plaintiff commenced a suit in the circuit court of Fond Du Lac county, and some time afterwards that suit, which is this suit, was transferred under the act of congress of 1867, before a complaint or any bill was filed, to this court, and after its transfer to this court the bill was filed, which is now the subject of demurrer.

Now there may be perhaps a question whether it was competent for the plaintiff, after the case had been thus dismissed under the order of the supreme court of the state, to make an application to the circuit court to get rid of the will which was thus established. Had she that right on the ground that the decree was obtained by fraud? I think she had. I do not think that question had become *res adjudicata*. Concede that the opinion of the supreme court is right, that the parties there might have tried the question upon the affidavits instead of an issue by a jury, and that that was a proper practice, the answer to it is, that it never was tried in that way. The plaintiff never submitted that issue upon affidavits, never asked for the decree of the court upon that issue upon affidavits, and therefore she was not precluded from making an application to the state court to have that issue tried in a proper way. She did ask that it be tried by a jury. Her appeal had been dismissed on the ground that she had no interest whatever in the subject-matter of controversy. Now, is it possible that this can be so? Is there no remedy in such a case? Suppose the case of a woman living in New York: a man owns an estate in Wisconsin and dies there; a will is presented, made by him as is alleged; it is probated, she comes forward and claims that she was the wife of the man who is thus dead. Can it be that without any notice to her, without, it may be, even her knowing that her husband is dead, she cannot have an opportunity of determining whether or not this is a will which divests her of any legal rights which she might possess? Can it be that because a will has been probated without her knowledge she cannot have an opportunity of being heard? How is she to be heard under the practice in this state? As I understand it she can be heard at law only by appeal. If she has no appeal, can she apply to a court of equity and obtain an order from a court of equity that this supposed will, if it was not in fact the will of her deceased husband, shall not be used

against her to prejudice her rights? I certainly do not see why.

Now while that is not the case here, her appeal had been summarily cut off and disposed of by the supreme court of the state, without any trial upon the issue which she tendered. And she had the right, in my opinion, to present her case on the equity side of the circuit court of this state to prevent these parties who had that probated will from using it to her prejudice, if in fact it was not a will. If that is so, she had the right to apply to this court, and to transfer her cause from a state court to the circuit court of the United States. Otherwise, the supposed safeguards which the constitution and the laws of the United States have thrown around the citizens of other states, become in such a case completely nugatory. That never could have been the intention of the constitutional provision and the acts of congress upon the subject.

Again: It is not necessary for us to determine now upon a demurrer to this bill whether all the relief that is sought for can be given. If any relief claimed by the plaintiff can be given, the demurrer should be overruled. This plaintiff claims to be the wife of James Amory. It appears upon the face of the bill that the will was set up against her and probated. He had no children. If he made no will, she, if his wife, was his heir under the law of this state. If he made a will, the devisees became his heirs. But he even by his will could not divest her of her rights of dower. If she was his wife she had a right that existed entirely independent of the will, and with which the probating of the will had nothing to do. And if his wife, she could come into the courts of this state and enforce her right of dower. Now if she does that, what bar is there to such an application? The bill says that the bar will be this record from the state of New York, which of itself would be prima facie sufficient, showing that she never was the wife of James Amory. But when she alleges that this decree of the New York court is void, because it was obtained by fraud, and established that fact, then she is entitled to relief independent of all considerations of the will, so far as her right of dower is concerned, unless, indeed, independent of the decree, they show that she was not the wife of James Amory.

It is enough to say that I think in the bill there are allegations sufficient, if sustained, to show that the decree of the court of New York was obtained by fraud. The particulars of the fraud are set forth in the bill. Among other frauds it is alleged that the very framing of the decree was fraudulently made by a person who apparently was acting as her attorney, but who was employed and fed by James Amory himself against her. If that is so, it cannot be controverted, I think, that when she makes an application in this court or any court of the state for

her rights of dower, and they interpose this decree, she has the right to show that it is of no effect, so far as the question of marriage is concerned. And if that is so, it does not affect this question of the probate of the will. I admit that as a general rule the probate of a will is to be treated as conclusive, certainly, wherever it comes up collaterally, but I am not prepared to admit that where a party has been so summarily dismissed from pursuing a remedy which the law furnished—to show that there was no will, and it was improperly probated—is without any redress by a direct application to a competent court to prevent the use of that will against the enforcement of all legal and equitable rights. A case recently came before the supreme court of the United States upon an application of a distributee against an administrator for the distribution of an estate, and the objection was taken that the party must go to the state court, as that was a matter entirely within the jurisdiction of the probate court, and that an application could not be made to the federal court although a party was a citizen of another state; and the court say such a rule would deprive the citizens of the several states of some of the rights which the constitution and the laws confer on them. *Payne v. Hook*, 7 Wall. [74 U. S.] 425. But it is scarcely competent for the legislature of Wisconsin to deprive a citizen of any other state of his legal or equitable rights, under the constitution and laws of congress, by declaring that they must be enforced in a local court.

In the *Gaines* case [*Gaines v. New Orleans*, 6 Wall. (73 U. S.) 642] there was a will of Daniel Clark, dated in 1811, which was probated in the upper court of Louisiana, and the executors went on and sold property, and placed the parties in possession. And Mrs. Gaines claimed under a subsequent will of 1813. She sought to enforce her rights in the federal courts, and they held that the probate of the will of 1813 revoked of itself the will of 1811. In *Gaines v. Chew*, 2 How. [43 U. S.] 650, the supreme court intimate that it was competent for a court of chancery to protect the rights of the plaintiff. It was suggested that those rights existed notwithstanding the probate of the will of 1811, although the will of 1813 had not been at that time probated.

These defendants in this case are residuary legatees under the will of James Amory. They claim all the real estate in this state. The plaintiff, if she be the wife of James Amory, has the right to come into court to enforce her rights of dower, to say the least. How can she not, if she is the wife of James Amory, prevent these parties from using this decree of the New York court against her if it is void or of no effect? I am not prepared to admit the rule contended for, that it is indispensable she should go into New York and have the decree vacated there.

I say if it is used here where she seeks to enforce her rights, that she has the power to get rid of it by showing that it is fraudulent without going into the state of New York and having it vacated. And when the court of Louisiana admitted to probate the will of Daniel Clark of 1813, they did it with the express reservation that any person might attack it by a direct proceeding whose rights were affected by it, and the supreme court of the United States in adjudicating the case of *Gaines v. Hennen*, in 24 How. [65 U. S.] 558, stated the same rule as applicable to the will. They proceeded upon the basis that any person by a direct proceeding could attack the will of 1813 which had been probated by a state court. So that taking all the facts, together, I am not prepared to say that the demurrer to this bill should be sustained, and that there is no equity, and while admitting there may be a question whether the party should not apply to the circuit court of the state instead of coming here by way of review to have the appeal set aside so far as relates to the probate of the will, I have no doubt that the bill can be sustained on the ground that she is entitled to dower if the decree was obtained by fraud in the state of New York, and as to a bill of review there possibly might be difficulty. In the state court her appeal was dismissed. There was no issue between the parties; the plaintiff never has submitted the issue or tried the question of fraud upon an issue even upon affidavits, as I understand the case. And as I said, I think it a case for the equitable interposition of the court. At any rate I leave this as a question that might come up hereafter. On the other point, that of dower, I have no doubt.

Counsel having asked what was the effect of the disagreement in the opinion of the court:

Judge DRUMMOND.—The law provides, where the judges are opposed in opinion, the point shall be certified to the supreme court, provided that the case may proceed, if in the opinion of the court it can be done without prejudice to the merits. My impression is at present that the case had better proceed; the parties can stand by their demurrer if they choose, and the plaintiff go on and make the proof, or of course the demurrer can be withdrawn, and in that case the point could be made by answer, just as well as by the demurrer, and then the question would come up on the final hearing.

Judge MILLER.—I think the bill will have to be dismissed, and the parties take their appeal.

Judge DRUMMOND.—I will be perfectly willing to certify it up, provided it can be done, but I am satisfied that it cannot be done.

Judge MILLER.—I do not think it is a case

proper to be certified up, either. That is my view.

[NOTE. This case was heard before Drummond, circuit judge, and Miller, district judge. The latter was of the opinion that the demurrer should be sustained and the bill dismissed. His opinion will be found in *Amory v. Amory*, Case No. 334. The hearing was before the passage of Act June 1, 1872, (17 Stat. 196,) as to which the note to this case in the *American Law Register* for September, 1873, is erroneous, but no certificate of disagreement had been signed when that act passed. The demurrer was overruled, with leave to answer. On final hearing, the bill was dismissed. See *Amory v. Amory*, Case No. 335.]

Case No. 334.

AMORY v. AMORY.

[3 Biss. 266;¹ 12 Amer. Law Reg. (N. S.) 38.]
Circuit Court, E. D. Wisconsin. April Term, 1872.

DECREE—WHEN CONCLUSIVE.

1. The original judgment or decree of a court having jurisdiction, cannot be disturbed in a co-ordinate tribunal, nor in a collateral action.
2. The decree of a state court having jurisdiction of a suit and of the parties, is conclusive of the matters determined, and cannot be impeached in the courts of the United States.
3. The circuit courts of the United States are not constituted to review and reverse the proceedings and judgments of state courts. It is the duty of such courts to give full faith and credit to the judicial proceedings and records of state tribunals.

In equity. This was a demurrer to a bill in equity, by Angelina Amory, praying that the defendants, Samuel B. Amory and John Amory, as executors of the last will and testament of James Amory, deceased, might be perpetually enjoined and restrained from pleading, setting up, interposing, or insisting upon the record proceedings or judgment of the superior court of New York city, for divorce, in any action or proceeding complainant might commence or prosecute in the courts of Wisconsin, for the purpose of recovering any portion of the real or personal estate of which James Amory died seized or possessed; and that the complainant might be adjudged and decreed the lawful widow and heir of the said James Amory. The bill sets forth that complainant intermarried with one William A. Williams, in the year 1839, at Portland, in Maine; that in September, 1841, at Boston, he shipped as second mate on board the ship *Louvre*, on a voyage from Boston to the East Indies and back, since which time she has not been able, after great exertions, to get any intelligence of or from Williams, except that he had deserted the ship at Singapore, East Indies, and it was rumored that he was lost in the China Sea. It is alleged that in the year 1845, complain-

¹[Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 12 Amer. Law Reg. (N. S.) 38, contains partial report only.]

ant removed to New York, where she became acquainted with James Amory, to whom she was lawfully married on the 12th of March, 1846; that she continued to live with him as his lawful wife until September, 1856, being during all that time recognized, received and treated as his lawful wife by him and his family and friends; and that in that same time there were various suits and proceedings in court in which she was a party with James Amory, as his wife, and she as such signed deeds and releases, etc. The bill further states that they separated by mutual consent; that in July, 1857, complainant commenced an action in the superior court of New York against James Amory, for a divorce, on the ground of adultery, in which, after a reference and report by the referee to the court, a decree was entered dismissing her bill, from which she, by her attorney, took an appeal in August, 1862, which was dismissed on motion of the attorney of James Amory, in May, 1863, on the ground that the appeal was not taken in time, according to the laws of the state. Complainant alleges that she was ignorant of the law which limited the appeal to thirty days after the service of notice of the judgment, and charges ignorance, negligence and bad faith on the part of the attorney who had appeared for her in the case. The bill then states, that James Amory departed this life in the city of Fond du Lac, in the state of Wisconsin, on the 16th day of August, 1868, where he was a resident and inhabitant, seized of a large real and personal estate, without lawful issue, and intestate, leaving complainant his lawful widow and heir under the laws of Wisconsin. It is further stated that on the 12th day of September, 1868, an instrument in writing, purporting to be the last will and testament of said James Amory, deceased, was presented to the county court of Fond du Lac county, by the defendants, together with their petition, praying that a day be appointed for hearing the proofs of said last will and testament, and that notice be given, etc., and that letters testamentary be issued to them as executors; that the will was admitted to probate, and letters testamentary were issued to the defendants, from which complainant took an appeal to the circuit court of the county, on the hearing of which the defendants interposed the decree in the divorce suit as final and conclusive against her right to interfere in the proceedings before the county court; that such proceedings were had in the circuit court, and in the supreme court of this state, that the appeal from the order of the county court was dismissed, it having been determined in the supreme court, in the absence of any trial of any of the questions of fact involved in such appeal, that the judgment in said action for a divorce was final and conclusive against this complainant, in respect to her interest in the subject matter of said appeal. 26

Wis. 152. Complainant further charges that the said alleged will is not in fact the last will of James Amory; and that her defense to said will is in all respects good and true; and that but for interposing said judgment record of the action for divorce, she would have been able fully to prove and maintain the same. The bill also prays that the judgments, orders and decrees of all said courts may be adjudged to be void and of no effect, and that the defendants, as executors, may be restrained and enjoined from executing said will under the order admitting it to probate, or from converting or disposing of the estate of said deceased; and that during the pendency of this suit the defendants be restrained and enjoined from executing the will, etc.

The records of the proceedings of all the courts mentioned in the bill are annexed. In the record of the divorce case in New York, it appears that complainant was pressed to proceed with the suit, and that a decree was rendered on her default, dismissing the action. On motion and affidavits the decree was opened, on condition that they would set down the case for trial peremptorily on a day named, and James Amory was ordered to pay two hundred dollars to enable her to prepare for trial. Reference was made to H. W. Robinson, by consent of the counsel of the parties. The referee took testimony and heard the parties by their counsel on the points submitted, and reported that the parties were not married on or about the 12th of March, 1846, or at any other time; that at that time, the complainant was the wife of William A. Williams, and not a single woman, nor capable of contracting a lawful marriage; and that Williams did not die previous to the 12th March, 1846. On the 2d of October, 1860, the cause coming on to be heard on the report of the referee, this complainant's counsel moved the court to open the case for further proof, which was denied, and a final decree was rendered against her. A petition was afterwards presented by this complainant to the superior court of New York, praying that the judgment against her be opened, which petition was denied. [For a subsequent hearing in this case, see *Amory v. Amory*, Case No. 335.]

J. M. Gillett and Carpenter & Murphy, for complainant.

S. U. Pinney, for defendants.

MILLER, District Judge. Complainant married James Amory as the widow of Williams. Amory had a right to consider her competent to enter into the marriage relation with him. They cohabited as husband and wife for nearly ten years, and during that time the facts of recognition occurred, he believing her to be his lawful wife. It coming to his knowledge that they were not lawfully married, for the reason stated, he was not estopped in the action for a divorce

from pleading and proving that her husband, Williams, was not dead at the date of his own marriage with her the 12th of March, 1846. She imposed on him in marrying him before she had reasonable or legal cause of belief of Williams' death. She married him before legal presumption of death by the expiration of seven years from the time Williams was last heard of. And it was proven before the referee that a letter from him had been recently received. She is in fault in this respect, not James Amory. Whenever he discovered complainant's want of legal right to become his wife, it became his duty to repudiate the marriage with her. The superior court was correct in disregarding the alleged facts of recognition in the petition to open the judgment.

This bill is virtually an appeal to this court from the judgment in the divorce case, and also from the orders and proceedings in the county and circuit courts of Fond du Lac, and of the supreme court of this state, and is sought to be sustained upon the alleged fraud of complainant's attorney, Shaffer. This court is not constituted to review and reverse proceedings and judgments of state courts. It is our duty to give full faith and credit to those judicial proceedings and records. It is well understood that the courts of the United States will not revise or correct judgments or decrees of state courts, where the jurisdiction of those courts appears in the record. A judgment or decree pronounced by a competent tribunal against a party having notice of the pendency of the suit is to be regarded by every other coordinate tribunal, and if the judgment or decree be erroneous, the error can be corrected only by a superior appellate tribunal. The binding distinction is between judgments or decrees merely void, and such as are voidable only; the former are binding nowhere, the latter everywhere, until reversed by a superior authority. *Hollingsworth v. Barbour*, 4 Pet. [29 U. S.] 466-470. The record in the action for divorce exhibits complete jurisdiction in the courts of the state of New York, and a conclusive judgment or decree not void anywhere. The complainant, by her bill and accompanying exhibits, attempts to show that the judgment or decree of that court is voidable for fraud on the part of her attorney. This she cannot do in this court. She must appeal for relief to the courts of the state of New York.

It is well settled by authority and long practice, that to an action on a judgment record, nul tiel record is the proper and only plea. The plea of nul debet is demurrable. *Mills v. Duryee*, 7 Cranch, [11 U. S.] 481. If it is found on inspection of the record, that the court had jurisdiction of the subject matter and of the parties, the judgment is conclusive. For fraud in obtaining jurisdiction, either by an unauthorized appearance of defendant by an attorney, or by confession of judgment by an attorney without au-

thority, or by a false return to the original process, or by any fraud on the party, relief can only be obtained in the court possessed of the original record. The tribunal wherein an action is pending, on representation of the facts, usually gives the party time to make his application for relief to the original court; and upon a certificate that the judgment is reversed or vacated, the plea of nul tiel record becomes available. The original judgment or decree of a court having jurisdiction cannot be disturbed in a coordinate tribunal, or in a collateral action. It is conclusive on the merits. *Landes v. Perkins*, 12 Mo. 254; *Landes v. Brant*, 10 How. [51 U. S.] 349-371; *Grignon v. Astor*, 2 How. [43 U. S.] 319; *McPherson v. Cunliff*, 11 Serg. & R. 422; *Dunlap v. Stetson*, [Case No. 4,164;] *Diggs v. Wolcott*, 4 Cranch, [8 U. S.] 179; *Elliott v. Peirsol*, 1 Pet. [26 U. S.] 329; *McKim v. Voorhies*, 7 Cranch, [11 U. S.] 279; *M'Elmoyle v. Cohen*, 13 Pet. [38 U. S.] 312; *Benton v. Burgot*, 10 Serg. & R. 240; *Huff v. Hutchinson*, 14 How. [55 U. S.] 586; *Parrish v. Ferris*, 2 Black, [67 U. S.] 606. Pleas to the contrary, of payment, or satisfaction, or release of the judgment, or of the statute of limitations, are allowable. Upon the same principle, the judgments and orders of the courts of this state are conclusive in a collateral action or proceeding. The complainant, not having prosecuted her action for divorce with proper diligence, cannot come to this court for relief, on the ground that an appeal was pending from a discretionary order of the court denying her petition for a rehearing, at the time of the death of James Amory, particularly as that order was correct and justifiable. The court of New York adjudged that complainant was not the wife of James Amory, consequently she cannot set up a claim here as his widow.

The prayer of the bill, that the defendants as executors of the last will and testament of James Amory, deceased, may be restrained and enjoined from executing the will, under the orders of the county court admitting the same to probate, involves direct interference on the part of this court with an exclusive and independent power and duty of that court. That court possesses exclusive and independent probate powers. This court has none. The orders of that court within its jurisdiction are as conclusive as the judgments of this court. That court has charge of the estate of the testator, and has the lawful power to admit the will to probate, to issue letters testamentary, and to control the action of the executors according to the will, who are trustees of the legatees. All persons interested in the estate have lawful right to look to that court for protection. That court has jurisdiction of the probate of the will and of issuing letters testamentary, and this complainant appeared and had her day in that court, the proceedings of which are sanctioned by the supreme court of the state. She cannot, as a non-resident

of the state, claim the jurisdiction and action of this court, upon the facts pleaded in her bill with the exhibits annexed as part thereof, and the demurrer must be sustained and the bill dismissed.

NOTE, [from original report.] The above case was heard before Judges Drummond and Miller, the former being of opinion that the complainant might, in this court, show fraud in the proceedings in the courts of New York. No certificate of disagreement, however, had been signed at the time of the passage of the act of congress of June 1st, 1872. (17 Stat. 196,) providing that in cases of a difference of opinion between the circuit and district judges the opinion of the former shall prevail, and thereupon, upon Judge Drummond's suggestion that the same point could be made by answer as well as by demurrer, the demurrer was overruled, with leave to answer, and the case is still pending. The opinion and note in American Law Register for September, 1873, are not strictly correct, the case having been heard at the January term, 1872, and decided at the April term, and prior to the passage of the act of congress. The opinion of Judge Drummond is reserved until the final hearing of the cause.

Case No. 335.

AMORY v. AMORY.

[6 Biss. 174; 6 Chi. Leg. News, 349.]

Circuit Court, E. D. Wisconsin. July, 1874.

IMPEACHING DECREE—WIDOW—PROOF OF HEIRSHIP—LACHES.

1. Fraud upon a party by her counsel in a state court will not invalidate a decree where it does not satisfactorily appear that it altered the result.

2. A woman claiming an estate from a man as his widow and heir-at-law, required in this case to give satisfactory proof, independent of her own statement, that she was actually the wife of the deceased.

3. If, soon after decree, the party has knowledge of facts calculated to throw suspicion upon the conduct of her counsel, she is bound to use due diligence in inquiring and in seeking relief, and a delay of eleven years bars any relief against the decree and the consequences of the fraud alleged.

In equity. This was a bill of Angellina Amory, claiming as widow and heir-at-law of James Amory, deceased, praying that the defendants, Samuel P. Amory and John Amory, executors, might be enjoined from pleading a decree of divorce by the superior court of New York city in bar of proceedings by the complainant to recover the estate of the said James Amory, and praying that the complainant might be adjudged the lawful widow and heir of said James Amory. The bill alleged fraud by the complainant's counsel in the divorce proceedings in the New York court. The facts are stated in the opinion, and more fully in 3 Biss. 266. [Amory v. Amory, Case No. 334.] where Judge Miller's opinion is given sustaining the demurrer filed to the bill.

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J. M. Gillett, Carpenter & Murphey, and Levi Hubbell, for complainant.
S. U. Pinney, for defendants.

Before DAVIS, Circuit Justice, and DRUMMOND, Circuit Judge.

DRUMMOND, Circuit Judge. The principal controversy in this case turns upon the effect of a decree of the superior court of the city of New York, as upon that must depend the right of the plaintiff to sustain the bill in this case, it being founded solely on the ground that she was, at the time of his death, the wife of James Amory, who died at Fond du Lac, Wisconsin, in August, 1868, intestate and without issue. In 1857, the plaintiff presented a complaint against James Amory in the superior court of the city of New York, alleging that she was married to him in that city, in 1846, and that they lived together as man and wife; that he had been guilty of adultery, and asking for a divorce on that ground.

James Amory answered the complaint and among other things, denied the marriage. The case was submitted to a referee to report certain facts, and he reported that the plaintiff and James Amory had not been married, and that she could not, at the time of the alleged marriage, make a lawful contract of marriage, because she, at the time, had a husband, one William A. Williams, living. In October, 1860, the superior court confirmed the report of the referee, and adjudged that she was not, and never had been, the wife of James Amory, and that she should take nothing by her complaint, and that judgment be entered in favor of the said James Amory upon the merits, and against her. She made various efforts to have this decree reversed or modified, but at the time of filing the bill in this case it was in full force.

1. We are of opinion that if any fraud was practiced or wrong done to her by her counsel in the conduct of the divorce suit in the superior court of New York, it was of such a character as not to change the effect of the decree of that court. It does not satisfactorily appear that he suppressed any evidence within his knowledge bearing upon the case. And upon the proofs before the referee and the court, it cannot be said that the main fact found by the decree, or the decree itself, was unwarranted. If her counsel was acting in the interest of James Amory, as she alleges, it must appear that his wrongful act caused a decree which otherwise would not have been made. There is nothing in the evidence to show that any misconduct of the counsel altered the result.

2. In any event, it must appear as a fact that the plaintiff was actually the wife of James Amory. Undoubtedly the parties lived together as man and wife for some years, from which, in the absence of other evidence, a marriage might be inferred. But in this

case there is such other evidence, and independent of her own statement, there is no satisfactory proof that a marriage ceremony ever took place between them. She was offered as a witness in the case, in the superior court, to prove it, but she was adjudged incompetent and it had to be determined by other testimony.

3. It appears that the plaintiff, not long after the decree was rendered in the superior court, had knowledge of certain facts, which, if true, were calculated to cast suspicion upon the conduct of her counsel. They were, at any rate, of such a character as to put her upon inquiry, and require her to use diligence to avoid the consequences of the fraud charged upon her counsel. This suit was not commenced till March, 1871, and we think she should not have waited so long before she asked for affirmative relief against the decree of the superior court of the city of New York. We have not considered the other objections made by the counsel of the defendants to the relief prayed for in the bill. The bill will be dismissed.

DAVIS, Circuit Justice, concurring.

Case No. 336.

AMORY v. LAWRENCE et al.

[3 Cliff. 523.]

Circuit Court, D. Massachusetts. Oct. Term, 1872.

MORTGAGES—WHAT CONSTITUTES—EQUITY—PAROL EVIDENCE—LIMITATIONS—PLEADING.

1. It is the settled rule in the federal courts that oral evidence is admissible to show that a deed absolute on its face was intended as a mortgage.

[See *Howland v. Blake*, Case No. 6,792; *Cadman v. Peter*, 12 Fed. 363; *Peugh v. Davis*, 96 U. S. 332; *Dow v. Chamberlin*, Case No. 4,037; *Bentley v. Phelps*, Id. 1,331; *Andrews v. Hyde*, Id. 377.]

2. The complainant being indebted in a large sum, conveyed certain real estate to one Otis, upon an agreement with one Appleton, that he should pay the amount due the complainant's creditors, and take a transfer of the property conveyed, and account to the complainant for the balance left of the property after he had paid himself the amount advanced and interest. The trustee was to hold the property as security for the money advanced. *Held*: The conveyance, though absolute on its face, was, under the decisions of the supreme court, a mortgage.

3. After the trustee had been repaid, the rents and profits of the property in the trustee's hands was a debt or liability not under seal, for which the trustee was responsible to the complainant, and as such constituted a good cause of an action of contract or suit in equity.

4. But the claim in this case was barred by the statute of limitations.

5. The construction given to state statutes of limitations, by the courts of the state in

which such statutes are enacted, furnish the rule of decision in the federal courts in cases where they apply.

6. The courts of equity in Massachusetts apply the statute of limitation in suits in equity.

7. The statute of limitations in this case began to apply when the complainant first became aware that the trustee had been repaid for his advances out of the proceeds of the sale or the rents and profits of the real estate conveyed to him, and knew what his rights in the premises were.

8. The claim against the executors of the deceased trustee, for the balance in the hands of the trustee of moneys collected in execution of the trust, beyond the amount advanced and interest, was held to be barred by the statute of limitations, the complainant having known, twelve years before the filing of the bill, that the trustee had been repaid for such advance and interest.

9. Where an absolute deed is intended as a mortgage, a subsequent purchaser with notice, stands in the place of the equitable mortgagee.

10. Six years is no bar to redeem a mortgage, nor is the plea of laches any defence to the suit, unless they are shown to have extended to the period of twenty years.

11. Courts of equity, in the case of a mortgagor coming to redeem, have fixed upon the term of twenty years after forfeiture and possession taken by the mortgagee, no interest having been paid in the meantime, and with no circumstances accounting for the neglect, as a period beyond which the right of redemption shall not be favored.

[See *Slicer v. Bank of Pittsburgh*, 16 How. (57 U. S.) 571; *Cromwell v. Bank of Pittsburgh*, Case No. 3,409; *Dexter v. Arnold*, Id. 3,857.]

12. Lapse of twenty years without any recognition of the complainant's rights to redeem the mortgaged premises, consisting of the undivided seventh part of the dower estate of the complainant's mother, and which the trustee in his lifetime conveyed to the last named respondent, was not shown in this case.

13. In this case, the property covered by the complainant's claim against the trustee (which claim the complainant purchased from the assignees in bankruptcy) was property not taken possession of by the assignee, to which the title of the bankrupt is good against all the world, except the assignee or any one to whom he might convey.

14. An assignee in bankruptcy is not bound to take property which may be onerous to the estate, or burden instead of benefit it. If he does not take it, it remains in the bankrupt.

[Cited in *Kimberling v. Hartly*, 1 Fed. 575; *Garrett v. Sayles*, Id. 377; *American File Co. v. Garrett*, 110 U. S. 289, 4 Sup. Ct. 94; *Taylor v. Irwin*, 20 Fed. 620; *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. 801.]

15. After the lapse of years, in this case, the court held that the conclusion must be that the assignee elected not to take possession of certain property of which the complainant when a bankrupt took an assignment as set forth in the bill.

16. Reasonable presumptions are admitted by a demurrer, as well as matters expressly alleged.

17. The allegation in the bill was sufficient, although it did not state that the assignment of the claim against the trustee was under an order of court first made, because the presumption is that such sale was made in conformity to such an order, and because, independently of the assignment, the bankrupt's title was

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good against all the world if the assignee elected not to take the property as not beneficial to the estate.

18. Waiver by the bill of oath in the answer, amounts to nothing unless accepted by the respondents.

In equity. Bill in equity praying for an account from the executors of William Appleton of certain real and personal estate conveyed by the complainant to said William Appleton during his life, and of the receipts derived therefrom, either from its sale or as income, and that said executors might be decreed to pay to the complainant all such sums as might be found due him on such accounting. The bill also prayed that one of the respondents, Thomas C. Amory, might be decreed to account for and pay to the complainant certain rents, profits, and receipts derived from certain real estate alleged to have been conveyed to said Thomas C. Amory by said decedent, William Appleton, and to reconvey said real estate to complainant. The complainant being indebted in the sum of \$10,000 to Isaac Coffin, on July 26, 1831, conveyed to William F. Otis certain real and personal property, including his reversionary interest in the dower set off to his mother in his father's estate. That conveyance was made upon an agreement with William Appleton, deceased, that he should pay the amount due to his creditor, and take a transfer of the property conveyed, and account to the complainant for the balance left of the property after he had repaid himself the amount advanced for the transfer and interest. In 1832 the complainant with his family removed to New York and remained there until 1842, when he returned to Massachusetts. In 1840, while residing in New York, he failed in business and in the following year went into bankruptcy and obtained a certificate of discharge in 1853. Until the year 1860 he was ignorant whether the decedent Appleton had been paid or not, what he had advanced on the complainant's account, but he believed as early as 1847 that he had been paid the full amount. The complainant's mother died in 1847, and one seventh of the estate held by her as dower reverted to the decedent. The complainant's confidence in the decedent, Appleton, remained undiminished, as he did not know the amount he had realized from the personal estate, nor what disposition he had made of his share of his father's real estate; but when he became convinced that Appleton intended to retain his, the complainant's share, in the dower estate, his confidence was much shaken, and he then requested the decedent to render his account of his receipts from the property so conveyed by the complainant. They had before that time frequently spoken of the trust property, and Appleton had never intimated that he did not intend to account for the proceeds, and when he requested the ac-

count, the decedent recognized his right, but would not agree definitely to make the account. Appleton told the complainant that it would be impossible to tell what the receipts would be until his share in his father's estate was all sold, and intimated that the property would not sell for more than enough to pay him, the decedent.

Repeated requests were made for the account, but the requests were always refused, the decedent asserting that he had not been paid the amount advanced. After his failure, the complainant was in reduced circumstances, and dependent upon his friends for a considerable portion of the income necessary for his and his family's support. Small amounts were paid by the decedent prior to 1850, and at that time in consequence of complainant's demands for an account, the decedent agreed to pay the complainant \$600 per annum, which has ever since been paid.

In 1860 he was enabled to have an examination made of the accounts, and being advised to purchase from his assignees in bankruptcy his claim against the decedent, he "accordingly procured an assignment" of the same, and he then ascertained the accounts to be as set forth in the bill of complaint, which showed that he was justly entitled to a large balance beyond the amount advanced and interest. In 1832 the decedent paid the complainant \$5,000, in 1842 \$400, in 1856 \$1,600, in 1858 \$600, annually as agreed, making an amount not exceeding \$10,000. The income derived from the property held in trust, must have been at least \$20,000, and the net receipts of the decedent beyond his advances, at least \$5,000 up to 1862, when the account closed, as stated in the bill. The complainant caused a statement of the whole matter to be made, and sent to those most interested in his welfare, hoping that publicity would force the decedent, then alive, to do him justice, but his friends being opposed to his cause, refused him any aid, without which it was impossible for him to proceed to suit. On the 27th of January, 1862, the decedent conveyed one seventh of certain real estate to complainant's brother, Thomas C. Amory, which estate was worth at least \$15,000, and at the time of the conveyance the grantee had full knowledge that the grantor held the same as trustee for the complainant, and that the complainant was doing all in his power to recover it.

In 1862 the trustee, William Appleton, died, and before his death caused the complainant, through Thomas C. Amory, to be informed that he had left with his executors a file of papers relating to his rights of property conveyed to the decedent, and that his executors had directions to see that his, complainant's, rights were acknowledged, and that the property was restored to him. Expressions of regret on the part of the trustee, were also conveyed to the complain-

ant, that justice to him had been delayed until it was impossible for the trustee to settle the matter personally with the complainant.

The complainant called the attention of the executors and devisees to the matter, but they refused to investigate his claim.

Such were the facts as alleged in the bill of complaint. The respondents filed three demurrers to the bill.

The Demurrer of Amos A. Lawrence, Thomas Jefferson Coolidge, William Appleton, and Charles H. Appleton, Certain of the Defendants Named in Said Bill, as They Are the Executors of the Will of William Appleton, Deceased.

These defendants, by protestation not confessing or acknowledging all or any of the matter and things in the said complainant's bill contained, to be true in manner and form, as the same are therein and thereby set forth and alleged, do demur to the said bill, and for causes of demurrer show—First. That the complainant hath not in and by his said bill, made or stated such a case as entitles him in a court of equity to any discovery from these defendants, or relief against them as to the matters contained in said bill or any of them. Second. That the complainant, in and by his said bill, in violation of law and the rules of this court, deprives the defendants of their right of answering under oath. Wherefore, and for divers other good causes of demurrer appearing in the said bill, the said defendants do demur thereto, and pray the judgment of this honorable court, whether they shall be compelled to make any further answer to said bill, and humbly pray to be hence dismissed.

The Demurrer of William Appleton, Charles H. Appleton, S. E. Appleton, Hetty S. Coolidge, Certain of the Defendants Named in Said Bill, as They Are Devisees and Legatees under the Will of Said William Appleton, Deceased.

These defendants by protestation not confessing or acknowledging all or any of the things in the complainant's bill contained, to be true in manner and form, as the same are therein set forth and alleged, do demur to said bill, and for cause of demurrer show—First. That the complainant hath not, in and by his said bill, made or stated such a case as entitles him in a court of equity to any discovery from these defendants, or relief against them as to the matters contained in said bill or any of them. Second. That the complainant, in and by his said bill, in violation of law and the rules of this court, deprives the defendants of their right of answering under oath. That it appears, in and by said bill, that it is exhibited against certain persons as executors of the will of William Appleton, deceased, and against these defendants as devisees and legatees under said will, and these defendants, as such devisees and

legatees, are improperly joined as parties defendant to said bill. Wherefore, and for divers other good causes of demurrer appearing in the said bill, the said defendants do demur thereto, and pray the judgment, of this honorable court, whether they shall be compelled to make any further answer to said bill, and humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

The Demurrer of Thomas C. Amory, One of the Defendants Named in Said Bill.

This defendant, by protestation not confessing or acknowledging all or any of the matters and things in the said complainant's bill contained to be true in manner and form, as the same are therein and thereby set forth and alleged, doth demur to said bill and for causes of demurrer showeth—First. That the complainant hath not in and by his said bill made or stated such a case as entitles him in a court of equity to any discovery from this defendant or relief against him as to the matters contained in said bill or any of them. Second. That the complainant in and by his said bill, in violation of law and the rules of this court, deprives the defendant of his right of answering under oath. Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant doth demur thereto, and prays the judgment of this honorable court, whether he shall be compelled to make any further answer to said bill, and humbly prays to be hence dismissed with his reasonable costs in this behalf sustained. [Bill dismissed as to executors and devisees, but for complainant as against Thomas C. Amory.]

B. F. Butler and Bumpus & Johnson, for complainant.

Sidney Bartlett and C. A. Welch, for respondents.

CLIFFORD, Circuit Justice. Admitted as the matters well pleaded in the bill of complaint are by the demurrers, the only question is as to their legal effect. Several objections are taken to the right of the complainant to a decree, which will be briefly considered in the following order. That the claim is within the statute of frauds, as the trust was not created or declared by an instrument in writing, signed by the party creating or declaring the same, as it is settled law in this state, that no trust can be created or declared except by such an instrument. That the claim is barred by the statute of limitations, which enacts that all actions of contract, founded upon any contract or liability not under seal, express or implied, with certain exceptions not material to be noticed, shall be commenced within six years next after the cause of action accrues and not afterwards. Gen. St. Mass. 777. That if the claim is not barred by the statute of limitations, still, it is barred by the laches of

the complainant, and those through whom he claims. That the bill of complaint fails to show that the complainant is entitled to any relief, because it is not alleged that he acquired a good title from his assignees in bankruptcy. That the cause of action is barred by the two years' limitation in the bankrupt act, under which the certificate of discharge was obtained. That the bill of complaint is demurrable, because the complainant attempted to deprive the respondents of their right to answer under oath contrary to the rules and practice of the court existing at the time of filing the bill.

Much discussion of the first question is unnecessary, as it depends at this day entirely upon authority. Undoubtedly the objection would prevail before the supreme court of the state, but the rule in equity is different in the federal courts, as appears by numerous decided cases. Whether oral evidence is admissible for the purpose of showing that a deed, absolute on its face, was intended as a mortgage, was directly presented in the case of *Wyman v. Babcock*, [Case No. 18,113,] and the decision of the court was that such evidence is admissible for that purpose; and that the statute of frauds is no bar to the admission of the evidence where it is offered to show that such a deed was intended as a mortgage. Twenty years earlier Judge Story decided the question the same way in the case of *Taylor v. Luther*, [Case No. 13,796,] holding that there is nothing in the statute of frauds rendering parol evidence inadmissible to show that an absolute deed was intended as a mortgage, and that the defeasance had been omitted or destroyed by fraud or mistake, or omitted by design upon mutual confidence between the parties. He examined the question upon principle and authority, and gave his reasons for the conclusion, and ten years later in the case of *Jenkins v. Eldredge*, [Case No. 7,267,] he reaffirmed the same position after giving the question a very elaborate consideration. Repeated decisions of the supreme court have affirmed the same rule, and it may now be regarded as settled in all the federal courts. *Conway v. Alexander*, 7 Cranch, [11 U. S.] 238; *Sprigg v. Mt. Pleasant Bank*, 14 Pet. [39 U. S.] 201; *Morris v. Nixon*, 1 How. [42 U. S.] 126; *Russell v. Southard*, 12 How. [53 U. S.] 139; *Babcock v. Wyman*, 19 How. [60 U. S.] 299.

Two questions are involved in the second proposition of the defence which, inasmuch as separate demurrers are filed, must be separately considered. 1. Whether the claim of the complainant against the executors of the trustee, for the income and receipts from the sale of the trust property in the lifetime of the trustee, other than the undivided parcel conveyed to the last-named respondent, is or is not barred as assumed by the executors, in their demurrer. 2. Whether the right to redeem the undivided seventh part of the property conveyed by the trustee to the last-named respondent is not also barred by lapse

of time, as assumed by that respondent. Before examining those questions, however, it becomes necessary to ascertain more definitely what was the real nature of the original transaction, and for that purpose reference need only be made to the bill of complaint, as all the well-pleaded allegations of the same are admitted by the several demurrers. Schedules of the property, as the complainant alleges, were prepared under the direction of the trustee, it being agreed that he, the complainant, should not part with any of his property until the trustee had made the arrangement to pay the \$10,000 to the complainant's creditor, that he made the transfer of his entire property as agreed, it being clearly and distinctly understood between him and the trustee, that the latter was to hold the property simply as security for the \$10,000 to be advanced by the trustee, and that he, the trustee, was to account for the balance as soon as he should be repaid the amount advanced, with interest. Payment was accordingly made to the creditor, the property conveyed to the person designated, and ultimately transferred to the trustee, and the whole transaction perfected as agreed between the complainant and the trustee. Viewed in the light of the decisions of the federal courts, the conveyance beyond all doubt, though absolute on its face, was a mortgage. *Wyman v. Babcock*, [Case No. 18,113,] *Babcock v. Wyman*, 19 How. [60 U. S.] 299.

Assume the allegations of both to be correct, and it appears that the trustee was fully paid prior to 1860, and the complainant admits that in that year it came to his knowledge not only that the trustee was fully paid, but that he had in his hands a large balance derived from receipts for the property sold, and the rents and profits of the property which was due to the complainant. Whatever that balance was beyond the sum advanced and interest was a debt or liability not under seal, for which the trustee was responsible to the complainant, and as such constituted a good cause for an action of contract or a suit in equity. *Wyman v. Babcock*, [Case No. 18,113,] same case, 19 How. [60 U. S.] 300. Such actions are barred by the six years' limitation, and the court is of the opinion that the claim against the executors is barred by that limitation. *Gen. St. Mass. 777*. State statutes of limitation and the construction of the same as given by the courts of the state furnish the rule of decision in the federal courts in cases where they apply. *Leffingwell v. Warren*, 2 Black, [67 U. S.] 599. Courts of equity in this state apply the statute of limitations in such cases in suits in equity to the same effect as they are applied in actions at law. *Farnam v. Brooks*, 9 Pick. 212; *Dodge v. Essex Ins. Co.*, 12 Gray. 71. Rights concealed by the trustee are not subject to such a rule of limitation; but it appears that the complainant knew what his rights were in that regard, twelve years be-

fore the bill was filed, as well as he knew what they were when the bill was framed, and it is clear that the statute commenced to run, so far as respects the balance in the hands of the trustee, arising from the sale of the property, or from the rents and profits collected beyond the amount advanced, and interest, when the party seeking relief became fully acquainted with the facts, and knew what his rights were in the premises. *Perry, Trusts*, § 230; *Pritchard v. Chandler*, [Case No. 11,436;] *Ang. Lim.* (2d Ed.) 176; *Kane v. Bloodgood*, 7 *Johns. Ch.* 90; *Hallett v. Collins*, 10 *How.* [51 U. S.] 174; *Boone v. Chiles*, 10 *Pet.* [35 U. S.] 177; *Finney v. Cochran*, 1 *Watts & S.* 118. Governed by these considerations, the court is of the opinion that the claim against the executors for the balance in the hands of the trustee for moneys collected in execution of the trust beyond the amount advanced, and interest, is barred by the statute of limitations, and having come to that conclusion, it follows that the claim against the devisees of the decedent trustee is without any foundation. Attempt is made to show that the limitation of six years should not be applied in this case, as the trustee died in 1862, but that suggestion cannot relieve the complainant from the bar, as the case is controlled by section 10 of the state limitation act, which in that state of the case only extends the time for bringing the action for the period of two years next after the grant of letters testamentary or of administration. *Gen. St. Mass.* 778. Suggestion is also made that the bill may be sustained against the executors as a mere naked bill of discovery; but the court is of a different opinion, for two reasons. 1. Because the executors in the further prosecution of the bill against the other respondent of the decree, or for the complainant, are competent witnesses for either party. 2. Because the complainant has been guilty of laches in bringing his bill which may well be taken into the account in determining that question.

Besides the money demand against the executors and devisees of the trustee, the complainant also claims to redeem the mortgaged premises so far as respects the undivided seventh part of the dower estate which the trustee in his lifetime conveyed to the last-named respondent. Evidently that claim rests upon entirely different principles from the money demand against the other respondents, as the property exists in specie without change, and is held by the grantee of the trustee who made the purchase, and took the conveyance of the property with full knowledge of the trust and of the rights of the complainant under the original arrangement whereby the title of his grantor was acquired. Where an absolute deed is intended as a mortgage, a subsequent purchaser with notice stands in the place of the equitable mortgagee. *Williams v. Thorn*, 11 *Paige*, 459; *Vattier v. Hinde*, 7 *Pet.* [32 U. S.] 253; *Everett v. Stone*, [Case No. 4,577.]

Six years is no bar to a claim to redeem a mortgage, nor is the plea of laches any defence to the suit unless it is shown to have extended to a period of twenty years. In the case of a mortgagor coming to redeem, courts of equity have by analogy to the statute of limitations, which takes away the right of entry of the plaintiff after twenty years' adverse possession, fixed upon that term as the period after forfeiture and possession taken by the mortgagee, no interest having been paid in the mean time, and no circumstances to account for the neglect appearing, beyond which a right of redemption shall not be favored. *Hughes v. Edwards*, 9 *Wheat.* [22 U. S.] 497; *Wyman v. Babcock*, [Case No. 18,113;] *Dexter v. Arnold*, [Id. 3,859;] *Elmendorf v. Taylor*, 10 *Wheat.* [23 U. S.] 168; 4 *Kent, Comm.* (11th Ed.) 187; *Demarest v. Wynkoop*, 3 *Johns. Ch.* 129. Twenty years without a recognition of the rights of the complainant is not shown in this case. Numerous allegations of the bill contradict any such theory, and show that such a defence in the present state of the pleadings cannot be sustained, as the bill alleges that in 1847 the trustee constantly recognized the rights of the complainant, and told him in substance that it was impossible to say what the receipts would be until his share in his father's estate was all sold, that he also recognized his right to an account, but would not agree definitely to give it, intimating that the property would not amount to more than enough to pay him what he advanced; that in 1850 he agreed to pay him \$600 annually, which has ever since been paid; that in 1856 he paid \$1,600, and \$600 in 1858, which must be understood as a sum in addition to annual payment under the prior agreement. Examined in the light of the declarations of the trustee and these several payments, especially the payment at one time of the sum of \$1,600, it is impossible to adopt the theory that the rights of the complainant were not recognized by the trustee within the period covered by those several allegations. Sixteen years only have elapsed since the large payment of \$1,600 was made by the trustee.

Sufficient has already been remarked in disposing of the second objection of the respondent to show that the third objection cannot be sustained, and it is accordingly overruled.

Objection is also made that the allegations of the bill are not sufficient to show that the complainant acquired a good title to the property from his assignees in bankruptcy. All the bill alleges upon the subject is that he was advised to purchase from his assignees in bankruptcy his claim against the trustee, and that he accordingly procured an assignment. Express provision was made by section 9 of the bankrupt act of the 19th of August, 1841, that all sales, transfers, and other conveyances of the assignee of the bankrupt's property and rights of property

shall be made at such times and in such manner as shall be ordered and appointed by the court in bankruptcy, and the supreme court of Massachusetts decided in the case of *Osborn v. Basterral*, 4 Cush. 406, that the sale of a bankrupt's real estate under an order of the district court in which no time or place of sale was fixed by the court, is irregular and void. In general, when a sale is made under a statute power, said Shaw, Ch. J., it must appear that the requisition of the statute as conditions precedent to the operation of the power to pass the estate, have been complied with. When the title to real estate is solely through a power, it must, in order to be sustainable, be proved that such power was duly executed. *Cleveland v. Boerum*, 27 Barb. 254. Title was claimed it will be seen in both of those cases under purchases by strangers to the proceedings in bankruptcy, and consequently their claim of title rested solely upon the assumption that the power to sell was duly executed by the assignee. Unlike what occurred in those cases, the purchase in the case before the court was made by the bankrupt, whose title, in the case of onerous property, where the assignee elects not to take it into possession, is good against all the world, except the assignee or some one to whom he conveyed the property. *Smith v. Gordon*, [Case No. 13,052.] All the property and rights of property belonging to the bankrupt, unquestionably pass by force of the decree of bankruptcy to the assignee by operation of law, and become vested in him as soon as he is appointed. But though the legal title passes to the assignee, he is not bound, said Judge Ware, to take possession of all the property. Leasehold estates pass to the assignee under the English bankrupt laws, but the assignee is not bound to take the lease and charge the estate with the payment of the rent, as the rent may be greater than the value of the lease, and thus the estate may be burdened instead of being benefited, and in such a case the claim may be abandoned by the assignee. He is not bound in such a case to take the property into his possession, and if he elects not to take the property, it remains in the bankrupt, and no one certainly, except the assignee, has a right to dispute his possession. *Copeland v. Stephens*, 1 Barn. & Ald. 603; *Fowler v. Down*, 1 Bos. & P. 44.

Years have elapsed since the proceedings in bankruptcy were closed, and the irresistible conclusion from all the averments of the bill is, that the assignee never elected to take possession of this property, or made any claim whatever upon the trustee for the same. Assignees may refuse to take possession of onerous properties or such as will be a burden instead of a profit, and the clear presumption from the bill as admitted by the demurrer is that the claim against the trustee was regarded in that light by the assignee. *Robeson* says it has long been a

recognized principle of the bankrupt law that the assignees of a bankrupt are not bound to take property of an onerous or unprofitable character, or property which will be a burden instead of a benefit. They are on that subject regarded as being in a very different position from that of the executors of a deceased testator, as the former take the property by operation of law, while the latter claim title through their testator, and are bound to perform his obligations to the extent of his assets. *Robs. Bankr.* 322. Where the assignee elects not to take the right of the bankrupt and charge the estate with the burden of an uncertain litigation, the right, whatever it is, survives in the bankrupt, and some of the authorities hold that it may be pursued by any creditor not a party to the proceedings in bankruptcy. *Smith v. Gordon*, [Case No. 13,052.] Persons acting as assignees in such a case are required to elect, within a reasonable time, and the rule is that if they refuse to elect when required to do so, it is deemed an election to reject the estate. *Lawrence v. Knowles*, 5 Bing. N. C. 399; *Carter v. Warne*, 4 Car. & P. 191; *Graham v. Van Diemen's Land Co.*, 11 Exch. 101; *Ex parte Blandy*, 1 Deac. 286; *Tuck v. Fyson*, 6 Bing. 321. Doubtless the complainant, in such a case, must allege or prove enough to show that the assignee is estopped to set up any right in opposition to his claim, and the court is of the opinion that enough is alleged in this case to satisfy that requirement. Reasonable presumptions are admitted by the demurrer as well as the matters expressly alleged. Pursuant to advice which the complainant received to purchase from his assignees his claim against the trustee, the allegation is that he procured an assignment of the same, which must be understood in this award as a transfer of all the property and estate embraced in the claim which he was advised to purchase by an appropriate legal instrument. Suppose that is so, still the argument is that the allegation is not sufficient, because it is not alleged that the sale was made by the order of the bankrupt court; but the opinion of the court is that such a prior order was not necessary under the circumstances of this case, to give validity to the sale, or if it was, that the reasonable presumption from the allegation of the bill is, that the assignment was made in pursuance of such an order of court. Independent of the assignment, his title, under the circumstances of that case, was good against all the world except the assignee, as the presumption is that the property was regarded as onerous, and that the assignee elected not to take it into possession or to prosecute the claim.

The next objection is that the cause of action is barred by the two years' limitation in the bankrupt law under which the complainant was adjudged a bankrupt. Suffice to say that the limitation does not apply to the

case of an assignee, which is all that need be said upon the subject in the present case. *Banks v. Ogden*, 2 Wall. [69 U. S.] 69.

It is also objected that the complainant attempted to deprive the respondents of their right to an answer under oath; but the controlling answer to the objection is, that it can have no such effect, as the waiver amounts to nothing unless the respondents accept it. *Heath v. Erie Ry. Co.*, [Case No. 6,306;] Story, Eq. Pl. § 874. Bill dismissed as to the executors and devisees. Decree for complainant against Thomas C. Amory.

AMORY, (TREMMAIN v.)

[See *Tremmain v. Amory*, Case No. 14,167.]

AMORY, (UNITED STATES v.)

[See *United States v. Amory*, Case No. 14,443.]

AMORY, (WARD v.)

[See *Ward v. Amory*, Case No. 17,146.]

Case No. 336a.

In re AMORY and LEEDS.

[Betts' Scr. Bk. 97.]

District Court, S. D. New York. 1842.

BANKRUPTCY—PROCEDURE—UNAUTHORIZED DECREE—CERTIFICATES OF DISCHARGE.

[1. In the absence of an express rule, the bankruptcy court will follow the rules of the circuit and district courts whereby agreements between counsel must be in writing or of record in order to bind their clients, provided that no inequitable result would be caused thereby.]

[2. Where the clerk enters a decree in bankruptcy granting a final discharge when the only decree authorized is one declaring the objections by the creditors to be badly pleaded, such unauthorized decree should be set aside.]

[3. After a decree of final discharge has been property taken out by a bankrupt, the following papers must—under Act Aug. 19, 1841, § 4, (5. Stat. 440, c. 9)—be submitted to the judge for examination, and receive his indorsement before certificate of discharge can be properly granted: (1) The official assignee's report; (2) the report of the clerk, stating whether the bankrupt has been regular in his proceedings, and has conformed to the orders of the court, and what creditors dissent to a final discharge. And, where the certificate has been granted before these steps have been taken, it should be revoked when the judge finds these papers, thereafter submitted, to be essentially defective, and refuses to approve the same.]

[In bankruptcy. In the matter of Jonathan Amory and Henry H. Leeds. Heard on motion by certain creditors to vacate and revoke certificates of discharge heretofore taken out by the bankrupts. Granted.]

BETTS, District Judge. This case was a motion to vacate and revoke the certificates of discharge delivered to the bankrupts, on

the 19th ult., and the circumstances of the case were briefly these. When the day for final hearing came round, objections were interposed by J. & G. Richardson, to which objections the bankrupt took exceptions, and the cause was set down for argument on the docket; Mr. Gerard, appearing for the creditors, and Mr. Noyes for the bankrupts. On Friday, the 18th of November, Mr. Noyes being engaged in the superior court, arranged with Mr. Gerard that if the cause should be reached that day, he would not argue it. It was not reached that day, and not being reached up to Saturday about 12 M., and Mr. Noyes being still engaged in the superior court, Mr. Gerard left the city, just notifying Mr. Noyes of his absence. It was called on between 1 and 3 P. M., and Mr. Barnard who had been engaged by Mr. Leeds to attend in the absence of Mr. Noyes, (but without Mr. Noyes' knowledge) no person appearing to oppose, moved for a decree by default of the opposing creditors. The following order was then entered: "Ordered that the objections filed in the cause by J. N. Platt, Esq., be, and the same are hereby overruled, and it is further ordered that the said bankrupts receive a certificate of discharge." Immediately on the entering of this order, certificates of discharge under the seal of the court were ordered to the bankrupts, and on the Monday following, the present motion to vacate them was read. The arrangement between Messrs. Gerard and Noyes, it is proper to say, was entirely unknown to Mr. Leeds, as is established by the affidavit of Mr. Noyes.

For the creditors it was charged (1) that the default was taken by the bankrupts in violation of an agreement made between their counsel and in entire surprise of the latter.

2. That the order was irregular and void, not being conformable to the decree of the court, and was not entered in presence of the court, but in the clerk's office, and at the dictation of the bankrupt's counsel.

3. That the delivery of the certificate by the clerk was irregular and without authority of the court. The positions to be considered now are: First, the regularity of the proceedings on the part of the bankrupts, in obtaining a default pending the arrangement between the respective counsel. It is insisted that the proceeding was not only inequitable and a surprise upon the creditors, but that it was irregular and absolutely void, the agreement of the counsel for the bankrupts having put it out of their power to go on with the case, without first disavowing the acts of their counsel, and giving notice to the other party.

For the bankrupts it is contended that this being a mere parol agreement of their counsel not communicated to them, it did not bind them, and that they were at liberty to proceed in court in their causes the same as if such understanding had not existed.

The court can give no weight to the suggestion that the bankrupts could only act through Mr. Noyes. They had a perfect right to move or argue them in person, or to substitute any other counsel to take charge of them.

Was the engagement between Messrs. Gerard and Noyes obligatory upon their respective clients? If it was, the proceeding to take default in violation of that agreement was irregular and the decree should be held void. The supreme court of the state by rule of April, 1796, declared that no private engagement or consent between parties in respect to proceedings in a cause, should be alleged or suggested by either of them against the other, unless entered in the book of rules by consent, or unless the evidence thereof shall be in writing, subscribed by the party against whom it is alleged or suggested. The same rule in substance has been ever since incorporated in the practice of that court and the court of chancery. The circuit and district courts of this district have also provided by rule that no agreement or consent between parties or their attorneys, in respect to proceedings in court, shall be binding unless reduced to writing and subscribed by the party against whom it shall be alleged or suggested. These rules are very strictly adhered to by the courts unless an intention is discovered to impose upon or mislead a party through parole stipulations.

The supreme court of the U. S. enforced an agreement by an attorney for a bank, to enforce execution against the principal debtor, and postpone it against the surety, although the agreement was verbal and denied by the bank. [Union Bank of Georgetown v. Geary, 5 Pet. (30 U. S.) 99.] No distinction can be taken in reason between the agreements made by counsel and those made by the party himself, or his attorney, and the rule exacting written evidence should apply indiscriminately to all. It is difficult also to perceive why an arrangement between counsel to defer the argument of a cause on the calendar and ready to be called, is not an agreement in respect to proceedings in court, and as such rendered of no avail by the standing rules of the court. The court of errors do not consider the rule applicable to that court, and accordingly gave effect to an arrangement similar to that before this court without regarding it material that the agreement was verbal and not in writing. The case in the court of errors was substantially the same with these now under consideration, with one circumstance in the present that did not appear then. The express admission of the counsel for the bankrupts [is] that the agreement was entered into at his instance and was acted upon in full faith, by the counsel for the creditors. There was no specific rule of the bankruptcy court exacting written evidence of agreement in respect to proceedings

therein, and all the regulations are framed upon the assumption that any step or stipulation affecting the progress of a cause would be indicated by the appropriate entry on the docket, or made by express order of the court, or by stipulation between the parties. In matters not provided for by express rule it has been the constant practice of the court to recur to the known principles governing the practice of the circuit and district courts in analogous cases.

The right of counsel and attorneys to bind their principals by their stipulations in respect to proceedings in court, cannot be questioned, and if the question is to be decreed open for the court to decide upon, conformably to the justice and equity of the case, I should have no difficulty in determining that the bankrupts here ought to be bound by the agreement of their counsel. Still I am exceedingly unwilling to trench upon the established and notorious practice of the court, and lay it down as a definite rule, that parties to this court shall be bound by parole agreements entered into by their counsel or attorneys. I shall always be disinclined to recognize them when disavowed or denied by either party, although I do not intend to say that if relief rested solely on the affirmance of the agreement between the counsel, the court would not act upon the authority of the court of errors of this state, and uphold the stipulation in furtherance of the palpable equity in the case, but I forbear in pronouncing in favor of the binding obligation of such parole arrangements as a general rule of decision.

Admitting the stipulation between the counsel could not prevent the bankrupts from taking further proceedings while it continued, it is urged that their subsequent proceedings were irregular and unauthorized by law. The motion acted on by the court was one for defaulting the opposing creditors and the order of the court was given to that extent and no further.—(Judge BETTS, here went into an elaborate review of the proceedings of the case, and continued:) The counsel states in his affidavit that after the default he attended at the clerk's office to have the necessary orders entered allowing the exceptions to the objections, overruling objections, and ordering certificate and discharge. At his instance and direction the decree first above stated was entered in the docket and certified by the assistant in the clerk's office. The decree did not conform to the allegata composing the issue between the parties, but went out and transcended that issue. Instead of declaring the particulars set up by the objections to be imperfectly or inaptly pleaded, it by a single bound overleaped the points presented, decided against the objections on the merits, and decreed a final discharge to the bankrupts. In these respects it was unauthorized by any express direction of the court, and it assumed conclusions and consequences which the

order of default did not warrant. No court will allow an irregular or unauthorized entry on its docket, or minutes, however formal it may be in terms, to work an injury to parties not procuring or assenting to it. Accordingly the rule of the 19th November last, decreeing a final discharge to the bankrupts must be set aside and vacated as irregular and void.

On the same day and almost concurrently with the entry of the decree on the docket, the certificates of discharge were made out and delivered to the bankrupts by an assistant in the clerk's office. If the decree of discharge had been proper and regularly taken out, still the delivery of the certificates cannot follow instantly upon such decree. Several important steps are to be taken—1st, the clerk is to examine and report to the court if the bankrupt has been regular in his proceedings and conformed to all the orders of the court; and what creditors dissent to a discharge; 2d, the official assignee is to file his report, and 3d, the judge is to examine these papers and endorse his certificate on them. These being done, the clerk may deliver a certificate. [Act Aug. 19, 1841, § 4, (5 Stat. 440, c. 9.)] In the present case these documents were not submitted to the court until Monday, (the certificates having been delivered on Saturday preceding) and they are found essentially defective and have not been approved by the judge. The bankrupts are accordingly in possession of their certificates without due authority of law.

I accordingly pronounce the decree of final discharge entered in these cases on the 19th Nov. last void, and order and decree that the same be revoked and vacated, and I further order that the bankrupts respectively deliver to the clerk's office on the 5th instant, the certificates issued them on the 19th of November last.

Case No. 336b.

In re AMORY and LEEDS.

[Betts' Scr. Bk. 101.]

District Court, S. D. New York. 1843.¹

BANKRUPTCY—ILLEGAL PREFERENCES AND TRANSFERS—ACT OF 1841—DISCHARGE.

[1. The receipt by certain creditors of an insolvent partnership of money and other assets on a composition and compromise of their claims, and in full discharge thereof, is a preference, within the prohibition of the bankruptcy act of August 19, 1841, § 3, (5 Stat. 440, c. 9,) when it appears that other creditors got nothing, and that the settlement was made after January 1, 1841,² and prior to the passage of the act, with the general authority and concurrence of both partners, though no particular acts are proved against one of them.]

¹[Affirmed by circuit court. In re Amory, Case No. 336c.]

²[See note at end of case.]

[2. Similar settlements with certain creditors, to the exclusion of others, made after the act of 1841 went into effect, are preferences, within the prohibition of that act.]

[3. Preferences of certain creditors, to the exclusion of others, are not exempted from the prohibition of the bankruptcy act of 1841 because obtained through the urgent demands of such creditors, or by means of threats to bring actions for their claims.]

[4. A retiring partner of an insolvent firm to whom the other partners make payment in satisfaction of his interest in the partnership is not a creditor, within the meaning of the second proviso of the bankruptcy act of August 19, 1841, § 2, (5 Stat. 440, c. 9.)³

[5. Assignments and transfers of real estate and personal property by a bankrupt to his sister, who is not at the time a bona fide creditor, although fraudulent and void in law, are not a bar to the bankrupt's discharge, under the act of August 19, 1841, §§ 2, 4, (5 Stat. 440, c. 9,) unless such frauds were committed after the passage of the act.]³

[In bankruptcy. In the matter of Jonathan Amory and Henry H. Leeds. Certificates of discharge which had been taken out were heretofore vacated. Case No. 336a. Certain questions were referred to the circuit justice, who died without answering them, and they are now submitted by agreement to the district judge. Discharges denied.]

Before BETTS, District Judge.

The following points in this case, which were referred to THOMPSON, Circuit Justice, who deceased without passing thereon, have been decided by BETTS, District Judge, at the request of the counsel for both parties:

First. If a debtor being insolvent since the 1st of January, 1841, makes compromise arrangements with a part of his creditors, and then pays to them a portion of their debts or assigns them assets of his estate in satisfaction of the debts and thereby exhausts the whole of his estate, having creditors who have received no part of their debts, are such payments or assignments prohibited by the bankrupt act?

Second. Does it vary the case if the same terms of compromise were offered to all of his creditors, by the insolvent at the time, and he was then able to fulfill the offer, or that the assets not accepted were subsequently expended in his necessary support and management of the business of the estate, or that they had become worthless from depreciation?

Third. Is a bankrupt whose application is voluntary barred a discharge, if, being insolvent, he by payment, assignment, or otherwise after the 1st January, 1841, gives or secures a preference of one creditor over another on the urgency and importunity of such creditor, and does it vary the case if the creditor threatens to bring suit, such payment or assignment not being made under actual coercion of law?

³[See note at end of case.]

Fourth. If on the dissolution of a copartnership previous to January, 1841, and then actually insolvent, one partner retires and is paid by the others a sum of money in satisfaction of his interest in the partnership, (the remaining partners at the time contemplating the passage of a bankrupt law,) is such retiring partner a creditor, and such payment a preference within the meaning of the bankrupt law?

Fifth. Does the conveyance of real estate by a party deeply in debt to another not being a bona fide creditor or purchaser for valuable consideration—and which would be void as against creditors under the state law—the conveyance being made previous to the 1st January, 1841, and not in contemplation of the passage of any bankrupt law, bar the discharge of such debtor under the bankrupt act, his application being voluntary?

Sixth. Does it vary the case if such conveyance is made in contemplation of bankruptcy?

It appearing to the court upon the proofs in the case that after the 1st of January, 1841, and prior to the passage of the bankrupt act, [of August 19, 1841, (5 Stat. 440, c. 9,)] various creditors of the bankrupts, by the general concurrence and authority of both bankrupts, (but no particular acts of the bankrupt Amory in this behalf are proved,) received payments in money, and various other creditors by assignments and transfers of assets of the bankrupts of value, on a composition and compromise with the said creditors of their respective debts, and in full discharge and satisfaction thereof by such composition and part payment, and that numerous others then creditors of the bankrupt received no payment whatever on their respective debts then due. Wherefore it is considered by the court that such payments and assignments, was giving and securing a preference to one creditor over another against the prohibition of the bankrupt law.

And it further appearing to the court that the bankrupts after the passage of the bankrupt law, and after the same went into operation and effect, and in contemplation of bankruptcy, in like manner compounded and settled debts owing by them, by payment thereof in part in cash to some creditors, and to others by assignments and transfers of assets of the bankrupts of value, for the purpose that the said debts on such composition and payment should be released and discharged to the said bankrupts, and that the same were thereupon released accordingly, and that others, then creditors of the bankrupts, received no payment whatever on their debts then due, and that the bankrupts had not at the time means to make such payments equal to all their creditors. Wherefore it is further considered by the court that such payments and assignments were made for the purpose of giving such

particular creditors a preference or priority over the general creditors of the said bankrupts.

And it is further considered by the court that preferential payments or assignments made by bankrupts to portions of their creditors are not exempted from the prohibition of the bankrupt law, because obtained through the urgent demands of such creditors, or by means of threats to bring actions therefor.

It is further considered by the court that the assignment and payment of assets and funds by the bankrupts to the retiring partner previous to the 1st January, 1841, if made in contemplation of the passage of a bankrupt law is not a preference to one creditor over another within the meaning of the second proviso of the second section of the act.

It is therefore adjudged and decreed by the court, that so much of the said objections and amended objections to the discharge of both the said bankrupts, as allege payments or assignments by way of preference as aforesaid, be allowed to the extent above particularized and specified, and no further; and it is further adjudged and decreed that such objections and amended objections so allowed, are in law a bar to the discharge prayed for—and in respect to the bankrupt Jonathan Amory, it is further ordered that all the objections and amended objections to his discharge, imputing a wilful omission or refusal to conform to the requisites of the bankrupt act, and a fraudulent concealment of any of the effects or property of the said bankrupt, be disallowed and overruled.

And in respect to the bankrupt Henry H. Leeds, it appearing to the court that the various assignments and transfers of real estate and personal estate made by him to his sister Frances B. Koun, were all made prior to the passage of the bankrupt law, and it further appearing to the court upon the proofs that his said sister was not at the time of any of the said transfers and assignments a bona fide creditor of the said bankrupt, it is therefore considered by the court, that such transfers and assignments did not give or secure any preference or priority to one creditor over others of the bankrupt within the intent and meaning of the law, and is therefore no bar under the second section of the act to the discharge prayed for.

And it being considered by the court, that although such transfers or assignments under the proofs are void in law, and fraudulent as against creditors, yet frauds of that character can legally bar the discharge of the bankrupt, only when committed posterior to the enactment of the bankrupt law; and it being further considered by the court, that though upon the proofs it is made to appear that the bankrupt in and by such assignments and transfers placed property in the hands of his sister with intent fraudulently

to cover the same and enjoy the benefit himself, and ultimately to resume the full ownership thereof, yet that transactions fraudulent in themselves, consummated before the passage of the bankrupt act, are not frauds within the meaning of the fourth section of the said act, which bar a discharge and certificate to a bankrupt.

And it not appearing to the court that the said bankrupt has, since the passage of the said act, made any fraudulent transfers of property, or concealed his estate or property, or committed any other act of fraud in respect thereto or the proceedings under the act, it is considered and adjudged by the court, that all the objections interposed to the discharge of the said Henry H. Leeds (other than the objections before specially allowed) be overruled and disallowed.

No costs allowed to either party.

[NOTE. The bankruptcy act of August 19, 1841, § 6, (5 Stat. 440, c. 9.) conferred jurisdiction in bankruptcy on the United States district courts, and provided that the district judge "may adjourn any point or question arising in any case in bankruptcy, into the circuit court for the district, in his discretion, to be there heard and determined; and for this purpose the circuit court * * * shall * * * be deemed always open."

[Section 2 provides "that all future payments, securities, conveyances or transfers of property, or agreements made or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person, any preference or priority over the general creditors of such bankrupts; and all other payments, securities, conveyances, or transfers of property, or agreements made or given by such bankrupt in contemplation of bankruptcy, to any person or persons whatever, not being a bona fide creditor or purchaser, for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act; and the assignee under the bankruptcy shall be entitled to claim, sue for, recover and receive the same as part of the assets of the bankruptcy; and the person making such unlawful preferences and payments shall receive no discharge under the provisions of this act."

[The second proviso of section 2 declares that, if it shall appear to the court in the case of the bankruptcy proceedings that a voluntary bankrupt has subsequent to January 1, 1841, or at any other time, in contemplation of the passage of a bankrupt law, given any preference to one creditor over another, he shall not receive a discharge without the assent of a majority in interest of the creditors not so preferred.

[Section 4 provides "that every bankrupt who shall bona fide surrender all his property, and rights of property, with the exception before mentioned, for the benefit of his creditors, and shall fully comply with and obey all the orders and directions which may from time to time be passed by the proper court, and shall otherwise conform to all the other requisitions of this act, shall (unless a majority in number and value of his creditors who have proved their debts shall file their written dissent thereto) be entitled to a full discharge from all his debts. * * * And if any such bankrupt shall be guilty of any fraud, or willful concealment of his property or right of property, or shall have preferred any of his creditors contrary to the provisions of this act, or shall willfully omit or refuse to comply with any orders or directions of such court, or to conform to any other requisites of this act, * * * he shall not be entitled to any such discharge."]

Case No. 336c.

In re AMORY and LEEDS.

[Betts' Ser. Bk. 113.]

Circuit Court, S. D. New York. 1844.¹

BANKRUPTCY—ILLEGAL PREFERENCES AND TRANSFERS—ACT OF 1841—DISCHARGE.

[1. The receipt by certain creditors of an insolvent partnership of money and other assets of a composition and compromise of their claims, and in full discharge thereof, is a preference, within the prohibition of the bankruptcy act of August 19, 1841, (5 Stat. 440, c. 9.) when it appears that other creditors got nothing, and that the settlement was made after January 1, 1841, and prior to and in contemplation of the passage of the act, with the general authority and concurrence of both partners, though no particular acts are proved against one of them. In re Amory and Leeds, Case No. 336b, affirmed.]

[See In re Amory and Leeds, 336b, note.]

[2. Similar settlements with certain creditors, to the exclusion of others, made after the act of 1841 went into effect, are preferences, within the prohibition of that act. In re Amory and Leeds, Case No. 336b, affirmed.]

[3. Preferences of certain creditors, to the exclusion of others, are not exempted from the prohibition of the bankrupt act of 1841 because obtained through the urgent demands of such creditors, or by means of threats to bring actions for their claims. In re Amory and Leeds, Case No. 336b, affirmed.]

[4. Such preferences are within the prohibition of the law, although the bankrupt originally offered to compromise with all his creditors at a fixed and equal ratio; especially when the compromises actually obtained were not in a uniform ratio.]

[In bankruptcy. In the matter of Jonathan Amory and Henry H. Leeds. Certificates of discharge which had been taken out were vacated, (In re Amory and Leeds, Case No. 336a;) and discharges were thereafter refused, (Id., Case No. 336b.) The bankrupts appeal. Affirmed.]

In the matter of Jonathan Amory and Henry H. Leeds, bankrupts.

The court [below] denied the application for the discharges on the grounds—

1st. That the debtors as partners, after the 1st of January, 1841, had compromised with certain of their creditors and obtained releases therefrom by paying part of their respective debts in cash, or by transfer of assets of the house equivalent to cash, while numerous other creditors were left unpaid in whole or part, thereby giving a preference to a portion of the creditors of the house, in contravention of the bankrupt law.

2d. That after the passage of the bankrupt law, and after the same went into operation and effect, the bankrupts, in contemplation of bankruptcy, in like manner compounded and settled with certain of their creditors by payment in part, either in cash or by transfer of assets of the house, and obtained releases therefrom whilst other creditors were left unpaid, whereby preference was given to particular creditors, con-

¹[Affirming In re Amory, Case No. 336b.]

trary to the provisions of the bankrupt law. 3d. The court below further held, that giving preference to particulars as aforesaid, by reason of the urgent and pressing demands of the creditors, or threats of bringing suit to recover their debts, did not exempt the act from the prohibition of the provisions of the law.

I have reviewed the case on appeal, after the benefit of a full argument by the learned counsel, on the part of the petitioners and creditors, and am entirely satisfied that the conclusion at which the court below arrived, both as to the facts and law, are well founded, and the discharges are properly denied. That preferences were given to certain creditors by the bankrupts in making payments by the way of compromise, after the 1st January, 1841, after the passage of the law, and even after the same went into operation, and when the house was hopelessly insolvent, is not denied. But it is supposed that the offer by the bankrupts to all of their creditors, as originally made, to put them on an equal footing in the general compromise, if they would come in, accept the 13½ per cent., and release their debts, takes the case out of the prohibition against the preferences in the law, as this offer was in the spirit of that law, and contemplated a distribution of the assets in conformity to, its provisions. But the answer is, the creditors were not bound to accept the compromise, and were at liberty to put themselves upon their legal rights, whatever they might be. The offer of compromise neither abridged these rights, as respects the bankrupt law, nor conferred upon the debtors the privilege of controverting any of its provisions. The refusal of any one creditor left both the creditor and debtor, as it respected their relative position and rights, the same as if no such compromise had been tendered. Any other conclusion would enable the bankrupt either to force his creditors into a compromise, or legalize any preference he might choose to make to favored assenting creditors, though in contravention of the express inhibition of the bankrupt act. Again, the payments made in point of fact, in effecting the compromise by the bankrupts, varied as to the amount, according as arrangements could be made with each particular creditor—some realizing more, some less, ranging, I believe, from 10 to 50 per cent. and some even at par; at all events, no uniform pro rata distribution of the assets was offered in compounding with the creditors. But apparently such per cent. advanced or secured by transfer of assets as was exacted by the creditor before he would consent to discharge his demand.

I am also satisfied from the evidence in the case, that these preferences were made in favor of creditors who would consent to release their demands after 1st of Jan. 1841, and before the passing of the bankrupt law, in contemplation of the passing of that law,

a threat having been held out by the bankrupts of an intention to take the benefit of the same, if passed into a law, unless the creditors would close with their term of compromise offered. These preferences, therefore, thus given after the 1st of Jan. 1841, and also after the passage of said law, and its going into operation, were in contravention of the express provisions of the 2d and 4th sections, and are necessarily fatal to the application for the discharges.

The court therefore deny the application for discharge in both cases, with costs.

Case No. 337.

The AMOS C. BARSTOW.

[8 Ben. 401.]¹

District Court, S. D. New York. March, 1876.

COLLISION IN NARRAGANSETT BAY—STEAMER AND SCHOONER — CHANGE OF COURSE BY SCHOONER TO AVOID ANOTHER SCHOONER.

1. A schooner was sunk by a collision with a propeller in Narragansett bay. The schooner was beating up the bay, and tacked from the west shore and stood across on her port tack. While on this tack she saw, as she alleged, that she was likely to come in collision with another schooner, which was holding her starboard tack, if both vessels kept their courses, whereupon she again tacked and came on the starboard tack, and shortly afterwards was struck by the propeller's stem, on her starboard side, near amidships. On behalf of the propeller it was alleged, that, as she was coming down the bay, she saw the schooner coming from the west shore and ported her helm to go under the schooner's stern, and had swung off to starboard, when the schooner suddenly, and without notice or reason, came about on her starboard tack, when so near the propeller that she could not be avoided: *Held*, That the tacking of the schooner, on the evidence, was so short a time before the collision as not to leave room for the propeller, which had taken measures, by porting, to go under the schooner's stern, as she was going east, to change her course so as to get under the stern of the schooner as she was going west;

2. That though such change of course by the schooner might not have been a fault, as respected the other schooner, which she was trying to avoid, that did not show that she was not in fault as respected the propeller;

3. That, the steamer was not in fault in not slowing before the schooner changed her course; that she took proper measures in time to avoid the schooner and stopped and backed as soon as there was any apparent necessity for it; and that she was not chargeable with the consequences of the collision.

[In admiralty. Libel by the Pennsylvania Railroad Company, owners of the schooner Wind, against the propeller Amos C. Barstow, for damages caused by collision. Libel dismissed, with costs.]

Beebe, Wilcox & Hobbs, for libellants.

R. D. Benedict and J. Sherwood, for claimants.

¹[Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

BLATCHFORD, District Judge. This is a libel filed by the Pennsylvania Railroad Company as owners of the schooner *Wind*, against the propeller Amos C. Barstow, to recover for the damages sustained by the libellants, by means of a collision which took place about 2 o'clock A. M. on the 17th of April, 1874, between the schooner and the propeller, in the western channel of Narragansett bay, between Conanicut island and the main land, not far above the south end of the island. The propeller was going down the bay and the schooner was beating up against the wind. Although the sky was obscured by clouds, and the stars were not visible, it was not thick or foggy, and there was no difficulty in seeing the lights of vessels. Both the propeller and the schooner had their proper lights set and burning. While the propeller was up the bay from the schooner, and going down, the schooner, from being on her starboard tack, heading to the western shore, came about under the western shore to her port tack and stood over towards the eastward. The wind was about north-east and the schooner's course was about east-south-east. The channel there is from a mile and a quarter to a mile and a half wide.

The libel alleges, that, when the schooner had just filled away on such port tack, she saw the propeller's lights, bow and stern and green lights, to the northward and eastward, up the channel; that, after the schooner had kept on such port tack for a short distance, she saw that she was likely to collide with another schooner which was on the starboard tack, if both kept their courses; that she then tacked and came on to the starboard tack; that, when she commenced to make such last tack, the propeller was more than a quarter of a mile to the eastward and northward of the schooner, and at a long distance from her course; that the propeller had not changed her course when the schooner came about, but, just as the schooner was filling away on such starboard tack, it was discovered that the steamer had ported and was rapidly closing in on the schooner and her course; that the propeller came on, still swinging at a rapid rate, until very close to the schooner, when her machinery stopped working but her headway was still rapid; and that, when it was seen that the propeller was evidently coming into the schooner, and in order, if possible, to make the blow a glancing one, the wheel of the schooner was kept hard-a-starboard, and the swing was kept up until she was struck by the propeller heavily, head on, at about amidships, cutting into her and causing her to sink. The libel alleges, as faults on the part of the propeller, causing the collision, that she did not have a proper look-out; that she did not keep on her course instead of porting, or, if any change was necessary, did not starboard instead of porting; that she did not starboard after she

had ported, when she found that the schooner was standing in shore; that she did not take the proper measures in time to avoid the schooner; and that she did not stop and back in time to avoid the schooner.

The answer alleges, that, after the propeller, in going down the western channel, had passed Dutch island, she discovered a number of schooners and small sailing vessels, most of them on the eastwardly side of the channel, on their course up the bay, on the starboard tack, showing green lights, and also discovered the libellants' schooner on her starboard tack, on the westerly side of the channel, showing a green light, and, soon thereafter, nearing the west side, changing to the port tack, shutting in the green light and showing a red light; that the course of the propeller was then south by west; that she was not on the easterly side, but near the middle of the channel, and was making her way to the leeward of the said schooners and small sailing vessels, which were on the starboard tack, having ample room and time to pass ahead of them; that the movements of the libellants' schooner were closely watched by those on board of the propeller, and, observing her progress from the westerly side on her port tack last mentioned, it was determined to keep to the starboard, so as to pass under her stern; that, accordingly, as the schooner was nearing the centre of the channel, on her port tack last mentioned, the wheel of the propeller was put hard to port, and her course changed from south by west to west-south-west; that, if the schooner had stood her tack out, or kept on her course, as she was bound to do, the propeller would have passed well under the stern of the schooner and no danger of collision would have been incurred; that, thereafter, and when the schooner, on her port tack, had reached a point about 400 or 500 feet ahead of the propeller, and one or two points off the port bow of the propeller, she suddenly, without any apparent reason, and without giving any signal, having ample room to proceed on her course, came about with great rapidity, changing her course and her tack, shutting in her red light, and showing her green light to the propeller; that, immediately, seeing this unexpected change of the course of the schooner, orders were promptly given on board of the propeller, and promptly executed, to slow, stop and back her; and that the collision was caused wholly by the negligence and unseamanlike conduct of those on board of the schooner, in not keeping on her course and standing out her port tack, and, if there was any fear of collision with the other schooner, in not giving way instead of going about, in not porting her helm, after she had made her last tack, instead of putting her helm hard to starboard, and in not showing a lighted torch or giving any signal, by lights or otherwise, of her

intention to change her tack, in time to enable those on board of the propeller to understand her proposed movements.

The libel admits that the schooner changed her course in the presence of the propeller, and went from her port tack to her starboard tack, after she had seen the lights of the propeller, and knew that that vessel was a steamer coming down the channel. But the libel alleges, that, when the schooner commenced to make such starboard tack, the propeller was a long distance from the course of the schooner, and had not yet ported to go under the stern of the schooner. This allegation is not borne out by the evidence. It is clearly established, that the red light of the schooner was seen from the propeller when the schooner was well over to the western shore, and that the propeller then properly discharged her duty of taking measures to avoid the schooner, by porting her helm, so as to pass under the stern of the schooner. She did this some time before the schooner left her port tack. She would have passed safely under the stern of the schooner, if the schooner had not suddenly changed her course, and thrust herself on the course of the propeller. It is impossible to see any fault in the propeller in any of the particulars alleged in the libel. Her lookout was adequate, because those in her pilot house saw the schooner's red light in ample season, and watched it, and took timely measures to avoid the schooner. It was proper for the propeller to port and go under the schooner's stern. It would have been imprudent for her to attempt to cross the bows of the schooner. She was on a swing to starboard, by porting, when she discovered that the schooner had starboarded; and, if it were an error of judgment for the propeller not then to starboard, which is not established, such error, in an exigency caused by the sudden movement of the schooner, cannot be imputed as a fault. The propeller did take proper measures in time to avoid the schooner, and she stopped and backed as soon as there was any apparent necessity for her doing so. This disposes of all the allegations of fault, contained in the libel. It was not incumbent on the propeller to diminish her usual speed until she saw that the schooner had changed her course.

The schooner may not have been in fault as against the other schooner, which it is alleged she was attempting to avoid; but that does not show she was not in fault as against the propeller, although engaged in discharging a duty she was bound to discharge towards such other schooner. She gave the propeller no signal, by a lighted torch or otherwise, when she was about to change her course suddenly, before she had run out her tack; and, even if, at the last moment, she could not avoid the other schooner by porting, but was obliged to starboard, it is entirely clear that she could

equally have avoided the other schooner, if she had ported when further away from such other schooner. When on her previous starboard tack she knew that such other schooner was following her on that tack, and that it would be her duty, on the port tack, to avoid such other schooner. The libel is dismissed, with costs.

Case No. 338.

AMOSKEAG MANUF'G CO. et al. v. The JOHN ADAMS.

[1 Cliff. 404;¹ 17 Leg. Int. 412.]

Circuit Court, D. Massachusetts. May Term, 1860.

COLLISION—VESSEL AT PIER—FOG—INEVITABLE ACCIDENT—STRENGTH OF THE MOORED VESSEL.

1. Passengers cannot be regarded as lookouts in any sense known to the maritime law, certainly not unless specially designated by the master for such purpose.

[Cited in Killam v. The Erie, Case No. 7,765; The Ancon, Id. 348.]

2. When a vessel shown to have been properly moored in a proper place is run into by a steamer crossing a harbor, the burden is on the steamer to show either that she was without fault, or that the disaster was the result of fault on the part of the moored vessel.

[Cited in The Russia, Case No. 12,168; The Clara, Id. 2,788; The Hansa, Id. 6,037; The Free State, Id. 5,090; The Lady Franklin, Id. 7,984; The Virginia Ehrman, 97 U. S. 315; Guibert v. The George Bell, Case No. 5,856; The James Bowen, Id. 7,192; The City of Lynn, 11 Fed. 340; The Rockaway, 19 Fed. 451; The Echo, Id. 454; The Ogemaw, 32 Fed. 921.]

3. Inevitable accident under such circumstances cannot be presumed, especially when the occurrence was in the daytime; but it must be clearly proved by the party setting it up, unless the fact appears from the testimony on the other side.

[Cited in the Russia, Case No. 12,168; The Clara, Id. 2,788; The Deer, Id. 3,737; The Hansa, Id. 6,037; The Virginia Ehrman, 97 U. S. 315; The City of Lynn, 11 Fed. 340; The Echo, 19 Fed. 454; The Ogemaw, 32 Fed. 921.]

4. Ferry-boats, in crossing harbors of commercial ports in a fog, or in the night, should proceed with great caution.

[Cited in Guibert v. The George Bell, Case No. 5,856; The Rockaway, 25 Fed. 776.]

[See The Ophelia, 44 Fed. 941.]

5. The owners of a vessel properly moored at a wharf are not bound to keep a watch on board.

6. Where a leak occasioned by an injury received by a vessel moored at a wharf had damaged the cargo because the leak was not discovered for some time after the accident, but where it at the same time appeared that two examinations of the injured vessel were made subsequent to the collision, and no indications of any injury below water could be discovered, *held*, that the damage to the cargo was not the result of negligence upon the part of those in charge of the injured vessel.

7. In case of a collision between a moving steamer and a vessel moored at a wharf, in

¹[Reported by William Henry Clifford, Esq., and here reprinted by permission.]

which the latter was injured, it is no defence to say that the damage would have been less if the vessel had been more strongly built.

[Cited in *The Deer*, Case No. 3,737.]

[In admiralty. Libel in rem by the Amoskeag Manufacturing Company, owners of the ship *Aldanah*, against the ferry boat *John Adams*, for damages caused by collision. Decree for libellants.]

The libel was filed in the district court on the 12th of February, 1859, but on the 17th of April, 1860, it was transferred to this court, pursuant to the act of the 3d of March, 1821, because the district judge was so concerned in interest as to render it improper for him, in his opinion, to sit in the trial of the cause. The facts were these: On the 19th of January, 1859, the ship *Aldanah* arrived at Boston from New Orleans, with a cargo of cotton, and on the 20th was moored in the harbor of Boston, at a place called Battery wharf. The steamer *John Adams*, in attempting to pass across the harbor from the eastern side to a slip or dock southerly of the place where the ship lay, ran into the stern of the ship, striking her stern-post, opening the wood ends of the vessel, and caused her to leak, and thereby injured a part of the cotton, the property of libellants. The *John Adams* was a ferry-boat and was at the time on her usual trip across the harbor. The respondent set up as a defence that the collision was the result of inevitable accident, and alleged that the steamer, in attempting to cross the harbor, was carried against the ship by the tide, in a dense fog, which shut down on the water when the steamer was about half-way across the harbor. They also alleged that, when the fog became too dense to proceed with safety, orders were given to slow, and finally to stop; that while thus stopping the steamer was mid-channel and exposed to a strong flood-tide which carried her from her course. After waiting for a time, and no change in the condition of the atmosphere taking place, the whistle was sounded, and, as a measure of safety to the steamer and other vessels, she was moved slowly for a brief period, then the wheels were reversed, and when in this condition the collision occurred. The respondents averred that such was the condition of the weather that no precaution on their part could have prevented a collision, even if the steamer had been moving by the tide alone. There was considerable testimony introduced tending to show that the ship's stern-post was not properly fastened, and that if it had been as strong as usual the ship would not have sprung aleak on account of the blow.

D. Thaxter, for libellants, cited *New York & V. S. S. Co. v. Calderwood*, 19 How. [60 U. S.] 241; *The Bay State*, [Case No. 1,148,] 18 How. [59 U. S.] 89; *The St. Louis and The A. Rossiter*, [Case No. 17,147,] *Ure v. Coffman*, 19 How. [60 U. S.] 56; *The Juliet Erskine*, 6 Notes of Cas. 633; *Netherland Steamboat Co. v. Styles*, 40 Eng. Law & Eq.

19; 1 Pars. Mar. Law, 201-211; *The Lochlibo*, 3 W. Rob. Adm. 310.

J. W. Hubbard, for claimants, cited *The Virgil*, 2 W. Rob. Adm. 201; *The Europa*, 2 Eng. Law & Eq. 557; *The Bolina*, 3 Notes of Cas. 208; *The Ebenezzer*, 2 W. Rob. Adm. 206; *The Neptune*, [Case No. 10,120.]

CLIFFORD, Circuit Justice. Inevitable accident is the main ground of defence assumed by the respondents. They do not controvert the fact that the collision occurred at the time and place and substantially in the manner as alleged in the libel. It took place between eight and nine o'clock in the morning of the 20th of January, 1859, while the ship was lying at the wharf. She had arrived the day previous from New Orleans, and the evidence is full to the point that she was properly moored, under the direction of the wharfinger, at a wharf where vessels of that description and all classes of vessels were accustomed to be moored. According to the testimony of the wharfinger, she was moored in the usual method at the end of what is called the middle pier of the wharf, with head-fasts and stern-fasts and with good ranging-fasts each way, and the mate testifies that she had a hawser across the dock. Her stem, as she lay, headed northerly, and her stern was towards the ferry slip. Two barks were moored at the pier next south of the ship and between her and the slip where the steamer was accustomed to land. One was outside of the other, and the jib-boom of the outer bark was partly over the stern of the ship, extending inside of the centre. Her boat was suspended by tackles on a level with the jib-boom, and the force of the collision was such that it was stove and broken in two pieces, so that one half was left hanging from one tackle, and the other half from the other. As described by the wharfinger, the pier at which the ship was moored projects some fifteen or twenty feet beyond where the two barks lay. Its width is about one hundred and thirty feet, and it is about the same distance from the southerly corner of the southerly pier to the ferry slip. When the collision occurred the ship was lying in a line with the cap-sill of the wharf, and extended some fifteen or twenty feet beyond the corner of the pier to which she was fastened. She registered ten hundred and forty-seven tons, and was one hundred and seventy-three feet long. Ships of all sizes have been moored at that wharf for a period of fifteen or twenty years, without any accident having occurred, and the wharfinger says he considers it one of the safest berths in the harbor. At the time the collision occurred the mate of the ship was standing on her port rail, and the blow was so severe that he was knocked off the rail by the concussion. Both the master and the mate lived on board, but the former was temporarily absent at the time of the disaster. He returned, however, before the

steamer left the stream, and immediately examined the ship to ascertain what damage had been done. Her bulwarks on the starboard side, about six feet from the stern, were stove for the distance of eight feet, exhibiting the appearance as if the timbers striking the vessel had hit her endwise. Pieces of wood from the steamer were left sticking in the broken parts of the bulwarks of the ship. The bulwarks were constructed of white-pine, and were ceiled inside with three-inch hard-pine planks. One of the hard-pine planks was broken, and so also was one of the wheel-ropes. It was a two and a quarter inch rope not lashed at all, and was broken near the middle. Damage was also done to the rudder, which was made of oak. Abreast the twenty-two foot mark it had a large scar on the starboard corner of the after part, an inch deep, and one or more of the braces also were started. It was not far from eight o'clock in the morning when the steamer started from her slip on the eastern side. As alleged in the answer she was a ferry-boat, and had on board two teams and some fifty passengers to be transported across the harbor to the main part of the city. Prior to her starting there was considerable fog on the western side of the stream, but, as it did not rest on the water, by six or eight feet, the hulls of vessels and other objects on the opposite side were plainly visible. Under these circumstances, the master of the steamer thought it prudent to make the trip without consulting the superintendent. He accordingly gave the order to start, and when the steamer had proceeded about one quarter of the way across, the fog shut down, first on the western and then on the eastern side, and became so very dense, as the master says, that he lost the sight of both shores. Orders were then given to slow, and the steamer proceeded as slow, according to the testimony of the engineer, as she could be worked under steam and have her wheels pass their centres. When about half-way across, the master says he gave the signal to stop, and then to reverse the wheels, and the orders were obeyed so as to stop the boat. That course was adopted in the hope that there would be a change in the weather, and with a view to ascertain the true position of the steamer. For that purpose the steamer remained stationary some three or four minutes, but, finding that the weather was not improving, the master directed her to be started again under a slow bell; but after the engine had made some three or four revolutions, the signal was again given by the master to stop. He then stepped two or three feet to the forward part of the pilot-house to ascertain whether he could see any object that would enable him to determine where he was, but could not; and accordingly gave the signal to reverse. At that moment the passengers began to move from the forward to the after part of the

boat, and before there was time for the engine to make one revolution under his last order the collision occurred. During all this time the master was in the pilot-house at an elevation of twenty-eight feet above the water-line of the vessel, and he admits that he could not see the water at all, and that he could only see the "glimmer" of men standing on the forward part of the steamer. Her whole company consisted of five men, to wit, the master, one engineer, one fireman, and two deck hands. One of the deck hands was stationed forward, but the other was aft, and the master says the former was at his post and was the lookout for the steamer. But it does not appear that the master made any inquiries of him during the passage, or that the lookout made any communication to the master or any other person in charge of the vessel.

Many of the passengers, as is usual in such cases, were standing on the forward part of the deck, and it is insisted by the respondents that they were looking out, and that their testimony shows that every reasonable precaution was taken to avoid a collision. Much conflict exists in the testimony, especially as to the distance that objects could be seen during the last half of the passage, and as to the speed of the steamer at the time of the disaster. Several witnesses examined by the respondents express the opinion that the ship could not be seen at the distance of more than ten or twelve feet as the steamer approached the western shore. On the other hand, about an equal number examined by the libellants testify that she could be seen at the distance of from one to two hundred feet. John F. Randall, the mate of the outer bark, says he saw the steamer come in collision with the ship while he was walking fore and aft on the quarter-deck of the bark, and he says when he first saw her she was from one hundred to one hundred and twenty feet from the place where he was standing. She was seen also as she approached by one of the stevedores on board the ship. At first he thought she was making her right course for the slip, which proved to be a mistake. He is unable to state the distance, but says she seemed to be far enough off to make her right course to the dock. When the master of the ship returned, the steamer was still in the stream, and he says he saw her when she was two hundred feet distant from the place of collision. His statement is substantially confirmed by the mate, who says he could see her at a distance of a hundred and fifty feet; and the carpenter of the ship testifies that the fog was not so dense at any time but that he could see the length of the ship, and he affirms that he saw the steamer at the time she was backing out when she was a hundred feet distant, and then turned away and went aft. One witness of experience also, who was on board the steamer, confirms these statements. He says he saw the ship

as they approached when she was one hundred and forty feet distant, and that he hailed the steersman of the boat as soon as he saw her. To the same effect also is the testimony of the principal stevedore who was on board the ship engaged in discharging cargo. He says he could see as far as fifty yards, though he admits it was foggy. Opposed to these statements is the testimony of the master of the steamer, the deck-hand who was forward, and some five or six of the passengers, who express the opinion that objects could not be seen at a greater distance than from ten to twenty feet. One theory may be suggested which perhaps may reconcile the testimony of the witnesses. Those examined by the respondents did not see the ship until they were close to her, and consequently they are of the opinion that she could not have been seen at any greater distance. On the other hand, the witnesses for the libellants saw her at the respective distances mentioned in their testimony, and therefore they know that she could be seen at that distance; or, in other words, one class of the witnesses speak from knowledge, while the other class but give their opinions. At all events, I am of the opinion, after a careful review of the evidence, that the density of the fog was not such that the collision might not have been prevented if the lookout of the steamer had performed his duty.

Very little reliance can be placed upon a crowd of passengers as a substitute for a competent lookout in such an emergency. They are generally eager to reach the opposite shore, and oftentimes by their unreasonable complaints induce those in charge of the vessel to adopt rash and dangerous experiments. Passengers, in point of fact, cannot be regarded as lookouts in any sense known to the maritime law, certainly not unless they are specially designated by the master for that purpose. Lookouts are usually and properly selected from the persons belonging to the vessel, and they must be persons of suitable experience, and continue constantly subject to the command of the master. Every steamboat travelling in the thoroughfares of commerce ought to have a trustworthy and constant lookout besides the wheelsman, for the reason that it is impossible for him to steer the vessel and keep the proper watch, especially when his position is so elevated that either fog or mist may prevent him from seeing the water. The *Genesee Chief*, 12 How. [53 U. S.] 463. Steamers thus navigating must have constant and vigilant lookouts stationed in proper places on the vessel, and charged with the duty for which lookouts are required, and they must be actually employed in the performance of the duty to which they are assigned. *Chamberlain v. Ward*, 21 How. [62 U. S.] 570. According to his own statement, the lookout in this case did not see the ship until the steamer was within five or six feet of her.

He says he was standing on the bow of the boat some ten feet from the edge, and seven or eight feet inside of the chain, and he affirms that he was carefully attending to his duty. But the statement is incredible, if he was competent for the place. Whether his failure to perform the duty required of a lookout arose from his incompetency or from inattention is wholly immaterial in the present inquiry, as in either event the owners of the steamer are responsible for the consequences. Looking at the whole evidence, there is much reason also to conclude that the master was less cautious than he ought to have been in the emergency in which he was placed. From his own testimony it is quite obvious that he had lost the bearings of the steamer on the western side, and was in great uncertainty as to his real position. Assume that what he states is true, that he could not discern objects on the deck, or see the water at all, and then it follows that he had no means of knowing whether the lookout was attending to his duty or whether he was he was at his post. After he had stopped his boat in the first instance, he spoke to the engineer, and remarked that he could not see anything, and was going ahead under a slow bell. His second order to stop was too late, and the order to back on that occasion was not given till the moment when the passengers began to run from the bow of the boat. Some of them had then seen the ship, and one of them had hailed the steersman of the steamer. All of these occurrences must have taken place in the presence and hearing of the lookout, if he was at his post, and yet there was no hail from him, and he now affirms that he did not see the ship until the steamer was "just about striking her." Taking his own account of the transaction, it is impossible to resist the conclusion that he was incompetent for the place or inattentive to his duty. Having come to this conclusion, one or two remarks as to the speed of the steamer will be sufficient. On this point also there is much conflict in the testimony. Several witnesses called by the respondents testify that she was not going faster than at the rate of a mile an hour, and the engineer affirms that she was moving as slow as she could under steam. But several very competent witnesses examined by the libellants express the opinion that her speed was at the rate of four knots per hour, and the circumstances attending the disaster go very far to confirm their statements. She first hit the ship, staving her bulwarks, scarring the rudder, and breaking one of the wheel-ropes, and then passed to the bark, lying partly inside of the ship, and stove her boat, cutting it in two pieces. Had her speed been reduced to the rate of a mile an hour, it is scarcely possible that such consequences would have flowed from the collision.

Without entering more into detail, I am of the opinion that the steamer cannot be excused upon the ground of inevitable acci-

dent, and the evidence falls so far short of establishing that defence, that it is hardly necessary to enter into any extended consideration of the law upon that subject. Inevitable accident, in the absolute and strict sense of the term, says Dr. Lushington, in the case of *The Europa*, 2 Eng. Law & Eq. 550, very seldom takes place. According to his view, the word "inevitable" must be considered as a relative term, and must be construed, not absolutely, but reasonably, with regard to the circumstances of each particular case. In a case where there was no evidence to establish a prima facie presumption of negligence or want of seamanship, and the party proceeded against had alleged inevitable accident, he held that the burden was not on the respondent to prove it, but that the party seeking indemnification must prove that the other party was to blame. *The Bolina*, 3 Notes of Cas. 208. That question, however, came up again in the case of *The Lochlibo*, 3 W. Rob. Adm. 318, before the same learned judge. On this last occasion, after defining the term "inevitable accident" as meaning a collision which occurs when both parties have endeavored by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the accident, he held it to be clear that prima facie the onus probandi was on the owners of the moving vessel, and that they were bound to establish by credible evidence that their vessel was not to blame at all, or that the blame rested solely with the pilot who was on board, in which case the owners would be exonerated from all responsibility. It was held by the supreme court, in the case of *New York & V. S. S. Co. v. Calderwood*, 19 How. [60 U. S.] 246, that neither rain, nor the darkness of the night, nor the absence of a light from a barge or sailing-vessel, nor the fact that the steamer was well manned and furnished and conducted with caution, will excuse the steamer for coming in collision with the barge or sailing-vessel where the barge or sailing-vessel is at anchor, or sailing in a thoroughfare out of the usual track of the steamer. Mr. Parsons lays down the rule, that if a ship at anchor and one in motion come into collision, the presumption is that it is the fault of the ship in motion, unless the anchored vessel was where she should not have been. 1 Pars. Mar. Law, 201. If a vessel anchor in an improper place, she must take the consequences that fairly result from her own improper act. *Strout v. Foster*, 1 How. [42 U. S.] 89; *The Scioto*, [Case No. 12,508.] But whether she be in a proper place or not, and whether properly or improperly anchored, the other vessel must avoid her if it be reasonably practicable and consistent with her own safety. *Knowlton v. Sanford*, 32 Me. 148; *The Batavier*, 40 Eng. Law & Eq. 25. All the evidence in this case shows that the ship was moored in a proper place, and that she was as helpless in her condition at the time of the accident as

the wharf to which she was fastened. Beyond question it is incumbent upon the libellants to show that their vessel was in a proper place, and that the collision occurred; but after those facts are shown, I hold that the burden of proof is upon the respondents, either to show that their vessel was without fault, or that the disaster was the result of fault on the part of the complaining party. Inevitable accident, under such circumstances, cannot be presumed, especially when the occurrence was in the daytime, but must be clearly proved by the party setting up that defence, unless the fact appears from the evidence introduced by the libellants to make out their case. Ferry-boats in crossing the harbor of a commercial port, either in a dense fog in the daytime or in the darkness of the night, ought to proceed with great circumspection and caution; and when those in charge of them have lost the bearings of the vessel, and do not know that the way is clear, they should stop, and if necessary come to anchor, and if, contrary to these suggestions, they rashly advance, the owners must stand the consequences; as in that state of the case the mere excuse that they could not see or did not know where they were will afford no justification for a collision. Three or four knots an hour was too fast under the circumstances of this case, especially if it be assumed that the fog was so dense that a large ship moored at the wharf could not be seen at the distance of more than ten or twenty feet. Vessels in motion for the purpose of crossing a narrow channel dividing a commercial port are under the strongest obligations to keep out of the way of those properly moored at the wharves; and if in any given case they cannot accomplish that duty in any other way than by returning temporarily to the position from which they started, and that expedient is safe and reasonably practicable, they are bound so to do in order to prevent a collision. Dr. Lushington said, in the case of *The Juliet Erskine*, 6 Notes of Cas. 633, that he was not competent to say what was a proper quantity of sail, in the case before him, or what was not; but he was competent to form the opinion that if, on a dark night, the vessel was proceeding at such a rate that those on her deck had not sufficient command over her so as to avoid all reasonable chance of accident, then that was too expeditious a rate, because it is the duty of those who navigate the commercial marine of the country to take care that they do not, for the sake of expedition, injure the property of other people. That principle was again affirmed in the case of *The Batavier*, 40 Eng. Law & Eq. 25. Sir John Patteson said in that case that at whatever rate the steamer was going, if going at such a rate as made it dangerous to any craft which she ought to have seen and might have seen, she had no right to go at that rate. At all events, she was bound to stop if it was necessary to do so, in order to prevent dam-

age being done to the craft in the river. No doubt the passengers in this case were impatient at the delay, but it is a mistake to suppose that the steamer was compelled to advance at the hazard of a collision. She had stopped once for three or four minutes, and might have stopped again without difficulty, or if it had been absolutely necessary she might have returned to the slip on the eastern side.

It is insisted by the respondents, in the second place, that the ship under the circumstances should have kept a watch, and that those in charge of her were in fault in not giving a signal to warn the steamer of her danger as she approached where the ship lay. No authority is cited in support of the proposition, and it is believed that none can be found where a vessel properly moored at a wharf, out of the usual track of a colliding steamer, has been held to be in fault because she failed to give a signal in the daytime to warn off the steamer as she approached. Some attempt was made to prove that the usage of the port required it, but every witness who was examined upon the subject denied all knowledge of any such usage. Owners frequently find it necessary to moor their vessels at the wharf for a considerable time when the vessel is waiting for employment, or when she is the subject of legal controversy, and to require the owners to keep a watch when the vessel is thus unemployed would be to expose them to an unnecessary and useless expense. Those in charge of the ship in this case knew that she was entirely out of the usual track of the steamer, and had no more reason to expect that the steamer would collide with their vessel until it was too late to give any signal, than the proprietors of the wharf had that the steamer would run against the pier to which the ship was fastened. She had her usual highway before her free and unobstructed, and it was her duty to keep in it, or at least to keep out of the way of vessels properly moored at the wharf; and clearly she had no right to complain that a ship lying entirely out of her pathway did not keep a watch to admonish those in charge of her to perform their obligations. Unnecessary burdens or useless restrictions are not imposed by the rules of the maritime law. Such rules are founded in reason, and only require parties so to conduct themselves in the enjoyment of their own rights as not to injure the rights of other persons. Absence of a light from a barge or sailing-vessel in the night-time will not in general excuse a steamer from coming in collision with such barge or sailing-vessel, if the latter is at anchor out of the usual track of the steam-vessel; and if not, it is difficult to see any reason why a vessel properly moored at a wharf where she does not in any respect encumber the pathway of commerce, or in any manner impede, obstruct, or hinder the passage of other vessels, should be required in the daytime to keep

a watch. Such a requirement as the one involved in the proposition would impose an unnecessary burden on the owners of vessels, and in the absence of any proof of usage in the port, or of any decided case to support the proposition, it must be overruled.

In the third place, it is insisted by the respondents that the master of the ship was guilty of gross negligence in not sounding her pumps immediately after the collision, and in not discovering the leak at an earlier moment. It is admitted by the libellants that the leak was not discovered until the next morning after the collision, and they do not controvert the fact that the vessel at that time had made ten feet of water, or that she was then drawing three feet more than she drew the day previous. But they deny that there was any negligence on the part of those in charge of the ship in not making the discovery earlier. She was a tight ship, and had always been so since she was built. According to the testimony of the mate, the pumps suck at fifteen or sixteen inches, and they had been sounded about a half an hour before the collision, when she had eleven inches of water. They were also sounded the day previous, when she had but nine inches of water; and two days before the collision she had but seven inches of water, and those in charge of her testify that, on the voyage from which she had just returned, she had made less water than is usual even for well-built ships. Most of the witnesses agree that it is not usual to sound the pumps more than once in twenty-four hours, while the ship is lying at the wharf discharging cargo, and some of them say that they seldom think of sounding them at all under such circumstances. Examination of the vessel was made by the master immediately after his return, and before the steamer reached her slip. All the injuries that could be discovered indicated that the entire damage was above water. They were such as have already been described, but the pitch in her wood-end seams above water was not cracked. In the course of the forenoon she was also examined by two experienced ship-carpenters, who were sent by the respondents for the purpose of repairing the damage done by the collision. No directions were given by them to have the pumps tried, and one of them assigns as the reason that he never thought of the thing, as he should not have supposed it possible that such a blow would have caused the vessel to leak. Witnesses called by the respondents express the opinion that the pumps should have been tried immediately, but wisdom after the fact is entitled to much less respect than that which precedes the necessity for its exercise. All can now see that it would have been wise to have tried the pumps; but inasmuch as all the injuries were apparently above water, and the pumps had just been sounded, it is not probable that many, if any, ship-masters would have thought of it at the time.

On the morning after the collision, while the master was standing on the wharf, a pilot inquired of him whether the ship was not deeper in the water than she was when she arrived. At first he thought not, and well-nigh convinced the pilot that he was in error; but upon looking at the water-mark on the rudder, he found that she was three feet deeper in the water than she was on the morning previous. Whereupon he gave orders to sound the pumps, and ascertained for the first time that she had made ten feet of water. Four pumps were employed during the day, and two were kept going until eleven o'clock at night, and men were hired to watch and tend the pumps until the cargo was discharged. Five days after the collision the leak was discovered by the carpenter. It proved to be an opening in the wood-ends of the vessel, between the thirteen and fourteen foot mark, and was occasioned by the stern-post being started. Repeated efforts were made in the mean time to discover the leak, but without success. In view of all the circumstances, I am of the opinion that the charge of negligence is not sustained.

Lastly, it is insisted by the respondents in substance and effect that the blow given by the collision would not have started the stern-post of the vessel, and opened the seams of her wood-ends so as to have caused her to leak, if she had been well built and her stern-post had been properly secured and fastened, and sufficiently calked and pitched below low-water mark. Two questions are presented by the proposition,—one of fact and the other of law. It assumes as matter of fact that the ship was not well built, and that her stern-post was not properly secured and fastened. Whether the theory assumed be true or not is a question of fact to be determined from the evidence. She had performed her voyage without any difficulty, and to the satisfaction of all the parties concerned, and was then lying moored at the wharf with a full cargo on board of undamaged merchandise, and to all appearance was in a sound and sea-worthy condition. Every presumption, therefore, on this branch of the case, is in favor of the libellants, and clearly it is incumbent on the respondents to prove the theory of fact on which the proposition rests. Much testimony was introduced on this point by both sides, and it is no more than just to say that it is very conflicting. Looking at the whole evidence, however, in connection with the circumstances of the case, it is the better opinion that the theory assumed by the respondents is not well founded. But suppose it to be admitted that the ship was not in sufficient repair to render her sea-worthy for a new voyage, still there is not a word of proof in the case to show that she was not sufficiently staunch and strong to fulfil all the unfinished purposes connected with the voyage from which she had just returned. On the contrary, the evidence is full to the point that she did not

leak, and was in all respects sufficiently sea-worthy to have enabled those in charge of her to have discharged her cargo without damage, and to have delivered the cotton pursuant to the contract of affreightment. For the argument's sake, therefore, let it be conceded that her condition was such as is here described; that is, that she was not sufficiently staunch or was too much out of repair for a new voyage, but that she was amply sufficient to have enabled her master to have discharged the cargo without damage and to have performed his contract. That view of the facts is certainly as favorable to the respondents, to say the least of it, as the evidence will sustain. Assuming the facts to be as already found, I am of the opinion that the defence set up by the respondents cannot be sustained and that they are just as clearly liable on that state of the case to the extent of the damage done as they would have been if the ship had been staunch, in good repair, and in all respects sea-worthy for a new voyage. They cannot defend themselves in this case against the wrong done by the collision, upon the ground that the blow would have been harmless if the vessel had been stronger, provided she was sufficient to enable her officers to discharge the cargo without damage, any more than a person accused of wilful homicide could successfully set up that the deceased would have recovered if he had not been in feeble health at the time the blow was inflicted. Extreme cases may be imagined, as if the injured vessel was actually sinking at the time of the collision, or was on fire and enveloped in flames, when possibly a different rule would apply; but if reasonably considered, the vessel was sufficient to accomplish the remaining purposes of the voyage, and was not certainly in a condition of inevitable destruction from natural causes, then it is clear that such a defence cannot prevail, and that is all that it is necessary to decide in this case. Whether such a defence could be admitted under any or different circumstances is not a question at the present time. It is no defence to a suit for damages caused by a collision, says Parsons, that no loss would have been sustained if the injured vessel had been stronger; and it was held by the supreme court of Kentucky that the fact that the plaintiff's boat was a weak one, afforded no protection to the defendant, if the collision happened through his carelessness. 1 Pars. Mar. Law, 211; *Inman v. Funk*, 7 B. Mon. 538. Upon the whole case, I am of the opinion, that the libellants are entitled to recover, and there must be a decree accordingly. Should any dispute arise in determining the amount of the damage, the cause must be referred to a commissioner to make the estimate.

AMPHITRITE, The, (UNITED STATES v.)
[See *United States v. The Amphitrite*, Case No. 14,444.]

AMSDEN, The CORNELIA.

[See *The Cornelia Amsden*, Case No. 3,234.]

AMSDEN, (TORRANCE v.)

[See *Torrance v. Amsden*, Case No. 14,103.]

AMSINCK, (BEAN v.)

[See *Bean v. Amsinck*, Case No. 1,167.]**Case No. 339.**

The AMSTEL.

[Blatchf. & H. 215.]¹

District Court, S. D. New York. March 22, 1831.

MARITIME LIENS—STEVEDORE'S LIEN—PERSONAL OBLIGATIONS OF OWNER.

1. A stevedore has no lien upon a vessel for his services in discharging her in port, and cannot sue in rem in admiralty for his compensation.

[Cited in *The Joseph Cunard*, Case No. 7,535; *Cox v. Murray*, Id. 3,304; *The A. R. Dunlap*, 513; *Miller v. The Maggie P.*, 32 Fed. 301.]

[Overruled in the *George T. Kemp*, Case No. 5,341. Questioned in *Roberts v. The Windermere*, 2 Fed. 723; *The Canada*, 7 Fed. 121; *The Gilbert Knapp*, 37 Fed. 211.]

[See *McDermott v. The S. G. Owens*, Case No. 8,748; *Paul v. The Ilex*, Id. 10,842; *The Circassian*, Id. 2,722; *The Estaban*, 31 Fed. 920; *The Wyoming*, 36 Fed. 493; and contra, *Florez v. The Scotia*, 35 Fed. 916.]

2. Where a debt, which might otherwise have been a lien on a vessel, is contracted under an explicit agreement with the master individually, that affords evidence that the creditor has agreed to look only to the personal responsibility of the master, or, at most, of the owner, and that the vessel is exonerated from any lien.

In admiralty. This was a libel in rem by a stevedore for services performed in discharging a vessel in port. The services were rendered upon an express agreement with the master for a stipulated sum.

J. D. De Lacey, for libellant.

Edwin Burr and Erastus C. Benedict, for claimant.

BETTS, District Judge. This action is resisted, in the first place, on the ground that the libellant has no lien upon the vessel, because his services as a stevedore were not, in their nature, maritime, and were really performed on land. It is to be remarked that the services consisted of nothing done to the vessel in her repairing or refitment, but of labor expended, partly on board and partly on shore, in discharging her cargo. This description of service has never yet been recognized as of a privileged order. It does not fall within the extensive list of debts privileged by the civil law; nor does it seem

to be comprehended within the principle upon which a lien or privilege is allowed.

A vessel is made chargeable with certain services, because they are necessary for her preservation or useful employment. Under this head is embraced the compensation of material men and others, for labor done upon the vessel, or in her navigation, or in promoting the health or comfort of the ship's company on a voyage. The language of the civil law has direct reference to this description of service; and the French law, which gives a broader application to the privilege than has ever been yielded in England, does not extend it beyond those engaged in labors connected with the equipment or refitment of the vessel, either in respect to the vessel herself, or her necessary stores, her crew, &c., or in services performed on her during her voyage. The American law has never gone beyond the doctrines recognized in the continental courts of Europe; and it seems to me that it would be a departure from the well-understood terms of the maritime law in this respect, and from the principle which pervades its enactments, to give a lien upon the vessel to a claim of the character of the one now under consideration. It in no respect merits such privilege, any more than do the services of any other class of laborers in any work connected with the business of the ship. It does not seem to differ from a transportation of the cargo from one place to another on the land; and the cartman who hauls off the lading and facilitates the discharge of the vessel, aids her in the same manner as the laborer who raises the cargo from her hold.

Independently of this objection to the maintenance of the present demand here, because of its character, there are other reasons why it cannot be enforced as a lien on the vessel. The testimony shows that it accrued under an explicit agreement with the master; and the whole nature of the contract shows that the personal responsibility of the master, or, at most, of the owner, was alone looked to. This would be sufficient of itself to exonerate the vessel, in a case where she might be chargeable in the absence of any personal credit. The mere circumstance that the price was fixed for which the services were to be rendered, will not free the vessel from a lien which would otherwise exist, because there is in this nothing inconsistent with the continuance of the lien, and nothing from which a waiver of it can be implied. But, when there is a clear unreserved agreement with the master individually, specifying the terms and mode of payment, the inference will be exceedingly forcible, that the personal responsibility alone was contemplated, and the creditor will be compelled to rely upon that. *Hutton v. Bragg*, 7 Taunt. 14; *Ex parte Lewis*, [Case No. 8,310;] *Murray v. Lazarus*, [Id. 9,962.] Upon both grounds, my judgment is against this action. Libel dismissed, with costs.

¹[Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

Case No. 340.

Ex parte AMY.

[1 Cranch, C. C. 392.]¹

Circuit Court, District of Columbia. April, 1807.

SLAVES—SUIT FOR FREEDOM—LIABILITIES OF OWNER.

If the owner of a slave who sues for freedom will not give the security required by law, he must pay the prison-fees for the commitment and safe custody of the slave pending the suit in the county of Alexandria.

Negro Amy, on her petition for freedom, having at November term, 1805, been delivered to the custody of the marshal by order of the court, and none of the material facts stated in the petition being proved by affidavit or otherwise, to the satisfaction of the court, it is ordered that she be delivered to Joseph Thomas, who is stated, in her petition, to have held her in slavery, upon his paying the marshal's fees for her custody, while in actual confinement under the said order.

AMY v. SHELBY COUNTY.

[See Case No. 345.]

AMY, (UNITED STATES v.)

[See United States v. Amy, Case No. 14,445.]

Case No. 341.

The AMY WARWICK.

[2 Spr. 123;² 24 Law Rep. 335.]District Court, D. Massachusetts. April, 1862.³**PRIZE COURTS—JURISDICTION—CIVIL WAR—BELLIGERENTS—ENEMY'S COUNTRY—BLOCKADE—POWERS OF PRESIDENT.**

1. The district courts of the United States are permanent prize tribunals, and take cognizance of questions of prize by virtue of their general jurisdiction.

2. Prize courts are subject to the instructions of their own sovereign. In the absence of such instructions, their jurisdiction and rules of decision are to be ascertained by reference to the known powers of such tribunals, and the principles by which they are governed under the public law and the practice of nations.

3. The United States may be engaged in war, and have all the rights of a belligerent, without any declaration by congress. In such a war, it would be the duty of the president to exert all his powers as commander-in-chief of the army and navy to capture or destroy the enemy. And if, under his instructions, an enemy's ship should be taken and sent in for adjudication, the prize court must proceed to decide the question of prize upon the principles of public law.

[See note at end of case.]

¹[Reported by Hon. William Cranch, Chief Judge.]²[Reported by Hon. Richard H. Dana, Jr., and here reprinted by permission.]³[Affirmed by circuit court, (decree nowhere reported; opinion not now accessible.) Affirmed by supreme court sub nom. The Prize Cases, 2 Black, (67 U. S.) 635.]

4. The hostilities which were commenced, and have been prosecuted, by the rebel confederates against the United States, constitute war in the legal and constitutional sense of that term.

[See note at end of case.]

5. In this war, the rebels are, at the same time, belligerents and traitors, and subject to the liabilities of both. The United States sustains the double character of a belligerent and sovereign, and has the rights of both. The temporary non-user of any such rights is not a renunciation of them, but they may be called into practical exercise at pleasure. The United States has full belligerent rights, which are in no degree impaired by the fact that their enemies owe allegiance, and have added the guilt of treason to that of unjust war.

[Cited in Miller v. U. S., 11 Wall. (78 U. S.) 307.]

[See note at end of case.]

6. If a hostile power, either from without or within our territory, shall make formidable war upon the United States, the president is bound to use the army and navy to carry on the war effectively against such an enemy. He may do so in the manner, and by the measures, usual in modern civilized warfare. One of the most familiar of these is the capture of an enemy's property, public and private, on the ocean.

7. The statute of 1807, c. 39, authorizes the president to employ the army and navy to suppress an insurrection. The manner in which they are to be used is left to the discretion of the president, guided by the usages and principles of civilized war. These, undoubtedly, authorize the capture of enemy's property at sea.

[See note at end of case.]

8. What is enemy's property is a judicial question. Residence of the owner in the enemy's country may be of such a character as to stamp property conclusively as hostile. The court may be compelled to decide what shall be deemed enemy's country.

[Cited in Keppel's Adm'rs v. Petersburg R. Co., Case No. 7,722.]

[See note at end of case.]

9. Richmond, in Virginia, held to be enemy's country, and property captured on the ocean belonging to a permanent resident of that place, to be lawful prize.

[See note at end of case.]

10. In establishing the blockade, the president exercised a great belligerent right. He could not prohibit or restrict the commerce of any state by a mere municipal regulation. The blockade, and the orders of the president to the navy, by which captures have been made, have been confirmed by congress by Stat. 1861, c. 63. This has the force of instructions to prize tribunals to regard those proceedings of the president as legal and valid.

[See note at end of case.]

11. The president, as commander-in-chief, may instruct the officers of the navy to capture, or to abstain from capturing, certain vessels or cargoes. The statute of 1861, c. 23, adds to the means of the president, but in no degree detracts from his previous authority to treat persons or property as he shall deem best.

12. The proviso in the 24th section of the crimes act of 1790, c. 9, and the analogous provision in the constitution, art. 3, § 3, do not preclude the government from having a forfeiture or condemnation of property, at least in cases where the owner has not been convicted of treason.

13. The acts of congress, passed in the summer of 1861, were intended to make the prosecution of the war more efficient, and, in no degree, to curtail the authority which the pres-

ident previously possessed. The previous right of belligerent capture at sea is left unimpaired.

[Cited in *The Ambrose Light*, 25 Fed. 425, 431.]

[In admiralty. Libel in rem against the brig *Amy Warwick* and cargo, as prize of war. The vessel sailed from Rio Janeiro, May 29, 1861, with a cargo of coffee, destined to Hampton Roads for orders. By her charter party she was to go either to Richmond, New York, Philadelphia, or Baltimore. She was captured August 10, 1861, by the United States ship of war *Quaker City*, and brought into this district for condemnation Robert Edmond, Isaac Davenport, Jr., and James Blair, trading as Edmond, Davenport & Co. at Richmond, Va., through their New York agents, claimed 400 bags of coffee, a portion of the cargo. Property condemned.

[The brig was claimed by David Currie and others, and the balance of the cargo by Dunlop, Moncure & Co., all of Richmond. These claims were dismissed, (the former decree unreported, the latter reported sub nom. *The Amy Warwick*, Case No. 342.) Another claim was filed by J. L. Phipps & Co., an English house at Rio Janeiro, for an advance made to supply a deficit of funds to purchase the cargo. This claim was allowed. *The Amy Warwick*, Id. 343. On appeal to the circuit court, the decrees of the district court were duly affirmed, (nowhere reported, opinion not now accessible,) whereupon all of the claimants, except Phipps & Co., appealed to the supreme court. Affirmed. *The Prize Cases*, 2 Black, (67 U. S.) 635.]

R. H. Dana, Jr., U. S. Atty., for the United States and the captors.

I. The property of an enemy, taken on the high seas, is prize of war; and residence in an enemy's country gives to the property of the resident, so found, a hostile character, irrespective of the actual feelings or intent of the owner. In such case, the condemnation is not a penalty on the owner for actual or implied hostility, but because the property is, or may become, a part of the resources of the enemy or be under the enemy's control. *The Venus*, 8 Cranch, [12 U. S.] 280; *The Sally*, Id. 384; *The Frances*, Id. 363; *The Chester*, 2 Dall. [2 U. S.] 41; *Murray v. The Charming Betsy*, 2 Cranch, [6 U. S.] 64; *Maley v. Shattuck*, 3 Cranch, [7 U. S.] 488; *Livingston v. Maryland Ins. Co.*, 7 Cranch, [11 U. S.] 506; *The Juffrouw Louisa Margaretha*, 1 C. Rob. Adm. 203 note; *The Lady Jane*, Id. 202; *The Hoop*, Id. 198; *The Bella Guidita*, Id. 207; *The Gerasimo*, 11 Moore, P. C. 88; *The Aina*, 1 Spinks, 313, 28 Eng. Law & Eq. 600; *The Abo*, 1 Spinks, 347, 29 Eng. Law & Eq. 594; *The Industrie*, 1 Spinks, 444, 33 Eng. Law & Eq. 572; *The Ida*, 1 Spinks, 331; *The Baltica*, 11 Moore, P. C. 141; *Brown v. U.*

S., 8 Cranch, [12 U. S.] 110; *The Danous*, 4 C. Rob. Adm. 255, note; *The President*, 5 C. Rob. Adm. 277; *Wheat. Int. Law*, 429; 1 Kent, Comm. 56-60, 74-77.

II. In civil war, the government may exercise all the rights of the public war against rebels, among which are blockade and the capture of property engaged in commerce upon the high sea. *Wheat. Int. Law*, 365; *The General Parkhill*, [Case No. 10,755a,] by Cadwallader, J.; *The Tropic Wind*, [Id. 14,187,] by Dunlop, J.; and *The Hiawatha*, [Id. 6,451;] *The Hallie Jackson*, [Id. 5,961;] *The Crenshaw*, [Id. 3,384;] *The North Carolina*, [Id. 10,317,] by Betts, J.; *The Revere*, [Id. 11,716;] *Rose v. Himely*, 4 Cranch, [8 U. S.] 272; *Cheriot v. Fousat*, 3 Bin. 252; *Dobree v. Napier*, 3 Scott, 225; *U. S. v. Palmer*, 3 Wheat. [16 U. S.] 635; *The Santissima Trinidad*, 7 Wheat. [20 U. S.] 306.

III. That Richmond, Va., was enemy's country at the time of the capture, is shown by the public acts of the president, by those of the state of Virginia, and of the confederate congress and executive, and by those facts of public notoriety of which prize courts always take cognizance. (Mr. Dana here cited various acts, proclamations, orders, ordinances, &c., of the president, of Virginia, and of the confederation.) A government de facto, engaged in war with the United States, was fully established there, with the apparent consent of the people of that district.

IV. The claimant being a resident in the enemy's territory, the onus is on him to show a reason why his property should not be condemned. *The Primus*, 1 Spinks, 353; *The Magnus*, 1 C. Rob. Adm. 31; 1 Wheat. [14 U. S.] 506, Append.; *Otis v. Walter*, 2 Wheat. [15 U. S.] 24; *The Countess of Lauderdale*, 4 C. Rob. Adm. 283; *The Walsingham Packet*, 2 C. Rob. Adm. 77.

V. The acts of congress of July 13, c. 3, (12 Stat. 255,) and August 6, c. 60, (12 Stat. 319,) do not relate to maritime captures under the war power. They are general acts, applicable to all future times, and not specially directed to the present state of things. They do not assume to determine what shall constitute a state of war, or whether or not there was, at the time of their passage, a war, or where and how far it extended, or what shall be considered a termination of a state of war. They rather recognize that those facts are to be passed upon by the president, from time to time, with full discretion as to policy in dealing with persons or districts. They confer certain powers on the president, attach certain consequences to his acts and declarations, and provide certain new and special modes of procedure. If the passing of those acts is to be construed as a legislative declaration that no captures or confiscations are to be made except under those acts, it will follow that the blockade, established by the proclamations of April last, could

not be enforced against neutrals, except where their property was used in aid of the insurrection, with the owner's knowledge, nor against our own vessels, except in that case, or in case of a trading with the enemy by vessels going directly to or from ports in loyal states. Vessels breaking blockade by voyages between enemy's ports, or bound to or from neutral ports, would not be reached by the act of July 13. The act of August 6, c. 60, would reach no property, contraband or not, which was not used in aid of the insurrection with the owner's knowledge; and section 6 of the act of July 13 reaches no vessels owned by rebels, and found in rebel ports; and a privateer could not be condemned without proof that the owners knew she was used in aid of the insurrection, and consented to the use. Yet the statute of August 6, c. 63, (12 Stat. 326,) confirms all the orders and proclamations of the president, including a blockade "under the law of nations," and was passed after many captures, as enemy's property, had been made, which the prior acts would not have warranted. The acts of 13th July and 6th August, c. 60, must be considered as avoiding all question of belligerent powers, and the time and mode of their use, and as providing additional civil and municipal forfeitures, to follow certain acts of the president in any cases, now or hereafter. Any other construction would prevent the president from exercising any rights of capture, not provided for in those acts, whatever might be the state of a civil war, now or hereafter, and whatever the exigency. And the act of August 6, c. 63, must be treated as admitting the rightful exercise of the war power of blockade and capture in the present insurrection. Among all the condemnations of prizes that have been made, not one has been placed on the ground of the acts of July 13, or August 6, c. 60.

Sidney Bartlett & Edward Bangs, for claimants.

The fundamental question that must rule this case is:—Under our frame of government, when an armed rebellion exists, which, wrongfully availing itself of state or municipal organizations, and professing to act in their name, holds forcible possession of the territory of such state, or municipality, and when the government is attempting to suppress such rebellion by arms,—Do these facts, ipso facto, and without further legislation by congress, produce a state of war of such character that all persons, by retaining their residence within the limits of such state or municipality, become public enemies, and their property found at sea, or wherever found, and however innocently employed, becomes subject to confiscation by the United States? And it is submitted,—

I. That, regarded as a question of public

law, as held and applied to monarchical or other forms of governments with no written constitution like our own, there is no authority for the position that consequences of the character above set forth, ipso facto, in the absence of any decree, edict, or act of legislation, result from war against an armed insurrection occupying portions or districts of an empire or kingdom. Upon this point the doctrine, as stated by Mr. Justice Nelson, is as follows: "On the breaking out of a war between two nations, the citizens, or subjects, of the respective belligerents, are deemed by the law of nations to be the enemies of each other. The same is true, in a qualified sense, in the case of a civil war arising out of an insurrection or rebellion against the mother government. In the latter case, the citizens or subjects residing within the insurrectionary district, not implicated in the rebellion, but adhering to their allegiance, are not enemies, nor to be regarded as such. This distinction was constantly observed by the English government in the disturbances in Scotland under the Pretender and his son, in the years 1715 and 1745. It modifies the law, as it respects the condition of the citizens, or subjects, residing within the limits of the revolted district, who remain loyal to the government." (Charge to the grand jury, Nov., 1861.) Nor does the question of the magnitude of the rebellion affect the principle, since it can hardly be left to judicial tribunals to find whether that magnitude is sufficient to bring the principle into existence.

II. That, even if such results could be deemed to flow from the principles of public law, held and applied under other forms of governments, yet, under our constitution, the question is purely a political one, in which the judgment of the legal tribunal must follow and rest wholly upon the acts and declarations of the executive, based upon some act of congress, or upon the direct legislation of congress itself. Those acts, and that conduct, may create a state of war, attended by all the consequences of open public war with foreign enemies; or those consequences may be distinctly modified and changed in their application to war of this character, as may be determined by considerations of policy.

III. That the mere exercise, by the executive, of the powers confided to him by the constitution and laws to suppress insurrection,—such as calling out the militia, restraining access to and from ports or places held by rebels,—do not, in the absence of special legislative provisions on the subject, create the general status of war, followed by the same consequences as war with foreign enemies.

IV. That the acts of congress, following and connected with, but not professing to repeal or modify, the acts and proclamations of the president, are to be construed together as declaratory of the original relations and liabilities of persons and property to the

government, flowing from the condition of public affairs to which they relate, and that these acts and proclamations show conclusively that no such state of public war exists, or has ever existed, as authorizes the confiscation of property found at sea, or elsewhere, merely because it belongs to citizens resident in a portion of the United States held by parties engaged in an armed insurrection. On the contrary, the acts of congress throughout show that no such result flows from this rebellion. Among other acts, that of July 13, 1861, declares that forfeiture shall attach to a ship or vessel found at sea or in port, from and after fifteen days from the issuing of the president's proclamation. Another (July 31, 1861, c. 28, 12 Stat. 283) provides for arming loyal citizens resident in the rebellious states,—citizens whose property, if found at sea, upon the theory of this libel, is to be the subject of forfeiture.

V. If the rule of public law could be held to warrant forfeiture without any legislation, yet the acts of congress in this case must be deemed to have repealed that rule.

SPRAGUE, District Judge. This vessel, with a cargo of coffee, of the value of one hundred and fifty thousand dollars, sailed from Rio Janeiro, on the 29th day of May last, bound for Hampton Roads; and, on the 10th day of July, was captured by the United States ship-of-war Quaker City, and sent into this district for adjudication. A libel has been filed against both vessel and cargo, as prize; and this hearing is upon the preparatory evidence, and the public acts of the United States and of the rebel states. Condemnation is asked on the ground of enemy's property. A claim to the greater part of the cargo has been presented in behalf of Messrs. Phipps & Co., British subjects resident in Rio Janeiro; but their title is disputed by the captors. Four hundred bags of the coffee have been claimed by Edmond, Davenport & Co., of Richmond, Va., and there is no doubt of their exclusive ownership. The question arising upon this claim of Edmond, Davenport & Co., will be first considered; because, if their part of the cargo be not liable to condemnation, the inquiry as to the ownership of the residue will be immaterial. This claim was filed on the 9th of August last by agents residing in New York. The claimants are therein described to be Robert Edmond, Isaac Davenport, Jr., and James Blair, merchants, copartners, residing and doing business in Richmond in the state of Virginia, under the firm name of Edmond, Davenport & Co. There is no evidence that they ever had any other residence or place of business. Is their part of the cargo liable to condemnation as enemy's property? That is the question.

In war, each belligerent may seize and confiscate all the property of the other, wherever found; and this right extends to the property, found at sea, of all persons per-

manently resident in the enemy's country. Property of private persons found by a nation within its own territory, on the breaking out of hostilities, is not usually confiscated by civilized nations, in modern times. The sovereign may, indeed, seize and appropriate it; but this being contrary to the general usage, it is not to be presumed that the sovereign wills it; and the courts, therefore, will not condemn such property without an express injunction to do so, which, in this country, must be by an act of congress. *Brown v. U. S.*, 8 Cranch, [12 U. S.] 110. Very different are the public law and usages as to enemy's property found on the ocean, which is, by all nations, seized and condemned as lawful prize. In many countries, there are permanent prize tribunals, which, on the breaking out of a war, take cognizance of captures on the ocean, and this by virtue of their general jurisdiction, and without any special authority being imparted for the occasion. Such are the district courts of the United States. The mere creation by congress of a permanent prize court, would, it is believed, invest it with the jurisdiction and authority usually appertaining to such tribunals by the law and practice of nations. It is unnecessary, however, to dwell on this view, because there are several acts of congress relative to captures on the sea. These acts do not, in terms, confer upon the court the power to adjudicate cases of prize, but they assume and recognize the existence of that power, and regulate its exercise. Thus, the statute of 1800, c. 33, (2 Stat. 45,) makes it the duty of the commander of a vessel who shall capture or seize any vessel as a prize, to send all the papers found on board to the judge of the district to which the prize is sent. The same statute further provides that no person in the navy shall take from any vessel, seized as a prize, any property "before the same shall be adjudged lawful prize by a competent court," but "the whole shall be brought in, and judgment passed thereon." The same statute, and the acts of 1816, c. 56, (3 Stat. 287,) and of 1849, c. 103, (9 Stat. 374,) provide for the disposition of the proceeds of vessels and cargoes which shall be adjudged good prize. These statutes, to some extent, prescribe the mode of procedure, but do not define the jurisdiction of prize courts, nor prescribe the rules of decision. These are to be ascertained by reference to the known powers of such tribunals, and the principles by which they are governed, in determining what shall be deemed lawful prize under the public law, and the practice of nations.

What shall be deemed enemy's property is a question of frequent occurrence in prize courts, and on which certain rules and principles are well established. Property captured at sea and owned by persons resident in an enemy's country is deemed hostile and subject to condemnation, without any evidence as to the individual opinions or predi-

lections of the owner. If he be the subject of a neutral nation, or of the capturing belligerent, and has expressed no disloyal sentiments towards his native country, still his residence in the enemy's country impresses upon his property engaged in commerce and found upon the ocean a hostile character, and subjects it to condemnation. *The Venus*, 8 Cranch, [12 U. S.] 253. See, also, *The Hoop*, 1 C. Rob. Adm. 196, and the cases there collected; and also the cases cited by Cadwallader, J., in *The General Parkhill*, (Dist. Ct. E. D. Pa., July, 1861,) [Case No. 10,755a.] But it is contended that although this property might be liable to confiscation if the contest were a foreign war, yet that it is otherwise in a rebellion or civil war. This requires attention. As the constitution gives congress the power to declare war, some have thought that without such previous declaration, war, in all its fulness, that is, carrying with it all the incidents and consequences of a war, cannot exist. This is a manifest error. It ignores the fact that there are two parties to a war, and that it may be commenced by either. If a foreign nation should send its fleets and armies to capture our vessels, ravage our coast, and invade our soil, would not this be war,—giving to the United States, as a nation, the position and rights of a belligerent? Such hostilities would impose upon the president the duty of exerting all his powers, as commander-in-chief of the army and navy, to capture or destroy the enemy; and if, under his instructions, an enemy's ship should be taken and sent in for adjudication, the prize court must proceed to decide the question of prize upon the principles of public law. How this civil war commenced, every one knows. A traitorous confederation, comprising several organized states, after seizing by force several forts and custom-houses, attacked a fortress of the United States garrisoned with its soldiers, under the sanctity of its flag, and by superior military force compelled those soldiers to surrender, and that flag to be lowered. This was war,—open, flagrant, flagitious war; and it has never ceased to be waged by the same confederates with their utmost ability. Some have thought that because the rebels are traitors, their hostilities cannot be deemed war, in the legal or constitutional sense of that term. But without such war there can be no traitors. Such is the clear language of the constitution. It declares that treason against the United States "shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." Some have apprehended that if this conflict of arms is to be deemed war, our enemies must have, against the government, all the immunities of international belligerents. But this is to overlook the double character which these enemies sustain. They are at the same time belligerents and traitors, and subject to the liabilities of both; while the United States

sustains the double character of a belligerent and sovereign, and has the rights of both. These rights co-exist, and may be exercised at pleasure. Thus, we may treat the crew of a rebel privateer merely as prisoners of war, or as pirates, or traitors; or we may, at the same time, give to a part of the crew the one character, and to the residue the other. And, after treating them as prisoners of war, we may exercise our sovereign power and deal with them as traitors. The temporary non-user of such rights is not a renunciation of them, but they may be called into practical exercise at pleasure. In modern times, if a rebellion has assumed such dimensions as to raise armies and involve great numbers, it has not been usual, during the contest, to exercise toward prisoners the sovereign right of dealing with them as traitors. They have generally been treated as prisoners of war until the contest is over. But this forbearance does not preclude their government from afterwards inflicting such punishment as justice and policy may require.

Mr. Wheaton, in his "Elements of International Law," page 365, so strongly maintains belligerent rights in civil war, that some of his language would imply that there are no other rights. This, however, could not have been intended; for, if sovereign rights be at an end, the war is merely international. Civil war, *ex vi termini*, imports that sovereign rights are not relinquished, but insisted on. The war is waged to maintain them. *Rose v. Himely*, 4 Cranch, [8 U. S.] 272, was a case arising out of the exercise of sovereign rights by France in her civil war with St. Domingo. The courts recognized the co-existence of belligerent and sovereign rights. *Cheriot v. Foussat*, 3 Bin. 252, also arose out of a municipal regulation made by France in the same civil war; and the court remark that France was possessed of belligerent rights which might be exercised against neutral nations. *Dobree v. Napier*, 3 Scott, 225, arose out of a blockade of the coast of Portugal by the queen of that country; and the condemnation of a vessel as prize for the breach of it was holden to be valid. See, also, *The Santissima Trinidad*, 7 Wheat. [20 U. S.] 306, and *U. S. v. Palmer*, 3 Wheat. [16 U. S.] 635. The United States has, during the present war, exercised both belligerent and sovereign rights. Examples of the former are, receiving capitulations of the enemy as prisoners of war, and holding and exchanging them as such; and a still more prominent instance is the blockade, which, before the assembling of congress, was established by the military authority of the commander-in-chief.

I am satisfied that the United States, as a nation, has full and complete belligerent rights, which are in no degree impaired by the fact that its enemies owe allegiance, and have superadded the guilt of treason to that of unjust war. But it is insisted that if these

rights exist, still the authority to exercise them by arresting and condemning enemy's property must emanate from the legislature; and that there has been no legislation authorizing this capture.

Congress has established permanent prize tribunals, and created an army and navy. The constitution declares that the president shall be the commander-in-chief of the army and navy of the United States. He is thus clothed with all the power appertaining to that high office; and he is not only authorized, but bound, to exert it when the exigency for which it was given shall arise. If a hostile power, either from without or within our territory, shall assail and capture our forts, and raise armies to overthrow our government, and invade its soil, and menace the capital of the nation, and shall issue commissions to public and private armed ships to depredate on our commerce, the president is bound to use the army and navy to carry on the war effectively against such an enemy, both by land and by sea. And he may do so in the manner, and by the measures, usual in modern civilized warfare; one of the most familiar of which is the capture of enemy's property, public and private, on the ocean. In war, the commander-in-chief is not only authorized to make captures by sea and conquests by land; but he may even govern the conquered territory, until congress shall have seen fit to interpose by legislation. In our last war, California having been subjugated, the commander-in-chief imposed duties, established custom-houses, and collected revenues; and this was sanctioned by the supreme court as a legitimate exercise of military power. *Cross v. Harrison*, 16 How. [57 U. S.] 164. There can be no doubt of the right of the president to make maritime captures and submit them to judicial investigation. It is one of the best-established and least dangerous of his powers as commander-in-chief. Further than this, congress has legislated upon the subject, although it was not necessary for it to do so. The statute of 1807, c. 39 (2 Stat. 443,) provides that, whenever it is lawful for the president to call forth the militia to suppress an insurrection, he may employ the land and naval forces of the United States for that purpose. The authority to use the army and navy is thus expressly confirmed; but the manner in which they are to be used, is not prescribed. That is left to the discretion of the president, guided by the usages and principles of civilized war; and these principles and usages undoubtedly authorize the capture of enemy's property at sea.

What is enemy's property is a judicial question, to be decided by the prize courts; and, unless otherwise instructed by their own sovereign, they must be guided by the rules and principles of public law. Property may be condemned as hostile, without proof of the personal sentiments of the owner

being disloyal. Acts which tend to subvert the interests of the enemy may impress a hostile character upon property, without regard to the political views or wishes of the owner. Residence of the owner in the enemy's country may be of such a character as to stamp the property conclusively as hostile. How far residence may, in any case, be open to explanation, or the presumption arising therefrom be repelled, I have no occasion to consider. When a hostile character is imputed to property because of the residence of the owner, the court may be compelled to decide whether the place of his residence be enemy's country. What shall be deemed enemy's country is sometimes a question of much difficulty. Some nations or tribes can hardly be said to have any country. Such are the nomadic Arabs, and such were the children of Israel during some part, at least, of their migration from Egypt. A belligerent nation may invade a neutral province, and hold the control of it, and yet the possession be such as not necessarily to impress upon the inhabitants a hostile character. Thus in the case of *The Gerasimo*, 11 Moore, P. C. 101, it was decided that, although Russia had taken forcible possession of the Danubian principalities, and for a time held dominion over them, yet that a ship of a resident of Wallachia was not liable to capture by a British cruiser as enemy's property; the occupation of that province by Russia being not only forcible, against the will of the inhabitants, but avowedly temporary, and for a special purpose. If Wallachia, by its local government, the Hospodar and Divan, had voluntarily joined with Russia and made common cause in the war against England, the inhabitants would, unquestionably, have been enemies, and their property on the ocean lawful prize.

In cases which may come within the definition of civil war, there may be only an assemblage of individuals in military array, without political organization or territorial limit; or armed bands may make hostile incursions into a loyal state, or hold divided, contested, or precarious possession of portions of it, as now in Missouri and Kentucky. In such cases, local residence may not create any presumption of hostility. Far otherwise is it in Virginia. On the seventeenth day of April, 1861, being immediately after the rebel confederates had attacked and captured Fort Sumter, a convention of delegates, by solemn ordinance, undertook to place all the inhabitants of that state in an attitude of rebellion, and to join in the war which had been previously begun against the United States. The act of rebellion was to take immediate effect, and an alliance making common cause with the confederate enemy was immediately formed, and hostilities actively waged by armies raised within, and invited from without, the state. All this was, indeed, subject to be disaffirmed by a vote of the whole people of the state, to be

taken on the twenty-third day of May; but no part of it has been disaffirmed. On the contrary, the popular vote on that day, apparently by a large majority, ratified the proceedings of the convention, the alliance, and the war. The western counties of the state nobly vindicated their honor and their fidelity, by refusing submission to rebel mandates, and adhering to the Union. They did not, indeed, change their domicile, but they removed the power of rebel Virginia from the place of their domicile. The Virginia rebellion was not the act of individuals asserting that moral right of revolution which belongs to all subjects, but it was the assertion of a pretended state right. It was founded solely on the deadly doctrine of secession, which claims that the state, as an organized political body, may sever itself from the Union. In attempting this, and carrying on the war, it acted by majorities claiming implicit obedience from the minority. The exterior boundaries of the state and its internal division by counties have been clearly defined; and the city of Richmond, where these claimants reside, is within the territory over which, by known limits, this political body has, for nine months past, held absolute dominion. Such residence subjects both property and person to the absolute control of the enemy, and augments his resources and his strength. And I see no sufficient reason why it is not to be deemed a continued residence in an enemy's country, which subjects property captured on the ocean to condemnation as lawful prize. In this case, it does not appear that the claimants ever had a domicile in any other place than Richmond; nor is there any evidence going to explain their continuance there, or to repel the presumption of hostility arising therefrom. It is not necessary, therefore, to decide whether such evidence could be admitted, or what would be its effect. In questions so novel, I do not think fit to go farther than the case before me requires. But it is objected that the question, what persons or country are to be deemed hostile, is not a judicial one; or rather that the courts cannot consider any person or country to be hostile, unless the legislature has previously designated them as such. This is directly met by the case of *The Gerasimo*, 11 Moore, P. C. 101, above cited, in which the sole question was whether the province of Wallachia was enemy's country, so as to subject the property of a resident therein to capture as prize. This question the high court of admiralty decided in the affirmative, and the privy council in the negative. Both decisions were founded exclusively upon the character of the Russian occupation, as exhibited by the evidence, the court having no aid or instruction by any act either of the queen or the parliament. The cause was most elaborately discussed, both by the bar and the bench, and yet not a doubt was suggested of the question being strictly judicial.

This objection, that it does not belong to the court to decide who shall be deemed enemies, or rather, that the court can decide only one way, and that against the captors, unless congress has previously declared who shall be considered enemies, really carries us back to the questions whether there can be war without a declaration by congress, and whether, in civil war, the parent country has full belligerent rights. Those questions have already been considered; and it is believed that such rights exist, and among them, undoubtedly, is that of making maritime captures of enemy's property. And when property is brought in for adjudication, the court must decide whether it be hostile or not; and, in doing so, it must, in the absence of legislative instruction, be guided by general principles and usage, under which one criterion of enemy's property is the residence of the owner. This is a known and well-established rule of decision which the court cannot disregard. It is not necessary, however, to determine how the court would deal with these questions in the absence of any action by other departments of the government, because there has been such action. In addition to other important acts, the president, by proclamation of the twenty-seventh of April, [12 Stat. 1259,] established a blockade of the ports of Virginia. This was the exercise of a great belligerent right, and could have been done under no other. He could not prohibit or restrict the commerce of any state by a mere municipal regulation. The blockade was avowedly established as a belligerent act under the law of nations; and it was accordingly announced that it would be rendered effective by an adequate naval force; and, in all proceedings in relation to it by our own country and other nations, it has been regarded as a belligerent act. Under it there have been divers captures by our navy and condemnations by our courts. Now such a blockade could not be valid unless it be of enemy's country.

Some have thought that it was to be deemed enemy's country, because of the proclamation of the president. It seems to me rather that the proclamation and the blockade are to be upheld as legal and valid because the territory is that of an enemy. But whichever view is adopted, the result is the same; namely, that the court must regard the country as hostile. Richmond, where these claimants reside, is one of the places that was thus blockaded. This is not all. The proclamation of a blockade of Virginia, as hostile territory, and the orders of the president to the navy, under which captures like the present have been made, have been expressly confirmed by congress. The statute of 6th August last, c. 63, declares that such acts and orders shall have the same efficacy as if they had been previously authorized by legislative enactments. Without going into a discussion of the effect of that confirmation, it is evident that it must have

the force of an instruction to prize tribunals to regard those proceedings of the president as legal and valid.

It has been urged that in a civil war it may sometimes be very impolitic to confiscate the property of persons resident in the rebel country; and that the expediency of doing so is a political question to be determined by the legislature. We are now dealing only with maritime captures. It is true that policy may sometimes require that the property of such residents should be exempted from arrest; and it is quite as certain that sometimes it ought not to be exempted. There should therefore be somewhere lodged a discretionary power to capture this property or not, as varying circumstances and exigencies may require. This power is now vested in the president. He controls the navy, and directs what captures shall be made. He may instruct inferior officers that particular vessels, or those belonging to certain persons, or engaged in a particular trade, are not to be arrested.

What captures shall be made, like many other questions of policy in conducting the war, may beneficially be left to the discretion of the commander-in-chief. The statute of 1861, c. 28, (12 Stat. 283,) has been referred to as assuming that there are loyal citizens in the rebel states who are to be aided and protected, and it is urged that their property should not be subject to confiscation. That act places two millions of dollars in the hands of the president, to be used at his discretion in arming, organizing, and sustaining loyal citizens in rebel districts. This act undoubtedly contemplates that there may be such loyal citizens, and that it may be expedient so to aid and strengthen them; and it makes an appropriation for that purpose. But it is wisely left to the unrestricted judgment of the president to determine who are such loyal citizens, if any, and to what extent they shall be treated as such. It adds to the means of the president, but in no degree detracts from his previous authority, to treat persons or property as he shall deem best. It has been contended that the proviso in the 24th section of the crimes act of 1790, c. 9, (1 Stat. 117,) should prevent condemnation of this cargo as prize. That act describes certain offenses and prescribes their punishment; and among them is the crime of treason. The proviso declares that no conviction shall work corruption of blood or any forfeiture of estate. This shows that the law-givers thought that death was a sufficient penalty, without confiscation following as a legal consequence of conviction.

There is an analogous provision in the constitution, art. 3, § 3; and, as it has embarrassed some minds, it deserves attention. In the first place, the objection assumes that there can be no condemnation unless the claimants are traitors. This is an error. As already stated, property may be treated as hostile, although the owner has not been

guilty of treason. He may be an alien, owing no allegiance; or a citizen, whose opinions or wishes are not proved to be hostile, and yet he may be so situated, and his property be so used, as to subject it to capture as prize. A striking case is to be found in *The Venus*, 8 Cranch, [12 U. S.] 253. In that case, a citizen of the United States, residing at Liverpool, shipped property for New York on the 4th of July, 1812, having no knowledge of the war, which had been previously declared by the United States. This property was captured by an American privateer, and held by the supreme court to be lawful prize. The court, in delivering their opinion, say that although the claimant, being a citizen of the United States, "cannot be considered an enemy in the strict sense of the word, yet he is deemed such, with reference to the seizure of so much of his property concerned in the trade of the enemy as is connected with his residence. It is found adhering to the enemy. He is himself adhering to the enemy, although not criminally so." See also the cases collected by Sir William Scott, in *The Hoop*, 1 C. Rob. Adm. 196.

In the case now before me, it is not proved or contended by either party that these claimants have been guilty of the crime of treason; and surely the claimants cannot set it up, in argument, as a defence. In the second place, the owner may, by certain acts, have subjected his property to be treated as enemy's, and, by other distinct acts, committed the crime of treason; and confiscation may be inflicted for the former, and the penalty of death for the latter,—just as the same person may be guilty of larceny, and subsequently of murder, and be fined for the first, and afterwards convicted of the capital offence. Third, suppose there should be but one act, which is such a use of property as subjects it to confiscation, and, at the same time, constitutes an overt act of treason; and suppose, further, that the government cannot proceed for both penalties, yet they may elect. They are not bound to prosecute for the crime; and if they enforce the forfeiture, the most that can be contended is, that they are thereby precluded from subsequently having a conviction for the treason.

The acts passed by congress last summer have been referred to as expressing the views of the legislature upon the subject of confiscations in the present war. As they do not reach cases like the present, it is contended that it was the intention of the legislature that such property should not be condemned. It is obvious that, in their general purpose and effect, they were intended to make the prosecution of the war more efficient, to give additional means and power to the president, but in no degree to curtail the authority which he previously possessed. They embrace some cases in which confiscation would not follow from the general

law, and render others more definite and certain, and provide new modes of procedure. The belligerent right of capture at sea previously existed, and congress has left it unimpaired. Further still: This right of maritime capture was not only well known, but had actually and notoriously been exercised. The last session of congress closed on the 6th day of August. Prior to that time, divers captures had been made of vessels and cargoes belonging to inhabitants of insurgent districts. In particular, the General Parkhill was captured on the twelfth day of May, and sent to Philadelphia, and there condemned as enemy's property at the June term of the district court, [Case No. 10,755a.] The Pioneer, [Id. 11,172.] The Crenshaw, [Id. 3,384.] The North Carolina, [Id. 10,317,] and The Hallie Jackson, [Id. 5,961.] were sent into the port of New York in the course of May and June, and the vessels or their cargoes have since been condemned as enemy's property. In this very case of The Amy Warwick, the capture was made on the 10th of July, and the libel was filed on the 18th of that month. All these captures were made by ships of war, and, of course, under orders emanating from the president. Yet, so far from discountenancing these proceedings, congress, as we have already seen, did, by the act of the 6th of August, c. 63, § 3, expressly confirm all orders respecting the army and navy which had been made by the president since the 4th of March last. The counsel for the claimant has relied upon a recent charge by Mr. Justice Nelson to the grand jury, in the second circuit. That learned judge did not enter into any discussion of prize law. The occasion did not call for it. He expressed the opinion, if correctly reported in the newspapers, that loyal citizens of rebel districts were not to be treated as enemies, nor their property confiscated. But he did not undertake to say who were to be deemed loyal citizens, what was to be the evidence of their fidelity, or how the presumptions arising from continued residence in the enemy's country were to be overcome. The counsel for the captors has relied upon a remark made by Judge Dunlop in the case of The Tropic Wind, [Case No. 14,187,] and upon the learned decisions of Judge Cadwallader in the case of The General Parkhill, [supra,] and of Judge Betts in the cases of The Crenshaw, The North Carolina, The Pioneer, and The Hallie Jackson, [supra.] These cases are directly in point; and I might well have rested my decision solely upon the authority of those

able and distinguished judges. But as it has been contended that those decisions are not sustained by the authorities which were cited in their support, I have yielded to the earnest invitation of the eminent counsel in this cause, to investigate the principles and authorities which it involves. Claim rejected, and the property condemned.

[NOTE. On appeal to the circuit court the district court decrees were affirmed, whereupon Edmond, Davenport & Co., Dunlop, Moncure & Co., and David Currie and others appealed to the supreme court. The decree appealed from was duly affirmed. Mr. Justice Grier, in delivering the opinion of the court, said: "The war is not the less a civil war, with belligerent parties in hostile array, because it may be called an 'insurrection' by one side, and the insurgents considered as rebels and traitors. It is not necessary that the independence of the revolted province or state be acknowledged in order to constitute it a party belligerent in a war, according to the law of nations. Foreign nations acknowledge it as a war by their declarations of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. * * * Whether the president, in fulfilling his duties, as commander-in-chief, in suppressing an insurrection, has met with such armed resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this court must be governed by the decisions and acts of the political department of the government to which this power was intrusted. He must determine what degree of force the crisis demands. The proclamation of blockade is, itself, official and conclusive evidence to the court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case. * * * Therefore, we are of opinion that the president had a right, *jure belli*, to institute a blockade of ports in possession of the states in rebellion which neutrals are bound to regard." The court held further that "enemies," in the technical sense in which it is used in prize courts, distinct from the common law, include rebels and traitors as well as aliens; that the seceding states claimed to be sovereign, and to absolve their citizens from allegiance; that the territory within the southern lines was all enemies' territory, because claimed and held in possession by an organized, hostile, and belligerent power. "All persons residing within this territory, whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners." The liability to capture as enemies' property does not in any manner depend on the personal allegiance of the owner. It is the illegal traffic that stamps it as enemies' property. It is of no consequence whether it belongs to an ally or a citizen. "The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicile of the owner, and much more so if he reside and trade within their territory." The Prize Cases, 2 Black, (67 U. S.) 635. See Alexander's Cotton, 2 Wall. (69 U. S.) 404, 419.]

Case No. 342.

The AMY WARWICK, (Dunlop, Moncure & Co., Claimants.)

[2 Spr. 143;¹ 24 Law Rep. 494.]

District Court, D. Massachusetts. April, 1862.²

PRIZE PRACTICE—CIVIL WAR—CONFISCATION—
CONSTRUCTION OF STATUTE.

1. The decision upon the claim of Edmond, Davenport & Co., 2 Spr. 123, [The Amy Warwick, Case No. 341,] to a part of this cargo, affirmed.

[See The Amy Warwick, Case No. 341, note.]

2. The language of the prize law, that property is to be condemned as enemy's, or is to be deemed enemy's, or is impressed with a hostile character, does not necessarily import that the owner is personally hostile, but only that his property has been placed in such relation to the enemy that a court of prize is to deal with it as if it belonged to the enemy.

3. The statute of 1862, c. 50, (12 Stat. 374,) for the better administration of the law of prize, affects only the mode of procedure. It prescribes no rule of decision, but leaves the court to be guided by the general law as known to the prize courts of the civilized world.

4. This statute applies to cases arising in this civil war, as well as to those that may arise in international war, and makes no distinction between them in the mode of procedure, or the rules of decision.

[See The Amy Warwick, Case No. 341, note.]

5. The rights of war exist only while the war continues. Titles to property, or political jurisdiction, acquired during the war by the exercise of belligerent rights, may survive the war.

6. The conquest of a foreign country gives absolute and unlimited sovereign rights. But no nation makes such a conquest of its own territory.

[Cited in Semmes v. City Fire Ins. Co., Case No. 12,651; U. S. v. Huckabee, 16 Wall. (83 U. S.) 434; Ford v. Surget, 97 U. S. 614.]

7. In this civil war, the military power is called in only to maintain the government in the exercise of its legitimate civil authority. No success can extend the powers of any department beyond the limits prescribed by the organic law.

[Cited in Semmes v. City Fire Ins. Co., Case No. 12,651.]

8. When the United States takes possession of any rebel district, it acquires no new title, but merely vindicates that which previously existed; and it is to do only what is necessary for that purpose.

[Cited in Semmes v. City Fire Ins. Co., Case No. 12,651; Ford v. Surget, 97 U. S. 614.]

9. Belligerent confiscations take effect only upon property of which possession is taken during the war. As against property which continues under the control of the enemy, they are wholly inoperative.

10. If possession is acquired by or after the peace, then previous legislation may take effect; but it will be by the right of sovereignty, not as an act of war.

11. Confiscations which go not against an offending thing, but arise from the personal delinquency of the owner, should be inflicted only upon due conviction of personal guilt.

¹[Reported by Hon. Richard H. Dana, Jr., and here reprinted by permission.]

²[Affirmed by circuit court, (decree nowhere reported; opinion not now accessible.) Affirmed by supreme court, sub nom. The Prize Cases, 2 Black, (67 U. S.) 635.]

12. Such penalties have no connection whatever with the decisions of prize courts enforcing belligerent rights upon property captured at sea.

[In admiralty. Libel in rem against the brig Amy Warwick and cargo, as prize of war. The vessel sailed from Rio Janeiro May 29, 1861, with a cargo of coffee, destined to Hampton Roads for orders. By her charter party she was to go either to Richmond, New York, Philadelphia, or Baltimore. She was captured August 10, 1861, by the United States ship of war Quaker City, and brought into this district for condemnation. Dunlop, Moncure & Co., of Richmond, Va., claim a portion of her cargo. Property condemned, and claim dismissed.]

[The brig was claimed by David Currie and others, and the balance of the cargo by Edmond, Davenport & Co., all of Richmond, Va. Both claims were dismissed, (the former decree unreported, the latter reported sub nom. The Amy Warwick, Case No. 341.) Another claim was filed by J. L. Phipps & Co., an English house at Rio Janeiro, for an advance made to supply a deficit of funds to purchase the cargo. This claim was allowed. The Amy Warwick, Id. 343. On appeal to the circuit court the decrees of the district court were duly affirmed, (nowhere reported, opinion not now accessible,) whereupon all of the claimants except Phipps & Co., appealed to the supreme court. Affirmed. The Prize Cases, 2 Black, (67 U. S.) 635.]

R. H. Dana, Jr., U. S. Atty., for captors.
S. Bartlett and E. Bangs, for claimants.

SPRAGUE, District Judge. These claimants, Dunlop, Moncure, & Co., having been permanent residents of Richmond, Virginia, before and ever since the sailing and capture of this vessel, are in the same condition as were Edmond, Davenport, & Co., the claimants of the four hundred bags of coffee which have already been condemned. [The Amy Warwick, Case No. 341.] If the opinion given in that case be adhered to, this claim must be dismissed. I have seen no reason to change that opinion. On the contrary, two important propositions, namely, that Richmond is enemy's country, and that permanent residence therein by the owner of property captured at sea is cause of condemnation without proof of personal disloyalty, have been strengthened by subsequent events and the recent legislation of congress. Richmond is not only the capital of rebel Virginia, but has continued to be the seat of the usurped confederate government; and no country was ever more absolutely under the dominion of an enemy, or more clearly within his territorial limits. Every reason why residence should cause condemnation in maritime captures in any war applies in full force to the case now before me. These claimants do not even offer proof of their loyalty, and there is a high

probability that they are willingly co-operating with the enemy. But, if this be not so, they were at the time of this capture, and have ever since continued to be, under his absolute control; and that control is an inexorable military despotism. Every dollar put into their hands or under their control is, to all practical purposes, in the hands of the enemy, and adds to his strength. The question before me is, whether this property shall be restored to the claimants, or condemned as prize. No intermediate or other course is asked or suggested by either party. Should the court decree restoration, it must order the \$120,000 now in the registry to be paid over to these inhabitants of Richmond. It will be delivered to their agent, who resides in New York, and will be subject to their order. They will doubtless order it to be transmitted in gold or exchanged to their banker in London, and it will be there held and disposed of for the benefit of the rebel confederates, and may at once be invested in munitions of war, and shipped for the rebel states by way of Havana, and then the fleet of the United States must be upon the alert endeavoring to intercept and capture the proceeds of the money now in the possession of this court. Any theoretical views which lead to such a result should be distrusted.

The decrees of the district courts condemning property as hostile, have been objected to on the ground that they pronounce the owners to be enemies, when in fact they may be personally loyal. But it is a mistake to suppose that those judgments go beyond the fact of permanent residence, and assert personal guilt in the owner. This mistake has probably arisen from misapprehending the import of certain language of frequent recurrence in prize law, such as that property is to be condemned as enemy's, or is to be deemed enemy's, or that it is impressed with a hostile character. These are equivalent expressions. They do not necessarily import that the owner is personally hostile, but only that his property has been placed in such relation to the enemy that a court of prize is to deal with it as if it belonged to the enemy. It is quite a mistake to suppose that property is never to be condemned except for personal delinquency of the owner. Even under the municipal law, ships and cargoes are liable to condemnation for the use that has been made of them where there has been no guilty knowledge or intent on the part of the owner; and, in prize law, condemnation is not the infliction of personal punishment on proof of individual guilt, but it is a matter of belligerent policy to destroy the commerce of the enemy and diminish his resources. This is emphatically set forth in the case of *The Venus*, 8 Cranch, [12 U. S.] 253, where property of a citizen of the United States was condemned by reason of his residence, although, as the supreme court expressly declares, there was no per-

sonal guilt. The same doctrine is found in many other cases. The objection, when scrutinized, involves a denial of the power of the court to make any condemnation as prize under the principles and according to the rules of the general law, and the practice of nations; and this is to deny to the United States the exercise of belligerent rights. For there is no right of war more clearly established or more universally exercised than that of maritime captures; and no reason can be assigned why the United States should be deprived of the power of exercising this important right in the present war. How far the peculiar circumstances of this or any other conflict should induce forbearance, like many other questions of policy in the conduct of the war, is to be determined by the commander-in-chief or the legislature. It is for them, or one of them, to say what captures should be made, and what cases, or classes of cases, shall be sent in, and condemnation sought by prosecution. In adjudicating such cases, the courts must be guided and governed by established principles and rules of decision. This is well known to the other departments of the government; and, when they send a captured vessel to the court to be there proceeded against as a prize, they necessarily intend, in the absence of other instructions, that the court shall proceed and decide according to the established rules and principles of prize law. There is no other guide. That the great conflict in which we are now engaged is war, in the legal sense of the term, is shown by the express language of the constitution in defining the crime of treason; that the United States, in this war, has, on the ocean, all the rights of belligerents, has never been distinctly controverted. To deny it is to break up the blockade, and every condemnation under it. Those who have thought that the courts cannot enforce the belligerent rights of the nation without the action of congress, should, I think, be satisfied that there has been sufficient legislation. In addition to the statutes passed during the last summer, and particularly the ratifying act of the 6th of August, which was adverted to in my former opinion, congress, on the twenty-fifth day of March last, (Acts 1862, c. 50; 12 Stat. 374,) passed an act to regulate the mode of procedure in prize cases. The first section relates to the custody and preservation of captured property, and the taking of evidence. The second and third sections relate to expenses, and the compensation of officers. The fourth section relates to the disposition of prize property after final condemnation. This statute affects only the mode of procedure. It gives no direction as to the principles or doctrines by which the court is to be guided in its adjudications. It does not touch the rule of decision. The title of this statute declares it to be an "Act for the bet-

ter administration of the law of prize." The court, then, is to administer the law of prize, and that must be the general law as known to the prize tribunals of the civilized world, with such modifications as may be made by our own legislature. But to what cases is this general law of prize to be applied? This question is answered by the fifth section of the statute, which declares that its provisions "shall apply as well to cases now pending as to all future cases of maritime captures." This court is thus expressly directed to administer the prize law in cases now pending or hereafter to arise in this civil war, as well as in cases of maritime captures in future international wars. No distinction is indicated between these two classes of captures, or in the rules of law which are to be applied to them. Further still: the legislature expressly recognizes the pendency of prize cases. In many of those cases, the only question was whether property should be condemned by reason of the residence of the owner in the enemy's country. This question had been decided by the district courts of three judicial districts, all concurring in decrees of condemnation. This was well known; and yet congress, in passing an act for the better administration of the prize law in cases then pending or hereafter to arise, does not prescribe any rules of decision or in any way discountenance those which had been adopted by the courts: this may be deemed an acquiescence in or a tacit approbation of those rules.

An objection to the prize decisions of the district courts has arisen, from an apprehension of radical consequences. It has been supposed that, if the government have the rights of a belligerent, then, after the rebellion is suppressed, it will have the rights of conquest; that a state and its inhabitants may be permanently divested of all political privileges, and treated as foreign territory acquired by arms. This is an error,—a grave and dangerous error. The rights of war exist only while the war continues. Thus, if peace be concluded, a capture made immediately afterwards on the ocean, even where the peace could not have been known, is unauthorized, and property so taken is not prize of war, and must be restored. Wheat. Int. Law, 619. Belligerent rights cannot be exercised when there are no belligerents. Titles to property or to political jurisdiction acquired during the war, by the exercise of belligerent rights, may indeed survive the war. The holder of such a title may permanently exercise, during peace, all the rights which appertain to his title; but they must be rights only of proprietorship or sovereignty; they cannot be belligerent. Conquest of a foreign country gives absolute and unlimited sovereign rights. But no nation ever makes such a conquest of its own territory. If a hostile power, either from without or within a nation, takes possession

and holds absolute dominion over any portion of its territory, and the nation by force of arms expels or overthrows the enemy and suppresses hostilities, it acquires no new title, but merely regains the possession of which it had been temporarily deprived. The nation acquires no new sovereignty, but merely maintains its previous rights. *Id.* 616. During the war of 1812, the British took possession of Castine, and held exclusive and unlimited control over it, as conquered territory. So complete was the alienation, that the supreme court held that goods imported into it were not brought into the United States, so as to be subject to import duties. *U. S. v. Rice, 4 Wheat.* [17 U. S.] 246. Castine was restored to us under the treaty of peace; but it was never supposed that the United States acquired a new title by the treaty, and could thenceforth govern it as merely ceded territory. And if, before the end of the war, the United States had, by force of arms, driven the British from Castine, and regained our rightful possession, no one would have imagined that we could thenceforth hold and govern it as conquered territory, depriving the inhabitants of all pre-existing political rights. And when, in this civil war, the United States shall have succeeded in putting down this rebellion and restoring peace in any state, it will only have vindicated its original authority, and restored itself to a condition to exercise its previous sovereign rights under the constitution. In a civil war, the military power is called in only to maintain the government in the exercise of its legitimate civil authority. No success can extend the powers of any department beyond the limits prescribed by the organic law. That would be not to maintain the constitution, but to subvert it. Any act of congress which would annul the rights of any state under the constitution, and permanently subject the inhabitants to arbitrary power, would be as utterly unconstitutional and void as the secession ordinances with which this atrocious rebellion commenced. The fact that the inhabitants of a state have passed such ordinances can make no difference. They are legal nullities; and it is because they are so, that war is waged to maintain the government. The war is justified only on the ground of their total invalidity. It is hardly necessary to remark, that I do not mean that the restoration of peace will preclude the government from enforcing any municipal law or from punishing any offence against previously existing laws. Another objection to those decisions of the district courts is founded upon the apprehension that they may lead to or countenance cruel and impolitic confiscations of private property found on land. This apprehension is unfounded. No such consequence can legitimately follow. Those decisions undoubtedly assert that the United States has the rights of a belligerent. But the extent of those

rights on land, or the manner in which they are to be exercised, was not discussed. They were not specially mentioned, except to say that enemy's property found by a belligerent on land, within his own country, on the breaking out of a war, will not be condemned by the courts, although it would be if found at sea. This distinction, so far as it goes, tends to show that the doctrine of maritime captures is not to be applied to seizures on land. But the danger upon which this objection is founded, does not arise from the administration of the prize law by the courts, or the exercise of belligerent rights by military commanders upon military exigencies. The objection really arises from fear of the legislation of congress. It is apprehended that they may pass sweeping or general acts of confiscation, to take practical effect only after the rebellion shall have been suppressed; that whole estates, real and personal, which have not been seized during the war, may be taken and confiscated upon coming within reach of the government, after hostilities shall have ceased. This, as we have seen, would not be the exercise of belligerent rights, the war being at an end. Belligerent confiscations take effect only upon property of which possession is taken during the war. As against property which continues under the control of the enemy, they are wholly inoperative. If possession be acquired by or after the peace, then previous legislation may take effect, but it will be by the right of sovereignty, not as an act of war. Under despotic governments, the power of municipal confiscation may be unlimited; but under our government the right of sovereignty over any portion of a state is given and limited by the constitution, and will be the same after the war as it was before. When the United States takes possession of any rebel district, it acquires no new title, but merely vindicates that which previously existed, and is to do only what is necessary for that purpose. Confiscations of property, not for any use that has been made of it, which go not against an offending thing, but are inflicted for the personal delinquency of the owner, are punitive; and punishment should be inflicted only upon due conviction of personal guilt. What offences shall be created, and what penalties affixed, must be left to the justice and wisdom of congress, within the limits prescribed by the constitution. Such penal enactments have no connection whatever with the decisions of prize courts, enforcing belligerent rights upon property captured at sea during the war. I have thus noticed the objections which have been made to the former opinion of the court, so far as they have come to my knowledge. They do not seem to me to be well founded. The claim of Dunlop, Moncure, & Co. must be dismissed.

[NOTE. This case was affirmed on appeal. The Prize Cases, 2 Black, (67 U. S.) 635. See The Amy Warwick, Case No. 341. note.]

Case No. 343.

The AMY WARWICK, (J. L. Phipps & Co., Claimants.)

[2 Spr. 150; 24 Law Rep. 501, 544.]

District Court, D. Massachusetts. April, 1862.*

PRIZE PRACTICE—RIGHTS OF NEUTRAL—DISPOSITION OF CAPTURED PROPERTY.

1. A detailed statement, supported by affidavits, is required of any party who asks leave to offer new and independent proof.

2. This rule does not apply where it is only sought to meet with counter proof, to the same points, evidence introduced by an opponent.

3. In a case of further proof, the testimony was ordered to be taken in the form of depositions on interrogatories and cross-interrogatories, that being the more satisfactory form of proof.

4. Objections to the delivery of the captured property on bonds, to claimants.

5. Where a neutral has a jus in re, where he is in possession with a right of retention until a certain amount is paid to him, the captor takes cum onere and should allow the amount of such right. But where the neutral has merely a jus ad rem, which he cannot enforce without the aid of a court of justice, his claim will not be recognized by a prize court.

6. A neutral merchant purchased a cargo of coffee for enemy correspondents, partly with their funds and partly with his own, and shipped it under a bill of lading by which it was to be delivered to his order, and with a statement thereon that part of the coffee was the property of neutrals. *Held*, that, having the legal title and possession, he was not to be deemed a lien holder, but rather a trustee with the right of retention until his advance should be paid to him.

7. In such case, a prize court will look beyond the legal title, and deal with the beneficial interest. The neutral will be paid the amount of his advance, and the residue of the property will be condemned as enemy's.

8. A motion for a second order for further proof was refused, because it was made at the final hearing (it being doubtful whether the motion could have been granted even if made at an early day), when it was known that the cause was to be carried up by appeal, and because such an order would occasion great delay, while it could be granted in the circuit court without delaying the final decision.

[9. Cited in *Miller v. U. S.* 11 Wall. (78 U. S.) 322, to the point that confiscation of property not for the use made of it, but for the personal fault of the owner, is punitive, and punishment should be inflicted only upon due conviction of personal guilt.]

[In admiralty. Libel in rem against the brig Amy Warwick and cargo, as prize of war. The vessel sailed from Rio Janeiro May 29, 1861, with a cargo of coffee, destined to Hampton Roads for orders. By her charter party she was to go either to Richmond, New York, Philadelphia, or Baltimore. She was captured August 10, 1861, by the United States ship of war Quaker City, and brought into this district for condemnation. The brig was claimed by David Currie and others; the cargo, by Edmond, Davenport &

*[Reported by Hon. Richard H. Dana, Jr., and here reprinted by permission.]

†[Affirmed by circuit court, (decree nowhere reported; opinion not now accessible.)]

Co. and Dunlop, Moncure & Co.,—all of Richmond, Va. J. L. Phipps & Co., an English house at Rio Janeiro, filed a claim for an advance made to supply a deficit of funds to purchase the cargo. The property was condemned, (The Amy Warwick, Case No. 341; Id. 342,) and all the claims dismissed, excepting that of Phipps & Co.]

In the decree lately made in this cause, the brig and a part of the cargo were condemned as enemy's property, being confessedly the property of permanent residents in Richmond, Va. The rest of the cargo, 4700 bags of coffee, was claimed by Messrs. Phipps & Co., an English house at Rio Janeiro, having a branch house in New York. After the hearing on the evidence in preparatory, by which it appeared that this cargo was bought for a Richmond house, the claimants moved for leave to offer further proof, for the purpose of showing that they were neutrals; that they advanced about \$15 000 to supply a deficit of funds to purchase this cargo; that they took and held the bills of lading in their own name, to protect their advance, and had not waived or parted with their legal title. This motion was supported by affidavits of the claimants' belief in those facts, and of their grounds for expecting to obtain the proof of them. The motion was allowed. The captors then moved that the order include a right to them to take counter proof to the same points. The claimants objected that the captors must file a motion, with affidavits, as had been required of them.

SPRAGUE, District Judge, was of opinion that a detailed statement, supported by affidavits, was required of any party who asked leave to offer new and independent proof, but that the rule did not apply to a party who only sought to meet with counter proof, to the same points, the evidence introduced by an opponent. A question also arose whether the proofs should be by affidavits or in the form of depositions. The English and some American cases were referred to, as allowing affidavits in cases of what is technically called further proof, as distinguished from plea and proof.

SPRAGUE, District Judge, said that, without deciding that affidavits were inadmissible in cases of further proof, he should order the proofs in this case, as more satisfactory, to be taken by a commissioner, on interrogatories and cross-interrogatories. The order was accordingly made, allowing the claimants to take further proof to the points set forth in their motion, and the captors to take counter proofs to the same points, each to file interrogatories within three days, with three days for cross-interrogatories, the proofs to be returned on or before a day fixed. The claimants then moved to have the cargo appraised and delivered to them on bonds. They claimed that the hearing in preparatory being had, and they being al-

lowed further proof, they were entitled to take the property on bonds, by the practice of prize courts. This was opposed by the captors, who moved for a decree for a sale of the cargo.

SPRAGUE, District Judge. There are very serious objections to delivering captured property on bonds to claimants, which have always weighed with prize courts. Before the hearing in preparatory, it cannot well be judicially known that the claimants are not enemies, or acting for enemies, or that they have such absolute title in the property as to be the persons to whom it should be restored, in case it should be decided to be no prize,—beside the consideration that the captured property may itself be evidence. If, on the hearing, their claim remained in doubt on any of these points, why should they take the property rather than the captors? The court must be careful to deliver the property to none but actual owners, and persons who would not pass it to any enemy for whom they might act. There are other difficulties attending this course. It throws on the captors the risk of the sufficiency of the bondsmen at the time, and their continued solvency until a final decision in the appellate court. It gives the claimants the choice of abiding or not abiding by the appraisement. If it is low, they would adopt it and give bonds, and so make a profit at the expense of the captors. If the appraisement is to the full value, they may decline to give the bonds. And there is always danger of undervaluation, not only by fraud, and by the pressure of interests in the trade, but from erroneous principles of estimation. A public sale is the best and fairest proof of value; and the most satisfactory course is to sell the property, deposit the funds in the registry to be delivered to the parties finally decided to be entitled to them, where there are no special circumstances. But, in this case, there is an especial objection to the delivery to these claimants. As the hearing left the case, and as the claimants propose to place it on further proof, they hold the legal title only to protect their advance, which is only about \$10,000 out of a value of over \$100,000. The residue they would hold in trust for an enemy. Being neutrals, their duty would be, after deducting their advance, to deliver the residue to the enemy. Now, the prize court of no nation can be expected to deliver captured property over to a neutral who would hold it in trust for an enemy. The most that a neutral claiming an interest can expect, is that his interest shall be protected. This is sufficiently done by allowing him to pay his advance out of the proceeds in the registry. Whether a prize court will respect such an interest, and whether there is such an interest in this case, are points to be argued and determined after the further proofs shall come in. After this opinion of the court, the claimants made no objection to the captors'

motion for a sale. A decree was accordingly made for a sale of all the cargo by the marshal, after notice in the chief commercial papers of New York and Boston.

A hearing was subsequently had on the further proof taken in the case.

R. H. Dana, Jr., for the captors, cited *The Ida*, Spinks, 331; *The Abo*, Id. 349; *The Aina*, Id. 316; *The Ariel*, 11 Moore, P. C. 119; *The Marianna*, 6 C. Rob. Adm. 25; and *The Frances*, 8 Cranch, [12 U. S.] 418,—to the point that the prize court would not protect the interest or lien of the neutral claimants, and contended that their lien had been waived.

S. Bartlett and E. Bangs, for the claimants, relied on *The St. Joze Indiano*, 1 Wheat. [14 U. S.] 208.

SPRAGUE, District Judge. I come now to the claim of J. L. Phipps & Co. After a hearing upon the preparatory evidence, the court, on motion of the claimants, allowed the introduction of further proof. It now appears that these claimants, five in number, are British subjects, two of them residing in New York, one in Rio de Janeiro, and two in Liverpool, and they constitute the three commercial houses of J. L. Phipps & Co. at New York, Phipps Brothers & Co. at Rio, and Phipps & Co. at Liverpool. In March, 1861, this brig, the *Amy Warwick*, was owned by David Currie and others of Richmond, Va., who chartered her to Dunlop, Moncure, & Co., of that city, for a voyage to Rio, and back to a port of discharge in the United States. Currie and others appointed and paid the master and crew, and retained the ownership of the vessel, during the voyage. Dunlop, Moncure, & Co. put on board a cargo of merchandise consigned to Phipps Brothers & Co. at Rio. They disposed of the cargo, and with the funds of the Richmond house in their hands, and £2000 of their own money, purchased these 4700 bags of coffee, and put them on board this vessel, then bound to Hampton Roads for orders. They took from the master a bill of lading, which stated that Phipps, Brothers & Co. were the shippers of this coffee, and that it was to be delivered to their order. Indorsed upon the bill of lading was a statement declaring that a portion of the coffee was the property of British subjects. This was signed and sworn to by the managing partner at Rio. Phipps, Brothers & Co. indorsed the bill of lading over to J. L. Phipps & Co., of New York. They also delivered to the master one part of the bill of lading, and an invoice of the coffee, and a letter of advice, to be conveyed to the firm in New York. This letter states that the coffee was shipped for account of Dunlop, Moncure, & Co., and that the bill of lading would have been sent to them, had it not been deemed advisable, by reason of the un-

settled state of political affairs, for the better protection of the property, and to prevent privateers from molesting the vessel, to have it certified on the bill of lading that a portion of the coffee was British property, and that this referred to the portion against which they had valued on Liverpool. That portion is stated in the claim to be £2000. After the capture, this letter of advice and the accompanying bill of lading came to the hands of J. L. Phipps & Co. at New York, and they indorsed and delivered the bill of lading to Charles M. Fry & Co., of New York, under an agreement that from the coffee there should first be paid to J. L. Phipps & Co. the £2000 advanced by the firm at Rio in making the purchase, and that the residue of the coffee and its proceeds should be held by Fry & Co. as the agents, and for the benefit, of Dunlop, Moncure, & Co. On the 9th of August last, Charles M. Fry filed a claim in this court as agent and in behalf of Dunlop, Moncure, & Co., alleging that they were the owners of the whole of this coffee, excepting the interest of Phipps Brothers & Co. therein to the amount of £2000 advanced towards the purchase. The claim of J. L. Phipps & Co. was filed on the 4th of September last. It alleges that this coffee was purchased by them partly by funds of Dunlop, Moncure, & Co., and partly by £2000 of their own money, that the legal title has always remained in them, "and that no other person is the legal owner, except the equitable interest of said Dunlop, Moncure, & Co." These facts seem plainly to lead to the conclusion that the claimants ought to be repaid the amount which they expended from their own funds in the purchase of the coffee, and that the residue of the proceeds should be condemned. This result I shall adopt, unless precluded from doing so by authority. The counsel for the captors contend that the claimants had only a lien on this cargo, and that liens will not be protected or regarded in a prize court. This position is sustained by the authorities as to certain kinds of liens. The extent of this doctrine, and the reasons on which it is founded, are stated by the supreme court in *The Frances*, 8 Cranch, [12 U. S.] 418. It is there said that "cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, are not allowed, because of the difficulties which would arise in deciding upon them, and the door which would be open to fraud." Similar reasons are given by Lord Stowell in *The Marianna*, 6 C. Rob. Adm. 25, 26, and in several other cases. These reasons are especially applicable to latent liens created under local laws. They do not reach the case now before the court. This coffee was purchased by the claimants at Rio, and shipped by them on board this brig under a bill of lading, by which the master was bound to deliver it to their order, and they ordered it to be delivered to

J. L. Phipps & Co., that is, to themselves. They then retained the legal title, and the possession of the master was their possession. Being the legal owners of the property, they can hardly be said to have a lien upon it; a lien being in strictness an incumbrance on the property of another. Their real character was that of trustees holding the legal title and possession, with a right of retention until their advances should be paid.

In *The Frances*, and many other cases, it is held that the lien of a neutral carrier for the freight of enemy's goods is, upon capture, to be allowed. The general doctrine seems to be that where a neutral has a jus in re, where he is in possession with a right of retention until a certain amount is paid to him, the captor takes cum onere, and must allow the amount of such right. But where the neutral has merely a jus ad rem, which he cannot enforce without the aid of a court of justice, his claim will not be recognized by a prize court. *The Tobago*, 5 C. Rob. Adm. 218. The high court of admiralty in England has in some instances gone further against captors, and allowed to British merchants the amount of their claims upon enemies' ships for repairs and supplies. *The Belvidere*, 1 Dods. 356; *The Vrow Sarah*, 1 Dods. 355, note. See, also, *The Constantia Harlessen*, Edw. Adm. 232. The case of *the St. Joze Indiano*, 1 Wheat. [14 U. S.] 208, has been cited by the counsel for the claimants; and they contend that it sustains their whole claim, and requires all the coffee to be restored to them. That case is a stringent authority to the extent of the £2000 which the claimants invested or advanced in the purchase; but I do not think that it authorizes me to go further. It is in several respects distinguishable from the present case. There the legal title to the cargo was held by enemies. Here it is held by neutrals. In both, the cargo was purchased partly by funds of the holder of the legal title, and partly by funds of their foreign correspondents. But, in the case now before the court, the amount advanced by these neutral claimants is clearly ascertained, while, in the *St. Joze Indiano*, the amount advanced by the enemy purchasers of the cargo, who held the legal title, did not appear by the preparatory evidence, and could have been ascertained only by further proof to be derived from the enemy, and to depend upon such accounts as he should make up after knowledge of the capture. Another and more important distinction between the cases is the indorsement on this bill of lading, made and sworn to by one of the claimants at Rio, stating that a portion of the coffee was the property of British subjects, thus distinctly announcing that, although, by virtue of the bill of lading, they had the legal title to the whole, part only really belonged to them, and that they held the residue for the benefit of others who were not British subjects. And accompanying this bill of lading was a

letter of instruction from the claimants' house in Rio to their house in New York, in which it is distinctly said that the portion stated in that indorsement to be the property of British subjects is the amount for which they had drawn on their house in Liverpool toward the purchase of the cargo. That amount was £2000. Nor is this all. After the capture, a letter with instructions and the bill of lading came to the hands of the New York house, the bill of lading being indorsed to their order; and thereupon they indorsed and delivered over the bill of lading to Charles M. Fry & Co., who were the agents of Dunlop, Moncure, & Co.; and at the time of such transfer it was agreed that, from the coffee or its proceeds, the £2000 should be paid to the claimants, and that the residue should be held by Fry & Co. as the agents, and for the benefit, of Dunlop, Moncure, & Co. The claimants thus transferred the legal title to the coffee, so far as was in their power in its then condition, to Fry & Co., who were to hold it merely as trustees, first for the benefit of the claimants to the extent of their advances, and the residue for the benefit of the Richmond merchants. Now suppose that the whole of the proceeds of the coffee should be restored to these claimants, it would clearly be their duty, after deducting the £2000 advanced by them, to pay over the residue to Fry & Co. as agents, and for the benefit of the Richmond merchants. The court would thus in effect order that residue (about nine-tenths of the whole) to be paid to Dunlop, Moncure, & Co. Every reason which has been or can be assigned against restoring this cargo to Dunlop, Moncure, & Co., upon their own claim, made through Fry & Co., exists in full force against restoring the residue upon the claim made by J. L. Phipps & Co. These two separate claims have been interposed to the whole of the 4700 bags of coffee. The claimants hope that one of them may be wholly sustained. It is immaterial to them which, and they are accordingly both represented by the same counsel. If the whole property shall be delivered to Fry & Co., they will pay to Phipps & Co. the £2000, and hold the residue for Dunlop, Moncure, & Co. If the whole be delivered to Phipps & Co., they will pay themselves the £2000, and hold the residue for Dunlop, Moncure, & Co. Prize courts have never thus protected the interest of the enemy. In *The Abo*, decided in 1854, Spinks, 351, Dr. Lushington says, "This court inquires in whom the property is vested, and not merely at what is called a legal title at common law." In *The Maria*, decided in 1857, 11 Moore, P. C. 281, 287, it appears that the high court of admiralty condemned a vessel because a neutral claimant held only the legal title, while the beneficial interest belonged to other neutrals. On appeal, this judgment was reversed by the privy council, because the whole property was in neutrals; no doubt

was suggested that, if the beneficial interest had been in enemies, there must have been condemnation. It is contended that the doctrine of these cases is inconsistent with that of the supreme court in *The St. Joze Indiano*, [supra.]. I do not think it necessary to determine whether that case goes the length of deciding that, wherever the mere legal title is in an enemy, condemnation must follow; because, if it be so, it only shows what is apparent from other cases, that belligerents sometimes condemn property upon a doctrine which they do not adopt when it will acquit. If this ought not to be, if in fairness a uniform rule should be established, it certainly ought not to be that which stops at the mere legal title, but that which ascertains and deals with the real beneficial interest. For, if the court were never to look beyond the legal title, the result would be that when such title is held by an enemy in trust for a neutral, the latter loses his whole property; but, when the legal title is in a neutral in trust for an enemy, the property is restored to the neutral, not for his benefit, but merely as a conduit through which it is to be conveyed to the enemy. To refuse to look beyond the legal title is to close our eyes for the benefit of the enemy. It would enable him always to protect his property by simply putting it in the name of a neutral trustee.

This cargo has been sold by an interlocutory order, and the proceeds brought into the registry. If the amount had been less than the original cost, it might have been necessary to look at the order under which the purchase was made, to see whether Phipps & Co. would not be limited to the same proportion of the coffee or its proceeds as the amount of their advance was of the whole purchase money. But that inquiry is unnecessary, because the proceeds exceeds the original cost, interest, and expenses, and Phipps & Co. claim, to their own use only, the amount of their advance and interest. That claim must be allowed. I am saved the necessity of determining the time and rate of interest, the parties having agreed that for this trial the £2000 and interest shall be deemed equal to \$10,793.63. This agreement is not to affect either party in any appellate tribunal. The claim of J. L. Phipps & Co., which I have been considering, states the amount of their advances to be £2000. They have now, at this late period, presented a claim for £900 more, and moved for an order for further proof to enable them to obtain evidence to show that their advances toward the purchase amounted to £2900. Considering the statements as to the advance found on the bill of lading in the letter of advice and in the original claim, and that this motion is founded on an account made up in Rio in December last, long after this capture must have been there known, I doubt whether the motion could have been granted, if it had been made at

an earlier day. It is unnecessary, however, to consider that question, because it comes so late that I think I must refuse it by reason of the delay which its allowance at this time would occasion. This cause is to be carried to the circuit court, and thence, it is understood, to the highest tribunal. If further time be allowed in this court, an appeal cannot be taken to the May term of the circuit court. It must go over to October, a loss of five months, and this may occasion the delay of a year in the supreme court; whereas, if a decree be now entered, and the appeal taken, the circuit court can allow further proof, if it see fit to do so, as to the quantum of the advances, without postponing the hearing and determination of the great and vital questions, and without delaying the ultimate decision of the cause.

Decree, that ten thousand seven hundred and ninety-three dollars and sixty-three cents be paid to J. L. Phipps & Co., and that the residue of the proceeds in the registry be condemned.

NOTE, [from original report.] On appeal to the circuit court, £2910. 11s. was allowed instead of £2000. Interest was only allowed to the date of the capture, because the property was so mingled with the belligerents, that it could not be separated until the proof were taken; and for the same reason, the rate of exchange on the day of the capture was taken. No appeal was taken to the supreme court as to so much of the decree as allowed the claim of Phipps & Co. The decree of condemnation of the residue was affirmed. See *The Prize Cases*, 2 Black, [67 U. S.] 635; [*The Amy Warwick*, Case No. 341.] A mortgage is treated as a lien, and not as a jus in re. *The Hampton*, 5 Wall. [72 U. S.] 372.

Case No. 344.

The AMY WARWICK.

[2 Spr. 160.]¹

District Court, D. Massachusetts. May, 1862.

AUCTION OF PRIZE CARGO—COMMISSIONS OF AUCTIONEER.

[The cargo of a prize ship was sold at public auction. The sale was successful in its results, \$145,393.04 being realized. Care, diligence, and labor proportionate to the importance and magnitude of the sale were exercised by the auctioneer, embracing labor in the preparation of samples, sorting and cataloguing the merchandise in lots, prior to the sale. *Held*, a commission of one-half of one per cent. was a suitable compensation for his services.]

In admiralty. At the sale of the *Amy Warwick's* cargo, which brought, \$145,393.04, the auctioneer, N. A. Thompson, charged, for his services, a commission of two and one-half per cent., amounting to \$3633.26. This charge was objected to by Mr. Dana, the United States Attorney, and by the counsel for the claimants, as excessive; and

¹[Opinion and statement reprinted from 2 Spr. 160, by permission.]

Sprague, J., ordered evidence to be taken as to the custom of auctioneers and merchants in similar cases. On the return of this evidence, the question was argued by Mr. Dana, and by counsel for the auctioneer.

R. H. Dana, Jr., U. S. Atty., for the United States and captors.

E. Bangs, for claimants.

Chandler & Shattuck, for N. A. Thompson.

SPRAGUE, District Judge. The question is, what compensation shall be allowed to the auctioneer. It is agreed that the marshal made no special contract with the auctioneer as to his compensation. It is suggested that there is an implied contract between them, by which the auctioneer is to receive the commission usually paid where no special contract is made. I cannot accede to this position. The marshal stated to Mr. Thompson that he had no authority to make any contract with him as to his compensation, for the reason that the court must finally decide on all charges; and Mr. Thompson so understood it. If there was no authority to make a contract, that excludes an implied contract as well as an express contract. There can be no contract binding the court as to the pay of the auctioneer; for it is the duty of the court to pass upon it, as a judicial question. The only point to be decided, therefore, is, What is a suitable compensation? To determine this, I have had evidence taken as to the usual or market rates of payment. The result of the testimony seems to be this: Where the auctioneer is also consignee of the property, and acts, in fact, as commission merchant, receives the merchandise, is responsible for its custody and preservation, decides on the manner, time, and terms of its sale, sells it and collects the money, he charges two and one-half per cent. If he guarantees the payments, he charges more. There are also some special cases, such as the sale of wrecked goods, where the auctioneer takes the charge of them, sees to the transportation, does many of the duties of consignee, and where the duties of auctioneer, from the state of the goods, are onerous, in which he charges two and one-half per cent. But if he performs the simple duties of an auctioneer of property in the custody of another, and there is nothing extraordinary in the condition of the property, the rule is to charge one per cent. But, if the property is not of sufficient value to make one per cent an adequate compensation, a round sum is charged. And if the value is great, as if it amounts to \$50,000, or \$100,000, it is customary to make a bargain beforehand; in which case, the rates agreed are often one-half or even one-quarter of one per cent. All the witnesses, those called by the auctioneers as well as those called by the claimants and captors, said they had never known a case where merchandise of one kind, as tea, coffee, or rice, of the value

of \$100,000 or upwards, had been sold by auction to a private person, when as much as one per cent had been paid. Special bargains were always made, and the rates would depend on circumstances; but in such cases, for the ordinary duties of auctioneers, from one-half to one-quarter of one per cent. would be a compensation, for which the most capable and trustworthy auctioneers would be glad to make the sales. Real estate and ships are not sold on a commission, but for round sums, and usually for sums, if the value is large, which would range from one-quarter to one-tenth of one per cent. In those cases, the duty is simple, and the auctioneer does not usually collect the money. Certain auctioneers have testified that, in selling for marshals heretofore, they have always charged two and one-half per cent., and for navy agents five per cent.; but as they admitted, on cross-examination, that they had always paid back one-half of their commissions to the officers employing them, I may properly disregard that evidence altogether. It is proper that I should add that these witnesses said they had not sold for any persons now in office, and under my jurisdiction. There was also evidence that the auctioneer who sells all the prizes in New York charges two and one-half per cent.; but this was only in the form of a letter, read by consent, with no cross-examination, and at most is only the charges of one person in another city. The result of all the evidence, to my mind, is plainly this: In the sale of merchandise, where the duties are simply those of an auctioneer, if the value is small, a round sum is charged; if very large, a special bargain is made; and in ordinary and average cases, the custom is to charge one per cent. It remains only to inquire, What were the duties performed in this case?

This cargo was coffee. It was in the custody of the marshal in a store-house. The marshal is responsible for the care and custody until the goods are turned into money, and is paid liberally for it. The auctioneer has not only no charge or custody, but cannot interfere with the goods in any manner beyond what is necessary to effect a good sale, and then subject to the marshal's care and custody. The auctioneer exercises no judgment as to the mode, time, or terms of the sale. These are determined by the court. The court directs the sale to be by auction, the terms to be cash, and the time of the sale is fixed by the warrant. The auctioneer assumes no responsibility on these points. He collects the money, it appears; but it is cash, and the duty is simply to receive and pay over to the marshal. But there were duties which the auctioneer performed, which did require time and attention, prior to the sale. He visited the stores four or five times, spending a couple of hours each time; and his partner visited them as many times, spending as much time on each occasion; and

their clerk made several visits there. The object of these visits there was to arrange the coffee into lots, label the lots, obtain samples of each, arrange the samples and send them to merchants here and in New York, prepare catalogues of the lots, and see to their printing and distribution. For the labor of others in these duties, separate charges are made, including all the printing, &c. There were some one hundred and seventy lots. The sale itself occupied from an hour to an hour and a half. The successful bidders could take their choice of lots, and take from one lot to the whole. There were, in fact, six purchasers in all. After the sale, the bills were made out, and the money collected from each purchaser, in cash or treasury notes, and paid over to the marshal. The sale was a successful one, and entirely satisfactory to the captors and the claimants; and it is understood that the auctioneer brought to bear diligence, attention, and the skill of his occupation. The amount was large, and attracted attention, and the consequent responsibility is to be paid for.

I desire to have it understood, as this case will tend to fix the rule in this district, that I treat the sale as one of magnitude, entailing proportionate care and responsibility, attended with labor beforehand in preparing samples, sorting, cataloguing, &c., which employed what might amount to the time of the auctioneer, his partner, and clerk, for the better part of three or four days, and one in which diligence and skill were exercised, and a sale entirely successful in its results. On the other hand, the duties were only those of an auctioneer, with such limitations on the exercise of discretion as I have noticed. I cannot think of allowing any such sum as has been charged,—two and a half per cent., amounting to over \$3,600. I desire to allow such a sum as, followed in future cases, will secure the services of the most skillful and responsible auctioneers, who shall feel themselves liberally paid. The interests of all, as well as justice to the persons employed, dictate such a policy. I am satisfied that in this case a commission of one-half of one per cent., amounting to \$726.96, will be such a compensation. It is accordingly allowed, in lieu of the charge made. At the same time, I am called upon to settle the allowance to the same auctioneer for selling the prize cargoes of the steamer P. C. Wallis, and the schooners Southern Independence, Victoria, and Charlotte. His charges are two and a half per cent. The duties performed are rather less in time and care than in the case of the Amy Warwick's cargo. Having some reference to the amounts of the respective sales, I assign the compensation as follows: Southern Independence and Victoria, one-half per cent. each; Charlotte, five-eighths per cent.; P. C. Wallis, one per cent. The result of all the cases is as follows:—

1 FED. CAS.—52

Amy Warwick	\$145,393 04
Allowed ½ per cent.....	726 96
Southern Independence	64,013 94
Allowed ½ per cent.....	320 06
Victoria	50,420 49
Allowed ½ per cent.....	252 10
Charlotte	31,338 75
Allowed ⅝ per cent.....	195 87
P. C. Wallis	8,392 83
Allowed 1 per cent.....	83 92

Case No. 345.

AMY et al. v. SHELBY COUNTY.

[1 Flip. 104.]

Circuit Court, W. D. Tennessee. Ang. 7, 1872.

TAXATION OF COSTS—FEES FOR RECEIVING AND FILING.

1. No paper is "filed" unless it has the proper indorsement of the clerk. Merely placing it in the court papers is no "filing." When indorsed by the clerk "received and filed," and actually filed, a fee of ten cents is allowed, and when it is necessary to enter a note on the calendar of such fact an additional fee of fifteen cents is allowed.

2. When the number of words are less than a hundred they are counted a folio, and as such entry is, in fact, a record, the departmental construction is the proper one, which gives the clerk ten cents for "filing" a paper and fifteen cents for the record entry in the calendar.

Appeal from taxation of clerk's cost. The facts are stated in the opinion.

Randolph, Hammond & Jordan, for plaintiffs.

Wm. W. McDowell, for defendant.

WITHEY, District Judge. Two thousand coupons, being for interest on certain bonds of Shelby county, were introduced in evidence by the plaintiff, and judgment was rendered in his favor, for the amount of all the coupons and interest. The clerk charged as fees ten cents for filing each coupon—\$200—also for making certificate on each of the fact that judgment was rendered thereon—fifteen cents—\$300; the court, for greater security against any improper use of such obligations, having ordered such certificates to be canceled. The ex-clerk rendered the services, and the taxation was by the present clerk. From his taxation defendant appeals. By agreement the appeal is submitted to me, as the cause was tried while I was on the bench discharging the duties of the district judge of Tennessee, who was necessarily absent in the eastern district.

I have carefully examined the question presented, and am of opinion that the taxed bill of clerk's fees should be reformed. The fee bill gives the clerk "for filing and entering every declaration, plea or other paper, ten cents." This relates to papers in the cause which constitute a part of the files proper, and embraces such only as when filed cannot be withdrawn of right by either party. Thus, a promissory note or bond,

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upon which suit is brought, introduced in evidence, is not a paper to be filed in the cause. It belongs to the party producing it, and when it has subserved its purpose as evidence, has no necessary place in the files; is not to be indorsed "received and filed," nor is it to be entered in the court calendar. It is true that such papers are usually left with the files, but strictly a note or bond used merely as evidence, is no part of the files proper, any more than is a deed used for a like purpose. The duty of the clerk is to indorse on such note or bond, where it constitutes the subject matter of the suit, a certificate of the fact that judgment has been rendered thereon. This is done to guard against any subsequent assertion of a claim thereon, or other improper use thereof. For such certificate the clerk is entitled to a fee of fifteen cents. If for any reason the court directs such paper to be filed, the clerk will be entitled to the fee of ten cents "for filing and entering." The coupons were used merely as items of evidence; they are not necessarily to be "filed and entered," and constitute in no proper sense a part of the files in the cause, unless the court ordered them to be filed. No such order was made, but the court did order that each coupon be indorsed by the clerk with a certificate that judgment was rendered thereon, in order that no improper use could be made of them thereafter. This was done by the clerk, but none are indorsed "received and filed," etc., and I do not see how the clerk can claim under the fee-bill ten cents each for filing papers which have never been filed. The clerk argues that when the coupons are placed in the files of the case, they are filed. I regard this a mistaken view. No paper is filed unless it has the proper indorsement thereon. The fee of ten cents is given for making such indorsement, and when necessary, entering a note on the calendar of the paper and date of filing.

The accounting officer of the proper department of the government allows ten cents for filing each paper, and fifteen cents additional for entering in the calendar a note of the filing; holding, I suppose, that such entry is a "record" entitling the clerk to a fee of fifteen cents a folio. When the number of words are less than one hundred they are counted a folio, and inasmuch as such entry is in fact a record, I am inclined to regard the departmental construction the proper one, which gives the clerk ten cents for filing a paper and fifteen cents for the record entry in the calendar. Again, the fee-bill, (and it is under this claim, as I understand, that the department gives the fifteen cents for entering in the calendar a paper regarding it a record,) provides "for making any record certificate, return or report, for each folio fifteen cents." In reference to the coupons in question, the court directed, as before stated, the clerk to indorse on each of the two thousand coupons a certificate that judg-

ment was rendered thereon, with date, number of cause and court. This was done, and for this service the clerk has charged a fee of fifteen cents each for two thousand certificates of one folio each, regarding such indorsement as a certificate. In this, I think the clerk is correct. While it is not a "record," it is a "certificate" of the fact that each coupon had gone into judgment, and a most important one for the defendant, Shelby county. It is a certificate of cancellation for which the county can well afford to pay, and is, I think, strictly within the terms of the fee-bill last referred to, a "certificate." The fee of fifteen cents per folio, counting each certificate one folio, amounts to three hundred dollars. This I allow.

I remark, that had the clerk, in fact, under the circumstances, actually indorsed on each coupon, "Recorded and filed," etc., I should be disposed to allow the fee of ten cents for filing. This not having been done, and not being necessary, I do not allow it. The ex-clerk's fees, as taxed by the present clerk, amounting to \$841.22. I disallow the item of \$200 for "filing 2,000 other papers in cause, ten cents each," and tax the clerk's cost under this bill at six hundred and forty-one dollars and twenty-two cents (\$641.22.)

Case No. 346.

The ANASTASIA.

[1 Ben. 166.]

District Court, E. D. New York. May, 1867.

SALVAGE—SUPERSEDING MASTER—TAMPERING WITH EVIDENCE—COSTS.

1. Where the libellant went on board the brig at Bermuda to come in her to New York, and alleged that the master proved incompetent, and after being out twenty-three days, the provisions and water falling short, he took charge of the vessel and brought her into a port of Nova Scotia, contrary to the wishes of her master, and thereby saved her to her owners, *Held*, That the facts alleged by the libellant as to the condition of the vessel were not sustained by the proof.

2. That whether the libellant did supersede the master or not, the facts of the case were not such as to warrant the court in giving him compensation for such action. No such extraordinary remedy was necessary under the circumstances shown. That the libellant's claim, therefore, must be dismissed.

3. Where the log of the vessel, as produced in court, had plainly been tampered with by the master or mate, or both—the master being part owner, and the mate his brother, *Held*, that such a circumstance might well justify a court in rejecting, without ceremony, not only the log, but also the evidence of the persons who attempted to impose it upon the court.

4. That the court would mark its disapproval of such misconduct by condemning the vessel to pay the costs of the action.

In admiralty. This was an action to recover salvage. The libel was filed by Walter

¹[Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

Burke in behalf of himself and all others, and it averred that in December last the libellant, Burke, being in Bermuda, and desirous of coming to New York, was offered a passage, free of expense, in the Italian brig "Anastasia," and he accordingly came on board for that purpose, and that there came on board at the same port a crew of six consul's men also bound to New York; that in the prosecution of the voyage the vessel met with adverse winds and cold weather, which the Italian master and crew proved incompetent to contend with successfully; that the vessel was frequently and unnecessarily put back, and so kept knocking about for some twenty-three days without making any port, when the whole voyage need not have occupied more than ten or fifteen days at the farthest; that on the twenty-third day of the voyage, when the provisions and water were already getting short, and when the vessel was within about thirty miles from the port of Liverpool, Nova Scotia, the wind then blowing from the northwest and the brig being badly iced, the master announced his intent to put back again and run for Bermuda; that such course, if adopted, would have placed the vessel in great danger of loss through the starvation of all on board; whereupon, the libellant, Burke, in order to preserve the vessel, took charge of the same, and with the aid of the consul's men knocked off the ice and headed her for Liverpool, contrary to the wishes of the master; that she arrived off Liverpool the same night at dark, and stood off and on till morning, when she went into the harbor in safety; and but for the services so rendered by him, the libellant alleged that the vessel would, as he believed, have been totally lost, and that such services were extraordinary and entitled him to a salvage compensation. These allegations the claimants for the most part denied, and they insisted that the vessel was in no danger; that her master and crew were competent to her navigation; that the libellant rendered no service; and that the vessel went into Liverpool in accordance with the wishes of her master, in order that they might get rid of the libellant and the consul's men, who, as it is claimed, seemed desirous of causing disturbance on the vessel.

Benedict, Tracy & Benedict, for libellant.

Beebe, Dean & Donohue and T. Scudder, for claimants.

BENEDICT, District Judge. This case has been treated on both sides as if the crew of consul's men were to be considered libellants as well as Burke, although the libel sets forth that no special services were rendered by the crew—makes no claim for compensation to them, and prays no decree in their favor. I shall therefore consider the case as it has been treated by the advocates, and shall in the first instance dispose of the claim of the seamen by saying that the proof

that they were paid in Liverpool for their services on board, a sum which they received in full of all their demands, is clear. They were intelligent men, and knew what they were about when they accepted this payment as in full, and I must hold any claim they may have had, to have been satisfied by this payment.

There remains the demand of Burke. The position of this person on board the brig, as described by himself, is somewhat anomalous, and I do not consider it clear that he can be considered to have been a passenger within the meaning of the maritime law as applied to passengers in cases of salvage.

In the case of *The Hanna*, 15 Law T. (N. S.) 334, it was held by Dr. Lushington that a person very similarly situated was not a passenger nor a seaman, but a nondescript.

This question, however, is immaterial in this case, as I am of the opinion that it is not in any respect a case where a salvage can be awarded to him. It will be observed that the libellant does not claim to have performed any considerable labor or incurred any personal risk or displayed any extraordinary ability, but his demand is based upon the fact, as he claims it to have been, that he assumed the extraordinary responsibility of overruling the actual master of the vessel and of putting himself at the head of the consul's men and carrying the vessel into Liverpool without the direction and contrary to the wishes of her master. That the libellant did this is stoutly denied by the Italian master and crew; but if he did, I cannot, under the facts of this case, endorse his action to such an extent as to award him a salvage compensation therefor.

This vessel had suffered no injury from stress of weather. The allegation that she was short of provisions or water is not sustained by the proofs. Her master and crew were in good health, sufficient in number for the ordinary crew of such a vessel; and, although their method of navigation would doubtless be far from satisfactory to most American seamen, they were competent, after their fashion and in their own time, to complete their voyage. It is, therefore, not a case where the extraordinary remedy which the libellant claims to have resorted to was necessary for the salvation of the vessel. It must be a strong case, clearly proved, which would justify a court in commending, by a salvage award, the assumption of such authority and such a responsibility.

The interests of commerce, which are the foundation of the whole doctrine of salvage, require that the master of a ship, who has been intrusted by the owners to take charge of their property, and who is responsible to them for its safe return, shall continue in command, as long as there is any vessel left to be commanded. He may call salvors to his aid, but he is to be superseded while at sea only as a last resort in a case of desperate necessity. I do not say that the case

may not arise where it might be the duty of a passenger, seaman, or any other competent person present, to overrule the master and change the destination of a vessel against his wishes, nor do I say that the due assumption of such a responsibility would not be good ground for awarding a salvage compensation. But I apprehend that a case far stronger than the present one must be made out to justify such an award, whether to a person who did or did not owe duty to the ship.

I shall therefore reject the libellant's claim to recover a salvage award, but in so doing cannot allow to pass unnoticed a feature in the defence which I regret much to have seen. I allude to the condition of the brig's log book as produced in court by the claimant. It is clearly to be seen that this log has been tampered with by the master (who is part owner of the brig) or the mate (who is his brother), or both—parts erased—parts written in since the occurrence of the transactions purporting to be related. Such a circumstance might well justify a court in rejecting without ceremony, not only the log itself, but also the evidence of the persons who attempt to impose it upon the court, and in a different case from the present might have ensured defeat to the claimants.

In the absence of any other way of marking my disapproval of such misconduct, I shall render in this case a decree similar to one rendered by Dr. Lushington for a different reason in the salvage case of *The Rosalind*, 2 Mar. Law Cas. 220, and while I award no sum to the libellant as salvage, shall condemn the vessel to pay the costs of this action.

Case No. 347.

The ANASTASIA.

[1 Ben. 188.]

District Court, E. D. New York. June, 1867.

BOTTOMRY—CHARTERED VESSEL—PRIOR ADVANCE REPAID OUT OF FREIGHT IN PREFERENCE TO SUBSEQUENT BOTTOMRY—UNIFORMITY IN MARITIME DECISIONS DESIRABLE.

1. The Italian brig *Anastasia* was chartered in Marseilles to the libellant for a voyage to New York for the round sum of £600. The charter-party provided that the master should sign bills of lading without prejudice to it, the loss or profit arising on them to be for account of the charterer; that the ship should be consigned to the charterer's correspondents, and that the charterer should "advance to the captain in Marseilles 4,000 francs on account of the freight, without interest or commissions, the captain paying the premium of insurance." The charterer advanced the 4,000 francs, and the vessel sailed with a cargo, partly the charterer's and partly taken on board by his orders. The freight by the bills of lading amounted to \$3,163.89, in gold, being \$283.89 in excess of the charter money. The vessel on the voyage met with disaster, and her captain took up money for her by bottomry on ship, cargo, and freight, and completed his voyage. The bot-

tomry not being paid, the bondholder filed his libel against ship, freight, and cargo, and the consignees paid the freight into court, and gave bonds for the value of the cargo, which abundantly secured the bond. Thereupon, the charterer filed a libel against the freight, claiming the amount of his advance and the excess above the charter money. By consent, his libel was treated as a petition, and the libel of the bondholder as an answer to it.

2. *Held*, That, under the rules which are applied in favor of bottomry bonds as against prior bottomries, mortgages, and other loans to the master or owner, it should be held that a bottomry bond binds not only the ship but her whole earnings. But that a distinction is made in the cases, between advances on freight and other advances, and it is held that sums advanced upon account of the freight must be deducted in preference to the bottomry.

[Cited in *The Eureka*, Case No. 4,547.]

3. That in this case the freight was, so far as the ship owner was concerned, paid to the extent of the advance, and was not at risk.

4. That the power to hypothecate by bottomry the cargo as well as the ship, is one conferred by the maritime law to facilitate commerce; and that it will be in furtherance of that object to limit the power as to the freight to the interest of the ship owner in the freight. This will enable a charterer to make an advance without risk of losing his security by a subsequent bottomry, which in many cases will enable a ship to raise money without bottomry, and will work no injustice to shippers of cargo, who, shipping in a chartered ship, may be held to have assented to the terms of the charter which provides for the advance.

5. That the interests of commerce require uniformity in the maritime law, as administered in the maritime courts of all countries.

In admiralty. In June, 1867, the Italian brig *Anastasia*, being in the port of Marseilles, was chartered to one Alfred Giraud, for a voyage thence to the port of New York. The charter-party, among other things, provided that the ship should receive its full and entire cargo at the choice of the charterer; that she should not be laden with merchandise other than that of the charterer or that sent by his order; and that she should sail to New York direct, and there make delivery of the cargo in conformity with the bills of lading, on payment of the freight of the round sum of £600, being for the entire capacity of the vessel. It was also further provided by the charter-party that the master should sign the bills of lading for the freight therein specified, without prejudice to the charter-party, the loss or profit arising thereupon to be for the account of the charterer; that the master should consign his vessel to the correspondents of the charterer in New York, and the charterer should "advance to the captain in Marseilles 4,000 francs on account of the freight without interest or commissions, the captain paying the premium of insurance." In pursuance of this contract the charterer advanced the stipulated sum of 4,000 francs, and the vessel set sail, laden with cargo, partly belonging to the charterer, and the balance taken by his orders, the freight list of which amounted to the sum of \$3,163.89, in gold, according to the bills of lading executed by

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the master in pursuance of the charter-party. During the voyage the vessel met with disaster, and was compelled to put into Bermuda, where the master raised the sum of £2,500, upon bottomry of the ship, freight, and cargo. Departing from Bermuda, the vessel arrived in New York, when the master declined to consign her to the correspondents of the charterer, refused to deliver up the bills of lading, or allow them to collect the freight, and neglected to pay the bottomry bond when due. The holder of the bond thereupon filed his libel in this court against ship, freight, and cargo; whereupon the consignees of the cargo paid into court the freight money according to the bills of lading, and the ship and freight being insufficient to discharge the bottomry bond, they gave security for the value of the cargo, thus abundantly securing payment of the bond. The freight money being thus in the registry, the charterer, Alfred Giraud, filed his libel against it, claiming to be entitled to be paid out of it, in preference to the bondholder, his advance of 4,000 francs, and \$283.89, being the excess of the freight list above the £600 for which the ship was chartered, and praying that the court would marshal the assets and direct payment of these sums to him. This libel being treated as a petition, and the libel of the bondholder being by consent taken as an answer thereto, and the master having filed an answer setting forth the facts attending the bottomry for the information of the court, but not claiming to be entitled to receive any part of the fund, the cause came up upon the issue so framed and the facts as alleged in the respective pleadings which were admitted to be true.

C. M. Da Costa, in behalf of the charterer, argued the following points:

1. At the time of the execution of the bond, the brig had received, on account of the freight due her from the charterer, the sum of 4,000 francs. The captain, therefore, could not and did not pledge it to the bondholder. Had no bond been given, the ship owner would, of course, have had to make the deduction; and, in the language of Dr. Lushington, "The bondholder, who stands in the ship owner's place with reference to this freight, must also be subject to the same deduction." *The Catherine*, Swab. 264. On principle, too, a man cannot pledge what does not belong to him. All that was then due the ship was the charter money, less the advance; with the freight list the master had, by the terms of the charter-party, no concern.

2. The rule is well settled, that a general hypothecation of the freight by the master in a foreign port, will be construed to include all the freight of the whole voyage, whether earned at the time the bond is made or not, provided it has not been paid to the master or owner.

Or, stated in other language: When freight is included in a bottomry bond, any portion of the freight which has been paid anterior to the date of the bond, is not subject to it. 1 Pars. Mar. Law, p. 429; *The John*, 3 W. Rob. Adm. 170; *The Cynthia*, 20 Eng. Law & Eq. 625; *The Catherine*, Swab. 264; *The Standard*, Id. 267; *The Salacia*, Holt, Adm. Cas. 322. In this last and latest case, Dr. Lushington reiterates the rule laid down in his former decisions, but adds, that in case the charter-party provides (as it did there) that the advance was to be made for ship's disbursements, it will not be deemed an advance on account of freight, but a loan to the captain, unless the charter authorizes it to be deducted on the settlement of the freight. In the case at bar, this distinction does not apply, for the charter-party in express terms says, that it is an advance on account of the freight or charter money.

3. The theory invoked that the bottomry bond saved the adventure, and that therefore the advance should be subject to it, is not tenable for a moment, because—1. At the date of the bond, the advance had been paid, and was therefore no longer at risk. 2. Besides, a bondholder has nothing to do with what is at risk or not; all he looks to is the property pledged. The theory of general average, cannot be, therefore, and never is, invoked in his favor. What interests, if any, shall contribute in general average, does not concern him, but only the owners of the property pledged, and their underwriters. *The Gratitude*, 3. C. Rob. Adm. 264; *Bradley v. Maryland Ins. Co.*, 12 Pet. [37 U. S.] 378, 405, 406.

4. The English cases cited under points 1 and 2 are directly in point. The fact that in the case at bar, the charterer himself shipped, only a part of the cargo (the rest being shipped by others with his permission, and by his orders), can make no difference in principle. True, we claim the profit to be for our account, but so would the loss have been. The charter-party expressly provided for the profit or loss being for account of the charterer. Had there been a loss, the bondholder could have compelled the charterer to have paid into court the entire charter money, less the advances. Besides, it nowhere appears in the English cases, that the charterers were the sole shippers of the cargo; and the case of *The John*, *ubi supra*, arose between the bondholder and an assignee of the charter-party.

5. All the equities are with the libellant; the bondholder is amply secured. The value of the cargo, alone, is fully five times as much as his bond. The court will, therefore, under any circumstances, so marshal the assets as to enforce the libellant's claim against the freight, leaving the bondholder to enforce his out of the ship, balance of freight, and cargo. See the rule as laid down by Dr. Lushington in *The Trident*, 1 W. Rob. Adm. 29, 35.

6. The libellant, therefore, is entitled to a decree for the amount claimed, with costs.

J. S. Ridgway, for the respondents, presented the following points:

1. The freight pledged to the lender on bottomry, &c., at Bermuda, was the freight expressed in the bills of lading and payable by the consignees of the cargo then on board for the carriage and delivery of said cargo, contradistinguished from the charter money (denominated freight) or hire of the vessel agreed to be paid by charterer to the owner of the vessel.

2. The power of the master, as agent of all concerned, including the charterer of the vessel, as well as the owner thereof and owners of cargo, to so pledge the freight payable for carriage of such cargo, will not be questioned. And in the present case, not only can the general principle be invoked that the master is in that capacity agent of all concerned, including the charterer, but the provision in the charter-party to the effect that the master shall sign bills of lading of cargo shipped, at rates of freight therefor designated by the charterer, is a recognition in express terms of such agency, and sufficient of itself to constitute the master such agent of the charterer, with power to act in his behalf concerning the subject matter.

3. The charterer was owner pro hac vice, and as such entitled to the ship's earnings on the voyage, and had undertaken the risks of safe carriage and delivery of the cargo specified in the bills of lading. The freight stipulated in the bills of lading was at risk, and dependent upon safe delivery of said cargo at the port of destination. No part of the freight stipulated in said bills of lading had been paid in advance, and the fact of the payment of part, or even the whole of the charter money in advance, does not in a case like the present, of a speculative character, create or constitute a valid claim or lien by or on the part of such charterer to be reimbursed out of the said freight the amount advanced by him on account of the charter or hire of the vessel, superior to or in preference to that of a lender on bottomry; for all the freight was at risk, and by means of the loan on bottomry, &c., was preserved to the benefit of the charterer for whose account and risk said voyage was undertaken and prosecuted. Standing in the position of owner for the voyage, such advance by the charterer, being on account of hire of the vessel and to acquire the control thereof for the voyage for speculative purposes, can be no more the ground of any valid claim to reimbursement of that amount to him out of the freight in preference to the claim and lien of a lender on bottomry, &c., than would the payment of a like sum by a purchaser on account of purchase money or the payment by the absolute owner of such amount

to provision the vessel for and dispatch her on the voyage. The freight on cargo on board, from which the party so advancing (whether owner or charterer) is or expects to be reimbursed with profit, is at risk, and on such freight, preserved and secured by means of such loan, the lender on bottomry has the first claim and lien, and it is such freight that is pledged. *The Eliza*, 3 Hagg. Adm. 87; 2 Park Ins. 881.

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5. A bottomry bond operates upon property then the subject of risk. In consideration of the maritime interest, the lender assumes the risks of perils of the seas to time of termination of the voyage and against which he may insure. And in case of a total loss of vessel and cargo by perils of the seas and without fault of any party, the bond would be of no force or effect further and would cease to operate, even though by its terms freight was pledged and though notwithstanding such loss, the charterer was indebted to the owner of the vessel for or on account of charter money or hire of the vessel. The amount of such indebtedness could not be reached by admiralty process, and not because of any defect in the remedies provided, but on principle; because a lender on bottomry, &c., cannot take maritime interest and at the same time have a claim on or hold as security property not subject to risk or perils of the seas on such voyage; and also because (as in the present case) the freight pledged is the compensation for the carriage of goods, and is in the cargo; while the charter money or hire of the vessel rests in covenant, and is not in the cargo, except in in-

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5. A bottomry bond operates upon property then the subject of risk. In consideration of the maritime interest, the lender assumes the risks of perils of the seas to time of termination of the voyage and against which he may insure. And in case of a total loss of vessel and cargo by perils of the seas and without fault of any party, the bond would be of no force or effect further and would cease to operate, even though by its terms freight was pledged and though notwithstanding such loss, the charterer was indebted to the owner of the vessel for or on account of charter money or hire of the vessel. The amount of such indebtedness could not be reached by admiralty process, and not because of any defect in the remedies provided, but on principle; because a lender on bottomry, &c., cannot take maritime interest and at the same time have a claim on or hold as security property not subject to risk or perils of the seas on such voyage; and also because (as in the present case) the freight pledged is the compensation for the carriage of goods, and is in the cargo; while the charter money or hire of the vessel rests in covenant, and is not in the cargo, except in in-

proaching her nearly bows on, at the distance of a mile and a half.

2. The duty of unremitting attention on the part of a lookout enforced.

3. If the night was foggy, as claimed by the libellants, the steamer should have blown her whistle and moderated her speed, both of which precautions she neglected until too late.

4. If sufficiently clear to permit an approaching vessel to be seen at the distance of a mile and a half, her negligence in not keeping out of the way was inexcusable, if not unaccountable.

5. The familiar excuse set up by the steamer, that the schooner changed her course and ran across her bows, rejected as not supported by the testimony; and because, if it did occur, as stated by the steamer's second officer and lookout, the steamer had ample time to avoid the disaster.

[In admiralty. Decree for libellants. Affirmed in *The Ancon v. Thompson*, 17 Fed. 742.]

Milton Andros, for plaintiffs.

McAllister & Bergin, for claimants.

HOFFMAN, District Judge. At about a quarter before five o'clock on Saturday morning September 15, the schooner *Phil Sheridan*, bound on a voyage from this port to the Umpqua river, state of Oregon, was run into by the steamer *Ancon*, and received such injuries as caused her shortly afterwards to capsize and become a total loss.

At the time of the accident two persons were on the deck of the schooner—the helmsman, and a lookout forward. The schooner was sailing close hauled to the wind, and heading towards the land on a north-east half north course. Her speed is stated by those on board to have been from two to two and a half knots per hour. The claimants' witnesses, however, suppose that a four-knot breeze was blowing; but this opinion is the result of an estimate of its velocity founded on the course of the smoke issuing from the steamer's smoke-stack, a method of determining the rate at which a schooner, close hauled to the wind, was actually sailing, which seems quite unreliable. In the view I take of the case, the point is immaterial.

Upon taking the wheel at two o'clock A. M., the helmsman had been instructed by the mate to keep a good lookout for the land, towards which the vessel was heading. He was first apprised of the steamer's approach by hearing the noise of her wheels, and supposing it to be the sound of breakers on the beach, he gave his wheel a round turn, and, fixing it with a diamond screw with which it was provided, he ran forward to see if the shore was discernible. Almost immediately on reaching the forward part of the vessel, he discovered the steamer looming through the darkness some two or three hundred yards distant, and bearing down upon the port bows of the schooner. The men endeavored, by shouting, blowing the fog-horn, etc., to attract the attention of the steamer; and the helmsman, rushing aft, found the captain—who had been aroused by the noise

—at the wheel, with the helm hard-a-port. The collision occurred a few seconds afterwards, and was in fact inevitable from the moment the steamer was first discovered by the schooner.

It is not denied that the schooner was provided with lights, set and burning as required by law. It is also in proof that a fog-horn was blown at short intervals for about twenty or thirty minutes previous to the collision. The failure of the schooner not sooner to discover the steamer is accounted for by the circumstance that a dense fog prevailed, which rendered it impossible to do so. On this point the testimony is irreconcilably conflicting, not merely because the claimants' witnesses deny that a fog prevailed—although they admit that the night was very dark, that the sky was "clouded" and overcast, and that it was "smoky"—but because, if the second mate is to be credited, the schooner was first seen by him at a distance, he "can safely say," of one and a half or two miles. Her green light was also seen by Meihan, the watchman, as he says, at the distance of seven hundred yards.

The schooner was struck near her forward rigging on the port side, and, swinging around under the force of the blow, fell alongside of the steamer on her starboard side. No effort was spared to rescue her crew and passengers, and they were all, though with imminent peril to one of them, transferred to the steamer. The steamer lay near the schooner some three quarters of an hour or fifty minutes, when the master of the steamer, observing that the schooner had fallen over on her side, with her sails in the water, abandoned all hope of saving her and proceeded on his voyage.

The evidence in the case is very voluminous. Much of it, however, relates to matters comparatively immaterial, and much of it to matters so clearly established by proof as to obviate the necessity of a critical comparison and analysis.

The case may almost be determined on the testimony of one witness—Mr. Douglas, the second mate of the steamer, the officer of the deck at the time of the collision—and by applying to the facts, as stated by him, a few well-settled and familiar rules of law.

Mr. Douglas testifies that when he first saw the schooner he was standing about twenty feet from the stem of the steamer, forward of the standard compass. He had relieved and taken the place of the regular lookout, and given him permission to go below to get some coffee. He first saw the vessel, but not her lights, at the distance of one and a half or two miles. She then bore about one point, or a little better, on his starboard bow; two or three minutes later he saw the schooner's green or starboard lights. He then gave orders to the quartermaster to starboard the helm, and the vessel went off about two points towards the shore. This

he verified by the compass, but "thought," he says, "that the course of the vessel was not altered quite fast enough." He does not appear, however, to have acted on that impression by repeating his order to the helmsman. At the time this change in the steamer's course was made, the schooner was distant about a mile.

The account given by Mr. Douglas of the succeeding occurrences is obscure and inconsistent.

On his direct examination he states that, after changing his course two points, as above described, he "thought he instantly saw two lights." He "then walked aft, about ten feet beyond the pilot-house, and notified the quartermaster that he had lost the appearance of the lights—to look out." He answered me, 'Yes, sir.'" "I then walked forward to the compass and looked at the compass again, and looked out for them again, and I saw they were coming very near, and I then ordered him to stop; seeing the red light, the flame, I ordered him to stop her; I then ordered him to blow the whistle, and he blew the whistle; I then ordered him to put his helm hard-a-starboard; I ordered him to blow the whistle to alarm the people, for I knew there would be a collision then."

On his cross-examination, in reply to an inquiry, how long after he saw the green light both lights came in view, he says: "That was instantaneous—probably two or three minutes after. It was so instantaneous that it confused me. That was when I ordered the quartermaster to look out—that he was changing his course."

The schooner was then, he says, probably half a mile or three quarters of a mile off. The two lights were in sight about half a minute. He then went aft to warn the quartermaster, and on his return only the red light was visible. The schooner was then "close aboard; probably two hundred and fifty yards off." It was then that he gave orders to stop and to put the helm hard-a-starboard. The helm up to this moment had remained as he had first ordered, viz., two or three spokes to starboard. In a subsequent part of his deposition the witness admits that, when he gave the order to stop, the schooner was within two hundred and fifty feet of the steamer. He also states that the collision occurred almost instantly on his return from the pilot-house, and that the time during which the schooner was not under his observation was about three minutes. He subsequently says, that on reflection he is inclined to think he has overestimated this interval.

The above is the substance of Mr. Douglas' testimony, expressed in his own language. Assuming his account to be in all respects accurate, there can be no doubt that the steamer was in fault. A vessel is described at a distance of one and a half or two miles; she is run down by a steamer which had, by

stopping, backing, or changing her helm, absolute control of her movements.

It is apparent from Mr. Douglas' narrative that, with the exception of starboarding the helm two spokes, nothing was done by the steamer to warn the approaching vessel, or to avert the disaster. The testimony clearly shows that the blowing of the steamer's whistle, the stopping of the vessel, and the putting of the helm hard-a-starboard, all took place too late to be of service, and when the collision was inevitable. When the lookout was permitted to go below, he was not relieved by another of the crew. The officer of the deck undertook to act as his substitute. So negligently did he perform his self-imposed duties, or rather so negligently did he attempt to discharge the duties of lookout and of officer of the deck at the same time, that he deserts his post, goes to the pilot-house, and only regains his station (after an absence of, as at first stated by him, three minutes) at the moment of the collision. At the speed at which the vessels were approaching each other, more than half a mile of the interval between them would be traversed in that time.

The absence of a competent lookout is of itself a circumstance strongly condemnatory, and clear and satisfactory proof will be exacted that the misfortune encountered was not attributable to her misconduct in that particular. The Alabama and The Gamecock, [Case No. 122;] The Armstrong, [Id. 540;] The Batavier, 9 Moore, P. C. 300, 301; The Blossom, [Case No. 1564;] The Colorado, 91 U. S. 694-699; The Europa, 2 Eng. Law & Eq. 563, 564; The Farragut, 10 Wall. [77 U. S.] 337; The Genesee Chief, 12 How. [53 U. S.] 462, 463; The Iona, 2 Mar. Law Cas. 133; The Java [Case No. 7,233;] Killam v. The Eri, [Id. 7,765;] The Londonderry, 4 Notes of Cas. Supp. 41-46; The Northern Indiana, [Case No. 10,320;] The Sea Gull, 23 Wall. [90 U. S.] 174-177; The New Orleans, [Case No. 10,179;] Ward v. The Ogdensburg, [Id. 17, 158.]

Nor will the captain or officer of the deck be accepted as competent lookouts. Chamberlain v. Ward, 21 How. [62 U. S.] 570; The Comet, [Case No. 3,051;] The Northern Indiana, [Id. 10,320;] The Ottawa, 3 Wall. [70 U. S.] 273. Nor the pilot and helmsman. The Alabama and Gamecock, [Case No. 122;] The Genesee Chief, 12 How. [53 U. S.] 463; The Ottawa, 3 Wall. [70 U. S.] 273; Rusk v. The Freestone, [Case No. 12,143;] Western Ins. Co. v. Goody Friends, [Id. 17,436.] Nor the steward and passengers. The Gratitude, [Id. 5,704;] McGrew v. The Melnotte, [Id. 8,812;] Amoskeag Co. v. The J. Adams, [Id. 338.]

The want of a lookout is not excusable because all hands are called to haul in a damaged mainsail, or to reef sails, or to haul down the flying jib, or to stow the anchor or by a custom for all the ship's company to stand lookout the first day of the

voyage. *Whitridge v. Dill*, 23 How. [64 U. S.] 453; *The Catharine v. Dickinson*, 17 How. [58 U. S.] 177; *Thorp v. Hammond*, 12 Wall. [79 U. S.] 414; *The H. P. Baldwin*, [Case No. 6,812;] *The Lady Franklin*, [Id. 7,984;] *Sturges v. The Mazeppa*, [Id. 11,271.]

The authorities I have cited sufficiently illustrate the inflexible rigor with which the rule which requires a competent lookout to be stationed, and that he be vigilant and unremitting in the discharge of his duty, is enforced.

"When strong evidence in a case of collision tends to show that the catastrophe was owing to the failure of the lookout of the libeled vessel to attend to his duty, every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated, until she vindicates herself by testimony conclusive to the contrary." *The Ariadne*, 13 Wall. [80 U. S.] 475.

The proof in the case at bar brings it fully within the principles thus laid down by the supreme court. But it is not merely that the second mate dismissed the lookout and assumed the discharge of his duties, and that he left his post and was absent during several critical minutes, while there was yet time to avert the disaster, but, by his own showing, he sees a vessel approaching nearly bows on, at the distance of one and a half or two miles; he sees her, as he says, change her course at the distance of one half or three fourths of a mile, and yet, up to the moment of the collision, takes none of the precautions, such as stopping, slowing, blowing his whistle, etc., enjoined by law and dictated by common prudence.

On the contrary, the starboarding (which might have been proper if, as he says, he first saw her green light) is persisted in after the red light became visible, and when there was ample room, by porting his helm, to pass under the stern or on the port side of the schooner, or by stopping and backing to have avoided all possibility of disaster.

The steamer being thus found to be clearly in fault, it remains to consider whether the schooner, by any fault on her part, contributed to the disaster. It is intimated, though not directly charged, by Mr. Douglas, that the cause of the accident was the change by the schooner of her course, so that she ran directly across the bows of the steamer.

This defense is characterized by Mr. J. Grier as "a stereotyped excuse, usually resorted to for the purpose of justifying a careless collision; it is always improbable, and generally false." [*Haney v. Baltimore Steam Packet Co.*] 23 How. [64 U. S.] 291.

The only evidence tending to show that the schooner made the change in her course imputed to her, is the statement of Mr. Douglas, that he first saw her green light alone. To accept this statement, we must disbelieve the evidence of those on board the schooner;

we must also reject the inferences which may naturally and safely be drawn from facts which are not fairly open to dispute.

The schooner was beating up the coast against a north north-west wind. She was close hauled to the wind on her port tack. The steamer was coming down the coast, heading nearly south. If, as the second mate testifies, she was one point on his starboard bow, the green light would probably not be visible to him—certainly not her green light alone. There is not the slightest reason to suppose that she went about and was put on the other tack. Her helmsman and lookout both testify that she was standing towards the land. The latter had been cautioned by the mate to look out for the shore, and the noise of the steamer's paddles was at first mistaken by both of them for the sound of breakers on the beach. This circumstance, which it is impossible to suppose they have invented, appears conclusively to show that they were in fact on the port tack, heading in shore, and that the vessel had not gone about so as to present her green or starboard light to the approaching steamer. No necessity or convenience of navigation is suggested which could have induced the schooner, when sailing on the wind, to luff up so as to expose her green light alone to a vessel approaching her from an opposite direction; and I see no reason for discrediting, on the faith of Mr. Douglas' unsupported statement, the positive testimony of those on board of her.

With regard to the weather, the testimony is, as has been observed, conflicting. All agree that the night was cloudy and dark. The claimants' witnesses deny that it was foggy. Two circumstances, however, lead me to the conclusion that in this they are mistaken:

1. The fact, which is uncontradicted, that some time before the accident, the fog-horn was passed by the man at the wheel of the schooner to the lookout, and was blown at short intervals up to the moment of the collision. That at the time of the collision it was sounded and heard on board the steamer is not denied. The weather, therefore, must have been such as to suggest to the crew of the schooner the propriety of its use.

2. A fog did in fact set in after the collision. It was of short duration; but the line which led from the steam whistle forward to the lookout station, was adjusted, and the whistle was sounded some half a dozen times, a short time after the collision.

This, though it does not prove, makes it probable that similar weather prevailed before the collision. The supposition, that owing to the fog the second mate of the steamer failed to observe the schooner until she was close aboard of her, is the more natural, and indeed more charitable, explanation of the occurrence, for it relieves Mr. Douglas of the imputation of gross and almost unac-

countable negligence, to which otherwise he would be obnoxious. It does not, however, acquit the steamer; for it was her plain duty to moderate her speed and to blow her steam whistle, both of which precautions she utterly neglected. A decree will be entered in favor of the libellants, and an order of reference to take proofs as to the damage.

Case No. 349.

Ex parte ANDERSON et al.

[3 Woods, 124.]¹

Circuit Court, D. Louisiana. Jan. Term, 1878.

ELECTIONS—OFFENSES AGAINST ELECTION LAWS— REMOVAL OF CAUSES.

1. Members of the election returning board established by the law of Louisiana are, even when engaged in canvassing the votes cast for presidential electors, state and not federal officers.

2. The petition of a party against whom a prosecution has been instituted in a state court, to remove said prosecution to the federal court on the ground that the same is on account of an act done under the provisions of title 26, Rev. St., should state such facts as show to the court that the case falls within the category of removable causes.

This was the petition of Thomas C. Anderson and others for a writ of habeas corpus cum causa, to remove into this court an information filed against them in the superior criminal court for the parish of Orleans, by the district attorney for said parish, charging them with feloniously publishing a false election return of the parish of Vernon of an election of presidential electors.

E. North Cullon, for petitioner.

BRADLEY, Circuit Justice. I have given careful consideration to the application for removing the prosecution in the above case to the circuit court of the United States, and for a writ of habeas corpus cum causa to that end. The right of removal is claimed under section 643 of the Revised Statutes of the United States; and under that clause of the section which authorizes a removal when any civil or criminal prosecution is commenced in a state court against an officer of the United States, or other person, on account of any act done under the provisions of title 26, "The Elective Franchise," or on account of any right, title or authority claimed by such officer or other person, under any of said provisions. To entitle the petitioners to the removal sought, therefore, their petition ought to show that the prosecution against them is either for some act done by them, as officers of the United States, or otherwise, under the provisions of title 26, or on account

of some right, title or authority claimed by them under any of said provisions. Does the petition show this? It states that the information against them charges them with falsely and feloniously uttering and publishing as true, in their capacity of returning board officers, a certain altered, false, forged and counterfeited public record, to wit, the returns from the parish of Vernon of an election held for presidential electors in the state of Louisiana, on the 7th day of November, A. D. 1876, under a writ of election dated September 16, 1876, ordering the same, knowing the said public record to be false, altered, forged and counterfeited. The petition further states that the acts for which they are accused are charged to have been done whilst they were acting under authority of law, and under oath of office, as a board of canvassers of election returns for presidential electors; and it claims that, in so acting, they were officers of the United States, and that the correctness and legality of their said election returns were duly presented by the said presidential electors before the electoral commission appointed under act of congress, passed January 29, 1877; and were by said commission fully investigated, adjudicated and sustained, and thereby became a thing adjudged. The petition further states that all their acts in the premises were done in accordance with the true intent and meaning of the 15th amendment to the constitution of the United States, and of the enactments of congress passed to enforce it—those acts consisting of officially inspecting, certifying, reporting and giving effect to the votes of all the citizens legally polled at said election in said parish of Vernon, and to none other. The petition denies the charge of making false, altered or forged returns, and insists that the petitioners are prosecuted for having, in their official capacity, given effect to the laws of the United States for the enforcement of the equal, civil and political rights of citizens of the United States, growing out of and appertaining to the elective franchise.

The claim that the petitioners, in acting as members of the returning board of Louisiana, were officers of the United States in reference to the election returns of presidential electors, is not tenable. They were state officers, appointed under a state law, and acting under state authority. The claim that the correctness of their returns was adjudicated by the electoral commission, is equally untenable. The electoral commission declined to go behind the returns, or to examine into their correctness. It denied its jurisdiction to do this. These grounds of removal, therefore, are not founded on fact.

The other ground alleged, namely, that the acts on which the charge of making false returns is based, were done by the petitioners in pursuance of the enforcement laws of the United States, is more to the purpose. The difficulty is, an entire want of specification

¹[Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

of the acts referred to. This may be owing to the fact that no specification of particular acts is made in the information against them. The charge is simply that of falsely and feloniously uttering and publishing as true false and forged returns from the parish of Vernon, of an election for presidential electors. What evidence will be presented in support of the charge does not appear. It may have no respect to the acts of the petitioners, done by them in pursuance of the acts of congress. The charge does not necessarily, nor presumptively, imply this. The petitioners can only conjecture that it will be so. In many cases there would not exist any doubt as to the specific acts complained of, and the defendants would have no difficulty in affirming the authority under which they were done. A revenue officer making a seizure, for example, and being prosecuted for taking the party's goods, could, with reasonable certainty, affirm what goods he was charged with taking, and could safely and with due certainty allege the authority by which he did the acts complained of, and thus be enabled to remove the cause to the federal courts. So if, in obedience to the enforcement act, an officer of election receives the votes of unregistered persons, not allowed to register on account of color, and is indicted for receiving unlawful votes, to wit, the votes of A, B and C, specified by name, or even without such specification, he could very properly affirm what particular acts he was indicted for, and could have no difficulty in removing his cause.

But in the present case the charge is for publishing a false return of an election held at a particular place. The defendants cannot allege that the return was made under an act of congress. It was not. But they suspect that it will be attempted to make out against them the falsity charged, by proving certain acts which they did under the enforcement act. This, however, they can hardly know with sufficient certainty, and if they do know it, they have not specified the acts, or class of acts, which they suppose to be the basis of the charge, so that the court may see with sufficient clearness that the case is one that is removable. It seems to me, therefore, that no sufficient case is presented for a removal of the cause. To be entitled to removal, the case must be shown to be within the category of removable causes. The general assertion of the party that it is so, or any general assertion that does not enable the court to see that it is so, is not sufficient. But the petitioners are not without remedy. If, on the trial, it should be attempted to sustain the charge by acts of the petitioners, done by them in pursuance of the acts of congress, they can then claim the benefit of those acts; and, if refused by the court, can carry their case to the supreme court of the United States by writ of error. The application must be denied.

Case No. 350.

In re ANDERSON.

[7 Biss. 233; 12 N. B. R. 502.]

District Court, W. D. Wisconsin. July, 1876.

GUARANTY—DOES NOT MAKE SECURED DEBT.

A guaranty is not such a security under the meaning of the bankrupt law that the creditor must surrender it to the assignee if he desires to prove his debt in full, and such creditor has the right to prove such debt as an unsecured one.

[Cited in *In re Broich*, Case No. 1,921; *In re May & Co.*, Id. 9,327; *In re Kinne*, 5 Fed. 60.]

In bankruptcy. The bankrupt, in order to obtain credit from the firm of Richards, Shaw & Winslow, procured John Servis to guarantee the payment of goods purchased of them by him to an amount not exceeding two thousand dollars, whereupon credit was extended to him by said firm to the sum of about three thousand dollars and he was indebted to them to about that amount for goods sold, when he was adjudicated bankrupt, two thousand of which was secured by the guaranty of Servis as hereinbefore mentioned. After the bankruptcy, the said firm made and filed with the register, Hon. C. Graham, proof of the whole claim as unsecured. The proof contained the usual allegations of no payments or security except the guarantee as aforesaid. The assignee and some of the other creditors objected to the allowance of the whole as an unsecured claim against the bankrupt, contending that to the extent of the amount guaranteed it should be treated as a secured debt and proven as such. Thereupon, the register, at the request of the attorneys of the respective parties, submitted and certified to this court the question "whether said claim should be allowed in gross as proven, or whether it should be allowed and proven in two separate items, one for two thousand dollars as secured, and one for one thousand and sixty-three dollars and forty cents, being the balance of the account, as unsecured."

Cameron & Losey, for assignee.

Wing & Prentiss, for creditors.

HOPKINS, District Judge. The counsel for the assignee has submitted an argument to me, in which it is insisted that the account to the extent of the amount guaranteed is a secured debt and should be proven as such. It is not denied but that the bankrupt was indebted to those creditors for goods sold him in the amount stated in the proof. The only question, therefore, is one of law, that is, whether this debt, to the extent of the guaranty of Servis, who is good, and responsible for the amount of it, is to be regarded as a secured debt within the meaning of the bankrupt law. This depends

¹[Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

upon the proper interpretation of section 5075, Rev. St. That section reads: "When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon, to secure the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt due after deducting the value of such property. * * * Or the creditor may release or convey his claim to the assignee upon such property and be admitted to prove his debt. * * * If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt." This is the provision in regard to proving secured debts, and it so clearly defines the kind of security meant, it seems to me that there can be but little doubt that a debt secured by the guaranty or indorsement of a third person does not fall within the purview of the acts. The security must be upon property real or personal of the bankrupt, that may be surrendered or conveyed to the assignee, and the estate in his hands be augmented thereby. It, in terms, applies only to security of property upon bankruptcy. It has been held both in this country and England (where the statute is similar to ours) that when a debt of the bankrupt is secured by the guaranty or indorsement of a third party and such third party has secured the debt by mortgage on his own property, that such a case was neither within the spirit or meaning of the act. A creditor holding such a security could not by a release or surrender use it for the benefit of the bankrupt's estate. In the assignee's hands it would be wholly unavailing. It has also been held that a creditor holding security upon the separate estate of the wife of the bankrupt for his debt is not a secured creditor within the act, and may prove his debt as unsecured. *Ex parte Hedderly*, 2 Mont. D. & D. 487; *Ex parte Parr*, 18 Ves. 65. The rule is stated that a creditor has a right in bankruptcy to prove and avail himself of all collateral securities from third persons to the full extent of the debt. Section 6075, in harmony with this conclusion, provides that when a party is liable upon a note or contract as a member of two firms having distinct estates to be wound up in bankruptcy, the debt may be proved as against both. See, also, in further elucidation and support of this view, *Ex parte Goodman*, 3 Madd. 373; *In re Plummer*, 1 Phil. Ch. 56; *Peacock's Case*, 2 Glyn & J. 27; *Ex parte Adams*, 3 Mont. & A. 157. The English authorities on this point were examined and approved by Justice Story, in *Re Babcock*, [Case No. 696.] That was the case of an accommodation acceptor of a bill of exchange going into bankruptcy, and the holder of the bill having attached certain property of the drawer, and having also proved his debt against the acceptor's estate.

*[12 N. B. R. 502, gives section 5074.]

Judge Story said: "Admitting the attachment to be a security and the bankrupt to be an accommodation acceptor, it is clear that the creditor has a right to proceed against the bankrupt for his debt in bankruptcy, and also against the other parties to the bill under his attachment until he has recovered the full amount of his debt, for it is not a security given by the bankrupt of his own property." That case was like this in some respects, for it seems that creditors had a suit pending, when the adjudication was had, against Servis, their guarantor, in which I learn from the counsel's argument, they had attached property of the guarantor. In *Re Cram*, [Case No. 3,343,] this question is very fully considered, and the same conclusion reached as I have arrived at in this case. Further support of this interpretation is found in section 5070, which authorizes indorsers or guarantors of bankrupts to prove such debt when not paid, in case the creditor holding them fails to make proof thereof, and thus obtain the benefit of all dividends in reduction of their liability. That class of persons are within the protection of the bankrupt act—are regarded as quasi creditors of the bankrupt, and entitled to have the dividends applied, as far as they go, in extinguishment of their liability for the bankrupt.

The assignee has no claim upon them or against them; they are in no sense liable to the bankrupt's estate, but the estate is under legal obligation to pay and protect them. In *Raikes v. Todd*, 8 Adol. & E. 846, a guaranty very similar to this was under consideration, and in that case, as in this, the principal debtor had gone into bankruptcy, and the creditor had proven his whole debt, which was in excess of the amount guaranteed. The guaranty being for a sum not exceeding two thousand pounds, and the whole debt proven being over twenty-four hundred pounds; a dividend had been paid the creditor upon the whole claim proven, of about three hundred pounds, leaving over two thousand pounds due, and an action was prosecuted against the guarantor for the two thousand pounds, the amount guaranteed by him. The defendant pleaded the amount of the dividend ratably applicable to the amount guaranteed as a payment pro tanto, and contended that it was to be distributed ratably over the whole balance, and that his liability was discharged to the extent of the dividend applicable to the amount guaranteed by him; that as a security under this bankrupt act (the same as under ours) who had paid a debt, could stand in place of the creditor, the declared dividend should be appropriated as so much upon every distinct pound; the plaintiff contending that he might recover the dividend on his own proof and apply the whole in reduction of the excess above the sum guaranteed. This claim of the plaintiff, however, was not sustained. The court held that the security was to pay

only the excess of the sum which he guaranteed over and above the dividend paid in respect of such sum. *Bardwell v. Lydall*, 7 Bing. 489, is to the same effect. This seems to me a correct exposition of the meaning and principle of these provisions of the bankrupt act, in regard to sureties for the bankrupt, and secures to them the benefits and protection contemplated by the act. Applying this doctrine to this case, these creditors would be required to apply the dividend paid in respect to the amount guaranteed by Servis in reduction of the claim upon him, each dollar of the claim being considered as reduced to the extent of the dividend paid by the bankrupt's estate. In that way the guarantor gets the same benefit as if he had paid the two thousand dollars guaranteed and then proved it up himself. It is in legal effect the same as paying it to the guarantor, as it is paid for his benefit and in extinguishment of his liability. This view of the equities of the case and the legal rights of the parties shows very clearly to my mind that the creditor not only has the right to prove for the full amount, but that it is a legal duty to do so if he proves at all. I, therefore, hold that these creditors, Richards, Shaw & Winslow, have the right to prove their full debt against the estate of the bankrupt in this case as an unsecured debt, and remit the matter to the register with direction to proceed in accordance with this opinion.

See, also, *Re Broich*, [Case No. 1,921.]

Case No. 351.

In re ANDERSON.

Ex parte WELSH.

[2 Hughes, 378; 9 N. B. R. 360.]

District Court, E. D. Virginia. March 16, 1874, and April 18, 1876.

Circuit Court, E. D. Virginia. Nov. 30, 1874.

BANKRUPTCY—CREDITORS' BILL—WIFE'S PROPERTY—HUSBAND AS TRUSTEE—WIFE AS WITNESS—JURISDICTION OF STATE COURTS—LIMITATIONS.

1. A proceeding in bankruptcy is in the nature of a general creditor's bill in equity, which, when once commenced, gives the bankruptcy court exclusive jurisdiction to administer the bankrupt's whole estate, and, therefore, the filing, after such a proceeding is instituted, of a general creditor's bill against the bankrupt, in a state court, is in conflict with the bankruptcy act and can give no jurisdiction to the state court.

2. In the schedule of this bankrupt was included his interest in lands inherited by his wife from her father. It was a question whether this was simply a life interest by the curtesy, or a fee acquired, ratified by a court, in the course of a suit instituted in a state court after the petition in bankruptcy by a judgment creditor against the bankrupt, his assignee, and his other judgment creditors, in the form of a general creditor's bill. In the

progress of this suit an agreement in writing in the form of a decree was signed by the attorney in fact of his judgment creditors, by the bankrupt himself, by his wife (who acted, however, under extreme moral duress and pressure), and was also intended to be signed by the assignee in bankruptcy, but was not so signed; by which writing the wife was to have only a fourth of his land and the creditors to get the rest. In this state of facts, held that this written agreement cannot bind the bankrupt's estate either favorably or adversely, because (1st), it was not signed by the assignee; (2d), because the signature of the bankrupt who was *civilliter mortuus* as to his estate was a nullity so far as the estate was concerned; and (3d), because a decree in a judicial proceeding *coram non iudice* is a nullity binding nobody.

3. Held, also, that the fact of the bankrupt having received his discharge in bankruptcy made no difference in giving effect to the writing he had signed, as to the estate surrendered in bankruptcy.

4. Held, also, that the assignee had no power to give consent to an extrajudicial decree of the state court, the laws of congress nowhere giving him power to become defendant to a proceeding in a state court commenced in *invidiam* towards and essentially in conflict with the jurisdiction which the bankruptcy act of congress gives to the bankruptcy court.

[Cited in *Augustine v. McFarland*, Case No. 648.]

5. In proceedings in bankruptcy the wife of the bankrupt is a competent witness to facts affecting the estate of the bankrupt (Revised Statutes of the United States, paragraph 5088), and so is every party "to the trial or cause" (section 8, of 22d June, 1874, amending section 26 of the general bankrupt act.)

6. The limitation of two years imposed upon certain proceedings by or against an assignee in bankruptcy does not bar a petition by a married woman who for more than two years has been defrauded by her husband, who is a bankrupt, when the fraud came to her knowledge within two years before filing her petition in the bankruptcy proceeding, claiming her rights against the bankrupt's estate.

7. Where a married woman, who has been deprived of her rights, under the coercion of judicial proceedings which she is made to believe are about to ratify the wrong she has sustained, signs an agreement by which she endeavors to save a part of what is due her, a court of bankruptcy on principles of equity will exercise all the power it has in setting aside such agreement and reinstating her in her rights.

8. Where a husband has by fraud or mistake been invested with the title in fee simple of real estate inherited by his wife, equity will treat him as a trustee of his wife, and a court of bankruptcy will refuse to subject the land to liens of the creditors of the husband who is a bankrupt.

[Cited in *Re Campbell*, Case No. 2,348.]

In bankruptcy.

This cause came twice before the district court. On the first of the two occasions the facts were as follows, on which the decision of 16th March, 1874, affirmed 30th November, 1874, was based: Anderson filed his petition in this court on the 29th December, 1868; on the 26th January, 1869, he was adjudicated a bankrupt by the register. In his schedules he surrendered large real estate in Montgomery county, including his interest in a tract of 1200 acres of land on Mill creek, inherited by his wife, Sarah J. Anderson, from her father. The debts

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shown by his schedules amounted to some \$25,000 or more, of which \$19,000 were judgment liens. C. B. Gardner was appointed his assignee. Anderson received his discharge in bankruptcy on the 14th November, 1872. Some time in the latter part of 1869, a general creditor's bill was brought in the circuit court of the state for Montgomery county, by the executors of James R. Kent, holding a judgment lien for about \$6750, against George W. Anderson, his assignee in bankruptcy, and his other judgment creditors, as defendants. There is no copy of the record of that suit in this court, but both Anderson and his assignee answered the bill. That suit went on in the circuit court of Montgomery until the 20th December, 1872, when an agreement in writing was entered into by J. J. Wade, attorney in fact for the judgment creditors on one part, and by Anderson and his wife on the other part, but in which the assignee of the bankrupt did not join, by which it was stipulated, in substance, that the tract on Mill creek and probably some other of the real estate mentioned in the creditor's bill should be divided into four parts, one of which parts, or so much as might be necessary, should be sold in satisfaction of the judgment debt to Kent's estate and costs; another part should be settled on Mrs. Anderson; and the other two parts should be sold for payment of the remaining debts of the bankrupt according to their priorities. There was a privy acknowledgment of this writing by Mrs. Anderson before a notary, who was an attorney for the creditors. This writing seems to have been executed under circumstances of pressure brought to bear on Anderson and his wife. One of its stipulations was, that it should be put into the form of a decree by the circuit court of Montgomery; and that court did instantly, on the day the agreement was executed, render a decree carrying out its stipulations, appointing T. E. Sullivan and John Gardner its commissioners to make sale of the lands. This cause did not come formally before this court until the 29th July, 1873, when Anderson filed his petition here, one of the allegations in which was, that "when your petitioner was adjudicated a bankrupt, a suit was pending in the circuit court of Montgomery to subject your petitioner's lands," etc. In that petition Anderson prayed for the exemption to him of a \$2000 homestead out of the lands which had been the subject of the written agreement of the 20th December, 1872. He also prayed for a restraining order against Sullivan and Gardner, commissioners, forbidding the sale of the real estate ordered to be sold by the decree of the local court. This court granted the restraining order thus asked for, and the motion now on the part of the commissioners is to dissolve that order. The petition having alleged that the chancery suit in the local court was pending when the pe-

tioner was adjudicated a bankrupt, this court was misinformed as to the material fact that that suit had been brought after the adjudication in bankruptcy. A further disguise of this fact was effected by the "abstract of proceedings" filed in this cause by the register, H. C. Gibbons, which is false in all its dates, and which post-dates the filing of the petition and all subsequent proceedings by twelve months. Whether that post-dating was a mistake or a device does not appear. The same petitioner filed another petition here on the 28th November, 1873, alleging, amongst other things, that "since filing his original petition" in bankruptcy, "and after this court had taken jurisdiction in the premises, the executors of James R. Kent filed a creditors' bill in the circuit court for Montgomery county," etc., etc., and praying that the parties in said suit, their attorneys and all other persons may be restrained from proceeding further in said suit, and that all matters touching his estate as a bankrupt may be adjudicated and settled here in this court. His wife, Sarah J. Anderson, by her next friend, has also come to this court, in a petition which is found in the papers, but the date of the filing of which is not noted, reciting the material facts bearing upon her title to the 1200 acre tract of land which has been mentioned; and praying, among other things, that her interests in the same may be protected. Thus is this court called upon to take action in the premises, for the first time since its knowledge of the fact that the creditor's suit brought in the local court, as mentioned, was brought after the adjudication of Anderson as a bankrupt.

[This cause was afterwards heard on petition for review. See 23 Fed. 482.]

T. E. Sullivan and J. J. Wade for creditors.
C. A. Ronald, for bankrupt.
Robert Stiles, for bankrupt's wife.

HUGHES, District Judge. Upon the facts as they have been recited I have to say as follows:

The written agreement of 20th December, 1872, cannot bind the bankrupt's estate; first, because it was not signed by the assignee; and second, because the signature of George W. Anderson, who was *civilliter mortuus*, was a nullity so far as the estate was concerned.

There is nothing in the point made by the commissioners in their answer, that Anderson signed the agreement after he received his discharge. By the very language of that paper, he was only "discharged of and from all debts provable against his estate which existed on the 31st of December, A. D. 1868." He was not discharged, as a party, from this court; and was in no manner or degree reinvested by the discharge with control over the estate which he had surrendered in bankruptcy. As to that estate, his becoming a

party to the agreement in question was an absolute nullity.

As an agreement between the parties to it, this writing had no validity against the bankrupt's estate. Did it derive validity from the consent which the assignee gave to the decree rendered in accordance with and execution of the agreement? The decree could only derive validity, if at all, from the consent of the assignee. He did consent.* The only question is, Had he power to do so?

I think he had not such power, for several reasons. The assignee in bankruptcy is the creature of the laws of congress on that subject. He has no power but such as these laws give him. And nowhere do they give an assignee power to become defendant to a suit, in another court than the bankrupt court, commenced after the petition and adjudication. He may become party defendant to a suit elsewhere which has been commenced against the bankrupt before his petition, and which may be pending at the time of the petition; but not to such a suit commenced after the petition. In fact, the law does not contemplate the possibility of such a suit. Having given full jurisdiction over the bankrupt's estate to the bankruptcy court, and mindful of the mockery of doing so if another court could appropriate that jurisdiction after the adjudication, it does not contemplate the possibility of an assignee going into another court as a defendant in such a suit, and nowhere gives him authority to do so.

It gives the assignee power to go out into other courts, and sue as plaintiff in right of the estate; its language being "he may sue and recover the said estate, debts, and effects." It gives him power to prosecute as plaintiff suits thus commenced by himself after the adjudication, or suits which may have been commenced by the bankrupt, and may be pending at the time of the bankruptcy. But it confines his power to appear as defendant to suits which were pending at the date of the bankruptcy; its language being: "He may defend all suits at law or in equity pending at the time of the adjudication of bankruptcy, in which such a bankrupt is a party in his own name, in the same manner and with the like effect as they might have been defended by such bankrupt," but for the bankruptcy.

The suit in the circuit court for Montgomery having been commenced after the adjudication, the assignee had no power to become defendant in it; his doing so was of no validity to bind the estate, and any consent which he may have given to the

proceedings in that suit was null and void. It is useless, therefore, to consider the question whether the state court had jurisdiction of a general creditor's bill against this bankrupt after his adjudication. Being civiliter mortuus as to the estate, his being a party to that suit was a nullity; and his assignee having no power to be a party to the suit, his being made so was a nullity. The suit itself was therefore a suit ex parte as to this estate, and its proceedings can in no manner bind it. I will say, however, on this question of jurisdiction, that I know of no case, in any of the reports, of a general creditor's suit in chancery being brought in another court than the court of bankruptcy against the bankrupt after his adjudication. I assume such a proceeding to be wholly anomalous. The law contracts with the bankrupt that in consideration of his surrendering his whole estate (certain exemptions excepted) for the benefit of his creditors, he shall be discharged of all debts provable against him existing at the date of adjudication. It provides a court to execute this contract, and it gives that court full and exclusive control of his estate for that purpose. For the law to allow any of these creditors to go into another court after the bankrupt has made his surrender, for the purpose of asserting control over the estate, would be to break faith with the other creditors and the bankrupt himself, and convert the whole proceeding in the bankrupt court into a mockery and fraud. The pretension to such a jurisdiction does not bear serious examination, nor deserve it.

I will say passim that the restraining order of 29th July, 1873, cannot stand longer on that prayer of the petition which prays for a homestead. The homestead exemption is not allowable to Anderson, and the restraining order granted for its protection cannot stand longer on that ground. I will sign an order continuing the restraining order given by this court on the 29th July, 1873, but basing it on the grounds set forth in this decision.

On appeal from an order entered by the district court as indicated, the circuit court rendered the following supervisory decision:

BOND, Circuit Judge. I am of opinion that this petition to the supervisory jurisdiction of the circuit court, to set aside a decree of the district court continuing the restraining order of the 29th of July, 1873, ought to be dismissed. Whatever may be the rights of the petitioner, Mrs. Anderson, in the district court, I do not think it necessary to determine; but it is clear that both she and her husband were entitled to be heard therein, and that the proceedings in the state court, commenced after the adjudication in bankruptcy, were null and void so far as they affected the rights of any person who might come into the bankrupt court claiming an interest in the property

* At the first hearing of this cause it was believed and conceded that the assignee had given his consent; but in fact he did not. Not until 27th November, 1875, did he consent, which he did then by indorsing on a copy of the agreement of 20th December, 1873, his acceptance and adoption of it.

in litigation in the state court; and there was necessity for the first restraining order, to prevent any disposition of the property till such claim was adjudicated; and upon the petition of Mrs. Anderson in the district court it was necessary to continue said order, which the district court has done, which action is the matter complained of. The court remands the case to the district court with directions to proceed to ascertain the rights of the parties claiming the property in litigation in the state court, without expressing any opinion as to the merits of the controversy.

On April 18th, 1876, this cause came on again before the district court, when, upon the facts and questions of law stated in writing, that court again rendered a decision in the cause as follows:

HUGHES, District Judge. In ascertaining the facts of this case I have relied chiefly upon that portion of the evidence to which no exception was taken by counsel on either side. But the objections which were made to the competency of Mrs. Anderson are not good. This is a "cause or trial" arising under the bankruptcy act; and it is expressly provided by that act, section 5088, that the wife of a bankrupt may be examined, and by the amendment of June 22d, 1874 (section 8 amending section 26), it is provided generally that any party to a trial or cause under the bankruptcy act shall be a competent witness. Premising this much, I proceed to state the leading facts of the case, which, so far as they seem to be material, are as follows: Sarah J. Anderson, the wife of the bankrupt, was an heir of Jacob Kent, who died intestate in 1858, leaving a large real and personal estate. There were several co-heirs, most of whom had received greater or less portions of the estate during their father's lifetime. In the division and distribution of the estate it was found that the homestead farm was nearly equivalent to the interest of one of the heirs and distributees. It was desired by the family that some one of the heirs should purchase this farm. Mrs. Anderson was persuaded, and agreed to do so, and accordingly, on August 26th, 1858, the day on which the home farm and most of the personal property of the estate was advertised to be sold, it was announced in the presence of the company that the home farm would not be sold, and that Mrs. Anderson had consented to take it as her share of the estate. Robert Gibbony, administrator of Jacob Kent, was authorized by the heirs to settle among them their shares of the estate, and to make sale of the lands for division. His authority was in the form of a power of attorney, dated the 19th July, 1858, signed by the heirs, and the husbands of those who were *femes covert*. But this power of attorney had no validity in law to bind these *femes covert*, not hav-

ing been privily acknowledged by them. By a paper similarly signed, it was agreed by the several heirs that each might take parts of the estate of the intestate Jacob Kent at such appraisement as might be made by persons appointed by the county court of Montgomery county, which was the county in which the intestate died and his estate was. On the 7th of February, 1859, there was an arbitration and appraisement (made by three citizens chosen for the purpose) of the home farm, and the valuation of it was thereby fixed at \$13,248, which, as was recited in the paper signed by the arbitrators, was "to be paid for by Mrs. Anderson's entire interest in the estate." In short, for several years, the purchase of the farm was treated by all concerned as made by Mrs. Anderson, the consideration paid for it being her interest in her father's estate.

At some time during Gibbony's agency in selling the lands of the estate, he sold to George W. Anderson, individually, a tract of 335 acres lying contiguous to the home farm for the price of \$6 an acre. Gibbony went on to sell all the other of the numerous tracts of land belonging to the estate, none of which, except the home farm, as aforesaid, was retained by any of the heirs. In the year 1862 (August 20th), having made contracts for the sale of all the lands, and probably collected much of the purchase-money, Gibbony caused deeds to be prepared, executed, and acknowledged, conveying on the part of all the heirs the several parcels of land (except the home farm) to the several purchasers of them. Mrs. Anderson, on the faith of having purchased the home farm with her own interest, joined in these deeds granting fee simple titles for all the other several parcels of the lands of the estate to the respective purchasers of them.

Notwithstanding the clear understanding which had been had at the beginning, and had continued for several years, between all persons in interest, and especially between Gibbony and Mrs. Anderson, that she had taken the home farm for her interest in the estate, yet Gibbony, in procuring the execution of the deeds conveying the several portions of the realty belonging to the estate as just mentioned, caused the remaining heirs, in conveying their interests in the home farm, to make a deed for it to George W. Anderson instead of Mrs. Anderson, and to reserve in this deed a vendor's lien (now claimed in favor of Gibbony's widow and representative) for about \$4000 due from George W. Anderson to the estate of Gibbony. On the 21st of August, 1862, the day after this deed of the remaining heirs purports to have been executed, Gibbony, by a paper signed between himself and George W. Anderson, treated the home tract of 1200 acres and the tract of 335 acres purchased individually by Anderson as both sold to Anderson himself, and took Anderson's bond for the aggregate sum of the \$13,248 which

had been awarded by arbitration as the price of the home farm, and \$6 per acre for the 335 acre tract. Whether or not Anderson's connection with these proceedings of Gibbony was fraudulent or not in intention, does not appear. The objects of Gibbony seem to have been to secure the debt of about \$4000 which he held against Anderson personally, upon the home tract as well as upon the other tract, and to make commissions as administrator upon the valuation price of the home farm (\$13,248), as well as upon his actual sales. No considerable amount of money, if any, was ever paid by George W. Anderson on account of this \$13,248; and Gibbony, as to most if not all of it, from time to time as he settled his fiduciary accounts before commissioners, merely handed to Anderson receipts purporting that he had received from Mrs. Anderson amounts approximately making up the price of the home farm. Afterwards, when the transaction of August 21st, 1862, came to be put in the form of G. W. Anderson's bond of that date, Gibbony credited these receipts nominally from Mrs. Anderson upon the record. Of these proceedings between Gibbony and her husband Mrs. Anderson was all the while ignorant; and it would seem also that the deed from her co-heirs conveying the home tract to Anderson instead of his wife was never delivered to Anderson; that the execution of it to himself individually was unknown to him; and that it was deposited for registration in the clerk's office of the county without the knowledge either of Anderson or his wife. The existence of the deed to her husband remained unknown to Mrs. Anderson until some recent time, which is not shown in the evidence or the proceedings. For all that the proceedings show, she did not know of the fraud practiced upon her until December, 1872.

In December, 1868, George W. Anderson had filed his petition here as a bankrupt, and was so adjudicated. In his schedule, B 1, he gave in his interest in the 1200 acres of land which have been referred to, as a life estate, stating that this tract of land "was inherited by Sarah J. Anderson, wife of petitioner, from her father, Jacob Kent, and petitioner only has a life estate in the same depending on his own life."

Notwithstanding the pendency of the proceedings in bankruptcy, the representatives of the estate of James R. Kent, who had received in 1867 a judgment for a large amount against George W. Anderson, filed, in August, 1869, a general creditor's bill in the circuit court of Montgomery county against G. W. Anderson and his two assignees in bankruptcy, for the purpose of subjecting his lands (treating the farm of Mrs. Anderson as his own in fee simple) to their own judgment and those of several other creditors, and to the vendor's lien for about \$4000 held by Gibbony's representatives, all the liens

amounting to about \$19,000, the whole real property, including the homestead, being supposed to be worth upwards of \$20,000.

The said court entertained the bill, and proceeded with the cause until it was ready for hearing. About the time the cause was ready for hearing Mrs. Anderson was made to believe that the deed of 1862 to her husband of the homestead farm had bereft her of her rights, and that she could not preserve her right to the whole home tract, and was persuaded to sign, which she did with great reluctance and distress, an agreement with the attorney of the creditors of her husband, by which it was stipulated that a decree should be entered for a division by survey of the home tract into four parts, giving the choice to herself of one of these parts to be held by her in separate right in fee simple; and for permitting the sale of the other parts for the benefit of her husband's creditors, and by which she agreed to such a division and distribution of the property. Her joining in this writing was acknowledged privily by her before one of the counsel of the creditors on the 20th December, 1872, under circumstances of haste and pressure; and a consent decree in accordance with an agreement was entered by the local court on the same day, directing the agreement to be carried into execution. The assignee of George W. Anderson (or rather the surviving assignee of two, one of whom is dead) did not sign the agreement of 20th December, 1873, at the time, but he has lately, to wit, on the 27th November, 1875, indorsed on a copy of it his acceptance and adoption of it.

After this decree was entered and the survey for division under it made, Mrs. Anderson joined her husband in a deed conveying the parts of the home tract not retained by her for the benefit of creditors, in pursuance of the agreement and decree just mentioned. This deed was acknowledged by her before the assignee of George W. Anderson in bankruptcy, a party in interest, but was never duly delivered; was recalled before delivery; and that part of the decree has never been executed by herself and her husband. So far as her own action goes, therefore, there is no further committal of herself to the alienation of her home tract than the agreement she signed with the attorney of the creditors, and the decree of the court made upon it; both on December 20th, 1872.

In an effort still to escape the action of the Montgomery court; George W. Anderson filed a petition in this court on the 29th July, 1873, praying an injunction against the plaintiff in the suit in that court, and his creditors, parties thereto, from all further proceedings therein, which was granted by the then judge of the court. The object of this petition was to have a homestead to the value of \$2000 set apart to the bankrupt out of the real estate he had surrendered in bankruptcy. This claim being inadmissible, that petition has been dismissed and the order of in-

junction granted upon it would have been dissolved but for the fact that afterwards, probably in December, 1873, Mrs. Anderson came into this court, by petition setting out the leading facts which have been recited, and praying the court to set aside and annul the deed of her co-heirs to George W. Anderson, of 20th August, 1862, and to require these co-heirs to convey the home tract to George W. Anderson only for his life, and after his death to herself and her heirs.

The petition brought to the knowledge of this court, for the first time, the proceedings that had taken place in the circuit court of Montgomery county; the agreement which Mrs. Anderson had signed, under the coercion of those proceedings, with the attorney of her husband's creditors, and the decree of the said court based upon that agreement.

This court decided, upon that petition, that the proceedings against George W. Anderson, a bankrupt and *civilliter mortuus* as to his estate, was *ex parte*, and as to the estate in bankruptcy and the assignees of the estate, was *coram non iudice* and null; the estate being in the custody and within the exclusive jurisdiction of this court, and the assignees having no power to make themselves parties to a proceeding in the nature of a creditors' bill against the bankrupt, his estate, and his assignees, commenced after the adjudication in bankruptcy. See Case of George W. Anderson, [opinion of Hughes, district judge, in the district court, ante, page 832.] Its decree to this effect was made on the 16th March, 1874, and was affirmed on appeal November 30th, 1874. That decree also enjoined all further proceedings in the circuit court of Montgomery by the assignees and by the parties plaintiff there, and no further steps have been taken in that court.

The case is in this court as a court of bankruptcy on the petition of Mrs. Anderson, by her next friend, which has been mentioned, on a plea of the statute of limitations interposed by the assignee to defendant's petition, and on the petition and answer of Isalah A. Walsh, administrator, *d. b. n.* of James R. Kent, the creditor who filed the general creditors' bill in the circuit court of Montgomery county, which has also been mentioned. This last petition (filed here December 7th, 1875) prays for a specific execution of the agreement signed by Mrs. Anderson on the 20th December, 1872. As to the rest, it is an answer to Mrs. Anderson's petition.

This court has, in this proceeding, jurisdiction to settle the title to the homestead farm of the Kent estate, at least as between Mrs. Anderson and all the creditors of her husband, George W. Anderson, who are before the court, inasmuch as Mrs. Anderson has herself voluntarily invoked the powers of the court in that behalf. How far it will exercise this jurisdiction in the present condition of the pleadings, I will state in the sequel.

The plea of the statute of limitations interposed by the counsel for the assignee against the petition of Mrs. Anderson is not good.

The bankruptcy court, in the bankruptcy proceeding, has jurisdiction under the first section of the bankruptcy law, for the ascertainment and liquidation of all liens and other specific claims upon the estate of the bankrupt, and for the adjustment of the various priorities and conflicting interests of all parties. Its jurisdiction is conclusive. Rev. St., § 711. This duty to settle conflicting interests between various parties is not affected by any provision of law limiting suits and proceedings within two years in cases where a mere adverse interest of the assignee in bankruptcy is concerned. Even if it were, however, Mrs. Anderson's petition was brought before the expiration of two years after she came to knowledge of the fraud. I now proceed to state my conclusions as to the rights of Mrs. Anderson in the home farm of her father, which is the principal matter to be dealt with in this proceeding.

The pivotal fact is that certain property belonging to a married woman, and in which the husband had no beneficial interest, was, without any fault on the part of the woman and without her knowledge, wrongfully, improperly, and mistakenly conveyed directly to the husband. Based upon this state of facts, the first proposition is, that as between husband and wife the husband took no beneficial title at all, and in equity the case stands upon the same footing as though that had been done which should have been done, and in pursuance of the well-known canon of equity jurisprudence, the court would regard that as having been done which ought to have been done. I therefore hold that Anderson took not for himself, but only as trustee for his wife, by the deed of 20th August, 1862, made by the co-heirs of his wife to him.

The second proposition is that the case stands upon exactly the same footing as between the wife thus situated and every other person not within the strict definition of a *bona fide* purchaser from the husband, without notice of the equitable title in the wife. None but a *bona fide*, actual purchaser, without notice, can take against the wife.

The third proposition is, that in order to constitute a *bona fide* purchaser within the above rule, the purchase-money must have been actually paid before notice, (2 White & T. Lead. Cas. Eq., White & T. 3d Amer. Ed., pp. 62, 91, 101); and must have been actually paid in money or negotiable instruments and not in bonds or other securities not negotiable, (*Id.* pp. 62, 117). The object of this latter part of the rule is manifest; for if the payment were made otherwise, the purchaser would be able to protect himself by pleading a failure of consideration.

It is not sufficient that a conveyance of the

legal title is made as security for an antecedent debt. *Id.* pp. 103, 108. Neither judgment creditors nor assignees for creditors are bona fide purchasers within this rule. *Id.* pp. 105-108, 110.

The fourth proposition is, and it is a corollary from the preceding one, that no property held by the bankrupt in trust shall pass by the register's assignment in bankruptcy to the assignee. This is expressly stated by section 5053 of the Revised Statutes. *Vide, also, Fisher v. Henderson*, [Case No. 4820;] *Faxon v. Folvey*, 110 Mass. 392. The authorities which might be cited and books referred to in support of these various propositions are exceedingly numerous and entirely decisive.

The fifth proposition is, that an assignment in bankruptcy will not pass a trust estate, for the court will not presume that the trustee intended to commit a breach of trust. *Perry, Trusts*, § 336; *Webster v. Cooper*, 14 How. [55 U. S.] 488; *Hill, Trustees*, margin pp. 269, 539; *Lounsbury v. Purdy*, 18 N. Y. 520; *Copeman v. Gallant*, 1 P. Wms. 314; *Finch v. Earl of Winchelsea*, *Id.* 278; *Bennet v. Davis*, 2 P. Wms. 318; *Scott v. Surman*, *Willes*, 402; *Carpenter v. Marnell*, 3 Bos. & P. 40; *Winch v. Keeley*, 1 Term R. 619; *Dangerfield v. Thomas*, 9 Adol. & E. 292; *Kip v. Bank of New York*, 10 Johns. 63; *Blin v. Pierce*, 20 Vt. 25; *Ontario Bank v. Mumford*, 2 Barb. Ch. 596; *Hynson v. Burton*, 5 Pike, 496; *Price v. Raiston*, 2 Dall. [2 U. S.] 60; *Kennedy v. Strong*, 10 Johns. 289; *Clarke v. Minot*, 4 Metc. [Mass.] 346. I will now state my conclusions on the foregoing facts and law.

The title of George W. Anderson in the home farm was in trust for his wife. That title being held in trust did not pass to Anderson's assignee in bankruptcy, but remained in him for the benefit of his wife, none but a life interest in the property attaching to himself. None but this life estate can be subject to the judgment liens against Anderson. The agreement of Mrs. Anderson, signed and acknowledged the 20th December, 1872, was made so unwillingly and under such moral duress that a court of equity ought to set it aside; the more as the acknowledgment of it was made before a notary who was of counsel for her adversaries and thereby morally disqualified from taking it. As the proceedings in the circuit court of Montgomery county were coram non iudice, the decree of that court carrying the agreement into execution was a nullity; nothing but the agreement itself can be considered in the case.

I have had no difficulty in arriving at the facts of the case or at the law and the rights of parties arising from those facts.

But I have some difficulty in deciding what to do with the agreement signed 20th December, 1872, by Mrs. Anderson, in the present condition of the pleadings here. But one of the creditors who through their at-

torney were parties to that agreement is before the court, viz., J. A. Welsh, administrator, d. b. n., of James R. Kent. It is competent for me to dismiss his petition; but it is not competent for me at this time to adjudicate upon that agreement in a manner to bind the other creditors of George W. Anderson who were through their attorney parties to the agreement but are not before the court. I have no doubt of the jurisdiction of the court to make all these creditors parties defendant to the petition brought voluntarily here by Mrs. Anderson for the purpose of setting aside that agreement; for it is competent for the court under the first section of the bankruptcy act "to adjust the conflicting interest of all parties" asserting claims upon the estate of the bankrupt, and if all the creditors who were parties to the agreement of 20th December, 1872, were before the court by personal notice and summons as defendants to Mrs. Anderson's petition, I should not hesitate to pass upon that agreement, and, upon the present proofs in the case, to set it aside.

The most I could do now would be to dismiss the petition of J. A. Welsh, administrator, etc., and declare that George W. Anderson brought into this court as assets no other estate in the home farm in question than an estate for life, and leaving open the question how far Mrs. Anderson's joining in the agreement of 20th December, 1872, affected her title in the home farm, until all parties in interest shall be before the court.

Case No. 352.

In re ANDERSON.

[2 N. B. R. 537, (Quarto, 166.)]

District Court, D. North Carolina.

BANKRUPTCY—COSTS—POOR DEBTOR'S OATH.

[Rule 30 in bankruptcy provides that, where the debtor "makes proof to the satisfaction of the court" that he is unable to pay the costs prescribed by the act and rules, the judge may, in his discretion, direct that the costs shall be limited to the amount required to be deposited. *Held*, that such an order will not be made upon the mere affidavit of the debtor that he is unable to pay the costs, as that is merely a statement of opinion, which may not be justified by the facts.]

[In bankruptcy. The bankrupt alleges that he has filed his petition, and has deposited \$50, as required by law; makes affidavit as to his inability to pay the costs prescribed by the bankrupt act and the general orders in bankruptcy, exceeding the sum deposited; and prays that an order may be made by the court directing that the fees and costs should not exceed said sum.]

John W. Hinsdale, for bankrupt.

BROOKS, District Judge. This is a petition at the instance of David Anderson, filed the 28th December, 1868, who alleges that he has filed his petition in bankruptcy, that he

has deposited fifty dollars as required by law, and makes oath that he is unable to pay the costs prescribed by the bankrupt act and the general orders in bankruptcy, exceeding said sum deposited.

The language of that part of Rule 30 which relates to this subject, is as follows: "In cases where the debtor has no means, and makes proof to the satisfaction of the court that he is unable to pay the costs prescribed by the act and these orders, the judge, in his discretion, may direct that the fees and costs therein shall not exceed the sum required to be deposited."

The petitioner rests his application for the order he asks, upon his declaration alone, made under oath, that he is unable to pay more than the sum deposited. I do not regard his inability sufficiently shown in this case. There are some laws so formed as to require a judicial officer to do certain official acts upon certain prescribed oath or oaths being made before him, as in our attachment laws. If the party applying shall make the oaths required, and execute the bonds, there is no discretion left with the judge, justice, or clerk; they must issue the attachment demanded. I might refer to other acts of our assembly of a similar character. There is a marked difference in the effect of the language used in these acts and that quoted above from Rule 30 in bankruptcy. In the former, the officer to whom application is made must act, he must grant the process when the prescribed oaths are made; there is no discretion: and in the latter, the oath of the petitioner may be considered with, or without, the affidavits of other persons to aid the judge in exercising a sound discretion.

The court is to presume every petitioner able to pay the lawful costs in a proceeding in bankruptcy, until he who may allege inability to pay such costs "shall make proof to the satisfaction of the court." Now, the petitioner swears that he is unable to pay any additional costs, and I grant that the petitioner may honestly believe this to be true, yet, if I knew his situation and circumstances fully, I might entertain a contrary opinion. There are those who would, and, indeed, do often declare their inability to pay a debt, and such are sometimes doubtless honest in the opinion so expressed; and yet I would as honestly differ with them upon the question of their ability: such might believe that it was of the highest necessity to support a style of living or even extravagance, which I would regard in no way necessary or proper in one involved in debt. In this case were I to grant the prayer of the petitioner, I would do so only upon the opinion of the petitioner, without any statement even made by him from which I am able to determine whether his opinion is correct or otherwise. The prayer of the petitioner is refused. Let this be certified to the petitioner.

Case No. 353.

ANDERSON'S CASE.

[2 Cranch, C. C. 243.]¹

Circuit Court, D. Columbia. May Term, 1821.

INSOLVENCY—DISCHARGE—ARREST FOR PRIOR DEBT.

A debtor, discharged under the insolvent act, cannot be arrested for a debt contracted before his discharge, although not payable till after his discharge.

James Anderson, who had been discharged under the act of congress, for the relief of insolvent debtors within the District of Columbia, was arrested for a debt contracted before his discharge, but payable after his discharge.

On motion of his counsel, Mr. Fendall. THE COURT ordered him to be discharged from the arrest, upon entering his appearance without bail.

Case No. 354.

ANDERSON v. BANK.

[Chase, 535.]²

Circuit Court, D. North Carolina. June Term, 1869.

PRINCIPAL AND AGENT — RELATION — EFFECT OF CIVIL WAR—LIABILITY OF AGENT—TAKING CONFEDERATE CURRENCY—PLEADING.

1. The late civil war did not revoke an agency in the southern states, established before the war, by a citizen of one of the northern states, but such an agent was bound to act with due care and diligence.

[See *Botts & Darnall v. Crenshaw*, Case No. 1,690.]

[See note at end of case.]

2. The receipt of Confederate treasury notes in payment of a debt due to a citizen adhering to the national government was not the exercise of such diligence.

[See *Fretz v. Stover*, 22 Wall. (89 U. S.) 198; *Taylor v. Thomas*, Id. 479.]

3. Such receipt did not discharge the debtor from his debt, though paid in form, and the notes delivered to him as paid by the agent, were not paid in fact.

[See *Fretz v. Stover*, 22 Wall. (89 U. S.) 198; *Taylor v. Thomas*, Id. 479.]

[See note at end of case.]

4. Nothing could discharge him except ratification of the acts of the agent or voluntary release by the creditor, or actual payment in lawful money.

[See *Fretz v. Stover*, 22 Wall. (89 U. S.) 198; *Taylor v. Thomas*, Id. 479.]

5. The agent can not be sued along with the debtor for the amount of the debt, without an averment of the insolvency of the debtor.

6. But this having been done, the plaintiff may either amend his bill and charge the insolvency of the principal, or he may, under the circumstances, take a decree against the agent for the value of the Confederate currency paid

¹[Reported by Hon. William Cranch, Chief Judge.]

²[Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

by the debtor, and a further decree against the debtor for what would then remain due after crediting this on the debt.

7. If the plaintiff is not content with such a decree, he may amend his bill by alleging the insolvency of Harris and loss of his debt through the unauthorized action of the bank.

In equity. Anderson lived in Kentucky and employed Young, also a citizen of that state, to sell mules for him in North Carolina. In August, 1860, Young as his agent sold mules to Harris in North Carolina, and took the notes of Harris for the purchase-money, payable to Anderson in January, 1861. Immediately after receiving the notes, Young deposited them in the Bank of Cape Fear at Raleigh, North Carolina, for collection, having first endorsed them for Anderson, as his agent, to Jones, cashier of the bank.

Harris did not pay the notes when they became due, but on January 22, 1861, paid part of one of them, which amount the bank remitted to Anderson by mail, less commissions and exchange. On February 22, 1861, Harris made another payment on account, which amount the bank likewise remitted by mail to Anderson, less commissions and exchange. In November, 1862, Harris paid to the bank the balance due on the notes, with interest to the date of payment in Confederate treasury notes, and received from the bank his two notes to Anderson.

The currency so received was placed by the bank to the credit of Anderson on special deposit, and subsequently invested by it in Confederate seven per cent. bonds, which bonds were placed in a package, among the special deposits of the bank marked, "Jno. Jay Anderson, Side View, Montgomery County, Kentucky." During the fall of 1862 Young was in Raleigh, and went with Harris to the Bank of Cape Fear, where Harris paid the notes in Confederate currency to Jones in the presence of Young. Whereupon Young demanded the amount so paid of Jones, who declined to deliver it to him on the ground that he had no authority from Anderson to collect it. Young claimed to have authority from the fact that Harris had given him the notes as agent for Anderson, and that he as such agent had endorsed and delivered them to Jones for collection.

As soon as the war terminated, and communication between Kentucky and North Carolina was restored, Anderson repudiated the action of the bank in securing Confederate currency for his notes, and filed his bill in equity against Harris and the bank, charging that the notes never had been paid; that they had been delivered to Harris without authority by collusion between the bank and Harris to defraud him.

The respondents put in separate answers. The bank admitted the reception of the notes for collection. Stated that it had remitted to Anderson all collections as long as it

was possible to do so, and that in receiving payment of the notes in Confederate currency, it had acted with due care and diligence in protecting Anderson's interest, exercising the same discretion as was used by the best business men in the community in the transaction of their own business, and just as much as had been at that time exercised by prudent executors, guardians, and other fiduciaries, and denied the charge of collusion. Harris, in his answer, admitted the main facts as charged, denied collusion, and claimed that Young as agent of Anderson had ratified his payment to the bank.

Young testified that on his visit to Raleigh in 1862, he was no longer agent of Anderson, that relation having terminated the year before.

Phillips & Buttle, for complainant.
Rogers & Bachelor, for the bank.
E. G. Haywood, for Harris.

CHASE, Circuit Justice. This is a suit in equity by the plaintiff, a citizen of Kentucky, against the defendants, who are citizens of North Carolina. The substance of the case is that Anderson having sold some mules to Harris, received his bonds for the price, and deposited them in the Bank of Cape Fear for collection, late in 1860, or early in 1861. Subsequently, the bank received partial payments, which were remitted to Anderson. The civil war broke out soon afterward, and there were no further payments until November, 1862, when the balance on the first bond was paid. The second bond of \$450, and interest, were paid in full early in 1863. These payments were made in Confederate notes, and the bonds were surrendered to Harris.

The bill charges that there was collusion between the bank and Harris in this attempt to satisfy the bonds by payment in Confederate currency, and prays that the defendant may be compelled to satisfy the debt due from Harris. The bill does not allege that Harris is insolvent, and the charge of collusion is denied by the answer, and not supported by proof.

There is no doubt that the bank was constituted his agent for collection by the plaintiff, and it is not denied that its duties as such were faithfully fulfilled until after the commencement of the civil war. The agency of the bank was not terminated by the breaking out of hostilities. The bank might, indeed, have declined to act further under its agency, and might have retained the bonds for delivery to the plaintiff, but if it acted at all, it was bound to act with care and diligence. In our opinion, the receipt of Confederate notes, in payment of a debt due to a citizen of a state adhering to the national government, was not the exercise of such diligence. Such receipt, however, did not discharge the debtor from his debt. The

bonds, though paid in form and delivered to him as paid by the agent, were not paid in fact. He still remained liable for the full amount of the debt. Nothing could discharge him except ratification of the acts of the agent, or voluntary release by the creditor, or actual payment in lawful money. No discharge, such as is here described, is alleged. The evidence is that the creditor disavowed the unauthorized acts of the agent and insisted on payment in full. But he can not recover damages for consequential loss without proof of such loss. If the debtor is not discharged, and is able to pay the debt, and no loss has arisen to the creditor from the acts of the bank, it is difficult to see how the creditor can establish any right as against that corporation. Rights and remedies as between the bank and the debtor are matters between them, and not between the bank and the creditor, unless loss has arisen to the creditor. But the bill contains no allegation of the insolvency of the debtor or of other loss. In the present state of the pleadings, therefore, the particular relief prayed for in the bill can not be granted.

But since the bank is undoubtedly liable to the debtor for the value of the Confederate notes received from him, and the debtor remains liable to the creditor for the full amount of the bonds, we think that, to avoid multiplicity and circuitry of action, under the general prayer for relief, and upon the whole case, a decree may be made for the payment by the bank to the plaintiff of the amount due to Harris, and against Harris for the balance remaining due after crediting that amount upon the bonds. If the plaintiff is not content with such a decree, his bill, in its present form, must be dismissed; but if he chooses, he may amend by alleging the insolvency of Harris, and loss of his debt through the unauthorized action of the bank. *Emerson v. Mallett*, Phil. Eq. 236; *State v. Mebane*, 63 N. C. 315; "Liability of Guardian," see *Confederate Notes*.

[NOTE. The one exception to the rule that war suspends all commercial intercourse between the citizens of two belligerent states is that of allowing the payment of debts to an agent of an alien enemy, where such agent resides in the same state with the debtor. But, said Mr. Justice Bradley, in *Insurance Co. v. Davis*, 95 U. S. 425, "this indulgence is subject to restrictions. In the first place, it must not be done with the view of transmitting the funds to the principal during the continuance of the war, though, if so transmitted without the debtor's connivance, he will not be responsible for it. * * * In the next place, in order to the subsistence of the agency during the war, it must have the assent of the parties thereto. * * * It is not enough that there was an agency prior to the war. It would be contrary to reason that a man without his consent should continue to be bound by the acts of one whose relations to him have undergone such a fundamental alteration as that produced by a war between the two countries, to which they respectively belong."]

Case No. 355.

ANDERSON v. BROWN et al.

[N. Y. Daily T. Oct. 25, 1851.]

District Court, S. D. New York. 1851.

COMPROMISE—PAYMENT—NEGOTIABLE PAPER.

[A draft given in compromise of a suit, and thereafter protested for nonpayment, is not a payment of the claim, and the original suit may proceed as if no settlement had taken place.]

[In admiralty. Libel for a marine tort by Moses Anderson against William H. Brown and Nathaniel Jarvis, owners of the steamship Pacific. A settlement was heretofore had. Heard on motion by libelant to proceed with the suit, and to add one Lowry as a party respondent. Granted.]

Before JUDSON, District Judge.

This action was commenced by the libelants for \$5,000 damages for a marine tort against the defendants, as owners of the steamship Pacific. Process of citation was issued, and both defendants were served. After service a settlement of the suit was made by paying the libelants a draft for \$750. After the draft became due, it was protested for nonpayment. A motion was now made by the libelant to proceed with the suit, and add another party, a Mr. Lowry, as defendant, and for an order to hold all the defendants to bail. Mr. D. W. Mahon, Jr., was heard for the libelant in support of the motion, and Mr. T. J. Brady, for the defendants, in opposition, who relied on rule 25 of the supreme court of United States. After considerable discussion, the judge decided in favor of the libelant, granting the amendment prayed for, and allowing the suit to proceed as if no settlement had taken place, and ordering the defendants to be held to bail on \$1,200; thus deciding that a draft is no payment unless paid.

ANDERSON, (DAVIS v.)

[See *Davis v. Anderson*, Case No. 3,623.]

ANDERSON, (GARDNER v.)

[See *Gardner v. Anderson*, Case No. 5,220.]

Case No. 356.

ANDERSON et al. v. GERDING.

[3 Woods, 487.]¹

Circuit Court, S. D. Georgia. Oct., 1879.

REMOVAL OF CAUSES—JURISDICTIONAL AMOUNT—ESTOPPEL TO RAISE OBJECTIONS—RES JUDICATA.

1. Three suits were brought in a state court by the same plaintiffs, citizens of one state, against

¹[Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

the same defendant, a citizen of another state, on three promissory notes of the latter, all given for parts of the same consideration, and each for less than five hundred dollars, and the same defense existed to and was pleaded against all of the notes. *Held*, that a verdict and judgment in one of the suits would constitute an estoppel, and be decisive of the others, and,

2. That, therefore, the matter in dispute, in each one of said suits, exceeded the sum or value of five hundred dollars, and that any one or all of said suits might be removed to the federal court under the act of March 3, 1875.

At law. This was a petition for the writ of certiorari filed by defendant Gerding, under section 7 of the act approved March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes." (18 Stat. 470.) The petition stated, in substance, that Anderson, Starr & Co., a firm all of whose members were citizens of the state of New York, on February 25, 1879, brought against the petitioner Gerding, who was a citizen of the state of Georgia, three several suits in the superior court of the county of Putnam, in the state of Georgia, on three several promissory notes, which purported to have been made by the firm of Gerding & Co., of which firm the petitioner was the surviving partner, and all payable to the order of the plaintiffs. Two of the notes, on which said suits were founded, were dated May 21, 1878, and were each for the payment of three hundred and nineteen dollars, and the third was dated July 25, 1878, and was for the payment of three hundred and twenty-four dollars. One of the notes fell due November 1, 1878, another December 1, 1878, and the third December 25, 1878.

Before the term of said state court in which said suits, or either of them, could be first tried, Gerding filed in said court his petition for the removal of said three suits to this court. His petition was accompanied by a sufficient bond as required by law. The petition for removal filed in the state court, averred that the amount of money involved in said three suits exceeded, exclusive of costs, the sum of five hundred dollars; that all of said notes were made for the same consideration, and that whatever defenses could or would be made to either of said suits, could and would be made to the others, and that all of said suits involved but one controversy or matter in dispute. This petition, therefore, prayed the state court to consolidate said three suits, if necessary, and for an order of the court directing the removal of said suits to this court. The petition for certiorari further alleged that the state court refused to comply with the prayer of the petition filed therein; refused to consolidate said causes, and refused to make an order for their removal. By an amendment to his petition for certiorari, the

petitioner alleged that at the September term, 1879, of the state, the petitioner amended his petition for the removal of said causes, and alleged that he had filed the same identical pleas and none other to each of said suits, and, therefore, there was but one controversy embraced in the three suits. The petition for certiorari further alleged that the state court, notwithstanding said amendment, and the offer by the petitioner of a new bond, still refused to make the order for the removal of said causes to this court. The petition and amended petition prayed for the writ of certiorari directed to the state court, commanding it to make a return of the record in said causes. The plaintiff, in the original action, did not deny any of the facts alleged in the petition for removal, but he resisted the removal of the suits on the ground that in neither one of said suits did the sum sued for exceed the value of five hundred dollars, exclusive of costs.

Clifford Anderson, W. A. Reid, and W. B. Wingfield, for petitioner.

George S. Thomas and W. F. Jenkins, contra.

WOODS, Circuit Judge. The state court refused to consolidate the three causes brought against the defendant Gerding. The motion made for that purpose was addressed to the sound discretion of that court: *Lewis v. Daniel*, 45 Ga. 124. The action of the state court on the motion cannot, therefore, be reviewed by this court. The petition for certiorari is, therefore, to be considered just as if the motion to consolidate had not been made, and the question is, are the causes, or either of them, removable under the act of March 3, 1875. The plaintiffs and the defendant are citizens of different states. The question then is, does each one of these suits involve a controversy where the matter in dispute exceeds the sum of five hundred dollars.

In the case of *Troy v. Evans*, 97 U. S. 1, the supreme court held that, "prima facie the judgment against the defendant, in an action for money, is the measure of the jurisdiction of the United States courts in his behalf. This prima facie case continues until the contrary is shown, and if jurisdiction is invoked because of the collateral effect a judgment may have in another action, it must appear that the judgment conclusively settles the rights of the parties in a matter actually in dispute, the sum or value of which exceeds the required amount." From this statement of the law, it follows that, as the matter in dispute in neither of these suits exceeds the sum or value of five hundred dollars the cases cannot be removed, unless a judgment in one of the cases would conclusively settle the others. If the judgment in one does conclusively settle the controversy in the others, then the matter in dispute, in

either of the suits, may be said to exceed the sum of five hundred dollars.

The petition for removal alleged that the three notes sued on were given for the same consideration; that the defense to all three of the notes was the same, and that the three suits involved but one controversy. It further appears, from the record, that the identical same pleas were filed by the defendant in each of the three suits—one of these pleas being *nil debet*. The question is, therefore, will a judgment in one of these suits be conclusive in the others. If it will, the amount in dispute will be sufficient to give this court jurisdiction, and authorize the removal of the cases, if otherwise, the cases cannot be removed. The rule of law upon this point is thus laid down by the supreme court in the case of *Cromwell v. County of Sac*, 94 U. S. 351: "Where the second action between the same parties is upon a different claim or demand, the judgment in a prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising upon a suit in a different cause of action, the inquiry must always be as to the point or questions actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." So in *Stinson v. Dousman*, 20 How. [61 U. S.] 461, it was held that though the suit be for less than the amount necessary to give the court jurisdiction, yet if it is connected with a claim to property, and the effect of the judgment would adjust the legal and equitable claims of the parties thereto, and the value of the property exceeds two thousand dollars, jurisdiction will be maintained. See, also, *Rake v. Pope*, 7 Ala. 161.

Applying the rule thus laid down, if it appears that the same identical defense is made in each of the cases, that the same questions are in issue in each, then a judgment in one case will be a bar to a judgment in the others, consequently the amount in dispute in each case is not the sum sued for in that particular case, but that sum and also the sums sued for in the other cases. For one trial and judgment would decide all the cases. The petition for certiorari avers, and the averment is not denied, that this state of facts does exist, that there is the same defense as to all the notes, and that the three suits involve but one controversy. In each of these suits, therefore, the amount sued for in all these suits is in dispute, and that amount exceeds five hundred dollars. This court, therefore, has jurisdiction over any one of the suits, and there is no reason why any one or all should not be removed. Let the writ of certiorari issue as prayed for.

Case No. 357.

ANDERSON et al. v. JACKSON et al.

[2 Paine 426.]¹

Circuit Court, Second Circuit.²

COURTS—RECORD MUST SHOW JURISDICTION.

To give the court jurisdiction, all the parties must be capable of suing; and the record must show affirmatively that the court has jurisdiction.

[At law. Ejectment by Jackson, on the demise of Bell and others, against Benjamin Anderson and others. Judgment for plaintiffs. Defendants appeal. Reversed.]

THOMPSON, Circuit Justice. The case is put entirely upon the want of jurisdiction. James Jackson cannot be considered a party within the sense of the constitution and the act of congress. All the parties must be capable of suing. Some of the lessors are citizens of New York, or at least there is no averment of citizenship; and it must appear upon the face of the record, affirmatively, that the court has jurisdiction.

The court gives no opinion upon the other points. Judgment reversed.

Case No. 358.

ANDERSON et al. v. JACKSONVILLE, P. & M. R. CO. et al.

[2 Woods, 628.]¹

Circuit Court, N. D. Florida. July, 1873.

EQUITY PLEADING — PARTIES — ORIGINAL BILL — CONSENT DECREE — STAY OF PROCEEDINGS.

1. Persons who are not parties to a suit cannot in general file a petition therein for a stay of proceedings, or any other cause. The remedy is by original bill. The exceptions noted.

[Cited in *Chester v. Life Ass'n of America*, 4 Fed. 489.]

2. Persons belonging to a class represented in the suit, such as mortgage creditors, represented by the trustees of the mortgage, are regarded as quasi parties, and may be heard on petition or motion.

3. Parties who have withdrawn their answer, and consented to a decree cannot afterwards ask to have proceedings on the decree suspended.

4. A consent decree was entered upon the basis of a certain agreement between the parties, by which execution was to be suspended upon certain terms. These terms not being complied with, the execution may be enforced.

5. Petition for a stay of proceedings on execution by persons not parties to the suit, and by other persons who consented to the decree, upon condition that proceedings upon it should be suspended upon certain terms—which were not complied with—dismissed.

[Cited in *Chester v. Life Ass'n of America*, 4 Fed. 491.]

¹[Reported by Elijah Paine, Jr., in 2 Paine, which covers the period from 1827 to 1840. Date of this opinion not given.]

²[Reversing an unreported decree of the district court.]

³[Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

[In equity. Hearing at chambers.]

A. S. Sullivan, for petitioners.

H. R. Jackson, for complainants.

BRADLEY, Circuit Justice. On the 2d day of July, 1873, a petition was presented to me at chambers in Washington, D. C., by Mr. Sullivan, on behalf of the state of Florida, the trustees of the internal improvement fund of the state of Florida, the Jacksonville, Pensacola & Mobile Railroad Co., and Milton S. Littlefield, praying for a stay of the sale of the road and franchises of said company, advertised by the marshal to be made on the 7th of July inst., under the decree and decretal orders heretofore rendered in this suit.

Mr. Jackson, for the complainants, objected to the application, being heard, first, on the ground that a justice of the supreme court is prohibited by the 7th section of the "act to further the administration of justice," approved June 1, 1872, from entertaining an application for an injunction or for a restraining order out of his circuit; secondly, that the governor of the state, being made a defendant as one of the trustees of the improvement fund ex officio, pleaded to the jurisdiction of the court on the ground that a suit would not lie in this court against a state, and on that plea the complainants voluntarily dismissed the bill as to said governor, and in like manner dismissed the same as to the comptroller of the state—so that the state and the trustees of the internal improvement fund had expressly declined to be parties in the case, and had no standing to be heard therein; thirdly, if it should be decided to hear the application, the complainant desired to present affidavits to show that delay of the sale would be highly prejudicial to the complainants and the public. The first point of objection I overruled for the reasons already stated in the case of *Searles v. Jacksonville, P. & M. R. Co.*, [Case No. 12,586.] The second is of a more serious character. The objection, in substance, is this: that persons who are not parties to a suit, have no standing in court to enable them to file a petition in said suit. If they have occasion to ask any relief in relation to the matters involved in said suit, or to the proceedings therein, they must file an original bill. This is undoubtedly the general rule. Strangers to a cause cannot be heard therein either by petition or motion, except in certain cases arising from necessity, as where the pleadings contain scandal against a stranger, or where a stranger purchases the subject of litigation pending the suit, and the like. *Daniell*, Ch. Pr. 357, 1080; [*Toosey v. Burchell*,] *Jac.* 159; [*Bozon v. Bolland*,] 1 *Russ. & M.* 69. Creditors who are allowed to prove debts, and persons belonging to a class on whose behalf a suit is brought, are regarded as quasi parties, and of course may have a standing in court. But

in this case, the state of Florida and the trustees of the internal improvement fund, being strangers to the suit, and not occupying any such relation thereto at the present time as to entitle them to intervene, and therefore not being bound by what is decreed or done in the suit, they cannot be received or heard on petition for a stay of proceedings therein. It would be a source of great hardship if persons not parties were allowed thus to come in and interfere. I say nothing here of the expediency or inexpediency of proceeding in the cause without making the trustees of the internal improvement fund parties, and without invoking the intervention of the state; that is a matter which more particularly concerns the plaintiffs; and if any failure to make proper parties should be found to render the proceedings of less value, they must abide the consequences. The only manner in which the state or the trustees can interfere with the proceedings is by original bill. The allegation that they intend to file such a bill is not sufficient.

The other parties to the petition, namely, the Jacksonville, Pensacola & Mobile Railroad Company and M. S. Littlefield, are parties to the suit, and to them the above objection does not apply. They are capable of filing a petition in the cause, and if the case were a proper one for the interference of the court, perhaps the petition might be amended by striking out the names of their copetitioners. But the case made by the petition, and the admitted facts, are not sufficient, as it seems to me, to authorize an interference with the proceedings. The railroad company and Littlefield cannot now ask for any alteration of the decree. They virtually consented to its terms, and withdrew all defense which they had set up in the cause. They have applied for a rehearing, and it has been denied after full argument. The decree, as above said, was essentially a consent decree. It was made upon terms, and those terms were fully expressed in an agreement between the parties, dated the 20th of December last. By that agreement the complainants were to discontinue certain other suits—one in the state court of chancery in Jefferson county, Florida, in which a receiver had been appointed, and one in this court, sitting at Tallahassee—and were not to press execution on the decree if the defendants made the payments next referred to. The defendants were to pay ten thousand dollars within thirty days from the date of the agreement, and ten thousand dollars every thirty days thereafter until the whole debt was paid and satisfied; and if default was made, the complainants were to wait ninety days after such default before making seizure and sale of the property.

The defendants, the railroad company and Littlefield, if they have any ground at all for a stay of proceedings, must found it upon this agreement. They allege that the com-

plainants, through the marshal, are proceeding to a sale of the property against the equity of their agreement. The facts seem to be that the complainants complied with the agreement on their part, by discontinuing the suits referred to; but that the defendants did not pay the first installment of ten thousand dollars until the 15th of February (whereas it should have been paid on the 19th of January), and have not paid any of the other installments. The defendants say that the complainants consented to the delay of the first installment, not having themselves discontinued their suits immediately, and thereby having delayed the defendants in obtaining possession of the property. The complainants admit that they accepted the first payment, but insist that they did not waive the payment of the succeeding installments. This is not controverted, and I do not see, therefore, what ground of equity the defendants have for staying the proceedings for sale. The second installment was due on the 18th of February, and the others at successive intervals of thirty days thereafter, and none of them were paid. The ninety days' indulgence which the complainants agreed to give expired on the 19th of May. The sale was advertised for the 7th of July. But the defendants do not even tender or offer to pay the installments which have fallen due. The petition is not based on any such ground as that of a desire or willingness to comply with the substance of the agreement. It is based rather on alleged equities of the state, and on the charge that the complainants have violated the agreement made on December 20th last.

Being of opinion that the complainants, as against the said defendants, have a right to proceed with the execution and sale, and that the defendants have shown no good reason for restraining them, I must deny the application for injunction.

ANDERSON, (McKENZIE v.)

[See McKenzie v. Anderson, Case No. 8,855.]

ANDERSON, (MASURY v.)

[See Masury v. Anderson, Case No. 9,270.]

Case No. 359.

ANDERSON v. MOE.

[1 Abb. U. S. 299.]¹

Circuit Court, E. D. Michigan. June Term, 1869.

TAXATION OF COSTS—WITNESS FEES.

1. The fact that the deposition of a witness has been taken upon a *dedimus potestatem*, and is on file, forms no objection to the allowance of the travel fees of such witness, in the

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taxation of costs, if he attended and was examined in person.

2. Under the fee bill of February 5, 1853, as well as under former laws, the successful party is entitled to tax travel fees of a witness who resides out of the state and more than one hundred miles from the place of trial, and who attends voluntarily, upon mere request.

[Cited in *U. S. v. Sanborn*, 28 Fed. 303; *The Vernon*, 36 Fed. 116.]

[3. Cited in *Cahn v. Monroe*, 29 Fed. 675, to the point that witness fees are taxable, although the witness was not subpoenaed, if his attendance was procured in good faith.]

Question of taxation of costs. After the trial of this action, a question arose as to the amount to be allowed in the taxation of costs for the traveling fees of a witness,—Stafford. This witness resided in another district,—New York,—and more than one hundred miles from the place of trial. He was not subpoenaed, but attended voluntarily at the request of the plaintiffs. The defendant objected to the allowance of traveling fees of the witness from his residence to the place of trial, and for returning: 1st. Because his testimony by deposition had been taken and filed in the case. 2nd. Because the witness was not served with subpoena. 3rd. Because the travel was from beyond the district, and more than one hundred miles from the place of trial.

Alfred Russell, for plaintiffs.

Charles L. Atterbury, for defendant.

WITHEY, District Judge. The first objection is not allowable. If a witness is present at the trial his deposition ought not to be used. If the testimony was material, the party had a right to have the witness present before the court and jury, if his attendance could be procured.

The second objection is not well made, and that and the third will be considered together. If a witness resides in another state, and more than one hundred miles from the place of trial, a subpoena cannot be made effective; its service will be useless; it will afford no ground for an attachment. Is a party, therefore, obliged to take out a commission to take his testimony? or if the personal presence of the witness be deemed essential, and it can be procured, is the party deprived of the benefit of the act of 1853, which allows witnesses' fees for each day's attendance in court, one dollar and fifty cents, and five cents per mile for traveling from his place of residence to said place of trial, and five cents per mile for returning? Both questions are answered in the negative. No rule of court and no construction can properly be allowed to override the plain language and obvious import of this enactment. Under the act of 1799, it was held that traveling fees were allowable from the residence of the witness, although without the state, and more than one hundred miles from the place of trial. 3 Story, 84, [*Whipple v. Cumberland Cotton Co.*, Case No. 17-515.] Before the passage of the act of 1853,

It was held,—5 McLean, 241, [*Dreskill v. Parish*, Case No. 4,076.]—under the act of 1799, that, if the witness “attended voluntarily, or without summons, his fees cannot be charged against the losing party.” This is but a literal rendering of the act of 1799, and, of course, it will bear the construction given it. That enactment allowed compensation “to witnesses summoned,” and not, as in the act of 1853, “to witnesses for each day’s attendance, &c.,” without reference to whether the witness be “summoned” or not. Clearly, under the act of 1853, a witness who attends by procurement of a party because his testimony was deemed material, is entitled to the per diem of one dollar and fifty cents, and traveling fees from his place of residence, and for returning, provided he actually traveled so far to reach the court, as it would be from his residence to the court. The taxation made in this case is proper.

ANDERSON v. MUTUAL LIFE INS. CO.
[See *Anderson v. St. Louis Mut. Life Ins. Co.*, Case No. 362.]

Case No. 360.

ANDERSON v. NEW YORK & N. H. R. CO.

[6 Amer. Law Rev. 754.]

Circuit Court, D. Connecticut. 1872.

RAILROAD COMPANIES—TICKET OVER CONNECTING LINE—VALIDITY.

[A railway from B. to W., which, by agreement with a connecting line, sells tickets over its own line with a coupon good for a passage over the connecting line from W. to N., cannot bind the connecting line by selling a similar ticket good for passage in the opposite direction,—from N. to W.]

At law. The plaintiff, who sued for damages for being put off the cars for want of a ticket, claimed to have had a ticket purchased by him in Boston at the regular office in the Boston and Worcester R. R. depot, as a through ticket for New York. It was proved that the Boston and Worcester R. R. Co. were authorized to sell through tickets from Boston to New York, with coupons headed “Boston to New York,” the last of which was good for one trip over the defendants’ railway; and that a reciprocal arrangement existed by which the defendants sold through tickets at New York for Boston, the coupons being headed “New York to Boston.” The plaintiff’s ticket was one of the latter description. The court (WOODRUFF, Circuit Judge, and SHIPMAN, District Judge) held that, assuming that the ticket agent at Boston had sold this ticket as a ticket for New York, he so exceeded his authority that the defendants are not bound by his act, and directed a verdict in their favor.

ANDERSON, (RILEY v.)

[See *Riley v. Anderson*, Case No. 11,835.]

Case No. 361.

ANDERSON v. ROSS et al.

[2 Sawy. 91.]¹

District Court, D. California. Oct. 24, 1871.
SEAMEN—PROTECTION BY MASTER—VIOLENCE OF OFFICERS.

1. It is as much the duty of the master to restrain the violence of his officers as to repress the insubordination of the men. If he fails to exert his authority with vigor and effect for the protection of the men, he will be held responsible in damages.

[Cited in *White v. McDonough*, Case No. 17,552.]

[2. Cited in *The Guiding Star*, 1 Fed. 349, to the point that actions for aggravated assault upon seamen should be in personam.]

In admiralty.

D. T. Sullivan, for libellant.

Milton Andros, for respondents.

HOFFMAN, District Judge. My attention has been called, since the delivery of the opinion in the above case, [nowhere reported; opinion not now accessible,] to the fact that Mr. Marcy, Mrs. Ross, and the two boys, testify that they heard the master tell the men to stop fighting. I was, therefore, in error, in saying that the fact that the captain interfered for the protection of the men rested upon his own unsupported testimony. In the light of this correction I have carefully reconsidered the case, and have sought with some solicitude to free my mind from all bias arising from the fact that I had formed an opinion, based upon a partially mistaken view of the evidence. I do not deny that my confidence in the correctness of the conclusion heretofore reached, has been in some degree shaken, and yet, after reflecting upon all the facts, I am unable to bring my mind to the conclusion that the captain did all that he should have done to protect the man from the violence to which he was subjected. The law arms the master with absolute authority, but it charges him with corresponding responsibilities. He is sustained with a high hand, in all measures necessary to control disorder and enforce obedience from the crew. He has a similar authority and a like duty when it is necessary to protect the crew from the brutality of officers. What he permits he is therefore justly considered to commit; and he permits that which he does not, by a prompt and energetic exercise of his authority, prevent. It is clear that a great part of the injuries received by the man were inflicted after the master appeared on deck. The clothes of the latter were stained with blood when he returned to the cabin. It is also evident that the assault by the second mate, which began near the corner of the after hatch-house, continued until the parties “worked over,” as the master says, to the main rigging on the starboard side of the vessel.

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The account given by Mr. Marcy, though he says he heard the captain tell them to stop fighting, does not seem to me to indicate that prompt and authoritative interposition which the circumstances demanded. Mr. Marcy denies having struck the man himself, or having spoken to him; I have with some hesitation accepted his statement. His narrative, however, bears some marks of improbability. He says that after throwing the knife overboard, he remained on the port side of the ship (it would seem a calm spectator of the struggle), some three or four minutes, when he heard the captain call. He immediately went to him and took hold of the second mate, and the men were separated.

Estimates of time under such circumstances are of course unreliable. But it may be concluded that Mr. Marcy, by his own showing, remained for an appreciable interval of time while the man was being beaten from the port corner of the hatch-house to the starboard main rigging, the master all the time vainly endeavoring to protect him, and to obtain from the second mate any respect for his authority; and yet he never stirred until called on to assist the master. This seems to me improbable, especially as we find Mr. Marcy, the moment the men were separated, starting with the second mate, in pursuit of Ross, whose only offense was that he was looking on, pursuing him into the forecabin with such demonstrations of violent intentions as to induce the master to follow, and after some occurrences, which are not disclosed, order them out of the forecabin.

That the master, at some period, ordered the men to stop fighting, I do not doubt; but the question is, when did he do so, and with what vigor did he enforce the command? Mr. Marcy is the only one of respondent's witnesses who saw the whole occurrence, and I am constrained to say that I cannot find in his evidence sufficient ground for concluding in the face of so much opposing testimony that the master discharged his whole duty under the circumstances. The fact that the master, so far as appears, in no way rebuked or reprimanded the second mate is not without significance. The latter had, in his presence, not only violently assaulted a seaman, but had continued that assault and inflicted serious injuries upon him, in contempt of the master's orders and in defiance of his authority. And yet the master leaves the deck without a word of rebuke or even remonstrance, and even without enjoining upon the second mate to abstain from further violence. The result of this omission was that the assaults of the second mate were renewed almost as soon as the captain had re-entered the cabin, and were continued until the cries of distress of the man had again called the captain on deck, where he found the second mate with a capstan bar in his hand. The master

seems at once to have accepted the second mate's explanation, that "the man saw the bar in his hand, got scared and cried out." And yet, if the evidence of the man and of numerous witnesses is to be believed, he was struck by the second mate several times with the bar, and finally received some severe blows on the back of his head with something the second mate had fetched from his room for the purpose. All this would, I think, have been prevented had the master, when he retired to his cabin, given strict orders to the second mate not to lay hands on the man or in any way continue his assaults.

On the whole, I recur to my original conclusion that the master, though he has not been guilty of any willful wrong, and is probably a just and humane man, has failed to exert his authority with the vigor and effect which the law required. I consider it of much importance that masters should feel it to be as much their duty to restrain the violence of the officers, as it is to repress the insubordination of the men, and that they will be held responsible if they fail to do their utmost to protect the men from the outrages on the part of the inferior officers, which have so often brought disgrace upon our mercantile marine. Motion for a rehearing denied.

Case No. 362.

ANDERSON et al. v. ST. LOUIS MUT. LIFE INS. CO.

[1 Flip. 559; 5 Amer. Law Rec. 140; 22 Int. Rev. Rec. 249; 5 Ins. Law J. 605; 2 N. Y. Wkly. Dig. 458; 1 Mich. Lawy. 17; 3 Cent. Law J. 354; 1 Cin. Law Bul. 203; 5 Bigelow, Ins. Cas. 527.]

Circuit Court, W. D. Tennessee. May 19, 1876.

LIFE INSURANCE—POLICY—CONDITION PRECEDENT—COURSE OF BUSINESS—RELIEF AGAINST FORFEITURE.

1. A policy of life insurance provided that if the insured did not pay annually in advance the interest on any unpaid notes or loans to the company on account of premiums, the company should not be liable for any part of the insurance, and the policy should cease and determine. Performance of this obligation by the assured was a condition precedent, and no recovery could be had without it.

2. The assured had been in the habit of paying this interest in cash, and for dividends earned the company credited him upon the principal of the notes outstanding; *Held*, that this course of business controlled the general principle of law, which requires payments upon notes to be credited first upon the interest, and then upon the principal, and that the policy would be forfeited, notwithstanding the dividends earned might exceed in amount the interest due upon the outstanding notes.

3. Against a forfeiture of a life insurance policy, incurred by non-payment of premiums upon the day stipulated, equity will not relieve.

In equity. Bill charged that on the 15th day of October, 1867, the defendant issued

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to William C. Anderson a policy of assurance for \$10,000, the premiums being \$490 per annum for life. It provided that, if two of said premiums shall be paid and default be made in payment of after premiums, the default shall not operate as a forfeiture, but the amount insured shall be commuted to the sum of the annual premiums paid. But if the insured failed to pay as above, or to pay annually in advance the interest on any unpaid notes or loans, then the company was not to be liable for any sum, but the policy was to cease. The policy continued in force to the 15th of October, 1870. Bill further stated that some of the interest—a small amount—on unpaid notes was not paid in advance annually; probably there was a failure to pay interest on one such note. The complainants did not know how this was. They insisted that the stipulation providing for payment of interest in advance was a penalty against which the court would relieve. Bill prayed for statement of the notes in defendant's possession and for an account of dividends that Anderson was entitled to since January 1, 1869; that the court would relieve against the forfeiture of the policy, and decree to complainants whatever amount might be justly due them. Demurrer was interposed, the grounds of which were, that, as the bill admitted the non-payment of certain interest in advance, when for that the policy provided a forfeiture, all previous payments thereon, and all dividend credits accruing thereon, should likewise be forfeited; and consequently equity would give no relief.

W. M. Smith, for complainant.
Kortrecht, Craft & Scales, for defendant.

BROWN, District Judge. There are three questions in this case, which, though not raised separately upon the face of the demurrer, are necessary to be determined in order that it may be properly disposed of. 1st—Under the policy in question, does the failure to pay the interest in advance upon the premium notes debar the plaintiff of a recovery, and work a forfeiture of the premiums already paid? 2d—Was the defendant bound to apply the dividends due the assured upon the interest upon the premium notes, instead of applying them upon the principal, and thus save the policy from lapsing? 3d—Will a court of equity relieve against the forfeiture of a policy of insurance incurred by reason of the non-payment of premiums?

The first question must be answered in the affirmative. The second proviso of the policy is unequivocal, that "if the assured fail to pay annually in advance the interest on any unpaid notes or loans which may be owing by the insured to the company on account of annual premiums, the company shall not be liable for the payment of the sum assured, or any part thereof, and this

policy shall cease and determine." The fifth clause also provides that, "in every case where this policy shall cease or become null and void, all previous payments made thereon, and all dividend credits accruing therefrom, shall be forfeited to the said company." Nothing could be plainer than this language. The prompt payment of premiums is the very essence of the contract of life insurance. The company has a right to insist upon the performance of this covenant upon the day named, as a condition precedent to the continued existence of the policy. So far, at least, the law is well settled. *Bliss, Ins.* 253-274; *May, Ins.* 406; *Robert v. New England Mut. Life Ins. Co.*, 1 *Disn.* 355, 2 *Disn.* 106; *Want v. Blunt*, 12 *East*, 183; *Beadle v. Chenango Co. Mut. Ins. Co.*, 3 *Hill*, 161; *Pitt v. Berkshire Life Ins. Co.*, 100 *Mass.* 500; *Baker v. Union Mut. Life Ins. Co.*, 43 *N. Y.* 283; *Phoenix Life Assur. Co. v. Sheridan*, 8 *H. L. Cas.* 745; *Catoir v. American Life Ins. & Trust Co.*, 4 *Vroom*, [33 *N. J. Law.*] 487. If it were otherwise, as it is optional with the assured to drop his policy at any time, the company could never know whether he intended to keep it alive or not. *Phoenix Life Assur. Co. v. Sheridan*, 8 *H. L. Cas.* 745; *Simpson v. Accidental Death Ins. Co.*, 2 *C. B. (N. S.)* 257. If the company elects to accept a note, and insists upon its prompt payment, or upon payment of interest in advance, it is a proviso for the benefit of the assured, and the company has the same right to insist upon punctual payment. *Patch v. Phoenix Mut. Life Ins. Co.*, 3 *Bigelow, Cas.* 780; *Wall v. Home Ins. Co.*, 36 *N. Y.* 157; *Williams v. Republic Ins. Co.*, 19 *Mich.* 469; *Pitt v. Berkshire Life Ins. Co.*, 100 *Mass.* 500; *Robert v. New England Mut. Life Ins. Co.*, 1 *Disn.* 355. Nor is there anything harsh or oppressive in this requirement. The contract of insurance is one in which great risks are assumed by one party, and there is no injustice in requiring a punctilious observance of its obligations on the part of the other. The company says in substance to the assured: "Pay me \$490 to-day, and if you die to-morrow, or at any time during the year, I will pay your representatives \$10,000; pay me the same sum annually, and this arrangement shall be continued during your life, with the assurance that your representatives will receive the \$10,000 upon your death, whenever it may happen. But if, on the other hand, you fail to make your annual payments, your heirs shall not only not receive the \$10,000, but you shall forfeit the amount already paid." I see nothing unfair or inequitable in this bargain, nor any reason why the company should not insist upon an exact performance by the assured. The hardship, if any there is, is quite as likely to fall upon the one party as the other, with this difference, however, that the contingency of loss by death is one the company cannot possibly

provide against, while the payment of premiums is always within the power of the assured, and nothing but his own negligence will cause a lapse of his policy. The fact that in this case the annual interest to be paid was very small, works no change in the principle. Indeed, it renders performance of his covenant on the part of the assured so much the easier.

I fail to see why courts should apply to policies of insurance rules of construction different from those applicable to ordinary instruments. If there is anything unjust in the proviso for the forfeiture, it is one which the legislature and not the courts are called upon to remedy. Something may be gained to justice by bending the law to the exigencies of an individual case; but more is lost by the bad precedent to the certainty of the law as a science. While a company which desires to increase its patronage and stand well in public estimation would not, as a matter of policy, habitually take advantage of accidental slips or omissions of its policy-holders, the law cannot distinguish between these cases and those where the assured elects deliberately to abandon his contract. In this case, however, there is nothing tending to show any desire on the part of the assured to keep his policy alive after October 15, 1870. As observed by the court of appeals of St. Louis, in the case of *Russum v. St. Louis Mut. Life Ins. Co.*, [1 Mo. App. 228,] the clause in the policy providing for commutation on failure to pay the annual premiums, and for a forfeiture on a failure to pay the interest, are not inconsistent. "They can both stand together, and we may give full effect to both. All that is needed for this is for the insured to bring himself within the terms of both. The first is intended to save the forfeiture which generally would be incurred by the failure to pay the annual premium; to this extent it is a privilege or advantage to the assured. The second proviso insists upon rigorous conditions in respect to what? Only of so much of any unpaid premium as the assured, instead of paying in cash, takes the indulgence of only paying interest on at six per cent. If he does not wish to incur the hazard of a forfeiture on account of this part of the premium, his remedy is easy. He can presently pay his note for the premium, and without more, he has a paid-up non-forfeitable policy for a fixed portion of the sum contemplated by the instrument when originally issued. If he wished, instead of this, to take the chances of gain, he must at the same time incur the hazard of loss; and cannot complain if he be held to the terms of the contract he has deliberately made."

I am unable to concur in the opinion of the court of appeals of Kentucky, in the case of *St. Louis Mut. Ins. Co. v. Grigsby*, 2 Cent. Law J. 123, that by commutation this became "a paid-up policy, except that

the company had the right, should its affairs render it necessary and proper, to demand the payment in whole or in part of the note executed for the unpaid portion of the three annual premiums." The court in this case treat the unpaid notes as loans to the assured, and the "interest on these loans in no sense an annual premium due from the assured to the insurer." The effect of the ruling is that the company has no remedy to enforce payment of notes, except to bring an ordinary action at law, to trust to dividends earned in a successful business to meet them, or to wait until the death of the assured and deduct them from the amount of his policy. If this be the law, then the assured, under every policy issued by the company, after the payment of the two first annual premiums, may give no further attention to it, and the company be left to carry on its business, pay its expenses, its losses, its dividends and other outlays, simply from the interest of the cash moiety of the first two annual premiums. The opinion throws no light upon the probable amount of dividends which a company, conducted under these principles might be expected to pay.

2d—Was the company bound to apply the dividends due the assured upon the interest instead of the principal of the premium notes, and thus save the policy from lapsing? The policy throws no light upon this point. It contains no agreement for the payment of the dividends. The charter of the company is not before the court, and we can look only to the allegations of the bill to answer the question. The bill avers that the defendant, being a mutual company, the assured, by virtue of his policy, became a member, and interested in its earnings and profits—was so considered and treated by defendant, and dividends were declared in his favor, and instead of being paid over to him in cash were credited on his annual premiums, as complainant supposes, and has no doubt, with the consent of the assured. From the bill and the exhibits the transaction appears to have been as follows: On the 15th of October, 1867, the policy was issued upon a payment of \$245 in cash and a note for \$245, upon which interest was paid in advance. On October 15th, 1868, the assured made another cash payment of \$245, gave another note for the like amount, and paid in cash \$20.40² interest on the two notes for one year. No dividend was credited to him at that time. On October 15th, 1869, a statement was made as follows:

Notes outstanding.....	\$490 00
Less dividend declared Jan. 1, 1869..	87 45
Balance of outstanding note.....	\$402 55
Note portion of premium—due above date	245 00
Total new note.....	\$647 55

²[22 Int. Rev. Rec. 250, gives \$29.40.]

Interest due in cash on note. \$ 38 85
Cash part of premium due above date 245 00

Total cash required. \$283 85

To this the receipt was appended.

While the general rule is admitted without hesitation, that where money is paid upon a note the law will apply it first upon the interest and then upon the principal, still, where the contract makes a different provision, or the course of business between the parties has established a different usage, I think the general rule must bend to this special agreement or custom. The policy makes no special provision for dividend credits, and its second proviso requires payment annually in advance of interest upon unpaid notes. The course of business between the parties, as evidenced by the exhibits, shows that the annual dividend which was credited to the assured was deducted from his notes outstanding October 15, 1869, and not from the interest upon the new note, which was given at that date. This interest was paid in cash. This was done with the assent of the assured, who appears to have given a new note for \$647.55. All that the company could be required to do in crediting subsequent dividends was to apply them, as had been done before, upon the principal of the outstanding notes, and as the assured had paid his interest in cash, I think he must be held as assenting to this arrangement. A similar rule or custom was recognized as binding upon both parties in the case of *Ohde v. The Northwestern Mut. Ins. Co.*, 4 Ins. Law J. 702. If there is anything in the regulations or prospectus of the company negating the course of business evidenced by these exhibits, it should be set forth, and I think the bill demurrable upon that ground.

3d—Has a court of equity power to relieve against the forfeiture of a policy? In Story's *Equity Jurisprudence*, (section 1314,) it is said: "Whenever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and therefore as intended only to secure the due performance thereof, or the damage really incurred by the non-performance. In every such case the true test by which to ascertain whether relief can or can not be had in equity is, to consider whether compensation can be made or not." But in section 1323, it is said: "The doctrine seems now to be asserted in England that in all cases of forfeiture for the breach of any covenant other than a covenant to pay rent, no relief ought to be granted in equity, unless upon the ground of accident, mistake, fraud, or surprise, although the breach is capable of just compensation." Section 1325: "It is upon grounds somewhat similar, aided also by considerations of public policy and the necessity of a prompt performance in

order to accomplish public or corporate objects, that courts of equity, in cases of the non-compliance of the stockholders with the terms of payment of their installments of stock at the time prescribed, by which a forfeiture of their shares is incurred under the by-laws of the institution, have refused to interfere by granting relief against such forfeiture." In the *Grigsby Case*, already cited, the court of appeals of Kentucky seemed to hold that equity would relieve against a forfeiture incurred by the non-payment of premiums; but I think this is opposed by a great weight of authority, including that of the learned circuit judge of this circuit, in the case of *Tait v. New York Life Ins. Co.*, [Case No. 13,726,] where the doctrine is fully discussed, and the conclusion reached that equity has no power to afford relief. See, also, *Robert v. New England Mut. Life Ins. Co.*, 1 Disn. 355; *Mutual Benefit Life Ins. Co. v. French*, 2 Cin. R. 321. As a further discussion of this point would be a mere reiteration of the opinion of the learned judge in the case above cited, nothing more will be added, except to say that this opinion is considered as an adjudication binding upon this court. The demurrer to the bill is therefore sustained.

NOTE, [from original report.] Judge Emmons, in *Frazer v. St. Louis Mut. Life Ins. Co.*, [unreported,] at Nashville, decided almost the same question raised here. It was there contended that the policy was a paid-up one, there being only a small amount of interest to be paid every year. The court held that the policy, by reason of the failure to pay the stipulated interest, was not to be considered as forfeited, but as lapsed; and as time was of the essence of the contract, the plaintiff could not recover. See, also, cases of *Seyms, Buck and Statham against the Insurance Companies*, October Term, 1876, S. C. U. S. [93 U. S. 24.] The court decide in these cases, in effect, that a failure to pay annual premiums during war or peace, determines the policy, but that its equitable value may be recovered.

Case No. 363.

ANDERSON et al. v. The SOLON.

[1 Crabbe, 17.]¹

District Court, E. D. Pennsylvania. May Sessions, 1836.

SEAMEN—WAGES—FORFEITURE—SEIZURE OF VESSEL BY REVENUE OFFICERS—LIEN.

1. A libel will be sustained, though the vessel has made a second voyage since the cause of libel accrued, if, by her sudden departure, the prosecution of the claim was previously prevented.

2. Where a vessel is seized by revenue officers, the mariners discharged, the vessel sold by her owner during seizure, and afterwards liberated, the lien of the mariners for wages is not destroyed.

[Cited in *Carter v. The Morrisania*, 3 Fed. 925.]

[See *Swift v. The Frank and Willie*, 45 Fed. 488.]

[See note at end of case.]

¹[Reported by William H. Crabbe, Esq.]

3. It is not such embezzlement as will forfeit a mariner's wages, if he sells part of the cargo, by the direction of the mate, during the permanent absence of the master, in order to procure necessary provisions for the vessel.

In admiralty. This was a libel [by Thomas and Wolley Anderson against the sloop Solon, James Holt, master] for wages. The libellants shipped on board the sloop Solon, at Philadelphia, on the 21st September, 1835, to ply between that port and New York, at twelve dollars per month. In January, 1836, the sloop sailed from New York for Philadelphia, but was obliged to go into harbor, on the coast of New Jersey, till the navigation of the Delaware should be open: it being then obstructed by ice. While in harbor, the captain left the sloop, taking her papers with him. During his absence, the provisions having become exhausted, the mate directed one of the libellants to sell a portion of the cargo, to procure food. The sloop was subsequently seized, by the custom-house officers, for want of the papers which were in the captain's possession, he still being absent. While under seizure, she was sold by her owner, and afterwards liberated. The new owner brought her to Philadelphia, when the libellants, who had been discharged at the time of the seizure, issued a summons to her master, which could not be served, on account of her immediately sailing for New York. On her return to Philadelphia, she was attached, in this suit, on the 14th April, 1836. The libellants claimed full wages, from the date of their shipping to their discharge at the time of seizure.

On the 13th May, 1836, the case came on for hearing, before Judge HOPKINSON. It was argued by Grinnell for the libellants, and by Bulkley for the respondent.

Bulkley for respondent.

The misfortunes of the vessel prevented the payment of wages; the seamen's lives were destroyed by the sale under seizure, as well as by her having made a second voyage before she was libelled; and the libellant, Thomas Anderson, had forfeited his wages by embezzlement of the cargo.

Grinnell, in reply.

If there are no provisions on board, the seamen may leave the vessel, and it will not be desertion followed by forfeiture of wages. The sloop was seized for the master's misconduct, and the voyage broken up by no act of the mariners. The libellant, Thomas Anderson, was not liable as for embezzlement, because he received the goods sold from an agent of the owner—the mate; and, also, because they were sold to procure necessary provisions. The sale of the vessel did not destroy the libellant's lien for wages. *Abb. Shipp. 181.* Process was issued the first time she came to the port where the libellants shipped. See *Blaine v. The Charles Carter*, 4 Cranch, [8 U. S.] 328.

On the 20th May, 1836, HOPKINSON, District Judge, decreed in favor of the libellants for the full amount of wages claimed, and costs.

[NOTE. A vessel bound from Baltimore to the northwest coast of America stopped on the coast of Chili, pursuant to sealed instructions from the owners, for the purpose of engaging in illicit trade. She was seized, and, with her cargo, sold by the government, and the officers and crew imprisoned, some of them for nearly four years. Finally they were released, and returned to the United States, and the proceeds of the sale of the vessel and cargo deposited to the credit of its owners. The court, by Mr. Justice Story, held that the seamen, having had no knowledge of the illicit trade intended, were entitled to a lien on the proceeds of the sale for their wages from the time of their departure till their return to the United States, notwithstanding the seizure and sale of the ship and consequent discontinuance of the voyage. *Sheppard v. Taylor*, 5 Pet. (30 U. S.) 675.]

ANDERSON, (STEWART v.)

[See *Stewart v. Anderson*, Case No. 13,421.]

Case No. 364.

ANDERSON v. STRASSBURGER et al.

[6 Ben. 372.]

District Court, S. D. New York. Feb., 1873.
FRAUDULENT PREFERENCE—GOODS TAKEN UNDER LEVY—MARKET VALUE—SHERIFF'S SALE.

S. & P. recovered judgment against O., on which execution was issued, and the sheriff levied on his stock of goods. The next day, O. filed a voluntary petition in bankruptcy. A. was appointed assignee in bankruptcy. An injunction was issued restraining the sheriff from selling under the levy. This injunction was afterwards modified so as to allow the sheriff to sell and hold the proceeds in place of the goods. This was done, and at the sale, A. bought in the goods for the creditors, at \$2,650. He then brought suit against S. & P. to recover the goods or their value. He testified that the creditors had the option of taking the goods at the \$2,650, but did not take them, and he took them himself; and that he thought that competent parties would appraise the goods at \$6,800. It appeared that S. & P., at the time of the entry of the judgment, knew O. to be bankrupt: *Held*, That A. was entitled to recover the goods or their value, and that the order modifying the injunction afforded S. & P. no defence; That they were liable, however, only for the \$2,650, which the goods brought at the sheriff's sale.

In equity. This was a bill in equity filed by the plaintiff, [William Anderson.] as assignee in bankruptcy of Frederick Ordemann, [against Oscar Strassburger and George F. Pfeiffer.] The bill alleged the voluntary bankruptcy of Ordemann, on petition filed on November 1st, 1871, and the appointment of the plaintiff as his assignee on February 6th, 1872. It further alleged that the defendants, on October 31st, 1871, recovered a judgment against Ordemann; that Ordemann on that day suffered his

¹[Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

stock in trade to be taken on legal process, viz., on an execution on said judgment; and that the defendants took the property to obtain a preference, and with knowledge that Ordemann was insolvent, and intended to give them a preference in fraud of the act. The bill prayed for a recovery of the goods or their value. In the bankruptcy proceedings, an injunction had been issued restraining the defendants from interfering with the property of Ordemann, which injunction was, on motion, modified so as to permit the sheriff to sell the goods on which he had levied, "and convert the same into money, and hold the proceeds in place and stead of the goods themselves, subject to the further order of the court;" and they were sold accordingly. The defendants answered, denying the allegations of the bill as to fraud or preference and the insolvency of Ordemann.

T. M. North, for plaintiff.
C. Wehle, for defendants.

BLATCHFORD, District Judge. Under the recent decisions of the supreme court of the United States in the case of Buchanan v. Smith, 16 Wall. [83 U. S.] 277, and of the circuit court for this district in the case of Mayer v. Hermann, [Case No. 9,344,] the right of plaintiff to recover, on the facts in this case, is clear.

The order made by the bankruptcy court on the 11th of December, 1871, only modified the injunction "so as to permit the sheriff to sell" the goods levied on, and convert them into money, and hold the proceeds of sale in place of the goods, subject to the further order of the bankruptcy court. It left the defendants at liberty to have a sale if they chose to take the risk. If they should sell, the proceeds of sale would stand in place of the goods. But the plaintiff is entitled to recover the goods or their value, at his option. He asks for their value. He does not ask for the goods, and he is not compelled to take the proceeds, which are merely a substitute for the goods, if such proceeds are not the full value.

But, on the evidence, I think the value of the goods cannot be fixed at a higher sum than the \$2,650 they brought on the sale. The plaintiff, who was not, at that time, assignee of the bankrupt, but was one of a firm who were creditors, bought in the goods at the sale for \$2,650, acting for the creditors generally. He says that other creditors for whom he acted had the privilege of taking the stock by paying the \$2,650, but they did not, and then he took it to himself at that price. Yet he fixes its value at \$6,800, by saying that that is "the price at which it would be appraised by competent parties, under partition or division, or in anticipation of a forced sale." That is his definition of "market value." Yet he says that in all the transaction his desire was "to prevent sacrifice," and to have the stock "bring near

its value," and he considered he was acting by direction of the creditors, so as to get for them "the largest possible percentage on their claims." Charged as he was with this trust, the presumption is that he discharged it properly, and, therefore, that he obtained full value for the goods he bid in, when he took them at \$2,650. It cannot be that their fair market value was \$6,800, and yet that he could get no more than \$2,650 for them. The plaintiff is entitled to a decree for \$2,650, with interest from the commencement of this suit, less a credit, on the 8th of March, 1872, of \$875.39, with costs of suit.

Case No. 365.

ANDERSON et al. v. TOMPKINS.

[1 Brock. 456; 1 Amer. Lead. Cas. 429.]

Circuit Court, D. Virginia. June 12, 1820.

PARTNERSHIP — POWER TO BIND FIRM — ASSIGNMENT OF PROPERTY TO PAY FIRM DEBTS — ABSENT PARTNER — BOOK DEBTS NOT ASSIGNABLE.

1. One partner has a right to convey the partnership effects, (other than real estate) to the creditors of the firm, in payment of their debts, either to the creditors directly, or through the intervention of trustees, and if the transaction be bona fide, the deed will not be set aside, although the consent of the other partner was not obtained.

[Cited in Bohler v. Tappan, 1 Fed. 470.]

[See Harrison v. Sterry, 5 Cranch, (9 U. S.) 289.]

2. Where all the partners of a mercantile firm are present, they have a right to be consulted in giving a preference to particular creditors, but this necessity is dispensed with, if one of the partners is absent in a foreign country.

3. The doctrine that a partner cannot bind his copartner by a deed, does not apply in a case in which the property purported to be conveyed by the deed, is of such a description, that a title to it passes by the mere act of delivery. The mere circumstance of annexing a seal to the instrument of conveyance, in such a case, does not annul a transfer so consummated.

4. If real property is conveyed to a firm, or to partners in trust for a firm, the members of the firm are tenants in common, and neither party can convey more than his undivided interest in the subject.

5. An assignment by deed of partnership debts, which are assignable at law, executed by one of the partners only, though void at law, will be sustained in equity, if it appear that the assignment was made with the bona fide intention of securing the creditors of the firm.

6. The book debts of a merchant are not assignable at law, and a deed executed by one member of a mercantile firm, purporting to convey such debts, does not pass the legal title. At law, the assignment is only a power to collect, and appropriate the debts, which is revocable. So far as collections were made under it, before revocation, the title to the money is in the trustees named in the deed. Such a power to collect, is a contract that could not be enforced at law, but will be sustained in equity, and have preference to any subsequent assignment by the other partner, as the prior equity must prevail in a contest between mere equities.

In equity. The complainants, merchants and partners, subjects of the king of Great

¹[Reported by John W. Brockenbrough, Esq.]

Britain, filed their bill in this court, alleging, that they were creditors of John Tompkins and Adam Murray, late partners in trade, residing in the city of Richmond, and state of Virginia, under the firm of Tompkins & Murray, to the amount of £715 13s. sterling: that on or about the 28th day of April, 1819, Adam Murray, one of the partners, embarked for Europe; and on the 8th day of May following, John Tompkins, the other partner, without (as was alleged) the knowledge or consent of Adam Murray, executed a deed, of that date, to Nicholas Anderson & Tompkins, citizens of Virginia, purporting to convey to them, not only all the partnership effects, real and personal, of Tompkins & Murray, but also the separate property of Adam Murray, upon trust; 1st, for the benefit of Sutherland, Colquhoun & Co. and Samuel Christian, all of them citizens of Virginia; and, 2dly, for the benefit of such of the creditors of Tompkins & Murray, resident within the United States, as should within sixty days, and of such of them, resident elsewhere, as should within six months from the date of the publication of the trust, by the trustees, exhibit their claims: that prior to the execution of this deed, Tompkins & Murray purchased several lots of ground in the city of Richmond, and certain tracts of land in the state of Virginia: that Adam Murray was proprietor, also, of another lot of ground in the city of Richmond, in his own right, of a share of a tract of land in the state of Kentucky, of a tract of land in Illinois, and of sundry other articles of household furniture, and other personal estate in Virginia: that subsequent to the execution of the said deed of trust, the partnership was dissolved, and after the dissolution, Adam Murray, who has never returned to Virginia, executed several deeds, bearing date the 10th of November, 1819, conveying all his moiety of the partnership effects, both real and personal, of Tompkins & Murray, and the whole of his own individual property, in Virginia, to James Dunlop, of London, in trust for the benefit, 1st, of James and John Dunlop, to secure a debt due from the firm of Tompkins & Murray; 2dly, in satisfaction of a debt due from the same firm to Leslie & M'Indoe; and, 3dly, to secure the debt due to the complainants, Anderson & Wilkins. This suit was instituted for the twofold purpose of establishing the deed of the 10th of November, 1819, executed in England, by Adam Murray, and to set aside the deed of the 8th of May, 1819, executed by John Tompkins. The validity of the last mentioned deed was contested, as well as to the complainants, and the other creditors of Tompkins & Murray, who failed to exhibit their claims within the time prescribed therein, as to Adam Murray, on several grounds: 1st, it was contended, that during the existence of the firm, Tompkins could not, without authority from Murray, dispose of the partnership effects,

or any part thereof, by deed: 2dly, that the deed was void, because it gave a preference to Colquhoun & Co. and Christian, to all other creditors, without consulting with Murray: 3dly, that it was void, because it purported to convey the separate property of Murray, over which Tompkins had no control.

MARSHALL, Circuit Justice. This suit is brought to establish a deed, made by Adam Murray, a partner of the house of Tompkins & Murray, in November 1819, while in England, conveying his moiety of the property of that house, to certain creditors of the firm. On the 29th of April, 1819, Murray had embarked for England, leaving all the effects of the company in the hands of John Tompkins, the partner remaining in this country, who continued, for a short time, to conduct the business of the concern. The pressure of their affairs was such, that in May, the house stopped payment, and Tompkins, for himself and his partner, conveyed all the effects of the company, and also the separate property of himself and partner, to trustees for the payment, first, of certain creditors named in the deed, and then of those who should bring in their claims, the American creditors within sixty days, the foreign creditors within six months. As the deed under which the plaintiffs claim, can operate on that property only, which is not conveyed by the first, it will be proper, first, to inquire into the legal extent of the deed made by Tompkins.

That deed, as has been already stated, purports to convey the whole property of the concern, and the private property of the partners. That property, consisted of the effects of the partnership for sale, of real property, and of debts. I shall consider the deed in its application to each of these subjects.

First.—The goods in possession for sale. The convenience of trade requires, that each acting partner should have the entire control and disposition of this subject. It would destroy copartnerships entirely, if the co-operation of all the partners were necessary to dispose of a yard of cloth. It is, therefore, laid down, in all the books which treat on commercial transactions, that with respect to all articles to be sold, for the benefit of the concern, each partner, though the others be within reach, has, in the course of trade, an absolute right to dispose of the whole. "Each," says Watson, "has a power to dispose of the whole of the partnership effects." This is a general rule, resulting from the nature of the estate, and from the objects for which men associate in trade. They are joint tenants, without the right of survivorship, they are seized per mi et per tout, and they associate together, for objects which require that the whole powers of the partnership should reside in each partner, who is present and acting. These general doctrines are universal, and have not been controvert-

ed in this case; but it is contended, that they do not authorize the deed made by Tompkins, because, 1st. This is not an act in the course of trade, but is a disposition of the whole subject, and a dissolution of the partnership.

2d. It is a preference to particular creditors, in making which, Murray ought to be consulted.

3d. It is by deed. It will be readily conceded, that a fraudulent sale, whether made by deed or otherwise, would pass nothing to a vendee concerned in the fraud. But, with this exception, I feel much difficulty in setting any other limits to the power of a partner, in disposing of the effects of the company, purchased for sale. He may sell a yard, a piece, a bale, or any number of bales. He may sell the whole of any article, or of any number of articles. This power would certainly not be exercised in the presence of a partner, without consulting him; and if it were so exercised, slight circumstances would be sufficient to render the transaction suspicious, and, perhaps, to fix on it the imputation of fraud. In this respect, every case must depend on its own circumstances. But with respect to the power, in a case perfectly fair, I can perceive no ground, on which it is to be questioned. But this power, it is said, is limited to the course of trade. What is understood by the course of trade? Is it that which is actually done every day, or is it that which may be done, whenever the occasion for doing it presents itself?

There are small traders who scarcely ever, in practice, sell a piece of cloth uncut, or a cask of spirits. But may not a partner in such a store, sell a piece of cloth, or a cask of spirits? His power extends to the sale of the article, and the course of trade does not limit him as to quantity. So with respect to larger concerns. By the course of trade, is understood, dealing in an article in which the company is accustomed to deal; and dealing in that article for the company. Tompkins & Murray sold goods. A sale of goods was in the course of their trade, and within the power of either partner. A fair sale, then, of all or of a part of the goods, was within the power vested in a partner. This reasoning applies with increased force, when we consider the situation of these partners. The one was on a voyage to Europe, the other in possession of all the partnership effects for sale. The absent partner could have no agency in the sale of them. He could not be consulted. He could not give an opinion. In leaving the country, he must have intended to confide all its business to the partner who remained, for the purpose of transacting it. Had this, then, been a sale for money, or on credit, no person, I think, could have doubted its obligation. I can perceive no distinction in law, in reason, or in justice, between such a sale and the transaction which has taken place. A merchant

may rightfully sell to his creditor, as well as for money. He may give goods in payment of a debt. If he may thus pay a small creditor, he may thus pay a large one. The quantum of debt, or of goods sold, cannot alter the right. Neither does it, as I conceive, affect the power, that these goods were conveyed to trustees to be sold by them. The mode of sale must, I think, depend on circumstances. Should goods be delivered to trustees, for sale, without necessity, the transaction would be examined with scrutinizing eyes, and might, under some circumstances, be impeached. But if the necessity be apparent, if the act is justified by its motives, if the mode of sale be such as the circumstances require, I cannot say, that the partner has exceeded his power. This is denominated a destruction of the partnership subject, and a dissolution of the partnership. But how is it a destruction of the subject? Can this appellation be bestowed on the application of the joint property, to the payment of the debts of the company? How is it a dissolution of the partnership? A partnership, is an association to carry on business jointly. This association may be formed for the future, before any goods are acquired. It may continue after the whole of a particular purchase has been sold. But either partner had a right to dissolve this partnership. The act, however, of applying the means of carrying on their business to the payment of their debts, might suspend the operations of the company, but did not dissolve the contract under which their operations were to be conducted.

Second.—It is said that Murray had a right to be consulted, on giving a preference to creditors. It is true, Murray had a right to be consulted. Had he been present, he ought to have been consulted. The act ought to have been, and probably would have been, a joint act. But Murray was not present. He had left the country, and could not be consulted. He had, by leaving the country, confided everything which respected their joint business to Tompkins; who was under the necessity of acting alone.

Third.—It is said, this transfer of property is by a deed, and that one partner has no right to bind another by deed. For this a case is cited, which I believe has never been questioned in England, or in this country. *Harrison v. Jackson*, 7 Durn. & E. [Term R.] 207.

I am not, and never have been, satisfied with the extent to which this doctrine has been carried. The particular point decided in it, is certainly to be sustained on technical reasoning, and perhaps ought not to be controverted. I do not mean to controvert it. That was an action of covenant on a deed; and if the instrument was not the deed of the defendants, the action could not be sustained. It was decided not to be the deed of the defendants, and I submit to the

decision. No action can be sustained against the partner, who has not executed the instrument, on the deed of his copartner. No action can be sustained against the partner, which rests on the validity of such a deed, as to the person who has not executed it. This principle is settled. But I cannot admit its application in a case where the property may be transferred by delivery, under a parol contract. Where the right of sale is absolute, and the change of property is consummated by delivery, I cannot admit that a sale, so consummated, is annulled by the circumstance that it is attested by, or that the trusts under which it is made, are described in a deed. No case goes thus far; and I think such a decision could not be sustained on principle.

The power of applying all the goods on hand for sale, to the payment of the partnership debts, is, I think, a power created by the partnership, and the exercise of it must be regulated by circumstances. In extraordinary cases, an extraordinary use of power must be made. What is called the course of trade, is not confined to the most usual way of doing business, in the usual state of things. In the absence of one of the partners, in a case of admitted and urgent necessity, the power to sell may be exercised by the partner, who is present, and who must act alone, in such manner as the case requires, provided it be exercised fairly. In this case, the fairness of the transaction is not impeached, and, certainly, upon its face, it is not impeachable.

So far, then, as respects the partnership effects which were delivered, I have never, from the first opening of the cause, entertained a moment's doubt.

The next subject to be considered is the real property comprehended in this deed. Real property, whether held in partnership, or otherwise, can be conveyed only by deed, executed in the manner prescribed by statute. This deed can convey no more title at law, than is in the person who executed it. Property conveyed to a firm, or to partners in trust for a firm, is held by them as tenants in common, and neither party can convey more than his undivided interest.³ In this case, where the legal estate was in Tompkins, the whole property passes at law, by his deed. Where the legal estate was in Murray, the whole property passes at law, by his deed. Where the legal estate was in Tompkins & Murray, the property passes in moieties, by their several deeds. I do not think that the superior equity of either party is such, as to control the legal estate, or the disposition made by law of the subject.

Where the legal estate is in trustees, for the use of Tompkins & Murray, the title does not pass at law by either deed, and I have great-

³ This principle is laid down in *Deloney v. Hutcheson*, 2 Rand. [Va.] 183.

ly doubted, whether the first deed ought not to be preferred. I have, however, come to the opinion, that this trust ought to follow the nature of the estate at law, and where the trustees have not conveyed before the subsequent deed was executed, that the title to this property, likewise, should pass in moieties.

The last subject to be considered, is, the debts due to the partnership. The right of one of the partners to assign debts which are assignable at law, is admitted, provided that assignment be made in the usual way. The assignment, then, of these debts, is as valid a transaction as the sale of goods on hand, if it be not contaminated by the seal. I should not suppose, on the principle settled in *7 Durn. & E.* [Term R.] that an action could be maintained on this assignment. But I am not satisfied that it does not pass the assignable paper, which the partner had a legal right to assign. I rather think it does.

A question of more difficulty respects the book debts. This is a part of the subject on which I have entertained, and still entertain, great doubts. The deed does not pass these debts at law. They are not assignable at law, but they are assignable in equity, and a court of equity sustains their assignment. At law, the assignment is only a power to collect and appropriate; and that power is revocable. So far as collections were made under it, before it was revoked, I can have no doubt, that the money collected was in the trustees. With respect to debts not collected, I have felt great doubts. I consider the power to collect, as a contract, which could not be enforced at law. But as Mr. Murray could not convey this property at law, and could only convey it in equity, I have supposed, that the prior equity must be sustained, and that these debts, also, pass by the deed of Tompkins.

The opinion of the court, then is, that the plaintiffs have a right to a decree for a sale of all the real property contained in the deed made by Adam Murray, the legal title to which was in Adam Murray, and to a moiety of the real property, the title to which, was in Tompkins & Murray, or in trustees for their benefit; and that the residue of the property passes to the trustees, in the deed executed by John Tompkins.

NOTE, [from original report.] During the continuance of a mercantile firm, one of the partners, though he is competent to bind, and does bind his own interest in the firm, cannot bind his copartners, by a submission to arbitration. *Karthaus v. Ferrer*, 1 Pet. [26 U. S.] 222. But see *Buchanan v. Curry*, 19 Johns. 137. The question, how far one partner may bind his copartner, by an instrument under seal, in equity, came under consideration in *Sale v. Dishman's Ex'rs*, 3 Leigh, 548. "Berryman & Dishman" were partners in trade, though it was proved, in fact, that Dishman had only permitted his name to be used in the firm, to give Berryman credit, and Dishman had advanced money to Berryman, which Dishman was to receive back, with interest, without re-

gard to the profit or loss of the trade. Berryman covenanted with Sale, for the purchase of corn, for "Berryman & Dishman," and Berryman, alone, signed and sealed the covenant, in the name of "Berryman & Dishman;" but it was clear, that the firm was looked to as debtors for the amount. Tucker, President, said: "The contract, thus signed, and, (by mistake of received principles of law, which deny the right of one partner, to bind another at law by a seal,) being sealed also, was, nevertheless, binding in equity upon both parties." "In this case, then, the partners were clearly bound by the original contract." Decree accordingly.

ANDERSON, (UNITED STATES v.)

[See United States v. Anderson, Cases No. 14,446, 14,447, 14,448, 14,449, 14,450, 14,451, and 14,452.]

ANDERSON, (WEBB v.)

[See Webb v. Anderson, Case No. 17,318.]

ANDES INS. CO., (CAHILL v.)

[See Cahill v. Andes Ins. Co., Case No. 2,239.]

ANDES INS. CO., (MICHIGAN CENT. R. CO. v.)

[See Michigan Cent. R. Co. v. Andes Ins. Co., Case No. 9,526.]

ANDES INS. CO., (YOUNG v.)

[See Young v. Andes Ins. Co., Case No. 18,151.]

Case No. 366.

The ANDOVER.

[3 Blatchf. 303.]¹

Circuit Court, S. D. New York. Sept., 1855.

CARRIERS—FREIGHT AND LIEN—ADMIRALTY JURISDICTION.

1. Where the printed form of a bill of lading of cotton contained, added at the bottom with a pen, the words, "contents and weight unknown," the freight to be paid at a certain rate per pound: *Held* that, although some figures were found in the margin of the bill of lading, apparently as the aggregate weight of the cotton, yet the shipper was bound to pay freight only on the actual weight of the cotton.

2. *Held*, also, that the vessel was liable in admiralty for the value of a part of the cotton, detained under a lien for the freight, after the shipper had offered to pay freight on the actual weight of the cotton, as soon as it should be ascertained.

In admiralty. This was a libel in rem, filed in the district court, against the ship An-

¹[Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

dover, to recover the value of ten bales of cotton. After a decree in the district court in favor of the libellant, the claimants appealed to this court.

George William Wright, for libellant.

Welcome R. Beebe, for claimants.

NELSON, Circuit Justice. The cotton in question in this case was part of a cargo shipped at New Orleans in the ship Andover, and consigned to the libellant at this port, he paying the freight. The bill of lading contained the clause, "contents and weight unknown." The freight was to be paid at a certain rate per pound, and, in the margin of the bill, the figures 29,782 were placed, apparently as the aggregate weight of the cotton.

On the arrival of the cotton, the consignees of the ship claimed that the figures in the margin of the bill of lading should govern in determining the weight, while the libellant insisted that, as the bill of lading said, "weight unknown," the cotton should be weighed and freight be paid accordingly. He offered to pay the freight on these terms, and tendered the amount, to be paid as soon as it could be ascertained. The ten bales in question were retained, under the ship's lien, for freight. The court below decreed for the libellant, for the value of the cotton, less the amount of the freight. [Opinion not reported, and not now accessible.]

There is nothing in the bill of lading indicating that the weight was agreed on between the master and the shipper, but the contrary. For, notwithstanding the memorandum in the margin, as to the supposed or real weight of the cotton, the master, as is apparent, required the insertion, at the foot of the bill, before he signed it, of the words, "contents and weight unknown," thereby excluding any inference that the owner was to be bound by the memorandum. This memorandum is not even referred to in the body of the bill, as the reference there is obviously to marks and numbers on bales, which marks and numbers are given in the margin, and not to the figures there, purporting to give the weight. But, if otherwise, it would not vary the result. The bill of lading is a printed form filled up, and the words, "contents and weight unknown," are added at the bottom with a pen, clearly indicating an intent on the part of the master not to be bound by any supposed ascertainment of the weight at the time by the shipper. Any other construction would be in disregard of the clear import of the instrument, and unjust to the master and his owner.

Decree affirmed.

Case No. 367.

ANDRAE et al. v. REDFIELD.

[12 Blatchf. 407.]¹Circuit Court, N. D. New York. Jan. 19,
1875.²CUSTOMS DUTIES—ACTION TO RECOVER PAYMENT
—LIMITATIONS—ESTOPPEL—INJUNCTION.

1. The plaintiffs in this bill had claims to be repaid the excess of duties, paid by them under protest, to the defendant, while collector of the port of New York, upon imported goods. The statute of limitations was about to take effect, and the plaintiffs contemplated bringing suit. An officer in the custom house at New York stated to the attorney for the plaintiffs, that, according to the practice, the presentation of their claims to a designated officer at the custom house prevented the running of the statute of limitations, and that, if they should be so presented, and suits should thereafter be brought, the statute could not be and would not be interposed as a defence. The defendant, who, at the time, had gone out of office, disclaimed any control in the matter, but declared his confidence in the experience and knowledge of such officer, and expressed to the attorney his concurrence in such statement and opinion. The plaintiffs presented their claims, and refrained from bringing suits until after the statute had run against all of the claims, relying upon the recognition by the government of claims of the like nature, and upon what was so said by such officer and by the defendant. The plaintiffs afterwards brought suits at law against the defendant, to recover such excess of duties, and the defendant pleaded such statute. More than seven years after the pleas were interposed, the plaintiffs filed this bill in equity, praying for an injunction to restrain the defendant from insisting upon the statute as a defence. The defendant demurred to the bill, for want of equity: *Held*, that the bill must be dismissed.

2. The power of a court of equity cannot be invoked to enjoin a defendant from setting up the statute of limitations, on the ground that the cause of action sued on was originally good and valid.

3. The lapse of time before the bill was filed, after the pleas were interposed, commented on, as a ground for withholding relief, even if the plaintiffs might otherwise be entitled to it.

4. Regarding the actions at law as suits against the government, it cannot be prejudiced by any opinion or promise made or expressed by the defendant, especially when, at the time he said what he said, he was no longer in office.

[See note at end of case.]

5. Regarding such actions as suits against the defendant, he cannot be prejudiced by anything said or done by the government or its officials, without his concurrence, especially after he ceased to be collector.

[Cited in *Hennequin v. Barney*, 24 Fed. 582.]

[See *Crooke v. Maxwell*, Case No. 3,413.]

[See note at end of case.]

6. Such actions are properly to be regarded as suits against the defendant, in fact as well as in form.

7. Such conclusion is not affected by the fact that, as a condition of obtaining an injunction herein, *pendente lite*, the plaintiffs stipulated that, in any event, certificates of probable cause should be granted in such actions, to the end that no execution should issue against the property of the defendant.

¹[Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

²[Affirmed by supreme court in 98 U. S. 225.]

8. The officer in the custom house had no authority to bind the government by an agreement not to plead the statute of limitations; and, on what is set forth in the bill, he did not profess to make any such agreement.

9. The defendant made no such agreement, but only expressed an opinion; and, if what he said could be viewed as an agreement, it was without mutuality and without consideration.

10. According to the statute of limitations of New York, (Code Proc. § 110,) "no acknowledgment or promise shall be sufficient evidence of a * * * continuing contract, whereby to take the case out of the operation of" the statute, "unless the same be contained in some writing signed by the party to be charged thereby," and the highest court of that state has decided, that a parol agreement not to plead the statute cannot operate as a new promise, or as a waiver of the statute, or as an estoppel in pais.

11. The facts stated create no estoppel as against the government, or as against the defendant.

12. Decisions of the court granting or refusing a preliminary injunction are not conclusive, either upon the court or the parties, in a subsequent disposition of the cause by a decree.

[In equity. Bill by Otto Andrae and Bernhard Andrae, trading as Andrae & Co., and others, against Constance C. Redfield, executrix, and Frank B. Redfield, executor, of Heman J. Redfield, deceased, to enjoin the plea of the statute of limitations in certain suits pending at law. Heard on demurrer to the bill. Bill dismissed. Plaintiffs afterwards appealed to the supreme court, and the decree was affirmed. *Andrae v. Redfield*, 98 U. S. 225.]

Almon W. Griswold, for plaintiffs.

Webster & Craig, for defendant.

Before WOODRUFF, Circuit Judge, and WALLACE, District Judge.

WOODRUFF, Circuit Judge. The bill of complaint herein is filed by the several plaintiffs in sixty separate actions at law, each brought to recover from the defendant an alleged excess of duty, illegally exacted by the defendant while collector of the port of New York. The payment of the various amounts exacted in excess of duty is alleged to have been made under protest, by the respective plaintiffs in the actions at law, at various dates in the years 1853, 1854, 1855, 1856 and 1857. It is not stated in the bill on what precise day the said several sixty actions at law were commenced, but it is inferrible, from what is stated, that they were commenced in May, 1864, about seven years after the defendant went out of office, as such collector, which was July 1st, 1857. In November, 1866, he pleaded, in those actions, among other defences, the statute of limitations. To the replications to those pleas demurrers were interposed, but issue was finally joined in April, 1872, and the cases were in apparent readiness for trial

for several terms, but were postponed from term to term. In March, 1874, this bill was filed, the several plaintiffs in those actions at law uniting herein as complainants. The defendant has filed a general demurrer. The only relief sought by the bill is an injunction, to restrain the defendant "from prosecuting or maintaining, upon the trial of any of the said sixty suits, his plea of the statute of limitations, and from claiming or insisting, on said trials, upon any defence thereunder, and from, in any way or manner, claiming or pretending, in said sixty actions, or any of them, that the statute of limitations is a bar thereto."

The alleged excess of duty consists of two items or particulars: 1st. That, in ascertaining the dutiable value of the goods imported, the defendant erroneously included the expense of transportation from the principal market in the country from which they were imported, to the place of shipment; 2d. That he also erroneously included in such dutiable value a higher rate of commissions than the usual or customary rate for purchases made at the places from which the importations were made.

The bill is liable to some criticism for want of clearness, certainty and definiteness in many particulars; and it introduces many matters which occurred after the defendant ceased to be collector, to which he was not a party, which, even if they tend to show that the duties were illegally assessed, as matter of law, ought not, in any manner, otherwise to prejudice the defendant, nor to affect his right to defend the said actions by any legal defence. It may be gathered from the bill, that the facts relied on as grounds for the injunction are, that, at some time, the bill does not state when, though its language may, perhaps, warrant the inference that it was prior to February 1st, 1856, the circuit court of the United States for the southern district of New York and the circuit court of the United States for the district of California, in suits, in like cases, brought by other importers, decided that similar exactions were illegal; that the amounts of the exactions in those cases were refunded by the secretary of the treasury; that, on the 1st of February, 1856, the secretary of the treasury published a general regulation, declaring that freight or transportation from the foreign port of shipment to the port of importation, or from the place of production or manufacture to another port, for shipment or transshipment to the United States, is not a dutiable charge; that, on the 4th of October, 1856, the secretary of the treasury addressed a letter to this defendant, in these words: "Sir—On application being made to you by Messrs. A. Iselin & Co. and others, of New York, you are authorized and directed to cause to be prepared the usual certified statements for return of 'duty on freight,' in such cases where the same has been found to have been paid in excess, as decided by

this department in general regulations, No. 63, p. 22, and under written protest, and transmit same to this department, for its consideration;" and that, on the 27th of May, 1857, the secretary of the treasury addressed another letter to the defendant, in the following terms: "Sir—I am in receipt of your letter of the 26th inst., transmitting a report of the U. S. appraisers in relation to the 'usual commissions' charged in China, Sweden, Norway, Holland and German ports, and have to state, in reply, that you will cause to be prepared and transmitted to this department the usual certified statements of return of the duty exacted in error, in all cases where it is found that the said duty has been on a rate of commission greater than the usual rate chargeable in the above named countries." It is not averred, in the bill, that any of the goods imported by the complainants in this suit were imported from either of the countries named in this letter, nor are the terms of general regulation No. 63 stated, so as to show specifically that the claims of these complainants in the several actions at law were embraced within the said letter of the previous 4th of October. These facts are, however, assumed as at least recognizing the principle claimed by the complainants, and the bill avers, that these letters determined and established the complainants' right to the return of the excess of moneys "so paid by them severally for duties," though it is not alleged that these letters were communicated to them by the secretary of the treasury, as a guide to their conduct in bringing suits, or otherwise, or were written or intended for the purpose of influencing them in that matter. If, however, it were conceded that the rights of the complainants to have returned to them the moneys so paid, or the moneys for which they ultimately brought their said several actions, were thereby determined and established, it is not very obvious that these letters constituted an excuse to the plaintiffs for not bringing suit within six years after their causes of action accrued, which should deprive the defendant of his defence, unless it be on the ground that a court of equity should, in all cases, enjoin a defendant from setting up the statute of limitations as a bar, if it appear clear that the cause of action was originally good and valid, as to which the observations of the court, touching the purpose and policy of statutes of limitations as statutes of repose, in *Levy v. Stewart*, 11 Wall. [78 U. S.] 249; *U. S. v. Wiley*, Id. 513; and *Leflingwell v. Warren*, 2 Black, [67 U. S.] 599,—are of some significance. The power of a court of equity cannot be invoked to annul statutes of limitation on any such ground.

The bill then avers, that the complainants furnished to the auditor of the New York custom house statements of particulars, to enable him to prepare the certified state-

ments called for by the aforesaid instructions of the secretary of the treasury, and that, before November 1st, 1859, all the particulars of their claims were furnished to such auditor. The occurrences which—if it be conceded that the plaintiffs had, prior thereto, valid causes of action—alone bear on the question, whether the complainants give such reasons as should move a court of equity to exercise the extraordinary power of enjoining the defendant from availing himself of his legal defence to suits brought against him, are, in substance, as alleged in the bill, the following: That, in the summer of 1859, the plaintiff's attorney suggested to such auditor, Mr. S. G. Ogden, (a subordinate in the New York custom house,) that the statute of limitations would apply to said claims, and the period of limitation of six years would expire, in some of the cases, on the 1st of November, 1859, and, in the residue of the cases, before July, 1863, and that he supposed it might be necessary to commence suits before November 1st, 1859, on all the claims, to prevent the statute from becoming a bar; that, to this, the said auditor replied, imputing it to the fault of the then collector, Mr. Schell, that the money was not refunded, stating, that the instructions given to such then collector, in May, 1858, (which included, in substance, the above letter of October 4th, 1856,) were peremptory, and further stating, that "all the plaintiffs had to do, to prevent the statute of limitations from running, was to present their claims, in each case, to the refunding clerk in the auditor's office, for adjustment, upon which presentation, by the rules and practice of the treasury department, the statute ceased to run," also, that, "if all the plaintiffs should commence suits for the recovery of these debts which the secretary had already ordered to be refunded, it would justify the department in the belief that it was done for the purpose of accumulating bills of costs, and must necessarily annoy the department, and unfavorably prejudice the department against the plaintiffs and their claims, and that it was not necessary to commence suits to prevent the statute from running, but only to present the claims;" that, afterwards, in or about September, 1859, the said attorney conversed with the defendant herein, (who had ceased to be collector,) and stated to him what the said auditor, Mr. Ogden, had said, to which the defendant replied, that he had no longer any control over the adjustment of these claims, and, as far as he was concerned, Auditor Ogden had the whole charge of the matter, who must be, from his long experience, familiar with the practice of the department, and the attorney could rely upon the accuracy of Mr. Ogden's statements; that, shortly thereafter, at a meeting of the said attorney and said Ogden and the defendant, said Ogden stated to the defendant, as he had before to the attorney, that, ac-

ording to the practice of the department, if the plaintiffs had already presented their claims for refunding, or if they would do so, the statute ceased to run from the date of such presentation, as effectually as if suit was commenced; and he corroborated his assertions by referring the defendant to decisions of the department to that effect, and, at the same time, expressed his belief that Collector Schell would yet be persuaded to resume the adjustment; and that the defendant thereupon said, he saw no necessity for suing on these cases, and, if the plaintiffs had presented or would present their claims for adjustment, the statute ceased to run from that time, and could not and would not be interposed as a defence to the payment of them, and he concurred with Mr. Ogden in the expressed opinion, that Collector Schell would soon resume the adjustment of them, and added, that, of course, these claims would all be paid. The bill also avers, that, relying on the matters aforesaid, and for the purpose of avoiding a multiplicity of suits, the plaintiffs refrained from bringing action immediately, in full faith and confidence that the statute of limitations would not be set up as a defence, in case suits should be brought on said claims at any time afterwards. As already suggested, there are other matters stated in the bill, to which the defendant was not a party, which tend to show that the government officers regarded claims of the nature of those alleged to be embraced in those sixty actions as valid, and constituting grounds for refunding whatever excess appeared, upon investigation, to have been paid. But it does not appear that these claims of the complainants were ever adjusted, and their specific nature, or the amounts thereof, ever ascertained, so as to be submitted to the treasury department in a form which, under the instructions referred to in the bill, would enable the secretary of the treasury to consider them, pass upon their legality or their amount, or give any order to pay them.

The case made by the bill may be, briefly, but, we think, completely, for all the purposes of the demurrer, stated as follows, assuming, of course, the facts alleged: The complainants had just and legal claims to be repaid the excess of duties, paid by them under protest, upon certain goods imported, and the defendant was liable to them therefor. The statutes of limitation were about to take effect, as a bar to an action for such excess, and the plaintiffs contemplated bringing suits. An officer in the New York custom house stated to the plaintiff's attorney, that, by the rules and practice of the treasury department, the presentation of their claims to the auditor, or to the refunding clerk at the custom house, prevented the running of the statute of limitations, and, if so presented, and suit was thereafter brought, that statute could not be, and would not be, interposed as a defence. The

defendant, disclaiming any control in the matter, but declaring his confidence in the experience and knowledge of such officer, expressed to the plaintiffs' attorney his concurrence in the statement and opinion thus given. The plaintiffs did present their claims, and, in reliance upon the recognition by the secretary of the treasury of claims of the like nature, and upon the statements and opinion of such officer, and the concurrence of the defendant therein, refrained from bringing suit until after the statute had run against all of the claims. Suits having been then brought, and the defendant having interposed the statute of limitations as a bar, the complainants, seven years and upwards after these pleas of the statute of limitations were filed, apply to this court, as a court of equity, to restrain the defendant from insisting upon the statute as a defence.

If it were true that the interposition of this defence by the defendant was inequitable, in such sense that it created a cause of action in equity, the lapse of time since the pleas were interposed, exceeding another limitation of six years, furnishes the plausible suggestion, at least, that the complainants, at so late a day, and after keeping the defendant so long in the court of law, are entitled to slight favor. Courts of equity expect of applicants for the exercise of extraordinary jurisdiction, that they apply promptly, so soon as occasion arises. If this lapse of seven years since these pleas were filed be not held a bar to the complainants' prayer for what they deem equitable relief, it creates doubt whether, at so late a day, this court ought to interfere in their behalf. But, without resting any conclusion upon this view of the complainants' position in the controversy, we have deemed it proper to examine the bill, to see what, divested of much of obscurity, indefiniteness and want of precision, it can fairly, and as a matter of substance, be said to present, as an appeal to a court of equity to exercise the extraordinary power of interference with the defendant's clear legal right.

The case obviously suggests the inquiry—are the sixty actions at law to be regarded, for the purposes of this suit, as actions against the United States, or as actions against the defendant therein? The counsel for the plaintiffs insist, as we understand them, that they should be deemed actions against the United States; and yet the bill of complaint, by its allegations, would seem to be designed to deal with the case, on some points, as if the defendant were defendant in fact and in law, as well as in form, and, on other points, as if the United States was the real defendant, and as if the formal defendant was only defendant in form and has no real interest therein.

1. If the actions are to be treated as if they were actions against the government, then how can the government be prejudiced

by any opinion, representation or constructive promise made or expressed by the defendant, and, especially, by any opinion, representation or constructive promise made or expressed after he ceased to be an officer of the government? We are of opinion, that, if such be the view we ought to take of those actions at law, the government cannot be so prejudiced. While the complainants are insisting that, for all purposes in a court of equity, those actions are against the government, in which the nominal defendant has no interest, still his opinion and alleged representations, long after the causes of action arose, and long after he ceased to be an officer of the government, are made, in the bill of complaint, prominent ground of that reliance which, as they aver, led them to refrain from bringing their actions. If it be true, that, for the purposes of this suit, the defendant has no interest in those actions, then he has, or should have, no control of those actions, then he could not do or say anything which would affect, or which should be permitted to affect, the rights of the government. It would necessarily follow, that all that is averred in the bill touching his assurances or representations, must be disregarded as irrelevant or immaterial. Thereupon, the complainants' case in this court would stand, and their claim to an injunction would rest, on these facts, viz.—the secretary of the treasury had recognized the validity of all claims of the like nature, and the complainants were assured by an auditor in the New York custom house, that the practice of the treasury department was, not to plead the statute of limitations in such cases, and that the statute did not run after the claims were presented to him or to a clerk in his office, and could not, and would not, be interposed, and, in reliance upon this, the complainants omitted to sue until the period of limitation had expired. On the question whether, in this aspect of the case, any just ground for an injunction can be found, some observations will be made in the further discussion which follows. In disposing of the demurrer to certain replications in the actions at law, the opinion was expressed, that the statute which, under certain circumstances, makes it the duty of the secretary of the treasury to pay the judgments, if any should be recovered against the defendant, had not barred him of any legal defence to the actions brought against him. We are inclined still to the opinion, that nothing in that statute was intended to operate to place the defendant at a disadvantage in a court of equity, and enable the government officers, by their acts, after the cause of action had accrued against him, to deprive him of his defence or defences. In that view, we suggest, that, although the counsel for the complainants repudiate that view of his relation to the suits, and claim that the actions should be treated as actions

against the United States, it is proper to consider the case in its other aspect.

2. If, then, the actions at law are to be dealt with as, in law and in fact, as well as in form, actions against the defendant, then, clearly, the defendant is not to be prejudiced by anything whatever said or done by the government or its officials, (without his concurrence,) after he collected the money for which he is sued, and, especially, after he ceased to be collector, which was long before these actions were brought against him; nor can anything so said or done create any equity in favor of the complainants, as against him. In this aspect of his relation to the actions at law, he may defend himself and his property by any lawful means; and can a court of equity properly restrain him, except upon the ground that he, himself, has said or done something which deprives him of his defence? Certainly not, and, if not, then this case and the prayer of the complainants for an injunction stand upon the mere conversation alleged to have been had with him in September, 1859, in which he expressed his concurrence in the opinion and statements of Mr. Ogden, the auditor of the New York custom house.

It is proper to add, in support of the view that the actions at law in question are, in fact as well as in form, actions against the defendant, that, if judgments be recovered therein, they become liens upon his real estate, and although, by a provision in the 12th section of the act of congress of March 3d, 1863, (12 Stat. 741,) which is now found in section 989 of the Revised Statutes, it may, upon certain conditions, become the duty of the secretary of the treasury to pay the judgments, it cannot be now asserted, in advance of the trial, that such duty will become absolute. Suppose that such payment should not, in fact, be made, can it be said that the defendant has no interest in the question of recovery or no recovery against him; and, especially, suppose that the court before which the trial may be had should not deem the case, as developed on the trial, one in which a certificate of probable cause ought to be granted, how, then, is the defendant to avoid the payment, protect his property from an execution, or relieve his estate from the lien of the judgment? We are not advised that there is anything in the Revised Statutes of the United States which makes these actions any less actions against the defendant; and sections 3009 to 3014 do not seem to us to change the nature of these actions, or deprive the defendant of any defence which he would otherwise be entitled to interpose.

When these actions were brought against this defendant, he was not a government officer. He is not sued as such officer, in any such sense that the suit proceeds against his successor in office. He must abide the re-

sult, and must pay the judgments, if judgments be recovered against him, unless, first, the conditions be fulfilled hereafter, upon which he may obtain indemnity from the government, and unless, also, it shall become the duty of the secretary to pay the judgments and that duty shall be performed.

We are informed, that, on a motion for an injunction herein, *pendente lite*, the plaintiffs were required, as a condition of granting the motion, to stipulate that, whatever facts might be developed on the trial, a certificate of probable cause might be granted, to the end that no execution might issue against the property of the defendant. If this could otherwise affect our determination, no such fact is before us on this demurrer to the bill of complaint. But, we ought not to pass by the argument founded thereon, without observing, that the plaintiffs cannot change the essential nature of their actions against the defendant, by any such stipulation made by themselves; and, second, which we conceive to be of greater and more obvious importance, that it would be a fraud upon the government to permit parties, by stipulation, to cast upon the government officers the duty to pay a judgment recovered against an individual. Whether a certificate of probable cause ought or ought not to be granted, is for the determination of the judicial tribunal, upon the facts developed on the trial; and the interests of the government, and the duty of the government to pay, are not left to the determination or choice of the plaintiffs in the actions. If it should be held, that the question, whether the government shall be required to pay the judgments may be decided by the plaintiffs therein, the government would be exposed to abuses and to collusion. This view might be illustrated by various supposable cases, but it seems too obvious to require it.

Viewing the actions at law as actions against the defendant, further suggestions are pertinent to the question, whether he can be prejudiced or affected by the acts of the government or its officials. The defendant had retired from the office of collector. He was a private citizen. He is sued by the complainants, to recover money which they allege he, when collector, exacted from them illegally. Now, it may be conceded that all legitimate sources of information may be resorted to by the court, to assist in the inquiry, whether, upon facts which may be proved, the collections which he made were or were not, when made, illegal. But it is, we think, equally clear, that neither the government officers, nor any authority of the government, can create a liability, either at law or in equity, which he did not incur; and we deny that either a subordinate in the New York custom house, or even the secretary of the treasury himself, could deprive the defendant of his right to defend by any defence valid and legal for his protection.

3. To any suggestion that the actions at

law may be regarded as of a mixed nature—in some possible contingencies, against the defendant, in other contingencies, as practically against the government—it must suffice to say, that this avails nothing in answer to the suggestions already made. In so far as the actions are to be treated as against the defendant, he is entitled to complete protection. He cannot be prejudiced by the acts, representations, or opinions of government officials, and, unless, by something said or done by himself, he has lost his legal defences, he must be permitted to urge them, and have judgment thereon in his favor, if the defences be valid; and this terminates the suits. On the other hand, in so far as these actions can be regarded (if at all) as actions against the government, it is true, as suggested in a previous point, that the acts, representations, or opinions of this defendant, after he ceased to be an officer of the government, cannot, either at law or in equity, prejudice the United States.

4. In any aspect of the case, what is the substance of the claim of the plaintiffs to a decree, and on what does such claim rest? On the argument of the demurrer to the plaintiffs' replications, (whereon an opinion was delivered, not reported,) it was claimed that there was an agreement not to plead the statute of limitations, made either by the defendant, or by the government officers, or by both. Several criticisms are pertinent to any such suggestion. The auditor of the New York custom house had no authority whatever to bind the government by any such agreement; and he did not profess to do so. He only assumed to state the rules and practice of the treasury department of the United States, to give an opinion upon the legal effect of the presentation of the complainants' claims to the auditor or refunding clerk, and to express the belief that the statute of limitations would not, after that, be urged as a defence to a suit or suits. This sufficiently, we think, disposes of any idea of contract by the government not to permit the statute to be pleaded, if it were conceded that any such contract could affect the defendant.

As to any idea of an agreement by the defendant, in the nature of a contract with the complainants—the conversation with the defendant, alleged in the bill of complaint, was so obviously the mere expression of an opinion as to what the department of the treasury and the then collector would do towards the adjustment and payment of the claims, and a concurrence in the opinions of the auditor, that it cannot import any undertaking on the part of the defendant whatever. Besides, viewed as a contract, it had in it no element of mutuality. There was no consideration therefor. The complainants did not agree not to sue, or to forbear for any period, short or long. On the contrary, they had the power, and the unimpeded right, to sue immediately. How,

then, was the running of the statute hindered? They did sue as soon as they deemed it for their interest. In this view, and, indeed, in every possible view of the subject, the inquiry is pertinent—how long after this conversation, upon the complainants' theory, might they delay? for ten years, or for twenty, and still claim that the statute could not be pleaded as a defence?

Again, the courts of the United States recognize and give effect to the statutes of limitation of the states in which those courts exercise their jurisdiction. This is well settled. See some cases collected in the opinion in *Re Cornwall*, [Case No. 3,250.] The cause of action here in question arose in the state of New York. The defendant was then, and when these suits were brought, a resident of the state of New York. This court exercises its jurisdiction within the state of New York, and, in the construction of the statutes of the state, and in declaring their effect, has respect to the decisions of the state courts. The statute of limitations of that state, from the protection of which the complainants desire to exclude the defendant, declares, (Code Proc. § 110,) that "no acknowledgment or promise shall be sufficient evidence of a * * * continuing contract, whereby to take the case out of the operation of" the statute "unless the same be contained in some writing, signed by the party to be charged thereby." And the court of last resort in that state, in *Shapley v. Abbott*, 42 N. Y. 443, hold, that a parol agreement not to plead the statute cannot operate as an acknowledgment of the debt, nor as a new promise, nor as a waiver of the statute; and, finally, that, although relied upon very much, as it is alleged the complainants relied upon the circumstances stated in this bill, it does not operate as an estoppel in pais, to preclude the defence. Shall this court, as a court of equity, say, that a parol agreement not to plead the statute will take a case out of the operation of the statute, when a parol promise to pay would not? Especially, shall they say so of, at the utmost, a mere declaration of opinion, or even of intention, not to plead the statute, founded on no consideration, and involving no mutuality of agreement? To do so would completely defeat the design of the statute to protect parties against perjury, by requiring that no promise shall have such effect, if not in writing and signed, &c. In this connection, it may be proper to bear in mind, that no actual fraud is alleged or claimed, in this bill, to have been practiced upon these complainants.

5. This brings us to the argument forcibly urged upon our attention, which was, however, considered in *Shapley v. Abbott*, above referred to—that the defendant is estopped to insist upon the statute as a defence. This claim requires, as already suggested, that it be first determined who is, for the purposes of this suit, to be deemed the real defendant

in the actions at law. If it be the government, as the complainants now insist, then the statements and representations of the defendant, after he ceased to be collector, should be laid out of view. What facts have the government stated or represented, so as to create an estoppel? Statutes, rules and regulations of the treasury department, if they show that the complainants once had a legal claim, if the facts be as stated in the bill, go no further. These do not affect the validity of the defence of the statute of limitations, either at law or in equity, if the complainants do not prosecute their once legal claim within the time limited. Can a subordinate officer in the custom house make representations, either touching the past or the future, which can estop the government in a case like the present? He is not appointed or authorized for any such purpose or with any such power. What he said or did was not in the receipt of money paid to him, or which he was authorized to receive, or in respect of which he was executing a general authority, such as enables agents, sometimes, to bind their principal by contemporaneous acts or declarations. The money was in the treasury of the United States. He had no power or authority to bind the government, by prescribing the terms or conditions upon which it should be refunded to the complainants.

But, what is it alleged that he represented? Nothing of substance, except, that, by the rules and practice of the department of the treasury, the presentation of the claim put an end to the running of the statute of limitations, and such statute could not and would not, thereafter, be set up as a bar. If that statement was an opinion, that, as matter of law, the presentation of the claims prevented the running of the statute, then, of course, it estopped no one. As a statement of a fact, it had no effect as an estoppel. It may, for the purposes of the question, be deemed the statement of the truth. Suppose that the rules and practice were as stated. Could not the department of the treasury change them at pleasure? The argument would make such a practice, once begun, forever binding and unchangeable, for, the moment an attempt was made to depart from it by setting up the statute of limitations as a defence, a court of equity would be called upon, as here, to enjoin the defence. All else that was said by the auditor was prospective. It had reference to the future conduct of a defence to a suit or suits which might thereafter be brought. If full authority to make the statement on behalf of the government were conceded, it was, at most, promissory. This is not of the nature of an estoppel in pais. In truth, it was but the expression of opinion, either of the law, or of what the treasury department would do in the future. Such an opinion is no estoppel. But, the want of authority in this official, already adverted to, is sufficiently

conclusive, apart from these last mentioned distinctions.

If, on the other hand, we again treat the defendant as, for the purposes of this suit, the real party in interest, then the considerations arising out of the terms of the New York statute apply, and the decision of the New York court of appeals is pertinent; and, besides this, his conversation is subject to like observations as are above made on the conversation of the auditor. Fairly interpreted, all that the defendant is alleged to have said to the complainants' attorney had reference to the future conduct of the government or the secretary of the treasury in the matter, and was a concurrence in the views of Mr. Ogden, accompanied with an express disavowal or protest that he, the defendant, had any control in the adjustment and refunding which the attorney was urging. How, in the face of that protest, and of his express reference to the judgment and experience of Mr. Ogden, for information as to what the government would do, could the complainants rely upon anything said by him as binding any one in any form? It is, however, unnecessary to pursue the discussion in that aspect, since the complainants, on the argument of the demurrer, insist, that we should regard the government, and not the nominal defendant, as the real party, and, if so, the acts or declarations of the defendant, after he ceased to be an officer of the government, cannot estop the latter. We add, however, that we are unable to find in either aspect of the case any sufficient ground for declaring that either are estopped to make any legal defense to these actions at law which may be available. There are many other views bearing upon the sufficiency of this bill, which have been adverted to on the argument, in support of the demurrer, but we deem it unnecessary to pursue further a discussion already greatly protracted.

It is easy to group all the circumstances detailed in this bill of complaint, and assuming that the claims of the complainants were originally just and legal, say that the complainants ought not to be vexed and hindered by such a defence; that the government ought to have refunded their money; that the complainants did wait in reliance upon the circumstances detailed in the bill; that, although they may have been unwise in so long delaying to sue, they did not suppose that their rights would be prejudiced thereby; that, even now, the government ought to refund the money; and that, unless there is some suspicion of unfairness or fraud, some loss of evidence bearing upon the justice of their claims, or the amount thereof, or reason to believe that delay in bringing suit has wrought some prejudice or endangered some right, or there is danger in establishing a precedent, or some reason other than appears on the mere face of this bill, then the interposition of such a defence, by or at the

instance of the government, enabling it to retain money wrongfully gotten into the treasury, and against importers who would seem to have been long and patiently doing what they could, short of suing, to obtain their rights, is ungracious, and invites an effort to avoid the effect of the statute, if possible. But we have not been able to find grounds upon which, on principles of law or equity, a court of equity can interfere.

It is suggested, that, as an injunction pendente lite was granted in this court, and upon this bill, we ought to deem the question res adjudicata, or ought, at least, to follow such allowance of the injunction as an authority. This would have saved us much time and labor; it would have been a throwing off of responsibility, quite grateful to us, if we had deemed it consistent with the proper discharge of duty. But, the granting of a preliminary injunction has for its precise object the retaining of all things in their then condition until the case can be deliberately heard or examined upon the issues finally made for hearing or trial. It is provisional merely. It is granted as matter of discretion. It is often and properly granted where the question is important and doubtful. When the case comes to be finally heard on the merits, and judgment is to be pronounced, the court are bound to apply to it the rules that govern the rights of the parties; and there is nothing provisional in such judgment. They then finally settle those rights. Until that can or should be done, a temporary injunction is often a discreet exercise of the power of the court, to see that nothing is done pendente lite which will impede the doing of what may be finally adjudged to be right, in the matter in controversy. But for this preliminary injunction, the defendant might have pressed the actions at law to trial and judgment, before this case could be heard and decided, so as to become the subject of further review, if the parties so desired. Decisions of the court granting or refusing a preliminary injunction are not conclusive either upon the court or the parties, and are not intended to be so, in a subsequent disposition of the cause by a decree. We are, therefore, not wanting in due respect to the court or the judge by whom the preliminary injunction was granted. On the contrary, our convictions tend to the belief, that, if sitting with us on the hearing of this demurrer, his conclusion must be the same as our own deliberate judgment.

The demurrer must be sustained, and the usual decree dismissing the bill, with costs, be entered, unless the complainants wish to amend. In that case, leave should be given, on the usual terms.

[NOTE. In affirming this decree, Mr. Justice Clifford, speaking for the supreme court, said: "Conceding that the United States is the real party, still the court is of opinion that there is nothing in the remarks attributed to the auditor of the customhouse, or to the refund clerk, or to the secretary of the treas-

ury which can be held to preclude the respondent from pleading any proper plea to the actions which he may think necessary in making his defense. * * * Congress, undoubtedly, might authorize actions of the kind to be brought directly against the United States; but all must concede that such a power has never been exercised and is not conferred, and, in the absence of such legislation, the court is of the opinion that such actions may in certain aspects be treated as actions against the collector, unless it appears that he acted under the directions of the proper official authority, or that a case is made where no execution can issue against the collector. * * * Taken in the most favorable view for the complainants, it is clear that it is impossible to regard the remarks attributed to the secretary of the treasury or to the officers of the customs as a contract or promise made by either party. There was no promise to forbear instituting the suits; nor was there any promise, if forbearance was accorded, that the statute should cease to run. * * * When they separated, each party was as free to pursue his own course, as when the interview commenced. Complainants might have brought suits the same day, and, if they had, the respondent would have been at liberty to make any defense in his power, irrespective of anything which had transpired at the interview." Justices Miller and Field dissenting. *Andrae v. Redfield*, 98 U. S. 225.]

Case No. 368.

ANDREAE et al. v. REDFIELD.

[15 Int. Rev. Rec. 105.]

Circuit Court, W. D. New York. Jan. Term, 1872.

LIMITATIONS — ACTION AGAINST COLLECTOR FOR DUTIES PAID—PROMISE NOT TO PLEAD STATUTE.

[1. In a replication to a plea of the statute of limitations, an allegation that the defendant resided out of the state 11 months, without an averment that the statutory period has not elapsed, exclusive of the time of his absence, is insufficient.]

[2. In a suit against a collector of customs whose plea is the statute of limitations, a replication alleging that the United States, and not the collector, were liable for the amount claimed; that the United States had made a new promise, and had promised not to plead the statute, if it contains any substantial defense to the plea, is double, and therefore insufficient.]

[3. The granting of leave to put in several replications merely permits the parties to put the matters in the record, and is not an adjudication of their sufficiency.]

[4. Where leave is given in a suit against a revenue collector to set up in reply to a plea of the statute of limitations an agreement that, if the plaintiffs filed their claims with the collector, the statute should not be pleaded, with an averment that they did file such claims, a replication setting up an agreement that the statute should not be pleaded to any claims for refund accruing within six years prior to the commencement of a test suit decided in favor of the plaintiffs, and acquiesced in by the treasury department, that such test suit had been so decided and acquiesced in, and wherein such suit is not particularly described, nor the connection of the case at bar with the alleged agreement or test suit shown, is too vague.]

[5. The averment in such a replication of a complete promise by the secretary of the treasury 10 years before the bringing of the suit is

insufficient. The secretary's promise cannot be construed to operate without any limit as to time.]

[6. Act March 3, 1863, providing for the relief of collectors of customs by discharging their liability for unlawful collections out of the treasury, did not confer on the secretary of the treasury any such power that his promise not to plead the statute of limitations will avail plaintiffs in an action against a collector.]

[See note at end of case.]

[7. Where leave is granted to file four replications in an action against a collector of customs, of which the first two rest upon promises by the collector, and the last upon promises by the secretary of the treasury, as if the collector was a merely nominal defendant, such last replication is bad, since it is inconsistent with the others.]

[At law. Action by Otto Andrae and others against Herman J. Redfield, collector, for a refund of duties. Leave to file four replications was granted. On demurrer to the replications. Overruled in part.]

The following opinion discusses an important question of pleading in "Collectors' cases," under the act of March 3rd, 1863, and, in order that the points considered and disposed of may be more apparent, we give a synopsis of all the issues under the demurrer.

A. W. Griswold, John C. Darrow, and Samuel Hand, for plaintiffs.

Webster & Craig and H. J. Begly, for defendant.

WOODRUFF, Circuit Judge. This action is for money had and advanced, money paid, laid out and expended, had and received, etc., in the form of the ordinary money counts in assumpsit. The defendant, among other defences severally pleaded, by his third plea avers that the several causes of action did not, nor did either of them, accrue within six years before the commencement of this action. To this plea, the plaintiffs desired to file four replications, and, by the order produced on the hearing, it appears that the court, in 1867, made a special order permitting the plaintiffs to reply specially the matters specified in the order. The plaintiffs thereupon filed four several replications to the plea of the statute of limitations so pleaded. These replications are: 1st. That before the expiration of six years from the time when the moneys were had and received, etc., etc., by the defendant, the said defendant promised and agreed to and with the plaintiffs, that the statute of limitations should not be pleaded, in case the plaintiffs should file their claim to be refunded the said moneys, with the collector of the port of New York, and the plea avers that the plaintiffs did file and claim within the specified period. 2nd. That the plaintiffs within six years before the commencement of this suit renewed and ratified his promises in the declaration mentioned. 3rd. That after the causes of action had accrued to the plaintiffs,

the defendant departed from, and resided out of the state of New York, for the period of about eleven months. And 4th. That by the act of congress of March 3rd, 1863, the defendant was discharged from all personal liability to repay the said several sums of money in the complaint mentioned, officially collected by the defendant, and paid into the treasury of the United States, but that it was by the said act made the duty of the secretary of the treasury to repay the several sums of money officially collected by the said defendant upon a recovery of a judgment against him in a suit brought against him in his official capacity to recover the said moneys, and that the secretary of the treasury, within six years before the commencement of this suit, did undertake and promise to pay the said several sums of money in the complaint of the plaintiffs mentioned; and that the defendant, while collector of the port of New York, paid over to the United States the moneys exacted by him from the plaintiffs on the condition, trust and agreement that the United States should and would undertake and assume to bear and be responsible for all claims that should be made against him as such collector for moneys received and exacted by order of the treasury department, and that the moneys paid by the plaintiffs to the defendant as in the complaint mentioned were so exacted. That this suit is defended by the United States, and "that before the expiration of six years from the time when the said money was paid to the defendant by the plaintiffs and by the defendant to the treasury of the United States, and within six years next before the commencement of this action, the said secretary of the United States did officially promulgate and make known and promise, and agree to, and with these plaintiffs, that the statute of limitations should not be pleaded as to any claims for refund of money so officially collected accruing within six years next prior to the commencement of a test suit in such cases, when such test suit had been decided in favor of the claimants and such decision acquiesced in by the treasury department. That test suits for the recovery of such money, as is in the complaint of the said plaintiffs mentioned, so officially collected, had been commenced in the courts of the United States in the years 1855 and 1856, and determined in favor of the plaintiffs therein, and the decision therein had been acquiesced in by the treasury department by letters of instruction issued by the secretary of the treasury, dated October, 1856, and May, 1857." To these four replications the defendant demurred. These replications may be briefly described as, 1. Promise by the defendant not to plead the statute if the claims should be filed with the collector. 2. New promise by the defendant. 3. Absence of the collector for about eleven months from the state. 4. New promise by the secretary

of the treasury, and promise by the secretary of the treasury that the statute of limitations should not be pleaded if a test suit should be brought and decided in favor of the claimants.

As to the first of these replications, I should have had great doubts whether it was an answer at law to the pleas of the statute of limitations, but for the case of *Gaylord v. Van Loan*, 15 Wend. 308, and the cases therein referred to. Such an agreement, if to be enforced as an agreement, would seem to me to furnish occasion for an application to a court of equity to restrain the defendant from pleading his legal defence, where, by reason of the agreement, and what was done under it, it was inequitable to plead the statute. How it is, as an agreement, a legal answer to the plea is not obvious. The theory of an estoppel in pais makes the circumstances creating the estoppel conclusive evidence of the facts imported thereby, and as evidence of such fact it is useful. It is doubtless grossly inequitable for a defendant to plead the statute of limitations when, for a sufficient consideration, he has agreed with the plaintiffs that he will not; or to plead usury when, upon like consideration, he has agreed that he will not; or to set up any defence when, upon like consideration, he has agreed that he will not defend. But a replication to a plea setting up that the defendant, for a consideration, would not interpose any plea to the action would be a novelty at least. A court of equity can deal much better with agreements of this description, and can examine all the circumstances attending the making of the agreement and its performance, consider all the resulting equities, and grant or withhold an injunction or not as may be just. I, however, yield this doubt to the cases cited, especially since the defendant's counsel does not, in his argument, deny the sufficiency of the replication on any such ground.

The second replication does not seem to be objectionable upon any facts appearing in this replication or the plea to which it is addressed.

The third replication is clearly bad, and it seems to me frivolous. No issue can be joined upon it which will either determine the truth or legal effect of the plea, or avoid it. Suppose it to be found by a verdict that after the cause of action accrued, the defendant departed from and resided out of this state for about eleven months. It does not follow that six years have not elapsed since the cause of action accrued, exclusive of the period of such absence. The plaintiff should make his replication such that it takes his case out of the operation of the statute; i. e., such that if true he is entitled to recover. The issue here tendered is immaterial. When the statute exception "beyond seas" is pleaded, the replication should aver that six years have not elapsed since the

defendant returned. So are the precedents, and so here the replication should show that six years have not elapsed, exclusive of the period of absence. I say nothing on the question whether it is necessary, under the statute of New York, to reply this absence specially; it is sufficient for this occasion that he has seen fit to do so, and he cannot be permitted to force the defendant into an issue upon such a replication as he here interposes.

The fourth replication is a novel and most extraordinary pleading. Its phraseology suggests that it was framed as and for a bill of complaint in equity, and yet it is as vague, indefinite, and uncertain in some of its parts as a bill of complaint may sometimes be where the complainant avers ignorance of particulars, and prays a discovery thereof from the defendant. As a pleading at law a most obvious defect is that it is double, if it contains any substantial matter in avoidance of the plea. Assuming that it is a legal answer to the plea, then it contains two answers, one a new promise by the secretary of the treasury, and the other a promise by the secretary that the statute of limitations should not be pleaded on certain conditions specified. I can hardly suppose that the plaintiff's averment of the payment of the money to the United States upon a trust, was intended as an avoidance of the plea on the ground that to a trust the statute of limitations does not apply; that doctrine might avail in a proper case, in an action between cestui que trust and trustee; but if that was the purpose on an idea that here the United States is to be regarded as the debtor, then there is a third substantial matter of avoidance.

This is sufficient to dispose of the fourth replication, but to obviate an application for amendment, it may be proper to make some further suggestions.

The granting of leave of court to put in several replications is no adjudication of the sufficiency of the matters mentioned in the order to be replied. It merely permits the parties to put the matters in the record to become the subject of examination and adjudication.

In the next place, so far as the plaintiff seeks to sustain this fourth replication by the order giving leave to file it, it is sufficient to say that the leave given did not contemplate the setting up of such an agreement as it contains, nor by any means such vague and indefinite allegations as accompany it. The purpose of a pleading is to apprise the adverse party of the facts relied upon, and intended to be proved, in such form that he can put them in issue with some idea of what he may expect to meet on the trial. The leave given was to set up an agreement that if the plaintiffs filed their claims with the collector, the statute of limitations should not be pleaded, with an averment that they did file such claims. The

replication sets up an agreement that the statute should not be pleaded, as to any claims, for refund of money so officially collected, accruing within six years next prior to the commencement of a test suit in such cases, where such test suit had been decided in favor of the claimants, and such decision acquiesced in by the treasury department; and that test suits were commenced in the court of the United States in the years 1855 and 1856, and determined in favor of the plaintiffs therein, and such decision had been acquiesced in by the treasury department by letter issued by the secretary of the treasury, dated October, 1856, and May, 1857.

What is a test suit? On what particulars, in any answer to that question, can the defendant take issue if he wishes to do so under this replication? By whom, in what court, and where, have such suits been brought? Who were the parties, and by what particulars can they be identified, so that the defendant can take issue with the plaintiffs, and have some means of ascertaining that of which the replication should itself apprise him, viz; what is to be proved in support of the plaintiff's case?

Again, what connection have the causes of action in this suit with such agreement, or with such test suit? It is not averred in this replication that these moneys were paid to the defendant or to the United States before such agreement, or that the right to such moneys was involved in the suits referred to, or that the causes of action herein constituted claims for refund of money so officially collected accruing within six years next prior to the commencement of the test suits mentioned, or that a test suit was brought within six years after these causes of action accrued.

And again: If the agreement should be sustained, held, sufficiently pleaded and complied with, the decision of the test suit and the acquiescence of the secretary of the treasury are averred to have been completely communicated in May, 1857. Is it to be construed that such an agreement operates without any limit as to time? That the plaintiffs could wait ten years after such final acquiescence, and then bring suit unaffected by the statute of limitations? Clearly the order giving leave never contemplated such a replication as this; and if the replication cannot be sustained on this demurrer, without the aid of the order, it ought not to be sustained on any ground.

Thus far I have treated this fourth replication as if the agreement by the secretary of the treasury could be pleaded in avoidance of the statute. I do not intend to countenance that view of the subject. The theory upon which the plaintiffs seek to justify this fourth replication makes their entire replication inconsistent, and any support the agreement gives to the fourth is destructive of the first and second replications. That theory is that the act of congress of March

3rd, 1863, has operated as sort of novation by which the United States has become the debtor of the plaintiffs, and the defendant is discharged from liability. He being, however, retained as a defendant in form, so that by due judicial proceedings the validity and amount of the plaintiffs' claims may be ascertained and determined. Hence, the United States, being the real defendant, the new promise by the secretary of treasury, and his promise that the statute of limitations shall not be pleaded, are operative and available to the plaintiffs. What then becomes of the first and second replications, which aver that the defendant, Redfield, made a new promise? and that he promised not to plead the statute? Surely if the statute deprived him of all interest, and relieved him of all liability, and cast it upon the United States so that the latter became and is the real debtor and the real defendant, then those promises of the nominal defendant cannot be permitted to prejudice the government. The theory of the plaintiffs cannot be used to sustain the promises of the secretary of the treasury, and be repudiated to sustain those of the nominal defendant, as an avoidance of the statute at law. I am, however, of opinion that the act of 1863 has neither wrought any change in the rules of law governing pleadings in the action, or in the tests to be applied to them by a court of law, nor has it conferred upon the secretary of the treasury any such power that his promise will avail the plaintiffs at all in their action at law against the defendant. The action must proceed governed by such rules as would govern the question of recovery, or no recovery at law, had no such statute been enacted. It is for the protection of the defendant, not for the benefit of the plaintiffs, that the statute intervenes to provide for the relief of the former by making provision to discharge his liability out of the treasury.

Under these views, the defendant must have judgment upon his demurrer to the third and fourth replications, and as to the first and second replications the demurrer must be overruled with leave to the defendant to rejoin.

[NOTE. Rejoinders were filed to the first and second replications, and issue joined thereon. While the cases were still pending, the plaintiffs filed a bill of complaint to restrain the respondents from pleading the statute of limitations in the action at law, setting up a promise by the customs officials and the secretary of the treasury not to plead the statute of limitations, new promises by both these officers, and the fact that in other actions, on similar facts, judgment had been given for the importers, and the excessive duties refunded by the government. The bill was dismissed by the circuit court, and on appeal the supreme court affirmed that decision, on the ground that conversations wherein the government officers said that under like circumstances it was not the custom of the treasury department to plead the statute of limitations did not amount to a promise not to plead the statute, nor to a new promise, be-

cause not in writing; that, if they did amount to such a contract, it was void for lack of consideration; and that the defendants were not estopped to plead the statute because both parties were equally well informed of all the facts. Miller and Field, JJ., dissented, on the ground that the acts and promises of the government officials amounted to an estoppel in equity to the plea of the statute of limitations. *Andrae v. Redfield*, 98 U. S. 225.]

Case No. 369.

In re ANDREWS.

[1 Hask. 87.]¹

District Court, D. Maine. Feb., 1867.

ARMY—ENLISTMENT OF MINOR—DISCHARGE ON REQUEST OF PARENT OR GUARDIAN.

A minor, who has enlisted in the army of the United States without the consent of his parent or guardian, must be discharged on request of his father.

[See, also, *U. S. v. Wright*, Case No. 16,777.]

Habeas corpus. A father asks the discharge of his minor son from an enlistment in the army, made without the father's consent.

Nathan Webb and Thomas Amory Deblois, for petitioner.

FOX, District Judge. The act of [March 16] 1802 [section 11, 2 Stat. 134] provided that no person under the age of twenty-one should be enlisted by any officer without the consent of his parent, guardian, or master, first had or obtained. The same provision is found in the act of 1813; but by act of [December 10] 1814, c. 10, §§ 1, 2, [3 Stat. 146,] the enlistment of men between the ages of eighteen and fifty was authorized; and it further provided, that such enlistment should be absolute and binding upon all parties under the age of twenty-one years; but any recruit might at any time within four days from his enlistment, reconsider and withdraw his enlistment. The third section repealed so much of the fifth section, of the act of [January 13] 1813 [3 Stat. 791, c. 12] as required the consent of the parent to the minor's enlistment. By act of [March 3] 1815, [3 Stat. 224,] entitled "an act fixing the military peace establishment of the United States," it was provided that the men should be recruited in the same manner, and with the same limitations, as are authorized by act of 1802. This revived the provision of the act of 1802, and restored the requirement of the consent of the parent to the enlistment of the minor. The act of 1814, I consider repealed, and the provision of the act of 1802 in this respect revived. The act of September 28, 1850, [section 5, 9 Stat. 507,] makes it the duty of the secretary of war to order the discharge of any soldier of the army, who at the time of his enlistment was under the age of twenty-one years,

upon evidence being produced to him that such enlistment was without the consent of his parent or guardian. I consider this as only affording a more speedy redress to the parent, and conferring on the secretary of war the power, or rather charging him with the duty, of granting a discharge in such a case. Before this, it might be necessary to apply to the courts for a discharge, and in some cases the soldier might be in the Indian Territory, or some other locality where the order of the court could not be had. The duty therefore devolved on the secretary of war to grant a discharge. There is nothing which can be construed as legalizing such enlistment. The next act I find is that of [February 13] 1862, c. 25, [12 Stat. 339,] which by the second section repeals the fifth section of the act of September 28, 1850. The repeal of this section leaves the law as it was before the act of 1850 was passed. The authority, which was by that section conferred on the secretary of war, was by its repeal simply withdrawn, and it did not in any way touch the validity of the enlistment, or the power of the court over it. I have no doubt that the enlistment is illegal as against the parent, being without his consent, and that the minor should be discharged therefrom. Vide act of [February 24] 1864, c. 13, [13 Stat. 6,] and [act of July 4, 1864,] c. 237, [13 Stat. 379,] and act of [March 3] 1865, [15 Stat. 487.]

Discharge ordered.

ANDREWS, (The JAMES.)

[See *The James Andrews*, Case No. 7,189.]

Case No. 370.

In re ANDREWS et al.

[11 N. B. R. (1875,) 59; 22 Pittsb. Leg. J. 41.]

District Court, W. D. Pennsylvania.

BANKRUPTCY—COUNSEL'S FEES—PREPARATION OF SCHEDULE.

[The fee to be allowed counsel for the preparation of a schedule of a bankrupt is not to be determined by the amount of mere clerical labor performed; the systematizing, arrangement, and condensation of the matter should be considered; and a fee of \$100 for preparing a schedule numbering 40 pages of bankruptcy blanks was properly allowed.]

In bankruptcy.

By the register: Noah W. Shafer, the register to whom was referred the petition of Ferguson & Murray, Esqs., attorneys-at-law and solicitors for said bankrupts, for a reasonable compensation for preparing and making the individual and partnership schedules of said bankrupts, beg leave to report: That I have very carefully examined the matters alleged in the said petition, and have compared and considered the amount of professional labor involved, and also what is a reasonable compensation for the same. It has been adjudi-

¹[Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

cated in your honorable court, that counsel in cases of this kind have the right to be compensated out of the funds of the bankrupt in the hands of the assignee, and the register accepts the adjudication as fixing the law and practice.

Then as to the amount of compensation. In examining the schedule I find that there are partnership schedules of Andrews & Jones, of Robert Andrews and Henry C. Jones, the individuals composing the said firm. The whole schedule numbers forty pages of bankruptcy blanks, exclusive of the blanks for jurats and certificates. The question of compensation of counsel fees in any given case is always difficult. It requires great care, experience, and caution to do justice to the solicitors and at the same time to preserve the estate from improper allowance. It is not the mere manual labor of writing that counsel, in cases of this kind, is required to do. He must first get his matter systematized, arranged, and condensed, so as to appear to as much advantage and convenience as is possible. This cannot be done with the celerity of mere copying, as all those who have tried it know. In a voluntary petition and schedules filed before me, or rather referred to me by your honorable court, not so large as this, not so many pages, nor any more difficult, the petitioner paid four hundred dollars for its preparation and the accompanying counsel and advice. I refer to the case of Stephen G. Barnes, [Case No. 1,010,] bankrupt, No. 2253 in bankruptcy. This, I have no hesitation in saying, is not to be taken as a fair precedent, for I am free to say that I think that a compensation entirely disproportionate to the work and professional skill required. In the case before me, and in view of the value that counsel put upon their own services (I mean counsel competent to perform the duties they undertake), the register does not think that one hundred dollars would be more than a reasonable compensation, but on the other hand, considers it reasonable—not too much, but at the same time ample for the services rendered. The professional labor required is much more than that required in an involuntary petition prior to the amendment of June 22, 1874, to the bankrupt law, in which cases, from seventy-five dollars to one hundred and twenty-five dollars have been allowed in my district. The assignee, A. W. Irwin, Esq., has funds of the said bankrupts in his hands, and whatever compensation is allowed, he has the funds to pay. The register would recommend that the petitioning counsel in this case be allowed the sum of one hundred dollars for the preparation of the schedules of bankrupt—both partnership and individual—the preparation of which was in obedience to the mandate of your honorable court, as contained in the warrant issued in the case, and further, that the assignee, A. W. Irwin, be directed to pay the same out of the funds

of the estate in his hands. Respectfully submitted, N. W. Shafer.

McCANDLESS, District Judge. The foregoing report of register Shafer, recommending an allowance of one hundred dollars to Ferguson & Murray, Esqs., solicitors for said bankrupt, is confirmed, and the assignee is ordered to pay the same.

ANDREWS v. BASSETT.

[See Andrews v. Spear, Case No. 379; Id. 380.]

ANDREWS, (BROWNING v.)

[See Browning v. Andrews, Case No. 2,040.]

Case No. 371.

ANDREWS et al. v. CARMAN.

[13 Blatchf. 307; 2 Ban. & A. 277; 9 O. G. 1011; Merw. Pat. Inv. 249.]

Circuit Court, E. D. New York. April 24, 1876.

PATENTS FOR INVENTIONS—VALIDITY OF REISSUE
—PROCESS—NOVELTY—MANUFACTURE—ANTICIPATION—ABANDONMENT.

1. The reissued letters patent granted to Nelson W. Green, May 9th, 1871, for a process of constructing wells, are valid.

[Cited in Andrews v. Cross, 8 Fed. 277; Eames v. Andrews, 122 U. S. 47, 7 Sup. Ct. 1073. Followed in Green v. French, 11 Fed. 591; Andrews v. Eames, 15 Fed. 110; Green v. French, Case No. 5,757.]

2. The state of the art of constructing wells at the time Green made his invention, explained. The peculiar features of Green's well, called the "driven well," explained.

[Cited in Andrews v. Cross, 8 Fed. 277; Eames v. Andrews, 122 U. S. 47, 7 Sup. Ct. 1073. Followed in Andrews v. Eames, 15 Fed. 110; Green v. French, 11 Fed. 591.]

3. The claim of the patent, namely, "The process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upwards, as it is in boring, substantially as herein described," is a claim to a process: and the element of novelty in the process consists in driving a tube tightly into the earth, without removing the earth upwards, to serve as a well pit, and attaching thereto a pump, so that the process puts to practical use the new principle of forcing the water in the water-bearing strata of the earth from the earth into a well pit, by the use of artificial power applied to create a vacuum in the water-bearing strata of the earth, and at the same time in the well pit.

[Cited in Green v. French, Case No. 5,757; Andrews v. Cross, 8 Fed. 277; Eames v. Andrews, 122 U. S. 47; 7 Sup. Ct. 1073. Followed in Green v. French, 11 Fed. 591; Andrews v. Eames, 15 Fed. 110.]

4. The claim may also well be construed as claiming the well as a manufacture constructed according to the process described.

[Cited in Andrews v. Cross, 8 Fed. 277; Eames v. Andrews, 122 U. S. 47, 7 Sup. Ct.

¹[Reported by Hon. Samuel Blatchford, District Judge, reprinted in 2 Ban. & A. 277; and here republished by permission.]

1073. Followed in *Green v. French*, 11 Fed. 591; *Andrews v. Eames*, 15 Fed. 110.]

5. A chance operation of a principle, unrecognized by any one at the time, and from which no information of its existence, and no knowledge of a method of its employment, is derived by any one, if proved to have occurred, will not be sufficient to defeat the claim of him who first discovers the principle, and, by putting it to a practical and intelligent use, first makes it available to man.

[Cited in *Green v. French*, Case No. 5,757; *Andrews v. Cross*, 8 Fed. 277; *Maxheimer v. Meyer*, 9 Fed. 462; *Eames v. Andrews*, 122 U. S. 47, 7 Sup. Ct. 1073; *Electrical Accumulator Co. v. Julien Electric Co.*, 38 Fed. 128; *Boyd v. Cherry*, 50 Fed. 283. Followed in *Green v. French*, 11 Fed. 591; *Andrews v. Eames*, 15 Fed. 110.]

6. The question of the dedication and abandonment of his invention, by *Green*, to the public, considered. The question of *Green's* delay in applying for a patent, for more than four years after he made his invention, considered, as bearing on the question of abandonment.

[Cited in *Andrews v. Wright*, Case No. 382; *Green v. French*, Id. 5757; *Andrews v. Cross*, 8 Fed. 277; *Eames v. Andrews*, 122 U. S. 47, 7 Sup. Ct. 1073; *Beedle v. Bennett*, 122 U. S. 76, 7 Sup. Ct. 1093; *The Driven Well Cases*, 122 U. S. 47, 7 Sup. Ct. 1077. Distinguished in *Andrews v. Hovey*, 123 U. S. 269, 8 Sup. Ct. 102. Followed in *Andrews v. Wright*, Case No. 382; *Green v. French*, 11 Fed. 591; *Andrews v. Eames*, 15 Fed. 110.]

[7. Under the act of 1839 there is no abandonment unless public use of the invention more than two years prior to the application for the patent, and with the knowledge and allowance of the inventor, is affirmatively proved.]

[Cited in *Campbell v. James*, Case No. 2361.]
[See *Elizabeth v. Pavement Co.*, 97 U. S. 126; *Campbell v. Mayor*, etc., of New York, 9 Fed. 504. See, contra, *Andrews v. Hovey*, 124 U. S. 715, 8 Sup. Ct. 676.]

[In equity. Suit by William D. Andrews and others against Theodore A. Carman to enjoin infringement of reissued patent No. 4,372, and for damages. Decree for complainants.]

George Gifford, Milo Goodrich, Benjamin F. Tracy, and Joseph O. Clayton, for plaintiffs.

William D. Shipman, Samuel L. Warner, and Silas A. Robinson, for defendant.

BENEDICT, District Judge. This is a suit in equity brought by the owners of a patent issued to Nelson W. Green, on May 9th, 1871, designated as reissue No. 4372, [patent No. 73,425,] against Theodore A. Carman, for an injunction and damages because of an infringement of their patent. The case presents issues belonging to nearly every class known in patent litigations. Of the various questions so elaborately discussed before me, I shall first notice those relating to the construction of the patent.

The patent is for a process of constructing wells. In order to a correct understanding thereof, the state of the art should be first briefly explained. A well consists of a pit sunk in the earth until a water-bearing stratum of the earth is reached, from which

the water therein will flow into the pit, and a supply of water be thus obtained. Two forms of well have long been known—one, the ordinary domestic well; the other, the artesian well. In the ordinary well, the well pit is sunk to a water-bearing stratum of the earth, from which the water will, by reason of the natural forces operating upon it, as it lies in the earth, ooze or flow from the earth into the bottom of the pit, as a reservoir, in sufficient quantities for the ordinary purposes of domestic use. In the artesian well, the well pit is sunk in the earth until a water-bearing stratum is reached where the water lies under the pressure of such a head, that, when struck by the well pit, it will come into the pit so rapidly that a stream of water is produced, flowing, by the force of its own current, from the earth, into and through the well pit, to the surface. These two forms are not different in their method of operation. Both rely upon the natural forces, as they are found operating upon the water in the water-bearing stratum reached by the well pit, to force the water from the earth into the pit. In both these forms the pit has uniformly been made by loosening the earth or rock and removing it upwards and out upon the surface, either by means of the spade or the drill or augur, and the sand bucket.

In this state of the art of obtaining a supply of water from the earth, a new form of well appeared, now known as the driven well, which forms the subject of this controversy. This well embodies an idea not present in any other form, namely, that the water in the water-bearing strata of the earth may, by the application of artificial power, be forced to flow from the earth into the well pit, with increased rapidity, so that a well pit only a few inches in diameter, sunk to a moderate depth, will afford an abundant supply of water, and constitute a practical and productive well. The characteristic difference between the driven well and other forms consists in the practical application of this new idea. In previous forms, the rapidity with which water flows from the earth into the well pit is dependent upon the natural forces as they happen to be found operating upon the water lying in the water-bearing stratum to which the well pit is sunk. The driven well adds artificial power, so applied as to cause a great increase in the rapidity with which the water in the earth will flow from the earth into the well pit. The foundation of this new form of well is the discovery that, if a pipe, with an opening at the lower end, be driven into the earth, extending down air-tight until it reaches the water, and have a pump attached air-tight to its upper end, and a vacuum be created in the pipe so fitted and connected with the water in the earth, water will flow abundantly from the earth into the pipe. The novelty consists in making the well pit to consist of the

tube of a pump connected tightly with the earth. This is accomplished by driving into the earth a tube to be used as the tube of a pump and at the same time as the pit of a well. This manner of inserting the tube renders it possible, by means of a pump attached to the tube, to create a vacuum in the pit of the well, and at the same time in the water-bearing stratum of the earth.

This discovery once made, its application to the purpose of obtaining a supply of water from the earth, for the use of man, was a natural consequence; and it was at once applied to practical use, by substituting, in place of the larger excavation ordinarily made to serve as a well pit, a moderate sized tube driven tightly into the ground and having a pump attached. The advantages secured by this method are manifold. As the force with which the water will flow into the well pit is greatly increased, a tube of moderate diameter forms a sufficient well pit, thereby saving much expense and labor in constructing the well pit. Good water may, by this method, be reached when the surface water is bad. The well pit being airtight, all water is excluded except that lying in the water-bearing stratum to which the pit is sunk. By this method, a quicksand may be overcome, when it would otherwise prove an insurmountable obstacle. By this method, all danger of using water fouled by dirt or noxious matter thrown in from the surface is avoided; and, by this method, water can, in most localities, be obtained with cheapness and without delay. To these obvious advantages must be added the noticeable one, apparently demonstrated by the experiment made, that the supply of water thus obtained directly from the water-bearing strata of the earth, by the simple action of an ordinary pump attached to a tube driven tightly into the earth, is measured by the quantity of water lying in the stratum to which the tube is sunk, so that, in most instances, the supply obtained by this method is constant and inexhaustible, when the reservoir of an ordinary well sunk in the same place would speedily give out. The difference in this respect is remarkable, and apparently of great importance.

It is plain, therefore, to see that the subject under consideration has utility. It seems also plain that it is patentable as a new process. A well is not a machine, but a process. It is a method of obtaining a supply of water from the earth. No change in the qualities of water is effected by a well. The water is subjected to no treatment whereby a better article is produced. No mechanical device is necessary. A pit is sunk under such circumstances that water flows into it from the earth, and thus becomes available for use. What is accomplished by the process is, that water is obtained by the operation of the powers of nature upon the water lying in the earth.

The difference between the new process under consideration and the old is, that the pressure of the atmosphere, which, in the ordinary well, operates at the sides and bottom of the well pit, to maintain an equally distributed atmospheric pressure upon the water, whereby the flow of water into the well is made dependent upon the force of gravity, in the new process is removed from within the well pit, and ceases there to operate against the inward flow of water, so that the pressure of the atmosphere operates with its full power to force the water in the earth from the earth into the well pit, and without any opposition caused by meeting, in its flow, the pressure of the atmosphere at the sides or bottom of the pit. This process involves a new idea, which was put to practical use when the method was devised of fitting tightly in the earth, by the act of driving without removing the earth upwards, a tube open at both ends but otherwise airtight, and extending down to a water-bearing stratum, to which is attached a pump, a vacuum in the well pit, and at the same time in the water-bearing stratum of the earth, being necessarily created by the operation of a pump attached to a pipe so driven.

It has been supposed by the counsel for the defence, that the invention under consideration must consist of some new instrument, machine, or mechanical device, and they say: "The well, consisting of a vertical shaft with a reservoir of water at the bottom, being known, in all its varieties, from time immemorial, what was there for any one to invent? Clearly, nothing but some new instrument, machine or mechanical device for sinking the shaft down to the water, or of raising the water to the surface. It is impossible to conceive any other field of invention connected with the subject." Here is disclosed a clear misapprehension. The novelty of the process under consideration does not lie in a mechanical device for sinking the shaft or raising the water to the surface, but in the method whereby water, by the use of artificial power, is made to move with increased rapidity from the earth into the shaft, whence it results, that a tube but a few inches in diameter, driven down tightly to a water-bearing stratum of the earth, affords an abundant supply of water to a pump attached thereto, and constitutes a practical and productive well. Such an invention is without the field of mechanical contrivance. It consists in the new application of a power of nature, by which new application a new and useful result is attained. There is no new product, but an old product—water—is obtained from the earth in a new and advantageous manner.

There can be no patent for a principle; but, "for a principle so far embodied and connected with corporeal substances as to be in a condition to act, and to produce effects, in any trade, mystery or manual occupation,

there may be a patent." The idea or principle of forcing water from the earth into a well pit by the use of artificial power is new, but is not by itself patentable. The idea, when made available by a method whereby it is put to practical use, is patentable as a process, and is thus secured to the person who has conceived the idea and invented the method. That method, in the present instance, consists in accomplishing the result first conceived by the inventor to be possible, by creating a vacuum in the water-bearing stratum of the earth and at the same time in the well pit, by means of a tube projected into a water-bearing stratum of the earth, and connected tightly with the earth, to which tube a pump is attached at the upper end. This constitutes "a combination or arrangement of processes to work out a new and useful result." It is "a process combining instrumentalities before known, but not employed together, to accomplish a new and useful result." The elements of the process may be old, but, when combined for the purpose of putting to practical use the new idea of forcing water in this way from the earth into a well pit, they constitute a new and useful process, within the meaning of the patent laws.

I have now pointed out what, in the light afforded by the history of the art, appear to me to be the patentable features of the structure known as the driven well. These views I conceive to be in harmony with the law upon this subject, as declared by the authorities, and to derive support from the following cases: *Roberts v. Dickey*, [Case No. 11,899;] *McClurg v. Kingsland*, 1 How. [42 U. S.] 202; *Foote v. Silsby*, [Case No. 4,919;] *Le Roy v. Tatham*, 22 How. [63 U. S.] 132; *Nelson v. Harford*, 1 Webst. Pat. Cas. 310; *Tilghman v. Morse*, [Case No. 14,044;] *Crane v. Price*, 1 Webst. Pat. Cas. 377.

I next proceed to examine the language of the patent upon which this action is founded, in order to determine whether the invention I have thus described is secured thereby. And here I meet one of the many sharp issues of this controversy; for, while the eminent counsel for the plaintiffs is clear that the patent does describe and cover such an invention, counsel on the other side, also eminent, contend with great earnestness, that the patent describes and covers nothing but the process of making a hole in the ground, and declare that the "pretended invention is a fabrication as discreditable as the patent is absurd." It is not difficult to agree with counsel that the patent is absurd, if it be true that it describes nothing but the process of making a hole in the ground. On the other hand, it is not easy to understand how a patent for nothing but the process of making a hole in the ground could be the result of the vigorous contest waged before the examiner, the examiners-in-chief, and the commissioners of patents, and also, on appeal, before the ex-

perienced judge of the supreme court of the District of Columbia, which was supposed to have terminated successfully for the inventor, when it was finally decided, upon appeal, that a patent must issue to Green for the invention described in his "broad claim." It seems natural to suppose, that a patent issued under such circumstances was intended to cover something more than the process of making a hole in the ground; and I think it can be shown, that the language of the patent, when construed according to the settled rules applicable in such case, does cover something more, and secures the invention I have above endeavored to describe.

The language of the claim may be first considered. It is as follows: "What I claim as my invention, and desire to secure by letters patent, is, the process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upwards, as it is in boring, substantially as herein described." Here the invention is stated to be "a process of constructing wells," not a process of making holes. A well is more than a hole. As has been shown, it is a process of obtaining a supply of water from the earth. The words, "the process of constructing wells, substantially as herein described," are, therefore, equivalent to "the herein described process of obtaining a supply of water from the earth."

Nor is the scope of the claim, as thus understood, limited by the other language of the claim, wherein it is stated that an instrument is to be driven, and driven into the ground, and driven until it is projected into water, and so driven that the earth is packed tightly around it—for that is the necessary result of driving the instrument without removing the earth upwards—and, when so driven, is to remain. Here is described the characteristic feature of the process of constructing a driven well, but no well is described. Not even a hole in the ground is described; for, it is not stated that the instrument driven into the ground is to be withdrawn, or that it is to be hollow. To suppose, therefore, that it was the intention to secure no more than the operation described in the claim, as being a process for constructing a well, is to suppose an absurdity. The operation described in the claim not only will not produce a well, but it is no step in the operation of constructing any kind of a well, except the driven well. The claim points out that an instrument is to be driven to form a well pit, but how it can be that a well pit is the result of such an operation is not pointed out in the claim. Plainly, it was not intended, by the language of the claim, to describe fully the invention intended to be covered by the patent. Necessarily, therefore, and naturally, we are referred by the claim to the specification, for the full descrip-

tion of the process which the patent was intended to secure. In the specification, we find stated more clearly the distinguishing feature of the process, wherein it differs from any process before adopted for procuring a supply of water from the earth; for, the specification says, that an instrument is to be driven into the ground until it reaches water, having the earth packed tightly around it. It is by means of this packing of the earth tightly around the tube, that the force developed by the creating of the vacuum in the well pit is brought to bear directly upon the water lying in the water-bearing stratum, to force it into the well pit; and this driven tube forms the well pit of the new invention, for, as stated, it is to be a tube made air-tight throughout its length, except at its lower end, where are to be perforations for the admission of water, and through and from which the water may be drawn by a pump. The specification also mentions the vacuum, and points out where it is to be created, for, a vacuum must of necessity be formed in the well pit and in the water-bearing stratum, by operating a pump attached to such a tube, so driven into the earth.

I find, therefore, in the specification of this patent, either set forth in terms, or by necessary implication, all the elements of the process known as the driven well; and this description is such, that no one can perform the operation thus described, without obtaining a supply of water by the process under consideration, and by the use of the same idea which it is claimed was first conceived by Green.

Neither is there anything in that part of the specification stated to be made with reference to the drawings, to enable the process to be put to use, which excludes this invention from the patent. It is there said, that the tube may be contracted at its lower end, but it is also carefully stated, that the contraction must be "slight," and only to insure an easy passage to the place to which the tube is to be "driven or forced," thus maintaining the necessary feature of a tight connection between the tube and the earth, effected by the driving of the tube without removing the earth upwards, upon the preservation of which the success of the process depends. So, it is stated that the diameter of the tube to be driven may be "somewhat" smaller than the diameter of the well. Still, it is plain that the tube is always to be driven, whence, of necessity, it results that the earth is packed tightly around it.

But, it is said that the specification covers a flowing well, in which the features of the driven well do not exist. It is true, that the patent contains the statement, that, "in some cases, the water will flow out from the tube without the aid of the pump;" but, it will be observed, that this statement of a fact is not contained in the description proper of the invention. The specification first states

in what the invention consists. Then, to enable others to use the invention, a description is given with reference to drawings; and, following this, is the statement under consideration, which can properly be considered to be simply the statement of a circumstance that sometimes occurs in conducting the operation, and which, when it does occur, obviously renders it unnecessary to go further in the operation by adding the pump, which, plainly, is supposed to be necessary in all cases where such a stream of water is not struck.

It thus appearing that the invention claimed by Green is found described in his specification, inasmuch as no violence will be done to the language of the claim by construing it to cover the invention, it is the clear duty of the court so to construe it. "If, by examination of the specification, and applying it to the then existing state of the art, we can learn what the invention was, then the claim, which was designed to be a condensed summary of the invention, is to be construed so as to be co-extensive with the invention, if that can be done without doing violence to its language." *Whipple v. Middlesex Co.*, [Case No. 17,520.] See, also, *Waterbury Brass Co. v. New York Brass Co.*, [Case No. 17,256;] *Le Roy v. Tatham*, 14 How. [55 U. S.] 181; *Haworth v. Hardcastle*, 1 Webst. Pat. Cas. 480; *Turrill v. Railroad Co.*, 1 Wall. [68 U. S.] 491. So construed, this patent becomes co-extensive with the discovery, and secures an exclusive right to use the new idea or principle put to practical use by the new process described; for, to use the language of the defendant's counsel: "If Green invented a process, it was not in fact dependent on the particular form of the instrument, nor does his specification so claim it." The right secured by the patent is not, then, the right to certain instruments, nor to a combination of instruments, but it is the right to use his discovery in any method presenting the characteristic features of his method, and accomplishing the same result in substantially the same way.

But, it is said, that the evidence shows that no such idea or process was in the mind of Green at the time when he claims to have made his invention. As I view the testimony, the contrary of this is shown. Not to mention the testimony which Green now gives, when he describes his invention, there are several witnesses who heard him describe his invention at the time when he claims to have made it, and what they say he then disclosed as his new method of obtaining a supply of water from the earth, appears to be a complete description of the invention covered by the patent, as I have construed it. The proofs show that the patentee not only conceived this process and put it in operation, but stated, in terms, that its success depended upon a vacuum being formed by the pump, and that the tight connection between the earth and the well pit,

by the act of driving the tube, was necessary to enable the vacuum to produce the sought for result upon the water lying in the earth.

Furthermore, it may be remarked, as bearing not only upon the language used by Green when he first described his invention, but also upon the language used in the patent, that the statement that a pump is to be attached to a tube forming a well pit, and driven to a water-bearing stratum without removing the earth upwards, involves, by necessary implication, the idea of a vacuum in the earth and in the well pit, as such a vacuum must result from the operation of the pump, provided the tube be driven tightly in the earth, as described. And this leads to the further remark, that the idea of a pump to be attached to the tube forming the well pit seems necessarily to be involved in the idea of using a tube as is described for the pit of a well. The sole object of the well being to obtain a supply of water, and it being manifest that water could not be procured from such a tube by hand or bucket, the statement that such a tube is to be the well pit, carries with it the idea of a pump attached thereto, that being the only practical method by which water could be drawn from such a tube.

I, therefore, understand this patent to be a patent for a process, and that the element of novelty in this process consists in the driving of a tube tightly into the earth, without removing the earth upwards, to serve as a well pit, and attaching thereto a pump, which process puts to practical use the new principle of forcing the water in the water-bearing strata of the earth from the earth into a well pit, by the use of artificial power applied to create a vacuum in the manner described.

But a somewhat different reading of the patent may be adopted, and supported by authority high in this court upon such a question. The claim, it will be recollected, states the invention to consist of "the process of constructing wells, substantially as herein described." This language is nearly identical with that which came under the consideration of Mr. Justice Nelson, in *Many v. Jagger*, [Case No. 9,055.] There, the claim was for the manner of constructing wheels "with double convex plates, one convex outwards and the other inwards, and an undivided hub, the whole cast in one piece, as herein fully set forth." This language was held to secure the thing made by the process described. There was, it was there said, no claim to the parts of the wheel taken separately and distinct from the perfect wheel, but the claim was for the entire wheel, as the patentees had constructed it, as a new manufacture. There was no novelty in the parts taken separately, but the "instrument," that is, the wheel produced in the manner described, was held to be secured by the claim. The form was held not to be material,

as the wheel was one of those manufactures where the particular form of the thing is not essential to its utility. In the present case, then, the well may be taken to be a manufacture, and the claim of "a process of constructing wells," like the claim of "a manner of constructing wheels," will cover all wells constructed according to the process described, without regard to form, and whether the parts taken separately be new or old. See *Many v. Jagger*, [Id. 9,055.] See, also, *Goodyear v. Central R. Co.*, [Id. 5,563.]

I have now to speak of a third construction of this patent, which has been strenuously contended for. It has been supposed that this patent can be upheld as being for an operation claimed to be new, as an operation in the process of making a well, or in its association with other operations of making a well, namely, the making of a well pit by forcing an instrument into the ground and moving the earth only laterally. The point of the invention is, by this construction, made to consist in a new manner of constructing the well pit, that is, by puncturing instead of excavating. The great stress which has been laid upon this view of the patent by counsel so learned, the opinion expressed by the expert called by the plaintiffs, and the vigor of the opposition made to such a construction, have led me to pause and consider whether I must not have fallen into error in supposing that the patent can rightfully be held to cover and secure, not a process of sinking a well pit, but the process of obtaining a supply of water from the earth, which I have found to be detailed in the specification, and endeavored to describe. But, the view I have expressed is so firmly impressed upon my mind, that I shall rest my decision upon it, and leave the more learned judges before whom the patent must shortly come to detect my error, and to uphold or destroy the patent as being for a method of sinking a well pit by puncturing instead of excavating.

The interpretation I have thus given to the patent renders it unnecessary to pass upon the evidence in the case, given to show that, prior to the time when Green claims to have made his invention, well pits had been sunk by puncturing the earth.

Was Green the man entitled to secure the invention which his patent describes? The evidence is convincing, that Green first conceived the idea, explained his idea to others, and caused the feasibility of his process to be tested by actual experiment. Comment has been made upon the fact that the particular tools and devices used in constructing the first wells made were not pointed out by Green. But, such comment loses its force, when it is considered that the tools and devices employed in sinking the shaft form no part of the invention claimed by Green. The invention consists in the method of putting to a practical use the new idea or principle of increasing the productive capac-

ity of a well, by forcing water directly from the earth into the well pit, artificial power being employed to create, by the operation of a pump attached to a tube driven tightly into the earth, a vacuum within the tube and the water-bearing stratum into which it is projected, whence follows an increased pressure upon the water in the earth towards the well pit, and an abundant supply of water is afforded to the pump. This conception was of such a character, that, when described, there was left nothing to be done but to test its correctness by an experiment so simple, and involving the use of means in such common use, that it could be fully tested by any one, upon the mere statement of the idea. In the present instance, the process was, at the outset, put to the test of an experiment conducted near Green's house, in his presence, and under his directions. His idea, and his process of putting it to a practical use, then became part of the property of the public, available for the purposes intended, unless it be secured by the patent in question. Subsequent experiments are spoken of in the evidence, which may properly be claimed by Green as his experiments, for, they were conducted in pursuance of his directions, by those acting at the time under his orders.

Furthermore, it should be remarked, in this connection, that, when Green first stated his idea and described his process, there were two points of doubt—one, whether force could be called into operation by the creation of the vacuum, sufficient to overcome the resistance of the soil, and afford a supply of water to the pump; the other, whether, practically, a tube could be driven to a water-bearing stratum of the earth under various conditions of soil, always excluding, of course, rock formations. The general utility of the invention depended upon the result of tests applied to the latter of these points of doubt. A wide range of subsequent experiment might, therefore, well be allowed for such an invention, notwithstanding the circumstance that the first experiment proved that the principle was sound, and could be usefully applied in some circumstances.

Upon this branch of the case, the contention has been, whether Green was the inventor, or Byron Mudge, the person who, under the direction of Green, conducted the early experiments; and a patent issued to Mudge, October 24th, 1865, is set up in the answer. The defendant does not, however, claim under Mudge's patent or under any patent. In fact there is no patent to Mudge, as his original patent was surrendered, and, upon his application for a reissue, a case of interference between him and Green was declared, which, after a severe contest, upon a large amount of testimony, and after careful argument, was decided in favor of Green. No patent to Mudge is, therefore, in this case, nor is Mudge called as a witness. But

the defendant contends, as he may rightfully do, that the evidence shows Mudge to have been the inventor, and not Green. I cannot find, upon the evidence, that this defence is sustained. On the contrary, it appears quite clearly that the inventor was Green.

A patent to James Suggett is also set up. That, however, is not a patent for a process, but for a combination which does not involve the use of Green's process, and to which Green makes no claim.

The whole question of prior use may at this place be disposed of. The answer sets up, that Green's process had been long before described in Ure's Dictionary of Arts and Manufactures, as well as in McKenzie's Five Thousand Receipts, and had been used in certain wells, constructed prior to the date of his invention, in the towns of Cortland, Ithaca, Dansville, Napierville, and Dexter, and in the salt wells at Syracuse. In respect to a well claimed to have been constructed by Stephen R. Hunter, at his planing mill in Cortland, I am compelled to the conclusion, that no such well was made at the time stated. In respect to the other wells as to which proof is given, a critical examination of the evidence would be here required, if the patent under consideration were considered to be a patent for the mere process of making the pit of a well, without removing the earth upwards. Over these wells there has been an extended controversy as to whether, in any of them, the well pit was constructed without removing the earth upwards. However this may be, it cannot be successfully contended that the evidence affords room to claim that any one engaged in the construction of these wells had, at that time, conceived the idea of using artificial power to force water directly from the earth into a well pit, as a means of obtaining an increased supply of water, or that any one of these wells presents the characteristic feature of Green's method, whereby the above idea is utilized and made practically available to accomplish that result. It becomes unnecessary, therefore, for me to determine whether or not the pit of any of the prior wells was constructed by puncturing or by excavating. The remark already made is also applicable to the evidence given in respect to the manner of sinking the salt wells. Plainly, the salt wells do not anticipate the process invented by Green. Nor is his process described in the printed publications set up in the answer; and, upon the evidence, it must be held, that the principle of Green's process was first conceived by him, and by him first made a practical and operative feature in a well.

It is, of course, true, that, prior to Green's invention, water had been pumped from a hole in the ground, and from a small hole. Doubtless, it is also true, that, in some such case, where a pump had been inserted in a small hole, for the purpose of raising there-

from the water found therein, the principle of Green's invention may at times have been called into operation. No such case is here proved; but, if such fact were proved, Green's right to a patent would not thereby be defeated. A chance operation of a principle, unrecognized by any one at the time, and from which no information of its existence, and no knowledge of a method of its employment, is derived by any one, if proved to have occurred, will not be sufficient to defeat the claim of him who first discovers the principle, and, by putting it to a practical and intelligent use, first makes it available to man.

As bearing upon the question whether the idea claimed to have been conceived by Green, and to have been put to practical use by him in his process, had before that been known and applied, it should also be noticed, that, while the advantages of the process claimed by Green are many and obvious, and, although, since the date claimed for his invention, numerous patents have been issued—some one hundred and fifty, I think, the evidence shows—for instruments to be used in putting down the tubes of such wells, no application for any such patent appears to have been made before that time. Moreover, the invention, when it was announced by Green, was received as a novelty, and, since then, an extensive business of constructing driven wells has sprung into existence, a business of such importance that the number of driven wells since constructed is computed by hundreds of thousands. In this state alone, the number is stated by a witness to be one hundred and fifty thousand and upwards. The change in the art of well making which the evidence discloses, of itself goes far to prove novelty. Indeed, when it is considered that the methods in use for obtaining a supply of water from the earth are matters of common knowledge, and that a well is a thing of every day use, everywhere, reference may be made to the common knowledge of mankind to show that it has not always been understood that a supply of water may be obtained in almost any place by simply driving down tight in the earth a tight tube and attaching thereto a pump. Even now, it is doubtless a new thing to many, to be told that, if an ordinary well, from which the water is drawn by a pump, be filled up with dirt and the dirt packed tightly about the pump, the productiveness of the well will be thereby increased.

My conclusion upon this branch of the case, therefore, is, that the invention of Green has not been shown to have been anticipated, and is properly claimed by Green as a new and useful invention made by him.

I come now to consider the question of dedication and abandonment, which is presented by the evidence here, and is a question as important as any raised in the case. It is contended that Green, at the time of his

invention, dedicated it to the public, and also that he abandoned it as not worthy to be patented. The law pertinent to this branch of the inquiry is the law in force prior to January, 1866. By the patent act of 1870, as well as by the Revised Statutes, all rights previously acquired were preserved. The law governing here is to be found, therefore, in the acts of 1836 and of 1839, as those statutes have been interpreted and applied by the courts.

The facts relied upon as showing a dedication of his invention by Green, are, that he permitted a well made by his process at the Fair Grounds, in Cortland, where the 76th New York regiment, of which he was colonel, was then stationed, to be there publicly used, and that he arranged for providing tubes to be taken with his regiment when it should move, in order to supply it with water when in hostile localities. That these facts do not amount to a dedication, I think, is plain. The occasion which called forth this invention was the rumor that the rebels were intending to poison the wells in places where the Union armies might come, and the report that some part of the Union army had been compelled to surrender for want of water. There was supposed to be a necessity for some form of well that would be tight, to prevent the possibility of poison, and that could be constructed quickly, cheaply and easily, so as to be available for a moving army. Under the pressure of this supposed necessity Green conceived the idea of his well, and also devised the method by which that idea could be put to practical use. Once conceived, a very simple experiment would test the soundness of the position he had taken and maintained, in discussions had respecting his plan, that it was possible to force water from the earth into the pit of a well, by using a tube driven tightly into the earth for a well pit, and creating a vacuum therein by a pump attached. This experiment, as the evidence shows, was made under the direction of Green, and in pursuance of the directions he had given, at or near his house in Cortland. The first experiment was a success, in this, that it proved the possibility of obtaining a supply of water by this process; but, of course, it could not prove that a tube could be driven down to a water-bearing stratum in all localities, with the cheapness and dispatch necessary to render the process one of general utility. It was natural, therefore, to suppose, that, before the process could be declared to be satisfactory, other experiments, in other and different localities, should be made. He could, by law, use his invention for this purpose, and permit it to be used, for two years, without forfeiting his right to a patent. Under such circumstances, it would be going far to say, that his act of permitting the use of his process at the camp in Cortland, where his regiment was then in camp, and of providing material wherewith to construct such wells

for his regiment when it should move into hostile territory, amounted to a dedication of his invention to public use, and worked a forfeiture of his right to it.

But, it is said, that the patent is invalid under the provision of the act of 1839. The act of 1839, as has repeatedly been held, has no effect to invalidate a patent, unless there be proof of a use of the invention more than two years prior to the application for the patent, and that such use was with the knowledge and allowance of the inventor. Here, there is no evidence of any use or sale of the invention by Green, prior to his application for a patent. Nor is there any direct proof of knowledge on his part of any such use or sale by others, during that period. There is, however, evidence, that, within two years prior to Green's application, some wells called driven wells were sunk in Cortland, and, as it is claimed, under such circumstances of publicity and locality, as to compel the inference that Green knew of the use of his process in their construction. It cannot be denied that knowledge of the putting down of some of these wells on the part of Green, seems highly probable. Still, there is no direct evidence of such knowledge, and Green denies the knowledge under oath. Furthermore, two witnesses produced by the defence, who also resided in Cortland, and one of whom was a justice of the peace, being asked as to these wells, say that no knowledge of such wells came to them. It seems necessary, therefore, to conclude, that the existence of those wells was not so notorious as to compel the inference that they were known to Green.

Here it may be noticed, also, that wells put down by James Suggett were under a patent issued to him March 9th, 1864, which patent was for a combination of three instruments—an iron perforated tube, a pointed plug to use as a drill, and a pump,—*Haselden v. Ogden*, [Case No. 6,190,]—and which it is a mistake to suppose necessarily involved the use of the process claimed by Green. It does not, therefore, follow, that knowledge of the fact that Suggett had put down wells in Cortland necessarily amounts to notice that the process of Green was being employed by Suggett. The rule of law being, that "proof of knowledge and acquiescence must be beyond all reasonable doubt, as every presumption is the other way,"—*Jones v. Sewall*, [Id. 7,493,] *Clifford, J.*,—I am of the opinion that Green is entitled to the benefit of the doubt raised by his own oath and the testimony of the two Hunters.

Again, it is contended that the acknowledged fact that Green made no application for a patent till January, 1866, between four and five years after the date of his invention, shows an abandonment of the invention. But, says Woodruff, J.: "Lapse of time does not, per se, constitute abandonment. It may be a circumstance to be considered. The circumstances of the case, other than mere

lapse of time, almost always give complexion to delay, and either excuse it or give it conclusive effect. The statute has made contemporaneous public use, with the consent and allowance of the inventor, a bar, when it exceeds two years. But, in the absence of that, and of any other colorable circumstances, we know of no mere period of delay which ought, per se, to deprive an inventor of his patent." *Russell & Erwin Co. v. Mallory*, [Case No. 12,166.]

In the present instance, the circumstances attending the delay are unusual, and, as I consider them sufficient to excuse a delay which certainly must be deemed extraordinary, a statement of these circumstances seems necessary. I premise the statement by repeating, that, upon the evidence, there is no room to doubt the fact that Green, at the time of his invention, claimed to have made a valuable discovery and to have invented a new process; and, furthermore, that he then declared an intention to secure his process by patent, and expressed his belief that large profits would accrue to him therefrom. At that time, Green, who had been partly educated at West Point, was engaged in organizing a regiment at Cortland, his residence, and was expecting soon to take part in the war of the rebellion. Within a few days after his invention, in the discharge of what seemed to him to be his duty, he felt compelled to shoot one of the captains of his regiment, named McNett. The shot was not mortal, but inflicted serious injury. In the then state of the public mind, this occasion gave rise to intense public excitement, out of which sprang a controversy of extraordinary bitterness, involving numerous persons and continuing for several years. The effect upon Green was disastrous in the extreme. He was suspended from his command, then tried by a court of inquiry, at Albany, and reinstated in command. His regiment, after having, it is said, required the protection of a battery to save it from violence at the hands of evil-disposed people of the county, removed to Washington, where Green was relieved from his command, and then dismissed the service, and subjected to military charges. He was, in addition, harassed by civil suits brought to charge him with personal liability for articles used by his regiment. He was also arrested, and then indicted, for the shooting of McNett, and, after repeated postponements of the trial, effected because of the excited state of the public mind, was tried in 1866, and, the jury having disagreed, was discharged. During this period, he also became involved in church difficulties arising out of the shooting of McNett, was expelled from the church and compelled to appeal to the Bishop, and also became involved in litigation with the pastor of his church. His efforts during this period to secure a reversal of the order dismissing him from the service were constant and ab-

sorbing, and were attended with such anxiety of mind as to give rise to the charge that he was insane. This state of things continued up to 1866, during which period he was of necessity often absent from Cortland, at Albany and at Washington; and he devoted his entire time to the controversy in which he had become involved, abandoning all other occupation, and exhausting all his means. The pressure of these circumstances was such, that he became discouraged and despondent, and was in fact driven near to madness. The extraordinary nature of the circumstances in which the man was placed during these years is fully proved, by many witnesses of character. These circumstances certainly give complexion to his omission to secure his invention by patent, and serve to furnish a proper excuse for such omission. In regard to a man so circumstanced, it would hardly be safe, in face of his positive oath to the contrary, to infer an intention to abandon an invention which evidently he always considered of great importance. This conclusion is strengthened by the uncontroverted fact, that when, in November, 1865, Green saw, by an advertisement in the papers, that driven wells were being put down, although he was advised by counsel defending him on the indictment, not to apply for a patent, as he would thereby increase the number of his enemies, and prejudice himself on the trial of the indictment then about to come on, nevertheless he did then, and in opposition to the advice of his counsel, file his application and assert his right to the invention. I conclude, therefore, that, upon the facts of this case, it must be held that the defendant has not produced that full measure of actual proof which is necessary to sustain the defence of abandonment.

I have now disposed of all the issues which have been seriously contested in this important case. There are several objections taken to the patent as a reissue, but they have not been greatly pressed, and I do not find in any of them ground for declaring the reissue void. I have given to these objections all the attention they appear to deserve, but it seems hardly worth while to extend this opinion by a statement of the reasons which have led me to reject them. I content myself with saying, that I consider the original patent to have been for a process, as is the reissue, and that the process I find described in the reissue is also to be found described in the original patent.

As to the question of infringement, I do not understand that it is disputed. At any rate, it is clearly proved. There must, therefore, be a decree for the complainants, in accordance with the prayer of the bill.

[NOTE. Patent No. 73,425 was granted January 14, 1868, to N. W. Green, reissued May 9, 1871, No. 4,372. For other cases involving this patent, see note to *Andrews v. Denslow*, Case No. 372.]

ANDREWS v. CASE.

[See *Andrews v. Spear*, Cases Nos. 379 and 380.]

Case No. 372.

ANDREWS et al. v. DENSLow et al.

[14 Blatchf. 182; 2 Ban. & A. Pat. Cas. 587.]
Circuit Court, E. D. New York. April 5, 1877.

EQUITY PRACTICE—DECREE PRO CONFESSO—SETTING ASIDE—LACHES.

In a suit in equity on a patent, a preliminary injunction was granted, on notice and without opposition. Afterwards a decree pro confesso was entered, and a reference ordered, which was commenced, and witnesses were examined, and the defendants produced their accounts and attended by counsel. Afterwards they moved to set aside the decree and for leave to file an answer, alleging matters which had been set up in a prior suit on the patent and overruled by the court, and sundry new matters. No mistake or misapprehension or neglect of counsel was alleged. The plaintiffs offered to limit their recovery to \$500, which would be less than the expense to the defendants of trying the issues. The defendants had ceased to use the patented invention: *Held*, that the motion must be denied, on the plaintiffs stipulating to limit their recovery to \$500.

[In equity. Bill by William D. Andrews and others against Walter P. Denslow and others to enjoin the infringement of patent No. 73,425, and for an accounting. Heard on defendants' motion to set aside a decree pro confesso which had been entered. Motion denied upon plaintiffs' stipulation to limit their recovery to \$500.]

Tracy & Catlin, for plaintiffs.

Betts, Atterbury & Betts, for defendants.

BENEDICT, District Judge. This case comes before the court upon a motion to set aside a decree taken pro confesso. The action is founded upon the reissued patent of Nelson W. Green, dated May 9th, 1871, reissue 4,372, for what has been termed "the driven well." The action was commenced in July, 1876. A motion for an injunction was noticed for the 28th day of July, at which time no opposition was made, and the injunction was granted. On the 3d of November, a decree pro confesso was taken, no answer having been filed, which decree was regularly signed and entered on November 10th, and a reference to ascertain the amount of the damages was directed. Such reference was thereafter commenced, and several meetings were had and witnesses examined, at which meetings the defendants were represented by counsel. No application was made to set aside the decree until December following. During this period negotiations were being undertaken with a view to an agreement as to the amount of damages, in the course of which the defendants stated that they had no intention of defending the case, and ten-

[Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 2 Ban. & A. 587; and here republished by permission.]

dered a sum of money for the damages. Now the defendants apply to have the decree set aside, and for leave to file an answer. No excuse is presented for the omission to answer at the proper time. The statement of the defendants, that "they had no idea there was any hurry about the matter," and that "the papers were printed, and I was extremely busy at the time, and I did not pay any special attention to them, or know their exact character," shows that there is no excuse; and the facts warrant the conclusion that the decree was suffered because the defendants had then no intention of defending. The intention to defend was subsequently formed, after the decree in question had been entered, and after the reference had been proceeded with. The decree sought to be set aside was regularly entered. Rule 18 does not require special notice of an application for a decree, when no answer is filed. Besides, here, the defendants and their attorneys knew that the decree had been entered, and they actually attended upon the reference to ascertain damages, where they produced their accounts, and witnesses were examined, without objection, although they were then represented by counsel, and this without the suggestion of an intention to contest any other question save that of the amount of damages.

I do not, on this motion, consider whether the defence set up in the answer which the defendants are asking permission to file, can be successful or not. A part of the matter set up has been considered by this court in an action similar to the present, brought against Carman, and, so far as this court is concerned, that portion of the answer has been disposed of and will not be again examined here. The other part of the answer, wherein is set forth certain patents and publications that have as yet never been presented to this court, which are supposed to show a prior description of the subject-matter of this patent, doubtless contains matter as to which the decision of this court can properly be invoked, when duly presented for determination. It may, therefore, for the purposes of this motion, be assumed that the answer discloses a meritorious defence. The question presented, then, is, whether the possession of a meritorious defence gives the defendants a right to have a regular decree pro confesso set aside, without regard to other circumstances. I know of no such rule. To entitle a defendant to be relieved from such a decree there must be a meritorious defence, and it must also appear, that, as between the parties to the action, equity requires that the defendant be allowed to interpose his defence. In the present case, no such equity exists, for the reason that the plaintiffs offer to limit their recovery to the sum of \$500, which, it is plain to see, is less than the expense to which the defendants would be put, in case of a trial upon the issues raised by

the answer. As to the injunction, the defendants make no objection, having ceased to use the plaintiffs' patent.

This is, then, a case where the plaintiffs obtained a regular decree pro confesso, not by means of any mistake or misapprehension of facts, or neglect of counsel, but through the deliberate intention of the defendants not to defend, and where the defendants now ask to be relieved from the effects of their omission to answer, although the result of granting such relief will be of no advantage to them and a disadvantage to the plaintiffs. For, it is apparent, from the nature of the action and of the questions involved in controversy, that holding the decree will, in view of the damages asked, require of the defendants no greater outlay of money than will be required by the trial which they seek; while, if the decree be set aside, the plaintiffs will thereby be put to large expense. A trial under such circumstances would seem to be a waste of money. The legal right of every citizen to spend money in litigation is not to be doubted, but it is a right that can be abandoned. In a case like the present, equity requires it to be held that the abandonment by the defendants of their right to defend upon the merits was final, and that the plaintiffs cannot be required to surrender their decree regularly obtained and deliberately suffered. The motion is, therefore, denied, upon the plaintiffs stipulating to limit their recovery to the sum they have named, \$500.

[NOTE. Patent No. 73,425, was granted to N. W. Green, January 14, 1868, reissued (No. 4,372) May 9, 1871. It has been the subject of litigation in the following cases: Andrews v. Carman, Case No. 371; Same v. Wright, Id. 382; Same v. Cross, 8 Fed. 269; Same v. Long, 12 Fed. 871; Same v. Creegan, 7 Fed. 477; Green v. Gardner, 22 O. G. 683; Andrews v. Eames, 15 Fed. 109; Green v. French, 11 Fed. 591; Andrews v. Spear, Case No. 379; Green v. Barney, 19 Fed. 420; Andrews v. Hovey, 16 Fed. 387.]

Case No. 373.

ANDREWS v. DOLE et al.

[11 N. B. R. (1875,) 352.]

District Court, D. New Jersey.

BANKRUPTCY—FRAUDULENT CONVEYANCES—STATE OF LIMITATIONS—LAGUES.

[A debtor executed a fraudulent conveyance of his real estate in 1865, and in 1867 passed into bankruptcy. On June 12, 1874, the assignee filed a bill attacking the conveyance, alleging that the grantor had retained possession of the property after the conveyance, and received the rents and profits thereof, and containing no averments showing that plaintiff had taken steps or made inquiries to ascertain the bona fides of the conveyance, but merely averring that he was ignorant of the fraud until informed of the facts June 14, 1872. Defendants pleaded the limitation of two years prescribed by Act March 2, 1867, § 2. Held, whether the statute began to run from the date of the appointment of the assignee or from the discovery of the fraud, it was a bar in this case, for want of due diligence in discovering the fraud.]

[In bankruptcy. Bill by Isaac M. Andrews, assignee in bankruptcy of Nathaniel Dole, against said Nathaniel Dole and others, to set aside, as fraudulent, transfers of his property made by said bankrupt. Delos E. Culver, made defendant as trustee, demurred to the bill. Demurrer sustained.]

G. W. Lockwood, Jr., for plaintiff.

R. Gilchrist and F. N. Bangs, for defendants.

NIXON, District Judge. This is a bill filed by an assignee in bankruptcy to recover certain real estate and personal property, alleged to have been transferred by the bankrupt in fraud of his creditors. The bill charges that the defendant, Nathaniel Dole, was adjudicated a bankrupt June 27, 1867, in the southern district of the state of New York; that the complainant was appointed assignee October 12, 1867, and that an assignment was duly made to him of all the estate and effects of the bankrupt, pursuant to the 14th section of the act; that Dole was engaged in business as a banker and broker in the city of New York in November, 1863, under the name and firm of Dole & Company, and continued in said business until March 14, 1864, when the firm failed and became insolvent, having liabilities to the amount of about five hundred thousand dollars; that at the time of said failure Dole was the owner of large tracts of real estate in Jersey City, New Jersey, and also the owner of 18,640 shares of the capital stock of the defendant, the Weehawken Ferry Company, of the par value of fifty dollars per share (the capital stock of the company being 20,000 shares), and also the owner of an indebtedness due to him from the said company, for moneys advanced, of about one hundred and forty-eight thousand dollars; that, shortly after the failure of Dole & Co., the said Dole conspired with one of the defendants, Jules S. De La Croix, to cheat and defraud his individual creditors, and the creditors of the said firm, by putting the title of his property in the name of the said De La Croix; that, in pursuance of this fraudulent design, he executed transfers of property as follows: (1) A deed from Dole and wife to the said De La Croix, dated March 30, 1864, for 18 52-100 acres of land, and duly recorded in the clerk's office of the county of Hudson, in Book 109 of Deeds, fol. 239; (2) one other deed, of the same date, for 71 87-100 acres, and recorded as aforesaid in Book 109 of Deeds, fol. 252; (3) one other deed, dated April 6, 1864, for 77½ acres, and recorded as aforesaid, in Book 107 of Deeds, fol. 557. That on the 31st of December, 1864, with the like fraudulent intent, he transferred to said De La Croix 18,640 shares of the capital stock of the Weehawken Ferry Co., and also his claim of indebtedness for one hundred and forty-eight thousand dollars against the said company; that the only consideration received

by Dole for the said property was the promissory notes of De La Croix, amounting in the aggregate to fifty-two thousand dollars; that said De La Croix was the brother-in-law of Dole, residing in Newburyport, Massachusetts; that he was, and is, wholly irresponsible and without pecuniary means, and dependent upon said Dole for his support.

The bill further alleges, that on the 11th of August, 1865, Dole and his wife executed a new conveyance of the same real estate to the said De La Croix for the pretended consideration of two hundred and fourteen thousand dollars, in which the said land was more particularly described by metes and bounds, which last-mentioned deed was recorded as aforesaid in Book 122 of Deeds, fol. 627; that no consideration was ever paid for the said property by the said De La Croix, or for any part thereof; that Dole did not part with the possession, nor deliver the same or any part thereof to De La Croix; but, on the contrary, resided on the property during the years 1864 and 1865, and has held, possessed, controlled, managed, and enjoyed the same and the proceeds thereof; collecting the rents and profits thereof the same since pretended sales as before, and has appropriated the said rents and profits to his own benefit.

The bill further alleges, that about June 1, 1865, Dole purchased of one Waterbury, Reynolds & Downing, a large tract of land in Hudson county, for forty-five thousand dollars, and procured the title of the same to be made to the said De La Croix; that afterwards, to wit, about April 3, 1866, he sold one portion thereof to the Pennsylvania Coal Co., and another part to Henry G. Schmidt, at a profit of about fifty thousand dollars—the transaction being negotiated by the said Dole for his own benefit, in the name of the said De La Croix; and that of the property, transferred as aforesaid by Dole and wife to De La Croix, Dole has subsequently sold for his own use, in the name of De La Croix, several parcels, by deeds, as follows: (1) one to W. Niles, dated January 24, 1867, conveying a lot 200 by 350 feet for three thousand dollars; (2) one to Weehawken Ferry Co., dated November 9, 1867, for 15 82-100 acres for the expressed consideration of one hundred dollars; (3) one to F. H. Cassatt, dated March 2, 1868, for 18 52-100 acres for eighteen thousand dollars; (4) one to John L. Jones, dated June 17, 1868, for six acres for fifty thousand dollars; (5) one to Jay Gould, dated September 1, 1868, for 77½ acres for three hundred and fifty thousand dollars; (6) one other to the Weehawken Ferry Co., dated December 31, 1870, for 31 11-100 acres for two hundred thousand dollars; (7) another of the same date to same company for several lots of land for seventy-five thousand dollars; (8) another of the same date to the same company for 21 81-100 acres for

seventy-five thousand dollars, and (9) another to same of like date for fifty thousand dollars. That the said Dole is now, and has been since long prior to March 1, 1864, the president of the Weehawken Ferry Co.; that during the month of December, 1870, he caused to be executed by said De La Croix and himself, as president of said Ferry Co., various conveyances and releases of land, and had transferred to the New Jersey Midland Railway Co., large portions of the said real estate held by De La Croix as aforesaid, for the bonds of the said Railway Co., of the par value of six hundred thousand dollars, and for the further consideration, that the company should assume and pay a certain indenture of mortgage, executed by the said Ferry Co. to one Francis Price, to secure the payment of one hundred and seventy-five thousand dollars; that Dole caused to be executed for his own use and benefit, but in the name of De La Croix, various mortgages upon the real estate held by De La Croix as aforesaid; sometimes to aid him in his purchases of other property, and sometimes to secure debts contracted by said Dole prior to 1864; that on January 2, 1867, De La Croix gave a mortgage to one Hugh White on a parcel of the said real estate to secure the payment of thirty-six thousand one hundred and sixty dollars, said White being a creditor of Dole in 1864, and the mortgage being given to secure said debt, and to procure the dismissal of a bill filed by White to set aside the above recited pretended conveyances to De La Croix; that the said mortgage was afterward paid by Dole in September, 1868; that De La Croix executed mortgages upon the said property at the instance and suggestion of said Dole, as follows: (1) one to Chas. G. Waterbury and others, dated June 1, 1865, to secure eighteen thousand nine hundred and fifty-three dollars, and paid by Dole, July 6, 1868; (2) one Elizabeth Paterson, dated December 2, 1868, for four thousand eight hundred dollars; (3) one to Jeremiah Lathrop, trustee, September 1, 1866, to secure twenty-nine thousand eight hundred dollars, for the alleged use and benefit of several of the relatives of the said Dole; (4) one to Charles G. Sesson, November 12, 1864, for thirty-five thousand dollars; (5) one to John B. Niles, November 6, 1870, for six thousand dollars; (6) one to the Union Ferry Co., October 1, 1870, for twenty thousand dollars; and that on the 31st of December, 1870 (being the day of the above recited transfer of real estate by Dole, in the name of De La Croix, to the Weehawken Ferry Co., amounting in the aggregate to four hundred thousand dollars), the said Ferry Co., by its president, Dole, executed a mortgage upon the real estate so conveyed to the defendant, Delos E. Culver, as trustee, to secure the payment of seven hundred bonds of said Ferry Co., of the par value of one thousand dollars each, making the aggregate

of seven hundred thousand dollars, the transaction being a part of the fraudulent scheme of said Dole and De La Croix to cover up said property, and to secrete it from the creditors of Dole, and the said bonds being the consideration for the real estate transferred to said company by De La Croix as aforesaid, and for the debt of one hundred and forty-eight thousand dollars which the company owed to Dole in 1864.

The bill further charges that the capital stock of the Weehawken Ferry Co. was divided into 20,000 shares, of the par value of fifty dollars per share; that Dole, at the time of his failure in 1864, owned nearly all of said said capital stock, to wit, 18,640 shares, which he then reported to be worthless, and transferred, without consideration, to De La Croix; that on the real estate conveyed as aforesaid by De La Croix were a number of dwelling-houses and extensive stone quarries, from which said Dole has since derived a large amount of money, and appropriated the same to his own benefit, using the name of De La Croix and of the Weehawken Ferry Co., of which he was president and chiefly owner, to conceal and cover up his interest in said property, and the profits derived from the rents and quarries aforesaid.

The complainant then avers "that he had no knowledge, information, belief, or suspicion of the fraudulent acts herein complained of, nor of any of them, nor of any of the acts, matters, and things relating in any manner to said property and the said transfers thereof until on and after the 14th day of June, 1872, when all the said fraudulent acts and deeds were communicated to him by one G. W. Lockwood, Jr., of the city of New York." After alleging that all of the property, real and personal, conveyed by Dole to De La Croix in March, April, and December, 1864, and August, 1865, or so much thereof as was retained by De La Croix when the petition in bankruptcy was filed on the 25th day of June, 1867, was held in secret trust for the use and benefit of Dole, the complainant charges that the said property, and all the rents, issues, and profits vested in him as the assignee of Dole, by virtue of the assignment, and that he is entitled to the same and to the proceeds of the sale thereof, in the hands of Dole, De La Croix, the Weehawken Ferry Co., and Delos E. Culver, trustee, or either of them.

The prayer of the bill is, that all the transfers of property, real and personal, made by the bankrupt, Dole, to De La Croix, as aforesaid, and by the said De La Croix to the Weehawken Ferry Co., may be decreed fraudulent and void; that the several defendants may be required to account for the proceeds realized by them, or either of them, from any sale or other disposition of said property, and to assign all bonds, mortgages, stock, notes, or other securities held by them and resulting from said sales, that an injunction may issue restraining the defendants,

or any of them, from pledging, selling, encumbering, or interfering with the said property in fraud of the rights of said assignee and creditors of the said bankrupt, and for the appointment of a receiver.

To this bill the defendant, Delos W. Culver, having been served with process, appeared by counsel and demurred, and assigned several causes of demurrer. From the view taken by the court of the case, it will be necessary to examine only one of these, to wit, the third: That by the second section of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March, 2, 1837, it is among other things in substance enacted, that no suit shall in any case be maintainable, at law or in equity, in any court whatsoever, by any assignee in bankruptcy, touching the property and rights of property of the bankrupt, transferable to or vested in such assignee, unless such suit shall be brought within two years from the time the cause of action accrued for such assignee, and it appears on the face of the record in this suit that such suit was brought after the expiration of two years from the time the cause of action accrued for such assignee.

We are thus called upon to construe the last clause of the second section of the bankrupt act, relating to the time in which suits may be brought by assignees, in regard to the property and rights of property of the bankrupt. That section, after conferring upon the circuit courts concurrent jurisdiction with the district courts of all suits at law or in equity, which may be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by any such person against the assignee, touching any property or rights of property of the bankrupt, transferable to or vested in such assignee, then enacts, "But no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee, provided that nothing herein contained shall revive a right of action barred at the time such assignee is appointed." I am not aware that this clause has yet received judicial construction, although it has attracted the attention of several judges in a number of cases, as for instance of Judge Dillon in *Martin v. Smith*, [Case No. 9,164;] of Judge Treat, in *Davis v. Anderson*, [Id. 3,623;] of Judge Sharswood, in the supreme court of Pennsylvania, in *Peiper v. Harmer*, 5 N. B. R. 252; of Judge Blatchford, in *Re Dole*, [Case No. 3,965;] and of Judge Hill, in *Friedlander v. Holleman*, [Id. 5,081.]

This suit is brought by the assignee under the 14th section of the act, to recover prop-

erty "conveyed by the bankrupt in fraud of the creditors;" and, by the provisions of that section, all such property is at once vested in the assignee by virtue of the adjudication of bankruptcy and the deed of assignment. It is insisted by the counsel of the defendant that the cause of action accrued to the assignee contemporaneously with the acquisition of the title to the property in controversy, and that as it appears by the bill that such title vested on the 12th of October, 1867, the action should have been commenced within two years from that date. The counsel for the complainant, on the other hand, maintains that as he comes into a court of equity for relief on the ground of fraud, and alleges a fraudulent concealment of the cause of action by the defendant, he is entitled to apply to the case the long established equity rule, that statutes of limitation do not begin to run until the fraud has been, or by reasonable diligence may have been, discovered. We have, then, the question fairly presented, whether such equity rule is to be invoked in those cases where the statute in express terms is made to apply to courts of equity as well as to courts of law, and where no exceptions to the limitation have been incorporated into the act itself?

It is a question upon which the best judicial minds of England and the United States have differed, and in view of the state of the law, is full of difficulty in all of its aspects. In examining it, let it be observed that statutes of limitations have never been understood to apply to courts of equity, in respect to causes of equitable cognizance, for the reason, as was observed by Lord Macclesfield in the *Hollingsworth Case*, 1 P. Wms., 744, that "they speak nothing of bills in equity." Yet, those courts have always held that wherever the legislature has limited a period for law proceedings, equity will, in analogous cases, consider itself bound by the limitation. Suits for relief, on the ground of fraud, have always been regarded, however, as exceptions to this extent, that equity will not allow the statute of limitations to operate until discovery of the fraud, or the means afforded of the discovery; holding, that pending its concealment by one party there was no laches in regard to the other, or, in other words, that it would be unconscionable for courts of equity, that are only bound by the spirit of the statute, to permit the defendant by pleading it, in cases of fraudulent concealment, to take advantage of his own fraud.

Attempts were early made to engraft this exception upon the statute of limitations in its application to its actions at law, and to the plea of the statute in bar to allow a replication, that there had been a fraudulent concealment of the cause of action by the defendant, and that suits had been commenced within, etc., the date of the discovery of the fraud. Thus, the supreme court of Massachusetts, in [*First Massachusetts*]

Turnpike Corp. v. Field, [3 Mass. 201,] held, in a suit at law, that a replication to a plea of the statute of limitations was good which disclosed a fraudulent concealment of the breach of the contract. Ch. J. Parsons, in delivering the opinion of the court, said, that where the delay in bringing the suit was owing to the fraud of the defendant, the cause of action against him ought not to be considered as having accrued until the plaintiff obtained the knowledge that he had a cause of action; and that if this knowledge was concealed from him by defendant fraudulently, the court would violate a sound principle of law if they permitted the defendant to avail himself of his own fraud. And that eminent judge, Mr. Justice Story, in *Sherwood v. Sutton*, [Case No. 12,782,] in an action on the case for a deceitful representation in a sale, to which the statute of limitations was pleaded in bar, sustained the replication of the plaintiff, that there had been a fraudulent concealment of the deceit by the defendant, until within six years before the suit was commenced. His opinion in the case exhibits, of course, much learning and research, but he is careful to state at the outset: "As a consideration of no inconsiderable weight, that as there was no state court in the judicial establishment of New Hampshire (the district in which the action was pending) which possessed general equity powers, the remedy (i. e., the suspension of the statute until the discovery of the fraud,) if it was to be administered at all, must be administered in such cases through the instrumentality of the courts of law." He further conceded that, as the statute of limitations in New Hampshire was in substance a transcript of the statute of 21 Jac. 1, so far as it respected personal actions of that nature, and as it contained like exceptions in favor of infants, feme-coverts, etc., but none as to actions founded in fraud, where the fraud had been concealed during the period of limitation, the legal propriety of creating such an exception would depend upon the same principles here as it would in the courts of Westminster Hall. He then examined how such a plea had been treated at law in the English courts, and came to the conclusion that there was enough in the dicta of several judges, commencing with Lord Mansfield, in *Bree v. Holbech*, 2 Dougl. 655, to warrant the inference, that the law courts of that country would not hesitate to postpone the operation of the statute in case of the fraudulent concealment of the cause of action.

To the same effect was the intimation of Mr. Justice Curtis, in *Prichard v. Chandler*, [Case No. 11,436,] which was a case under the somewhat analogous statute of limitations in the bankrupt act of 1841, where it was in substance held, that if the bankrupt fraudulently concealed from the assignee the cause of action from the time when his title accrued, the two years' limitation did not begin to run.

But their attempts at judicial legislation were resisted in other states, and made little progress. The supreme court of Vermont, in *Smith v. Bishop*, 9 Vt. 110; of New York, in *Troup v. Smith's Ex'rs*, 20 Johns. 33; of Ohio, in *Fee v. Fee*, 10 Ohio, 469; and the court of appeals of Virginia, in *Callis v. Waddy*, 2 Munf. 511,—have all held, that at law, independent of any express provision, the statute of limitations begins to run from the time the cause of action first accrued, even where the defendant has fraudulently concealed it from the plaintiff.

The question came before the English court of exchequer in 1854, in the case of *Imperial Gas Light & Coke Co. v. London Gas Light Co.*, 26 Eng. Law & Eq. 425, and the court held that to a plea of the statute of limitations, that the cause of action did not accrue in six years, it was no answer, that in consequence of the fraud of the defendant the plaintiff was prevented from discovering the cause before that time, and that he commenced his action within six years after he discovered it. The court assumed during the argument that the question was no longer open, and that the principle had been established by many cases, that the statute runs from the accruing and not from the discovery of the cause of action. C. B. Pollock, in delivering the opinion of the court, struck the keynote of the difficulty in allowing such a replication in proceedings at law, by observing: "The statute of limitations expressly points out certain cases in which it is not to run, that is, the cases of persons under certain species of incapacity, but it does not make any exception in favor of persons laboring under any other incapacity, and we cannot graft upon the statute the exception here sought to be engrafted on it, namely, where, by the fraud of the defendant, the plaintiff has been prevented from asserting his rights within the time prescribed by the statute." * * * "If we were to hold the legislature as having enacted, that the statute of limitations should not run, whenever the jury are satisfied that a fraud has been practiced to prevent its operation, it would not only give rise to much litigation, but to that which the law abhors—continual litigation: 'Interest reipublice ut sit finis litium.'"

The statute of limitations has been called the statute of peace, but if the construction here contended for by the plaintiffs were to prevail whenever there was a case of hardship or suggestion of fraud, you would have an action brought, though the statute had expired, and have it urged that the matter was for the jury and not for the court. To which suggestion Alderson, B., added: "There would be no statute of limitations against a widow with six children." And such is obviously the opinion of the supreme court of the United States, so far as it can be gathered from the general principles announced in the cases where it has had the statute of limitations under consideration. Thus, in

McIver v. Ragan, 2 Wheat. [15 U. S.] 25, an attempt was made to incorporate into the statute an exception which the legislature had not expressed. The case was briefly this: An ejectment was brought for a large tract of land in North Carolina. The defendant claimed under a junior patent and an adverse possession of seven years, which, by the statute of limitations of the state, was a bar if the possession was under color of title. The plaintiff offered to show that no course or corner of the grant under which he claimed was marked; that the land in dispute was within the Cherokee Indian boundary, and was not ceded to the United States until 1806; that the action was commenced within seven years of that date, and that while the land was a part of the Indian Territory he was prohibited by the laws of the United States from entering thereon for surveying or marking the same. Ch. J. Marshall delivered the opinion of the court, and upon the claim that the statute ought not to be allowed to run while the disability existed in regard to surveying and marking the land, observed: "Whenever the situation of a party was such as in the opinion of the legislature to furnish a motive for excepting him from the operation of the law, the legislature has made the exception. It would be going far for this court to add to those exceptions. * * * If this difficulty be produced by the legislative power, the same power might provide a remedy; but courts cannot on that account insert in the statute of limitations an exception which the statute does not contain." The above case was referred to and quoted with approbation, by the same court in 1850, in *Bank of State of Alabama v. Dalton*, 9 How. [50 U. S.] 529. Mr. Justice Catron, speaking for the whole court, observing: "The legislature having made no exception, the courts of justice can make none, as this would be legislating. * * * The rule is established beyond controversy."

The object of this review has been to indicate, first, that courts of equity, although they were not embraced within the statute of limitations, act in obedience to it, in cases where their jurisdiction is concurrent with courts of law; second, that they act by way of analogy only, where they apply it to equitable rights and titles not cognizable at law; and third, that they decline to recognize its obligations in cases of direct trust and secret fraud, not because they are above the law, but outside of it, and because the statute, not being addressed to or obligatory upon them, ought not to be applied in the exercise of an equitable discretion for the encouragement or protection of fraud. But if no discretion has been left to them by the legislature—if the statute has been prescribed for all courts, and in all suits in equity and at law—where is the authority in equity, any more than at law, to incorporate within it an exception which the

Congress, in its desire to afford facilities for the speedy settlement of bankrupt estates, did not see proper to put in? And if any hardship should result, in particular cases, because of such omission, is not the remedy to be found in the legislature rather than in the courts?

Although my attention has not been directed to any judicial construction of the clause in question, there are several cases in which learned judges have incidentally suggested, that where the statute of limitations has in express terms been made applicable to all courts, no court ought to add an exception which the legislature has not expressed. Thus in *U. S. v. Malliard*, [Case No. 15,709,] a suit was brought by the government to recover the value of certain merchandise, on the ground that such value became forfeited by reason of the violation of the 66th section of the act of March 2, 1799. The defendants pleaded that the cause of action did not accrue within five years next before the bringing of the suit. To this the plaintiffs replied, that the acts set forth in that respect in the declaration, were fraudulently concealed by the defendants from the plaintiffs, until within five years before the suit, so that they could not until within that period elect whether to claim for forfeiture of the goods or of their value, or bring an action for such acts. To this replication the defendants demurred, and Judge Blatchford sustained the demurrer, saying, "It is well settled, that however strong the reason may be, a court cannot engraft on a statute of limitations an exception which the statute itself does not make * * * so, also, the clear weight of authority, at least in the state of New York, is, that where the statute does not make a fraudulent concealment of the existence of the cause of action an exception to the running of the statute, the court has no right or power to make such exception, either directly, or by the indirect method of saying that the cause of action does not accrue in case of a fraudulent concealment, until the discovery of the fraud. It is true that Mr. Justice Story, in *Sherwood v. Sutton*, [Case No. 12,782,] dissents from the decision in *20 Johns.*, (*Troup v. Smith's Ex'rs*); but I cannot but regard the making by the court of an exception, in a case of fraudulent concealment, when the statute does not make it, as violating the rule settled by the supreme court, as before stated."

Freelander v. Holleman, [Case No. 5,081,] was a suit brought by creditors of a bankrupt, making the assignee a party-defendant to set aside certain conveyances of the bankrupt as fraudulent and void. The court treated the case as if the assignee was a co-complainant, in order to consider the question presented, to wit: whether the limitation to bringing such suit in the second section of the bankrupt act, should be applied to the case. Judge Hill dismissed the bill, because it was not filed within two

years after the title of the property in dispute had vested in the assignee by the deed of assignment, saying, "This act, unlike the state statute, makes no exception in favor of married women, infants, absence, or for concealment of the cause of action; and thus congress, having complete power over the whole subject, had the right to provide, and such provision is in accordance with the policy of the law, and is a rule which it is the duty of this and all other courts to apply when a case is presented to which it is applicable."

Martin v. Smith, [Case No. 9,164,] was an appeal from the district court to the circuit court of the United States, in Missouri, in a suit where a bill had been filed by an assignee in bankruptcy to recover property alleged to belong to the bankrupt estate. The case was made to turn upon the statute of the state of Missouri, which provides that "actions for relief on the ground of fraud must be brought within five years after the cause of action accrued; but the cause of action shall be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud." It became necessary for Judge Dillon to construe this clause, and in doing so he observed: "If the provision had been merely that, 'actions for relief on the ground of fraud should be commenced within five years after the cause of action accrued,' it is extremely probable that the courts would have been obliged to have held that the statute would begin to run from the period when the fraud was consummated; and not as, under the well-known equity rule, from the period when the fraud was or should have been discovered. To remove all doubt on the point, and to preserve the equity doctrine on the subject, the legislature added the words: 'The cause of action in such case shall not be deemed to have accrued until the discovery * * * of the facts constituting the fraud.'"

If congress had been desirous of preserving the equity doctrine on this subject, in the bankrupt act, would not some such clause have been equally necessary?

But whilst I am strongly inclined to hold that the demurrer must be sustained on this ground, it is not necessary so to do. There is another ground on which, in my judgment, the demurrer is fatal to the bill as filed. It must be remembered that where courts of equity postpone the operation of the statute of limitations in cases of concealed fraud, the postponement is not until the discovery of the fraud, but until the period of time when, with due diligence, he might have discovered it.

The bill discloses these facts: The assignee was appointed in 1867. All the property and the rights of property of the bankrupt, including all that he had conveyed in fraud of his creditors, then vested in the assignee. It was his duty at once to devote his

time to the collecting in the assets of the estate, in order to their distribution amongst the creditors. His attention was not to be confined to the property included in the schedules, but it was especially his duty to ascertain by what tenure this voluntary bankrupt retained the possession of a large amount of valuable real estate which he had not put in the schedules, or surrendered to the assignee. The bill alleges that the bankrupt reported no assets, but stated debts amounting to upwards of six hundred and fifty thousand dollars. It also alleges that he was then in the possession of property worth hundreds of thousands of dollars. After the recital of the conveyance by the bankrupt and wife to De La Croix, on August 11, 1865, of the real estate in controversy for the pretended consideration of two hundred and fourteen thousand dollars, it then avers "that no consideration was ever paid for said property by De La Croix, or for any part thereof; that Dole did not part with the possession, nor deliver the same or any part thereof, to De La Croix, but, on the contrary, resided on the property during the years 1864 and 1865, and has held, possessed, controlled, managed, and enjoyed the same and the proceeds thereof, collecting the rents and profits the same since said pretended sale as before, and has appropriated the said rents and profits, and the proceeds thereof, to his own use and benefit." Now, surely such a state of affairs should have put the assignee and creditors on inquiry. They had the whole effective machinery of the bankrupt law within their reach, to investigate, and sound to the bottom, every business transaction in which the bankrupt had been engaged for years before the adjudication. Was anything done or attempted by the assignee or the creditors until the filing of the present bill, June 12, 1874, nearly seven years after the cause of action had accrued to the assignee? If there was, he has not thought proper to disclose it in the bill. His only allegation on the subject is, that "he had no knowledge, information, belief, or suspicion of the fraudulent acts herein complained of, nor of any of them, nor of any of the acts, matters, and things relating to any of said property and the transfers thereof, until on and after June 14, 1872, when they were communicated to complainant by G. W. Lockwood, Jr., of the city of York."

But mere absence of knowledge is not a sufficient excuse for the delay, when the facts exist, which are notorious and which suggest inquiry to the assignee. Was any inquiry made? If so, it ought to have been stated; and if unsuccessful until so late a period, the reasons of the want of success should have been assigned. If courts can allow nearly seven years to elapse, after the appointment of an assignee, before he shall be required to take any steps to investigate alleged fraudulent transfers of property, or

to ascertain why the bankrupt retains the possession and control of the bulk of his estate, after adjudication and without any excuse being assigned for such delay, except the naked statement that he did not know of the fraud until two years before the suit was brought, I can see no reason why seven times seven years may not be allowed to pass, and still a suit be maintainable upon the simple allegation of the want of knowledge. It is neither the province or prerogative of courts to repeal legislation by any such methods of construction.

The demurrer must be sustained, and the bill dismissed with costs. If, however, the assignee did in fact use diligence and did institute inquiries which the sagacity of the bankrupt baffled for five years, and if the omission to make any statement of this character was accidental and can be truthfully supplied by amendment to the bill, and if the complainant desires the opinion of the circuit or supreme court upon the first question on the demurrer, I shall be glad to allow him to amend and to have the case put in such a position that the judgment of this court may be reviewed, and if needs be corrected.

Case No. 374.

ANDREWS et al. v. ESSEX FIRE & MARINE INS. CO.

[3 Mason, 6.]

Circuit Court, D. Massachusetts. Oct. Term, 1822.

ADMIRALTY JURISDICTION — MARINE INSURANCE — REFORMING POLICY — EQUITY — MISCONDUCT OF MASTER.

1. A policy was underwritten, "1000 dollars on brig Union, and 4000 dollars on effects on board said brig from Salem to port or ports in the West Indies, one or more times for the purpose of selling her outward and procuring a return cargo, and at and from thence to her port of discharge in the United States." The memorandum for insurance contained this clause:—"The Union is bound to Kingston, Jamaica: if not allowed to sell there, will proceed to Cuba." At the time of the insurance, both parties supposed the port of Kingston open to American vessels under a proclamation of the governor; and neither contemplated any illicit trade. The Union went to Kingston, supposing the port was open, and was there seized and condemned for the illicit trade. *Held*, that the underwriters were not liable for the loss—that the omitted clause, if inserted in the policy, would not have altered the nature of the insurance, or liability of the underwriters.

[Cited in *Dean v. Equitable Fire Ins. Co.*, Case No. 3,705.]

2. *Held* also, that a court of admiralty has jurisdiction over policies as maritime contracts; but not over contracts leading to policies;—that it cannot reform a policy by the antecedent contract;—that this part belongs to a court of equity.

[Cited in *The Perseverance*, Case No. 11,017; *The Tribune*, Id. 14,171; *Dean v. Bates*, Id. 3,704; *Gloucester Ins. Co. v. Younger*, Id. 5,487; *Kynoch v. The S. C. Ives*, Case No. 7,958; *Deely v. The Ernest and Alice*, Id.

3,735; *The Star of Hope*, Id. 13,313; *Oakes v. Richardson*, Id. 10,390; *The Brothers*, 7 Fed. 880; *The C. C. Trowbridge*, 14 Fed. 876; *Wenberg v. Cargo Mineral Phosphate*, 15 Fed. 288; *The G. Reusens*, 23 Fed. 405; *Paterson v. Dakin*, 31 Fed. 683; *Rea v. The Eclipse*, 135 U. S. 599, 10 Sup. Ct. 876.]

3. *Held* also, that the omitted clause was not in the contemplation of both parties a part of the contract to be inserted in the policy; but was a representation of a fact.

[Cited in *Dean v. Equitable Fire Ins. Co.*, Case No. 3,705.]

4. *Quære*—If a loss by a peril insured against, occasioned by the misconduct of the master be a loss, for which underwriters are liable.

[5. Cited in *Joy v. Allen*, Case No. 7,552, and *Packard v. The Louisa*, Case No. 10,652, to the point that admiralty proceeds rather on equitable than on strict legal principles.]

[6. Cited in *Leland v. The Medora*, Case No. 8,237, to the point that a contract to buy or build a ship is not a maritime contract; *Cunningham v. Hall*, Case No. 3,481, to the point that a contract to build a ship is not enforceable in admiralty.]

[7. Cited in *Taylor v. Brigham*, Case No. 13,781, to the point that the owners are liable for the willful and malicious acts of the master, done in the course and scope of his employment.]

In admiralty. This was a libel [by John H. Andrews and another against the Essex Fire & Marine Insurance Company] on a policy of insurance, underwritten by the respondents for the plaintiffs, on the 12th of January, 1819, as follows, viz. "the sum of 1000 dollars on the brig Union and appurtenances; also, 4000 dollars on effects on board said brig, from Salem to port or ports in the West Indies, one or more times, for the purpose of selling her outward and procuring a return cargo, and at and from thence to her port of discharge in the United States." The libel charges that a clause in the agreement on which the policy was underwritten, was omitted by mistake, and declares upon the policy as reformed. A total loss is alleged of vessel and cargo in the course of the voyage, by capture and seizure under the authority of the king of Great Britain and Ireland. The facts of the case were, that the plaintiffs, being owners of the Union and her cargo, were about to send her on a voyage to the island of Cuba, and on the 12th of January, 1819, when she was ready to sail on the voyage, a paragraph appeared in the newspapers, stating that a committee of the legislature of Jamaica had reported that the November storm had destroyed the principal articles for the labouring classes in the western parishes, and recommended that the governor be requested to open the ports of the island to all nations for the importation of those articles of provisions required to support the population generally, and in return, to allow payment in produce or otherwise; but that they had not heard that the Duke of Manchester (the governor) had acted upon it. In consequence of this information (which was known to both parties), the plaintiffs altered their voyage, and

made application in the evening of the same day to the respondents for insurance by the following memorandum. "\$3000 on brig Union and appurtenances, \$8000 on effects on board said brig, Allen Putnam master, from Salem to port or ports in the West Indies, one or more times, for the purpose of selling outward and procuring a return cargo, and at and from thence to port of discharge in the United States; and what return if said vessel trades to but one port and arrives safe without loss? The Union is bound to Kingston, Jamaica; if not allowed to sell there, will proceed to Cuba." There were afterwards added the words, "2 years old, sheathed last voyage, 129 tons." The memorandum was laid before the president and directors on the same evening, who agreed to underwrite a policy for four per cent. Before the proposition was accepted by the plaintiffs, Mr. Shepherd came to the office, and informed the secretary, that he wished insurance only for \$1000 on the vessel, and \$4000 on the cargo, because he expected to get it for a less premium elsewhere; and the secretary then wrote upon the memorandum, "agreed for \$1000 on vessel, and \$4000 on effects as above," which Mr. Shepherd signed for himself and Mr. Andrews. The act of the secretary was confirmed by the president, and the policy was made out in the terms already stated, omitting the clause:—"The Union is bound to Kingston, Jamaica—if not allowed to trade there will proceed to Cuba." The policy as made out, was received by the plaintiffs without objection, and the usual premium note was given. By the public by-laws of the corporation "the president and directors consider themselves holden on a marine policy, from the time a verbal agreement is made between the president and the person applying for insurance. The president in all cases, where the person applying for insurance is unable to wait for the completion of his papers, will cause a memorandum of the agreement to be made and signed by the person applying for insurance." The brig sailed on the voyage, and having spoken with a pilot near Morant Point (Jamaica), who, upon inquiry, stated that the trade was open for Americans, the master concluded to go directly into the port of Kingston. Soon after his arrival in port, a boat came alongside, from which he learned that the port was not open, and that it was necessary for him to represent that he came into port in distress. He accordingly did this; but the vessel and cargo were immediately afterwards seized, and the master still insisting, upon the trial in the vice-admiralty court, that the case was one of real distress, there was a decree of condemnation pronounced of both. From this decree there was an appeal to the high court of admiralty, which is still pending. It was agreed on both sides that there was no intention of illicit trade by the owners on this voyage, but that it was undertaken

solely upon the expectation that the trade was or would be, on arrival at Jamaica, open and free. It was farther in evidence that the present respondents never underwrote any risks upon voyages in illicit trade, and that this was the general custom of incorporated insurance offices. The plaintiffs contended, that they were entitled to answer for a total loss under all the circumstances of the case, the loss having been by a risk contemplated by the policy. They insisted in the first place, that the clause of the memorandum, to which reference has been made, was omitted by mistake, and constituted a part of the contract of insurance, and that they were entitled to have the policy reformed by the court so as to include that clause; and that if so reformed, the risk would be clearly covered by the policy. They insisted in the next place, that even without such reformation of the policy, the legal result was the same; and that the nature of the voyage being made known to the underwriters at the time of the policy, they were bound to the same extent, as if it were expressly stated upon the face of the policy.

On the other hand the underwriters explicitly denied all these positions; and contended that the loss was a loss by illicit trade, which neither in law, was insured, nor contemplated, in fact, by the parties to be insured. And farther, that if this ground should fail, the loss was occasioned by the fault and gross misconduct of the master in setting up a false and fraudulent pretence of distress, as the cause of going into the port of Kingston.

Webster & Saltonstall, for libellants.
Prescott & Nicholls, for respondents.

Before STORY, Circuit Justice, and DAVIS, District Judge.

STORY, Circuit Justice. There cannot at the present day be any serious doubt that a court of equity has authority to reform a contract, where there has been an omission of a material stipulation by mistake. And a policy of insurance is just as much within the reach of the principle, as any other written contract. *Graves v. Boston Marine Ins. Co.*, 2 Cranch, [6 U. S.] 419; *Henkle v. Royal Exch. Assur. Co.*, 1 Ves. Sr. 317; *Townshend v. Stangroom*, 6 Ves. 328, 333; *Motteux v. Governor of London Assur. Co.*, 1 Atk. 545; *Ramsbottom v. Gosden*, 1 Ves. & B. 165; *Watt v. Grove*, 2 Sch. & L. 492; *Gillespie v. Moon*, 2 Johns. Ch. 585; *Marsh. Ins. b. 1, c. 8, § 4*, and notes; *Hogan v. Delaware Ins. Co.*, [Case No. 6,582;] *Condy's Marsh. Ins. 345a*, note; *Lyman v. United Ins. Co.*, 2 Johns. Ch. 630. But a court of equity ought to be extremely cautious in the exercise of such an authority, seeing that it trenches upon one of the most salutary rules of evidence, that parol evidence ought not to be admitted to vary a written instrument. It ought, therefore, in all cases to withhold

its aid, where the mistake is not made out by the clearest evidence according to the understanding of both parties, and upon testimony entirely exact and satisfactory. There is less danger where the instrument is to be reformed by reference to a preliminary written contract, which it was designed to execute. But even here there is abundant room for caution, since the parties may have varied their intentions or the clause may not have been originally understood by either party to go to the extent now required. And these considerations acquire additional force, where circumstances have occurred in the intermediate time, which give an intense importance to the asserted mistake. Under these limitations the doctrine of courts of equity on this subject does not seem at variance with general convenience or justice.

In the present case the memorandum signed by the plaintiffs after it was agreed to by the president of the company, constituted a good and valid agreement binding upon the parties. The by laws of the company make it in such a case expressly obligatory upon them. And if there be an omission in the policy of any clause constituting a part of that agreement, it ought in equity and good conscience to be corrected. It is not sufficient for the underwriters, that they suppose the words do not cover a particular risk, for they may mistake the law, and their mistake shall not prejudice the other party. When once the contract is agreed to, whatever that contract, by a just and reasonable interpretation, includes, the underwriters are bound to insert in the policy, and if they omit to do it the assured has a right to insist upon a perfect conformity to the original proposition and agreement. The case under such circumstances is clearly distinguishable from the cases referred to at the bar [*Lyman v. United Ins. Co.*,] 2 Johns. Ch. 630; [*Vandervoort v. Smith*,] 2 Caines, 155, where the proposals for insurance never assumed any obligatory shape, and could therefore be considered in no other light, than as proposals, which were merged on the execution of the formal instrument. Here the proposal was agreed to and formed the basis for the execution of the policy; and there is no pretence to say that it was ever afterwards varied by the parties. The true question then is, whether the omitted clause in the contemplation of both the parties was to be inserted in the policy. I say both the parties, because it must be a joint intent and assent. It is not sufficient that one of the parties intended it, if it was not agreed to by the other. If the clause was to be inserted in the policy, then it is no answer on the part of the underwriters, that they may possibly be liable for the risk of illicit trade against the known general usage and designs of the corporation. They must take the legal consequences of all that stands in the text of their contract. And the opinions of the very respectable gentlemen,

who have testified in this case, demonstrate that the general understanding of merchants is in perfect conformity to the principles of law on this subject. We must then resort in the first place to the memorandum itself to ascertain what was the contract to be executed. It is not pretended that every thing contained in the memorandum was to be inserted in the policy. It is perfectly notorious that proposals of this nature often contain remarks, representations, and queries for the information and guidance of the underwriters, which cannot by any reasonable construction be supposed proper for insertion in the policy. In many instances the insertion would be absurd, and in some might be repugnant to the obvious intent of the parties in their final act. This very memorandum illustrates the truth of these observations; for it contains particulars of inquiry and information, which neither party now supposes to belong to the policy. It is not sufficient therefore to show that a clause is in the memorandum, to justify its insertion in the policy, unless from its nature and object it clearly formed a part of the contract. A clause may in the event become material and decisive of a right if inserted, which may nevertheless, at the time of the proposal, not have been contemplated by either party as a part of the policy. It might make all the difference between a representation and a warranty, a difference in many cases of the most serious importance.

The memorandum in the present case contains a perfect description of the ship, the master, and the voyage intended to be insured; and the policy follows this description with the most minute care. It was drawn up according to the understanding of the insurance company as a full description of the risk; and it was received without objection by the plaintiffs. No application was made to alter it, until after the loss occurred, and then the materiality of the clause now in question became apparent. It is argued that being material, the plaintiffs are now entitled to have it inserted, because the parties must be presumed to have contemplated the insertion of every thing material to the risk. That is true in a limited sense; but not universally. If the clause be material in the event, it must still be seen whether in fact it constituted, in the understanding of the parties, a part of the original contract. If there had been an omission of a descriptive part of the voyage, or of the name of one of the owners, it would have been perfectly clear that these must have been constituted a necessary part of the policy upon the true import of the memorandum, and therefore the presumption of mistake would be irresistible. But if the clause be a mere statement of a fact, which in its place in the memorandum may be either construed a mere representation, or a modification of the terms of the contract, it stands equivocal, and the like presumption cannot prevail.

The underwriters may, as in the present case, understand it in one sense and the insured in another; and it is the presumed assent of both which gives it the effect of a contract. The acts of the parties under such circumstances become very material; and their acquiescence in one mode of execution of the policy would go far to show that it was the true mode. The clause in the memorandum is in these words: "The Union is bound to Kingston, Jamaica; if not allowed to sell there, will proceed to Cuba." It is certainly in terms a representation of a fact. Is it such a fact as belonged to the policy? That the clause was not intended to abridge the general liberty given in the description of the voyage is conceded on all sides. The brig was still to be at liberty to go to any other port or ports in the West Indies, otherwise the general description would be useless. It would be absurd to ask or give general liberty to all West India ports, and in the same breath to tie up the adventure to Kingston and Cuba. Was it designed as a warranty that the brig should go to those ports? This can scarcely now be contended, for the underwriters did not claim its insertion in this view; and the owners by reserving the general liberty of the West Indies may fairly be presumed to have reserved the liberty of changing honestly the direct voyage. Can it then be considered in any other view than as a representation of the present intention of the owners, to guard against any objection for concealment or misrepresentation? The plaintiffs contend that its insertion was necessary and intended by them because it would cover the risk of the contingency of the voyage to Jamaica being lawful. The defendants deny that they ever contemplated such a risk under the contract. The burthen of proof then rests on the plaintiffs; and if the language of the memorandum be not unambiguous, if the construction be not necessary, but doubtful; if the acts of the parties have left the presumption against the plaintiffs, a court of equity ought to be very slow in undertaking to reform the policy upon conjecture.

It is material here to consider that the answer of the company explicitly denies any intention to insert the clause, or to become liable for the risk of illicit trade. The latter might be true, and yet if they had in fact bound themselves to such a risk, their mistake of the law would not help them. But the circumstance of the denial is not insignificant, as it stands confirmed by their acts. If their practice is not to insure illicit voyages, and the policy conforms to this practice, it would require strong evidence to force upon them such a risk by a construction of a memorandum clause, which justly might admit of various interpretations, and might fairly be understood in different ways. The premium in a case of this nature is certainly not decisive either way; but if it be the usual premium for the com-

mon risks, it affords some presumption that the underwriters did not contemplate unusual risks; and in this view it may aid in the construction of doubtful words.

The rule of courts of equity is not to reform a policy, unless the mistake be made out by the clearest evidence. The cases of *Henkle v. Royal Exch. Assur. Co.*, 1 Ves. Sr. 317, before Lord Hardwicke; of *Lyman v. United Ins. Co.*, 2 Johns. Ch. 630, before Mr. Chancellor Kent; of *Hogan v. Delaware Ins. Co.*, [Case No. 6,532,] *Condy's Marsh. Ins.* 345a, note, Whart. Dig. 320, before Mr. Justice Washington; and of *Graves v. Boston Marine Ins. Co.*, 2 Cranch, [6 U. S.] 419, 442, before the supreme court of the United States,—are conclusive upon this point. The asserted omission in the present case is indeed incontestable upon the evidence; but whether it was a part of the contract omitted by mistake is, to say the least of it, extremely questionable. I do not mean to say that the plaintiffs did not act with the most perfect fairness, or did not contemplate an indemnity against the very loss, which has occurred. I believe they did; and that whatever security was to be obtained by a policy conforming to the substance of the memorandum they meant to provide for. The difficulty lies not in the honesty or reasonableness of their intentions, but in giving effect to those intentions, if they were not communicated in such a manner to the underwriters, in the memorandum, as to lead them to the conclusion, that the omitted clause was a part of the proposed contract. Whatever might be my opinion as a private man upon the propriety of inserting the clause, as a judge sitting in equity I should have extreme difficulty in saying that the case afforded plenary evidence of any mistake which the court was called upon to rectify. The terms of the memorandum are not necessarily matters of contract, and if they are ambiguous in their import or object, the parties must be left to their rights upon the policy as executed. Perhaps it is the less necessary to dwell on this point, because I am of opinion that if there be a mistake in the policy, this is not the tribunal to correct it. The authority over this subject is generally confided, and most conveniently, to courts of equity. The rules of evidence and the modes of relief in these courts are admirably adapted to cases of this nature; and it appears to me that the jurisdiction exclusively attaches these. To be sure in a certain sense, and in the exercise of their general jurisdiction, courts of admiralty may be properly said to be courts of equity, that is, courts proceeding *ex aequo et bono*, and not confined to the narrow notions of the common law. But courts of admiralty may be properly said to administer relief as courts of equity. They cannot entertain an original bill or libel for specific performance, or to correct a mistake, or to grant relief against a fraud, though they may perhaps sometimes, like

courts of law, perform what may be deemed analogous functions. They may give the same benefit, as if there were no fraud or mistake, or omission of performance; but this can be in a few cases only, which fall, in all their circumstances, completely within their general jurisdiction. Courts of admiralty, in my view, have jurisdiction over maritime contracts when executed, but not over contracts leading to the execution of maritime contracts. If there were a contract to build a ship, or to sign a shipping paper, or to execute a bottomry bond, and the party refused to perform it, it has never been my impression that the enforcement of such a contract belonged to the admiralty. I know of no authority pointing to such a conclusion, and I must say I should be sorry to find one; for it would lead to the utter confusion of jurisdictions. But if the contract be an executed maritime contract, the jurisdiction attaches; and the admiralty may then administer relief upon that contract according to equity and good conscience. The law looks to the proximate and not to the remote cause as the source of jurisdiction; and deals with it only when it has assumed its final shape as a maritime contract. It has been said that the memorandum in the present case is an executed maritime contract, equivalent to a policy; but I understand it to be nothing more than an agreement for a policy; and if no policy had been executed this case as a court of admiralty would not have had jurisdiction to enforce it. We are not at liberty in such cases to consider that done which ought to have been done.

If therefore any thing in point of law, material to the plaintiffs' case, depends upon this clause, and a mistake has occurred in omitting it, my judgment is that a court of admiralty is incapable of administering the proper relief. The remedy lies at common law, for damages for nonperformance of the original agreement, or in equity, for a specific performance by reforming the policy. In the present suit I can only deal with the policy, as it stands. And this leads me to the other question made at the bar, which has always appeared to me to be the turning point of the cause, and to be in itself of very great difficulty and nicety. If in the investigation of it I could derive any consolation from full and learned arguments, I should be bound to make the acknowledgement, that nothing has been omitted. Still I cannot say, that I have arrived at a conclusion without very considerable hesitation.

It is perfectly settled that the underwriters, by the general terms of the policy, are not liable for any loss arising from foreign illicit trade, unless the policy be underwritten with the full knowledge on their part that such was the object of the voyage. This is the general doctrine of foreign maritime writers, and has been recognized in the fullest manner by the common law tribunals. 2 Valin, lib. 3, tit. 6, art. 49, pp. 127, 128, 130;

Cleirac Le Guidon, c. 2, arts. 2, 5, pp. 233, 234; Santema, p. 4, note 17; Id. p. 5, note 10; Straccha, Assecur. Gloss. 5, p. 23; Loccenius, lib. 2, c. 5, note 7, p. 981; Roccus, Anec. note 21; 1 Emerig. c. 8, § 5, p. 212; Targa, c. 71; Molloy, bk. 2, c. 7, § 15, p. 288; Marsh, Ins. bk. 1, c. 3, § 1, p. 60; Anon., 2 Vern. 176; Planche v. Fletcher, 1 Doug. 251; Gardiner v. Smith, 1 Johns. Cas. 141; Richardson v. Maine Fire & Marine Ins. Co., 6 Mass. 102; Parker v. Jones, 13 Mass. 173; Pollock v. Babcock, 6 Mass. 234. The reason of the doctrine is obvious. If the voyage be lawful, the underwriters cannot be presumed to undertake risks occasioned by a violation of law by the owner or his agents; and in such case the law, notwithstanding the general terms of the policy, will exempt them from such losses. But if the trade is known to be illicit, and can be carried on only by smuggling, and the underwriters do not make an exception of the risk of illicit trade, there is the strongest presumption of their intention to take it. Their knowledge does not indeed add new terms to the policy; but it takes away any pretence for saying that the loss by seizure, which is, an "arrest, restraint, or detainment of the sovereign" within the policy, was not contemplated by the parties. In the present case it is clear that no illicit trade was intended to be covered by the policy, for the trade was not supposed to be prohibited at the time. It is true that it was well known that Jamaica, as a colony of Great Britain, was restricted from foreign trade by the British colonial system. But it was as well known that authority had been given to the king to open the colonial ports under certain circumstances. The Adams, Edw. Adm. 289, 303; 46 Geo. III. c. 3; The Vixen, 1 Dod. 136. And this authority was supposed still in existence and might be exercised and promulgated through the colonial governor. The intelligence in newspapers without doubt led both parties to the belief, that this authority had then been, or would, before the arrival of the vessel, be rightfully exercised; and both parties proceeded in the insurance upon the ground that the trade would be lawful. In point of fact the port was not opened, and immediately upon the brig's arrival in port, she was seized and condemned for an illegal importation of goods, contrary to the navigation acts of Great Britain. These acts make it illegal to import any goods into any of the colonies except in ships, British built, and owned and navigated by British seamen to the extent of three-fourths of the crew. 12 Car. II. c. 18; 7 & 8 Wm. III. c. 22. The libel against the Union and cargo proceeds upon these acts for the forfeiture. And it is perfectly clear by the whole current of authority that a voluntary arrival in port with a cargo constitutes an importation, within the purview of these and other revenue acts. The Eleanor, Edw. Adm. 135, 160; The Adams, Edw. Adm. 289, 298; The Sarah,

1 Dods. 77; Hale, Cust.; Harg. Law Tracts, 213; The Paisley, 1 Edw. Adm. Append. E. 18.

There can then be no doubt that the arrival at Jamaica being voluntary, and not from necessity or stress of weather, brought the case within the prohibitions of these laws; and that consequently the condemnation might be rightfully made upon this general ground, although the mistake of the master as to the trade being lawful, was the sole cause of his going into port. The question then is narrowed down to this consideration, whether the knowledge of the underwriters of the destination to Jamaica, under the circumstances, makes them liable for a loss by illicit trade, occasioned by mistake and ignorance and against the intentions of the owners. If the trade to Jamaica was prohibited universally, and this fact was understood by the underwriters, they would have been held to the risk of illicit trade. If the trade had been previously open, and was closed during the voyage, they might have been exonerated from that risk. The trade was not open at the time, but the parties contemplated that it would be during the voyage; and then comes the point, whether the underwriters took upon themselves the chance of its being open, and of course the risk of its being illicit.

It cannot be denied that the general words of the policy coupled with the knowledge of the actual destination fully authorized the voyage to Jamaica; as fully, indeed, in my judgment, as if the words had been inserted in the policy. And the case is put in the strongest manner, when it is asked what would be the effect, if the policy had been for a voyage in terms to Jamaica. I do not know, that this would relieve us from a single difficulty, for the same question would still recur, whether under the circumstances it covered the risk of an illicit entry into the ports of that island.

There is not a single case where the underwriters have been held responsible for losses of this nature, unless they have in express terms, or by fair implication, assumed it. If the present policy had contained an express exception of losses by illicit trade, a condemnation for proceeding to Jamaica, although there had been no actual trading there, would have been within the exception. The case of *Church v. Hubbard*, 2 Cranch, [6 U. S.] 187, 232, is an authority directly in point; and that has been followed in the supreme court of Massachusetts. *Higginson v. Pomeroy*, 11 Mass. 104. See, also, *Smith v. Delaware Ins. Co.*, 7 Cranch, [11 U. S.] 434. So that where the risk of illicit trade is not designed to be taken, the presumption is that the risk of proceeding to the port for this purpose is not taken. Is there any difference between a risk excluded by express words and a risk excluded by fair implication? If the underwriters are not presumed to take the

risk of illicit trade, are they to be presumed from the same facts to take the risk of an illegal arrival or importation?

It is argued that the underwriters having insured the voyage to Jamaica must be presumed to warrant a right of entry into the port at least for the purpose of inquiry. That if they authorize the going to the port, they warrant by implication that the voyage to the port is lawful and thus assume the risk of seizure on this account. If this were so, the argument would be exceedingly strong in favour of the plaintiffs. But the authorities do not seem to speak pointedly to such a conclusion. The fair result of the cases in England and in Massachusetts is, that a denial of entry or an interdiction of commerce at the port of destination is not a risk within the common policy. *Hadkinson v. Robinson*, 3 Bos. & P. 388; *Ludbock v. Rowcroft*, 5 Esp. 50; *Parkin v. Tunno*, 11 East, 22; *Richardson v. Maine Ins. Co.*, 6 Mass. 102, 115. The decisions in New York do indeed maintain a different doctrine. See *Suydam v. Marine Ins. Co.*, 1 Johns. 181; *Schmidt v. United Ins. Co.*, Id. 249; *Craig v. United Ins. Co.*, 6 Johns. 226. The supreme court of the United States has held that a restraint by blockade after the commencement of the voyage is a peril within the policy. *Olivera v. Union Ins. Co.*, 3 Wheat. 183. And it was also decided, in conformity with the English cases, that the breaking up of the voyage for fear of capture, because the port of destination was shut, is not a peril within the policy. It was there said, "that the underwriter does not warrant that the vessel shall have a right to trade at the port of destination; but only that notwithstanding the perils insured against, the vessel shall proceed to such port." *Smith v. Universal Ins. Co.*, 6 Wheat. 176. But this language was used in a case where the underwriters were expressly exempted from losses by illicit trade; so that it is in no degree different from that held in *Suydam v. Marine Ins. Co.*, in New York. 1 Johns. 181. The precise point whether seizure for going into an interdicted port, which it is supposed might be open, is a risk within the common policy, does not appear to have arisen in England. In *Hadkinson v. Robinson*, 3 Bos. & P. 388, Lord Alvanley admitted, that if the vessel had proceeded to Naples and had been actually seized, the loss might have been within the policy. Chief Justice Parsons, in *Richardson v. Maine Ins. Co.*, 6 Mass. 102, 115, said, "If new regulations, made during the voyage, should render the trade illicit, and the master on his arrival should violate those regulations, and for that cause the property insured should be confiscated, the assurer will not be answerable, unless he had insured against seizure for illicit trade." This language may perhaps cover the case, where the master ignorantly violates the new regulations; but it does not seem addressed to a case, where

there is a present interdiction and an expected opening of the port during the voyage, contemplated by both parties at the time of the insurance. In *Pollock v. Babcock*, Id. 235, the court decided that if a vessel be insured to an interdicted port, and be seized at an intermediate port (to which she had gone from necessity during the voyage,) on account of her destination, she not having in fact carried on, or attempted to carry on, an illicit trade, it is a loss within the common policy. The court seemed to consider that the going to the interdicted port was lawful, though it was unlawful to trade there. But it decided that if it was unlawful to go to the port, and that fact was unknown to both parties, still the insured was entitled to recover. It is somewhat singular that it was not decided whether, from the facts of the case, the underwriter did not take the risk of illicit trade by implication, for the report states that trade was generally known to be prohibited with the port. If they did take the risk, then the loss was clearly within the policy. If they did not, it is somewhat difficult to reconcile this case with others on the same subject. The case, so far as it goes, does seem to countenance the doctrine that on a voyage supposed to be lawful by the parties, but not in fact so, the underwriters are liable for a confiscation, for sailing on the voyage. In *Parker v. Jones*, 13 Mass. 173, both parties supposed the trade to be lawful to Curacao; but the property was condemned for a violation of the statute of 43 Geo. III. regulating that trade, and the court held the underwriters not liable for the loss, upon the ground that they had not taken the risk of illicit trade. Yet there it might have been said that as the vessel was insured to Curacao, there was an implied undertaking that the property insured might be carried there, and that the risk of its lawful importation was assumed by the underwriters.

Not being able to find the doctrine established that an insurance to a port includes, on the part of the underwriters, the risk of going into the port in violation of law, except where the risk of prohibited trade is assumed, I do not feel at liberty to incorporate it into the construction of the policy. The true principle seems to me to be this, that the policy guarantees an indemnity in going to the port against all losses by the perils insured against; and unless the peril of illicit entry at the port be contemplated as one of the risks insured against, the underwriters are not held. The risk of illicit entry is not presumed to be taken where the trade is not known to be prohibited and expected during the voyage to remain so. If both parties contemplate the trade as free, the policy covers only the ordinary risks. It is only when the trade is not expected to be carried on except by violation of the laws, that the underwriters are

presumed to take that risk upon themselves. The chance of illicit trade is never assumed, unless it is clearly intended to be carried on.

It is asked, if the contingency of illicit trade was not contemplated in this case, what reason was there to insert the clause in the memorandum, that the brig was bound to Jamaica. My answer is, that it might be material information to the underwriters. They might wish to know the intended voyage; and if it were to an interdicted port, it might, even with the exception of prohibited trade, be a risk, which they might not choose to assume. But the same memorandum informed the underwriters that if the brig was not allowed to sell at Jamaica, she was to go to Cuba. This is a plain declaration, that the owners did not mean to force an illicit trade at Jamaica, or an illicit entry there. It was equivalent on their part to a notice, that the brig, though bound to a British colony, was intended to sail only on a lawful voyage, and that the insurance was to cover it as such. And if the owners had concealed the fact of a destination to Jamaica from the underwriters, as the general words of the policy would lead them to presume the voyage was to lawful ports only, it might have been questionable, if the concealment would not have avoided the policy. At all events, it would certainly have done so, if there would have been any increase of premium or risk. The owners in this respect conducted themselves with the most entire good faith and frankness.

What would have been the effect if the memorandum had only said, "The Union is bound to Kingston, Jamaica," I pretend not to decide. It is supposed in the argument, that it would then have clearly covered the risk of an illicit entry. But is this certain? If the parties contemplated only a lawful voyage, and the information led them to the belief, that such a voyage was lawful, could the underwriters be presumed to take the risk of its possible illegality? The law does not say that the underwriter takes the risk of illicit trade, where he by mistake supposes it lawful, but where the trade being known to be illicit, he cannot be presumed from the nature of the voyage to have had any other object in contemplation. Admitting even that the underwriters took the risk of the vessel's going to Jamaica to make inquiries, it is not shown that this was in point of law an illicit act. The very statute on which this condemnation was founded is for an illegal importation of goods, not for an inquiry before arrival in port. There is no British statute within my knowledge that makes it a cause of forfeiture to lie off a colonial port, or to make inquiries, if near the port, whether it be open or not. The statutes of Car. II. and Wm. III. apply only to importations consummated by a voluntary arrival in port. Unless therefore an arrival in port were necessary for the purpose of inquiry, which can

scarcely be pretended, the vessel might have gone to, though not into the port of Kingston, and have been entirely protected by law. See *The Sarah*, 1 Dod. 79. The master himself proceeded upon this supposition. He made inquiries off the port, and was told that the port was open; and this information, given falsely by design or mistake, was the real cause of his going into port.

It is certainly true that both parties must have contemplated that the ports of Jamaica might not be open, for the memorandum provides in that case for a voyage to another island. But the effect of this is to show, not that the underwriters meant to take the risk of the voyage, being illicit, but that they meant to provide another voyage, if it should turn out to be illicit. They engage that the vessel may go to Jamaica, if allowed, if not, then she may go to Cuba. In a case of this peculiar cast I have searched the foreign jurists with a hope of meeting with some principles to illustrate it. But I cannot say that the search has resulted in anything satisfactory. Valin, after remarking, that illicit trade is not covered by a policy, where the underwriter is not informed of the risk at the time of the insurance, says, that his opinion is the same, in cases where the insured is himself ignorant that the trade is prohibited. 2 Valin, lib. 3, tit. 6, Assur. art. 49, pp. 127, 128.

Upon the whole my opinion is, after considerable hesitation, that the present policy, under all the circumstances of this case, did not cover the loss by the condemnation of the property for an illicit importation into Jamaica.

There is another point in the cause, upon which it may be thought necessary, after the full argument at the bar, that I should express an opinion. It is, that the loss was occasioned by the misconduct of the master in setting up a false pretence of distress, and that if the truth of the case had been stated, no condemnation could have been decreed. Whether in any case the underwriters are liable for a loss by any of the perils in the policy, the remote cause of which is the negligence and misconduct of the master and mariners not amounting to barratry, is a vexed question, upon which opposite opinions have been expressed by very distinguished courts. In England the point has recently received after a solemn discussion a decision in the affirmative. (*Busk v. Royal Exch. Assur. Co.*, 2 Barn. & Ald. 73; *Walker v. Maitland*, 5 Barn. & Ald. 171; *Mal. Law Merch.* 111; *Law v. Hollingsworth*, 7 Durn. & E. [Term R.] 160; *Park Ins.* (6th Ed.) c. 3, p. 83; *Carruthers v. Sydebotham*, 4 Maule & S. 86; *Marsh. Ins. c. 12*, § 6. p. 519; *Id.* § 3, p. 494;) though it is not difficult to perceive, that the former opinions inclined the other way. In New York the point has been unequivocally settled in the negative, (*Vos v. United Ins. Co.*, 2 Johns. Cas. 180; *Grim v.*

Phoenix Ins. Co., 13 Johns. 451;) and that appears to be the leading opinion also in Massachusetts. *Cleveland v. Union Ins. Co.*, 8 Mass. 308, 320; *Coffin v. Newburyport Marine Ins. Co.*, 9 Mass. 446. The foreign jurists generally concur in exempting the underwriters from losses by the fault of the master, unless that risk is expressly assumed. 2 Valin, lib. 3, tit. 6, Assur. art. 27, p. 79; *Poth. Assur. note 64*; 1 *Emerigon*, c. 12, § 17, p. 434; and see [*Busk v. Royal Exch. Assur. Co.*], 2 Barn. & Ald. 80, 81; *Miller, Ins.* 136, 138, etc.; *Carevegis Dis.* 142, notes 26, 27. In this diversity of doctrine I desire to suspend my own judgment, until the question is absolutely necessary to be decided. In the present case I am not satisfied that the loss was occasioned by the misconduct of the master. The libel and condemnation are for an illegal importation; and it is said, that if the arrival had been for the mere purpose of inquiry and had been so asserted. It would have been no breach of the statutes restricting the colonial trade. But it appears to me, that a voluntary importation of the goods, though under mistake or for the purpose of inquiry, is within the prohibitions of these statutes. The case of *The Sarah*, decided by Lord Stowell, (then Sir William Scott), is directly in point, (1 Dod. 79; *The Vixen*, *Id.* 136;) and no judge ever understood the colonial laws better or administered them with more lenity. I am therefore spared the necessity of looking at the more general question, since whatever may be the extent of the misconduct of the master, it is not shown to have been the efficient cause of this loss.

As however upon a principal point, the reformation of the policy, my opinion proceeds upon a defect of jurisdiction in the court, I think the plaintiffs are entitled to have that question litigated in another forum, and shall therefore decree that the libel be dismissed without prejudice to any other suit.

Case No. 375.

ANDREWS' EX'RS v. GARETT.

[1 Flip. 445; 22 Int. Rev. Rec. 42; 1 N. Y. Wkly. Dig. 452; 2 Cent. Law J. 797; 2 N. Y. Wkly. Dig. 142; 8 Chi. Leg. News. 122; 1 Law & Eq. Rep. 40.]

Circuit Court, S. D. Ohio. Nov., 1875.

REMOVAL OF CAUSES — ACT OF 1875—TIME WHEN CAUSE MAY BE REMOVED.

By the provisions of section 3, Act 1875, [18 Stat. 470.] a cause pending when the act was passed may be removed to the federal from the state court, if "at or before the first term at which said cause could be first tried" after the passage of the act the petition and bond are filed. It was so held in a case where there had been a trial, and a new trial was granted before the act passed.

[Cited in *Crane v. Reeder*, Case No. 3,356; *Merchants' Bank v. Wheeler*, Case No.

¹[Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

9,439; *Young v. Andes Ins. Co.*, Id. 18,151. Approved in *Hoadley v. San Francisco*, Id. 6,544; *Meyer v. Delaware Railroad Const. Co.*, 100 U. S. 473.]

At law. On the 25th day of March, A. D. 1867, suit was brought by the plaintiffs [as executors of Andrews, deceased] against the defendants in the court of common pleas of Ohio, to recover the sum of \$10,000 deposited with the defendants as indemnity for acceptance by them for the accommodation of the Steubenville and Indiana Railroad Company, and which the plaintiffs claim the defendants became liable to pay to them. Attachments were issued, and certain property was attached. On the 18th day of May, 1867, the defendants filed the motion to remove the cause into the circuit court of the United States. Upon the hearing of the motion it appeared that one of the plaintiffs was a citizen and resident of Illinois, and one a citizen and resident of Minnesota. The motion was overruled. Thereupon the parties made up the issues in said court of common pleas, and at the April term, 1873, a jury was waived and the case submitted to the court, and judgment rendered in favor of the defendants. The plaintiffs were awarded a second trial, amendments were made to the pleadings, and the cause was, at the November term, 1874, tried before a jury, and a verdict had for the plaintiffs. At the same term the verdict was set aside, and the cause was continued till the January term, 1875. On the 25th of January the cause was continued. At the same term, on April 25, 1875, this order was set aside, and a petition was filed by the defendants praying for a removal of the cause to the circuit court of the United States, under the provisions of the act of congress of March 3, 1875. Bond with good security was also filed. The grounds of removal were, that the defendants were citizens and residents of the state of Maryland, and that one of the plaintiffs was a resident of the state of Illinois, one a citizen and resident of Minnesota, and the other a citizen and resident of Ohio. The application was resisted on the ground that the case did not come within the provision of the act of March 3, 1875, because not filed with the court at or before the first term at which the cause could be tried, and before the trial thereof. On the hearing of this petition, the court, for the reason that the action was triable, and was actually tried in said court before the passage of the act of congress, overruled said motion. On the 12th day of May, 1874, the defendants filed in this court a transcript of the record and proceeding in said cause. On the 6th day of October, a motion was filed to strike the case from the docket for want of jurisdiction in this court.

Mr. Granger, of Muskingum county, and E. F. Hunter, for the motion.

A. G. Thurman, opposed.

SWING, District Judge. The disposition of this motion involves the construction of the second and third sections of the act of congress, passed March 3, 1875, [18 Stat. 470.] providing, etc. The second section of that act provides: "That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and arising under the constitution or law of the United States; * * * or, in which there shall be a controversy between citizens of different states, etc., either party may remove said suit into the circuit court of the United States for the proper district. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs as defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district." The third section provides: "That whenever either party or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a state court to the circuit court of the United States, he or they may make and file a petition in such suit in such state court before or at the term at which said case could be tried, and before the trial thereof." The remaining part of the section refers to the bond and proceedings on removal.

It is not denied that the amount involved in this case, and the citizenship of the parties, were within the requirements of the second section. The amount was over \$500. The controversy was between citizens of different states, and the suit was pending in a state court at the time of the passage of the act of congress, possessing every element to authorize its removal to the circuit court of the United States. The third section simply provided the time when and the mode in which the application shall be made for such removal, and the steps necessary to accomplish it. The mode is to be by petition to the state court, and the time is before or at the term at which said cause could be first tried, and before the trial thereof. The facts found by the learned judge of the state court show that the petition was properly filed, and all the necessary steps taken in accordance with the provisions of the third section, and that the petition was filed before or at the term at which said cause could be tried after the passage of said act of congress. And if the term referred to be the term after the passage of the act, there can be no controversy in the case. The jurisdiction must be admitted. That congress had the power to authorize the removal of the cause in its then condition cannot be doubted. *Home Life Ins. Co. v. Dunn*, 19 Wall. [86 U. S.]

214. Did they, by the terms and the spirit of this statute, so authorize its removal? The language of the statute is, any suit now pending; in other words, all suits now pending of the requisites may be removed, and the length of time which the suit had been pending, or the condition it was in if no final judgment had been rendered, could make no possible difference in the reason which operated upon congress to confer the jurisdiction, as is clearly shown in the reasoning of the court in the case of *Home Life Ins. Co. v. Dunn*, [Id.] The term referred to is the term at which said cause—what cause? The cause referred to in the second section; to-wit: any cause pending at the passage of the act could be first tried after the passage of the act, and not the term, at which said cause could have been tried long before the passage of the act. The motion will, therefore, be overruled.

Case No. 376.

ANDREWS v. GRAVES.

[1 Dill. 108;¹ 4 N. B. R. 651.]

Circuit Court, D. Missouri. 1870.²

BANKRUPT ACT—PRACTICE—DEPOSITIONS—RIGHT OF ADVERSE PARTY TO USE, ETC.

1. Under a declaration upon the 35th section of the bankrupt act, alleging that the bankrupt did "transfer, assign, and convey," &c., to the defendant, the plaintiff is not limited on the trial to the proof of a technical assignment under the state insolvent laws.

2. A judgment will not be reversed because papers recognized on the trial in evidence were not formally read.

3. Under the circumstances stated in the opinion, it was held that district court did not err in allowing a deposition taken and filed by one party to be read in evidence by the other.

4. Dates fixed by the records of the court may be stated to the jury as facts.

5. The court will look at the entire charge to the jury, in order to ascertain whether the law was, upon the whole, fairly presented to them.

6. Construction of the 35th section of the bankrupt act; and the ingredients of a right of the assignee to recover thereunder, stated and commented on by Treat, District Judge.

In bankruptcy. Writ of error, to the district court for the western district. The action was brought by the assignee of Lawrence, against the defendant, under the 35th section of the bankrupt act. The plaintiff recovered, and the defendant sued out the writ of error, which now brings the cause before this court.

Glover & Shepley, for plaintiff in error.

E. T. Allen, for defendant in error.

Before DILLON, Circuit Judge, and TREAT, District Judge.

¹[Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

²[Affirming an unreported decree of the district court.]

TREAT, District Judge. Many of the errors assigned are dehors the record. This was an action, substantially, of trespass de bonis asportatis. The declaration avers that the bankrupt did on the (blank) day of October, 1869, "transfer, assign, and convey" (the statutory terms) to the defendant, &c.

The counsel below seems to have supposed the time material, and that the cause of action was limited to a technical assignment, as under the state statute, and consequently no evidence was admissible as to any other form of an alleged fraudulent transfer or conveyance, or as to any such transfer or conveyance at a different time from that stated in the declaration. The declaration is so framed as to cover any fraudulent transfer, assignment, or conveyance during the six months prior to the filing of the petition in bankruptcy. Hence all the errors assigned which are based on the incorrect hypothesis of counsel below as to the cause of action, disappear.

It is said there is no evidence that Andrews was adjudged bankrupt, or the plaintiff appointed assignee. The declaration avers these facts, and that the adjudication was made by the court which tried the case; and frequent reference is made at every stage of the case to the records of the court in the bankruptcy proceedings, showing that those records were produced and recognized as in evidence. No objection was made below that they were not formally read or offered in evidence; but all parties treated them as before the court and jury.

It appears that the defendant caused the deposition of Higgins to be taken on notice, before Register Lindenbower, and that at the time and place designated both parties appeared by counsel and examined, cross-examined, and re-examined the witnesses at great length; that said deposition was duly filed in the cause, and that defendant moved to strike the same from the files, on the grounds set out in the written motion therefor, and subsequently objected to the plaintiff's reading the deposition for reasons stated. The grounds thus stated are, except in one particular, dehors the record, and for aught known to this court, the motion and the objections were overruled, because it was apparent to the court that they had no foundation in fact. It does appear that the deposition was taken before the register at the instance of the defendant himself, and with the assent of the plaintiff, that after being duly certified was placed on file in the case. In *Yeaton v. Fry*, 5 Cranch, [9 U. S.] 335, one of the errors assigned was that the plaintiff was permitted to read in evidence depositions informally taken by the defendant under a commission, and the supreme court held that there was no error committed, Chief Justice Marshall delivering the opinion. That case does not expressly determine all the points here presented, but it decides that, when depositions are not tak-

en ex parte or de bene esse under the act of 1789, or both parties appear and examine and cross-examine, and the depositions are subsequently placed on file, the party at whose instance they were taken, cannot object to their being read by the opposite party on the ground of any irregularity or informality. Having taken a deposition under the circumstances named he cannot except thereto, nor cause the same to be suppressed. The officer before whom taken ought to cause the same to be transmitted to the court, for the benefit of all concerned, and once on file the defendant could not suppress or withdraw it. Although a register has no authority to take such a deposition, yet he has full authority to administer oaths; and when by the assent of parties he has taken such a deposition to be used as evidence in the cause, the same becomes a sworn statement made in the case to be used as evidence therein, to which the defendant causing the same to be taken cannot object. The irregularity was defendant's, to which the plaintiff might have excepted, not the defendant.

We do not understand the record to show that there was any objection to the use of the deposition on account of the incompetency of the officer before whom it was taken; nor does the objection seem to have been made that one party could not use the deposition taken by another, had it been properly certified, returned, and filed. But there having been an appearance before the officer by counsel of both parties, and a full examination and cross-examination of the witness, and no showing that the witness was present in court, and the course pursued being conformable to the usual practice in the state, we unite in holding that the court did not err in allowing the deposition to be read, without now deciding that one party has in all cases an absolute right to use depositions taken by his adversary.

As the records of the court before the judge fixed the precise date at which Andrews' petition in bankruptcy was filed, and were absolute verity, no error was committed in stating that date to the jury.

To determine whether there was error in charging the jury it is necessary to look to the whole charge, so as to ascertain whether one part thereof is not qualified by another, and thus the law fairly presented. The definition of insolvency in this case (the defendant being a merchant) was not only correct, but the allusion to another provision of that act, as illustrative of the reason of the rule, was unobjectionable.

All through the charge the court endeavored to enforce upon the jury that it was their exclusive province to weigh the testimony, and determine what it established. Their attention was called to the testimony bearing upon certain points to be ascertained, and the rules of law in reference thereto stated. If the charge were to be considered as to

each sentence or point, dis severed from the other sentences or points in the complex problem, room might exist for sharp criticism as to successive details; but the question for review is whether the law governing the case was fairly and correctly stated, and not whether another and different mode of presenting them would not have been more satisfactory to one or the other of the parties litigant.

The law on which is based the plaintiff's right to recover, requires these facts to be proved:

1st. The vendor was insolvent, or in contemplation of insolvency.

2d. The vendee had reasonable cause to believe such to be the condition of the vendor.

3d. The sale was made by the vendor with a view to contravene the provisions of the bankrupt act.

4th. The vendee had good reason to believe such to be the view or intent of the insolvent vendor in making the sale. *Babitt v. Walbrun*, [Case No. 694.]

Hence as to the vendor, it must be shown that he was insolvent, &c., and that he made the sale with the view named; and on the part of the vendee, that he had reasonable cause to believe the status of the vendor to be as charged, and his purpose or intent to be in making the sale a contravention of the act.

In ascertaining the alleged fact of insolvency, it was proper to charge the jury in such a way as to give them a clear view of the legal meaning of the term. That was done. Not only was a correct definition of insolvency given, as applicable to a merchant, but it was illustrated by reference to another provision of the act. That illustration, so far from being ground of error, was quite appropriate, in order that the jury might have a clear understanding of the general proposition stated. So it was proper to direct the attention of the jury to the distinction between "reasonable cause to believe" and "actual belief"—between willfully shutting the eyes against demonstrative facts and circumstances, and their obvious existence. In that respect the charge was more favorable to the defendant than a stricter statement of the rule might have justified.

The statute declares what shall be prima facie evidence of a fraudulent transfer, and when such a prima facie case is made out, and no explanatory evidence is offered, it is unnecessary for the court to enter upon minute or elaborate distinctions as to the force and effect thereof. The case should be treated in the light of the law as applicable to the testimony produced, and not with reference to supposed or imaginary states of proofs possible to be adduced in some other cause. The jury are to be instructed and not confused; and there is no need of going beyond the legal requirements of the case presented. In the light of the testimony, the court was called upon to define the rules

of law applicable thereto, and did so without repeating each element of the problem as it passed to the next in logical order.

The testimony sufficiently established the insolvency of the vendor, and reasonable cause in the vendee to believe the vendor insolvent. It also showed that the sale was made out of the ordinary course of business, and consequently there was prima facie evidence of fraud—fraud on the part of the vendor, in which the defendant was directly participating. If the law declares a sale under given circumstances, prima facie evidence of fraud, it is prima facie evidence to all concerned—to the vendee as well as to the vendor. It is difficult to perceive how, when prima facie evidence of a fact is presented, a person has not reasonable cause to believe the fact to exist, or, in the language of the decision, “to be put upon inquiry.”

Dealing with the case as it thus stands, the court below brought with sufficient clearness to the minds of the jury the legal rules by which their action was to be governed, and guardedly stated that it was exclusively for them to give, even to the prima facie evidence, such weight as they might deem proper.

In referring to the testimony concerning the mortgage on the property of the bankrupt's wife, and the manner in which by the contrivance of the defendant and the bankrupt conjoined, that mortgage was paid off at the expense of the creditors, the court used the strong language with which the law characterizes such a transaction. Certainly there is no assignable error on that ground. If a father-in-law, when his son-in-law is known by him to be insolvent, and within a few days of his voluntary application to be adjudged a bankrupt, buys, out of the usual course of trade, a large, if not the largest portion of the insolvent's property, and gives notes payable at long dates, and then cashes the notes and pays to his own son as mortgagee the money thus furnished, in discharge of a mortgage on the property of his daughter, who is the wife of the bankrupt son-in-law, it is not improper to say the law frowns on such contrivances for using the bankrupt's means to the detriment of his honest creditors. That transaction obviously was the transfer of the bankrupt's property to his wife in fraud of his creditors, through the agency of the wife's father for the benefit of herself and of his son, the mortgagee.

The defect in the declaration was cured by the verdict under the statute of jeofails.

DILLON, Circuit Judge, concurs.
Affirmed.

NOTE, [from original report.] In the circuit court for the eastern district of Arkansas, at the April term, 1871, (present, Dillon, Circuit Judge, and Caldwell, District Judge,) it was held, that where the plaintiff had taken ex parte a deposition de bene esse, and subsequently in like manner took the second deposition of the

same witness upon the same subject, and read the last in evidence (which referred to the first), that the defendant might read to the jury the first deposition; and the case was distinguished from *Sexton v. Brock*, 15 Ark. 345, where this subject is fully considered, and the cases collected and reviewed by Mr. Chief Justice Watkins. See, also, *Yeaton v. Fry*, 5 Cranch, [9 U. S.] 335.

Case No. 377.

ANDREWS et al. v. HYDE et al.

[3 Cliff. 516.]¹

Circuit Court, D. Massachusetts. Oct. Term, 1872.²

MORTGAGES—WHAT CONSTITUTES—EQUITY—EVIDENCE—PLEADING.

1. Repeated decisions of the federal courts have established the rule that oral evidence is admissible for the purpose of showing that a deed absolute on its face, was intended as a mortgage, and that the defeasance was omitted from mutual confidence between the parties.

[See *Amory v. Lawrence*, Case No. 336; *Howland v. Blake*, Id. 6,792; *Cadman v. Peter*, 12 Fed. 363; *Peugh v. Davis*, 96 U. S. 332; *Dow v. Chamberlin*, Case No. 4,037; *Bentley v. Phelps*, Id. 1,331.]

2. The evidence to prove the agreement ought to be clear and satisfactory, as the rule is one of exceptional character in the law of evidence.

[See *Cadman v. Peter*, 12 Fed. 363.]

3. Where the evidence to prove the agreement, was that of only one of the parties, the other having deceased, and was uncorroborated by any word or act of the other, proof of friendly relations existing between the parties is not sufficient where the evidence is otherwise subject to doubt.

4. Where witnesses are not excluded on account of interest in the event of the suit, the rule still applies that their veracity or impartiality may be affected by such interest.

[See *The Boston and Cargo*, Case No. 1,673; *The Helen R. Cooper and The R. L. Mabey*, Id. 6,334.]

5. Something is due in such a case as this, to the denials of the answer to the effect that the conveyances were not made as security for any indebtedness.

6. Where the allegation of the bill is that certain real estate was conveyed to a deceased person as security for a debt, the complainant is not entitled to a decree upon the uncorroborated testimony of a single witness, and certainly not unless his statements are positive, and he appears to be without prejudice, bias, or interest adverse to the respondent.

[See *Clark v. Van Riemsdyk*, 9 Cranch, (13 U. S.) 153.]

In equity. The complainants were the assignees in bankruptcy of the estate of Horatio Woodman, and the respondents were the heirs at law and administrators of the estate of John A. Andrews, late of Boston, deceased. Briefly stated, the cause of action, as alleged, was as follows: That Woodman on the 17th of September, 1860, borrowed of John A. Andrews the sum of \$6,000, for which

¹[Reported by William Henry Clifford, Esq., and here reprinted by permission.]

²[Reversing an unreported decree of the district court.]

he gave his notes, and as for security for the debt and notes he conveyed or caused to be conveyed to him by two deeds dated respectively September 17, 1860, and October 8, in the same year, certain real estate situated in the counties of Shelby and Franklin in the state of Iowa, as more fully described in the said deeds. Said deeds, as the complainants alleged, were executed as security for said indebtedness, and that the grantee agreed to hold the lands only as security as aforesaid, and that he would reconvey said real estate to said Woodman when he should pay the amount of the loan and interest. Based upon these allegations, the prayer of the bill was that the complainants might be permitted to redeem the said lands, and for an account. The principal deed in question was the one first described, which was acknowledged on the day of its date, and was recorded on the 26th of the same month in the proper registry of the county where the land is situated. It acknowledged the receipt of three thousand dollars, which the grantor told one of the witnesses was the full value of the land. When conveyed, the land was wild land, neither party occupying it. Service was made, and the respondents appeared, and filed an answer in which they denied that the land was conveyed as a security, and averred that the conveyance was absolute and not as security. Testimony was taken, and the district court entered a decree for the complainants, from which decree the respondents appealed to this court. [Decree reversed, and bill dismissed, with costs.]

Woodman testified that the deeds were never in the possession of the grantee, that they remained in his possession until the appointment of his assignees in bankruptcy, that the deeds were made as security for present and future loans, that at the date of the first deed he was owing the grantee \$3,540.91, and that at the time of his death, October, 1867, he owed him \$7,000.

H. W. Paine and C. M. Ellis, for appellants.

H. D. Hyde, for appellees.

CLIFFORD, Circuit Justice. The testimony was full to the point that the deeds were given as security, and, if so, the complainants must be permitted to redeem, and they are entitled to an account as prayed in the bill, as repeated decisions of the federal courts have established the rule that oral evidence is admissible for the purpose of showing that a deed absolute on its face was intended as a mortgage, and that the defeasance was omitted from mutual confidence between the parties. *Wyman v. Babcock*, [Case No. 18,113;] *Babcock v. Wyman*, 19 How. [60 U. S.] 299; *Russell v. Southard*, 12 How. [53 U. S.] 139. Argument to support that rule of law is unnecessary, as it is well settled by authority, but the evidence

to prove the agreement ought to be clear and satisfactory, as the rule is one of an exceptional character in the law of evidence. Unquestionably the issue in this case depends entirely upon the credit to be given to the party who made the conveyances, in a case where he is not corroborated by any act or word done or spoken by the other party.

Attempt is made to show that he is corroborated by certain circumstances in the case, but the circumstances relied upon are too remote or too slight, in the judgment of the court, to have any substantial weight in that regard. They are as follows: 1. That friendly relations had existed between the parties for many years; but it is difficult to see how that fact tends to show that it was agreed between them that a deed absolute on its face should be held merely as a security for money loaned, and that the grantor might redeem the same at any future period of time during his natural life. Woodman admits that he was buying and selling land-warrants and lands during that period, and it is not unreasonable to suppose that he would be as ready and willing to sell to a friend as to a stranger, especially as it appears that the lands in question cost him only about one dollar per acre. Having purchased the land cheaply, it is quite as probable that he might be willing to give his friend a good bargain for prompt payment, as that his friend should agree to allow him an indefinite and unlimited right of redemption in the lands. 2. That the grantee paid the taxes. The only evidence of that fact is found in his own testimony, and if credit is not given to the witness, the fact is not established. Payment of the taxes, if made by the grantor, could have easily been proved, but the fact, if established, would not amount to much, as persons holding Western lands frequently employ agents to pay their taxes. 3. That the grantee retained the possession of the original deeds. The fact as shown in evidence is, that the grantee did not have the deed first described. On the contrary, it was sent to the registry of deeds, where it remained for a long time. True, he states in his deposition that the deeds were returned to him as soon as they were recorded, and that they were retained by him, and remained in his possession until the appointment of his assignees, but it appears from the deposition of Augustine Jones, that Woodman, in August, 1870, told him that the deeds were in the office of the registry of deeds in Iowa, and that he would send for them, and that at a subsequent time, when the witness called for the deeds, he told him that they had not arrived. Superadded to that, is the letter of Woodman to that witness, dated September 8, 1870, in which he states that he has received "the original deed from me to Governor Andrew of the Shelby county land, which I enclose to you with two cancelled agreements" there-

in described, showing that the pretence that he had the deeds in his possession all the time, is unfounded. Such a pretence is invoked, as showing that the deeds were under his control as the real owner of the property, but the pretence being disproved, it tends to discredit the witness, instead of confirming his testimony. Had he retained the deeds, as the pretence is in his testimony, something doubtless might be inferred from that circumstance in support of the theory of the complainants, but he having set up that theory in his examination, in chief, and the pretence being disproved, it must be assumed that the circumstance tends to discredit the grantor as a witness, especially as it is not shown by any other witness that he ever claimed any interest in the land during the lifetime of the grantee, or that the grantee ever in any way recognized the pretence that he had any interest in the lands.

Nothing certainly can be inferred in support of the theory of the complainants from the character of the supposed transaction, as the story is quite improbable on its face. It is that the grantor executed an absolute deed of lands, put it on record without the knowledge of the grantee, and kept it a secret from him for the period of three years, without anything to show that the deed was not what it purported to be, both of the parties having experience as conveyancers, and being well aware of the necessity of a defeasance of some kind, and that the same condition of things was continued four years longer, after the grantee was informed of the conveyance, without any step being taken by either party to supply the omission. Such men, whether friends or not, would not be likely to leave their rights in such uncertainty. Much strength is added to that view from the fact that the grantor from September, 1866, to March 20, 1867, was not indebted to the grantee at all, and yet, as the theory of the complainants is, the title was allowed to stand in the name of the grantee as a security for indebtedness, when nothing was due to the party holding the absolute estate. Debtors are frequently negligent in procuring a renewal of an expiring defeasance in cases where they have been in fault in not making the stipulated payments to their creditor, but when the whole incumbrance is paid, they are much less likely to remain quiet without some written assurance that their rights will be respected.

Administration on the estate of the grantee was first granted to William Rogers, and it appears that the grantor in those deeds was one of the appraisers. Jones was the other, and he testifies that Woodman never, in any of their consultations, stated that his notes to the intestate were in any way secured, and it does not appear that he made any such disclosure when, at a subsequent period, he was appointed administrator de bonis of the same estate. In his deposition he states that when these deeds were executed, he

was indebted to the grantee in the sum before mentioned, which was secured by the conveyances, but Jones says that in their conferences as appraisers, he never mentioned that the notes were secured, that he did say, at another time, that the deeds were given to secure the sum of \$7,000, and that it was agreed at the time the deeds were made, that they should be security for that sum. Contradictory statements are certainly calculated to impair the credit of a witness, and it is clear that the statement that such an agreement was made at the time the deeds were made, is utterly inconsistent with his testimony given in the case, that the grantee did not have any knowledge of the deeds for three years after they were made and forwarded to be recorded. His statements also to Jones are inconsistent with each other, as at another time he told him that the land conveyed was worth just about \$3,000, which was the amount borrowed of the grantee, and that after 1860 he never owed the grantee less than that amount, which cannot be true, if he is to be believed, as he testifies that he owed him nothing from September, 1866, to March 20, 1867, as before explained. He is also contradicted in other particulars. He told Jones he paid the interest regularly, that he took no receipts, and that the notes with the indorsements of interest were all destroyed. Interest was not paid as there stated, as conclusively appears from the letter of the grantee, dated December, 1862, to the grantor, which is an exhibit in the case. When cross-examined in respect to those exhibits, Woodman admitted that they showed that he did not pay interest from December 1, 1862, to March, 1867, a period of more than four years. Important parts of the relation he gives of his dealings with the grantee, are materially erroneous, if not wilfully false. He claims that his exhibit of those matters is taken from his notebook, and that the statement shows the true state of his indebtedness, but the administrator produces a large number of notes and checks to the amount of \$1,300, to which the witness does not allude in his account, which goes very far to show that no reliance can be placed in his statements as their dealings, or the amount he owed the grantee when the deeds were given. Witnesses are no longer excluded on account of interest in the event of the suit, but the proof of interest affects the credit of the witness now, as well as before, the passage of the act not changing the rule in that regard, as it shows that the witness is not impartial, that he has a motive to color his statements or to suppress the truth or to state what is false.

Woodman is not impartial, though decreed to be a bankrupt before he testified, as he was a defaulter to a large amount to the estate of the deceased grantee, from which he could not obtain a discharge in the bankrupt court. No debt created by the fraud or embezzlement of the bankrupt, or by his de-

falcation as a public officer, or while acting in any fiduciary character, can be discharged by the bankrupt court in any case. 14 Stat. 533. As administrator of the estate, he is a defaulter to the amount of \$6,759.39, for which he cannot be discharged under the bankrupt act, but if he can establish the theory that those deeds are mortgages, and compel the legal representatives to get the pay for the claim out of those lands, he will be relieved from that liability and embarrassment. Something also is due to the absolute denials of the answer, in which the respondents not only deny that the real estate was conveyed as a security for any indebtedness, but aver their belief that the deeds were made as absolute conveyances and not as a security. Administrators and heirs cannot be supposed, in such a case, to have personal knowledge upon the subject, but the decision of the supreme court warrants the conclusion that in such a case the complainant is not entitled to decree upon the uncorroborated testimony of a single witness, certainly not, unless his statements are positive and the witness appears to be without bias, prejudice, or interest adverse to the respondent. *Carpenter v. Insurance Co.*, 4 How. [45 U. S.] 218. Grave doubts are entertained whether a decree in such a case ought ever to be made upon the uncorroborated testimony of the grantor, but it is not necessary to decide that point, as the court is clearly of opinion that such a decree ought not to be made where it appears that the witness is interested adversely to the respondent, is contradicted by another witness, and has himself given false and contradictory accounts of various matters material to the issue, and, especially, where it appears that the claim has been long delayed and was never made in the lifetime of the grantee. Claims of the kind are easily made, and unless full proof is required to sustain them, it is to be feared that the estates of dead men will afford much less comfort and support to their widows and minor children than the decedents supposed the estates would, while they were expending their strength in toil and industry to earn and save the property for that purpose. Decree reversed and bill dismissed with costs.

ANDREWS v. KELLY.

[See *Andrews v. Spear*, Cases Nos. 379 and 380.]

ANDREWS, (LOW v.)

[See *Low v. Andrews*, Case No. 8,559.]

ANDREWS v. NICHOLS.

[See *Andrews v. Spear*, Cases Nos. 379 and 380.]

ANDREWS, (PALMER v.)

[See *Palmer v. Andrews*, Case No. 10,683.]

ANDREWS v. PLATT.

[See *Andrews v. Spear*, Cases Nos. 379 and 380.]

ANDREWS v. PRATT.

[See *Andrews v. Spear*, Cases Nos. 379 and 380.]

ANDREWS v. PRAY.

[See *Andrews v. Spear*, Cases Nos. 379 and 380.]

ANDREWS, (ROCKVILLE & W. TURNPIKE ROAD v.)

[See *Rockville & W. Turnpike Road v. Andrews*, Case No. 11,984.]

ANDREWS, (SCUDDER v.)

[See *Scudder v. Andrews*, Case No. 12,564.]

ANDREWS v. SNYDER.

[See *Andrews v. Spear*, Cases Nos. 379 and 380.]

Case No. 378.

ANDREWS et al. v. SOLOMON et al.

[Pet. C. C. 356.]

Circuit Court, D. Pennsylvania. Oct. Term. 1816.

WITNESS—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT—EQUITY PLEADING—ADDITIONAL PARTIES—AGENCY.

1. A person who came to a knowledge of facts while he was a student in the office of an attorney who was consulted by a party in this cause, in relation to the matter to which he is called to testify, may be a witness. The rules of law which prohibit an attorney or counsel being witnesses, do not apply to a student in the office of such attorney or counsel.

2. Where the original bill contains no allegations against defendants, who have nevertheless answered the bill, they having been made parties by permission given by the court to the complainant, but who did not file an amended bill, if even a proper case for the interference of a court of equity were made out, the court would be compelled to dismiss the bill as against these defendants.

[Cited in *Baker v. Biddle*, Case No. 764.]

3. A court of equity will not interfere where the parties have a remedy at law.

[Cited in *Baker v. Biddle*, Case No. 764.]

4. The irregularities of an agent in relation to the disposition of the proceeds of real estate sold by him, do not affect the title to the estate conveyed to the purchasers.

[Cited in *Baker v. Biddle*, Case No. 764.]

*[Reported by Richard Peters, Jr.]

In equity. This was a bill on the equity side of the court, filed by the widow and all the legal representatives of H. Solomon, deceased, except H. Solomon one of the defendants, in order to set aside the sales and conveyances of certain lots of ground in the city of Philadelphia, made by the sheriff under a writ of venditioni exponas issued at the suit of the defendant, E. Solomon, against the executors of his father, the aforesaid H. Solomon, deceased, and for other and further relief. By the bill it appears, that H. Solomon the father, died seized of the legal estate in two of the lots in question, and that the other five lots were granted by the state of Pennsylvania to a Mr. Franks. The bill alleges, that the purchase money was paid either by the said H. Solomon the father, or by his widow; and that she took out the patent in the name of Franks, intending it, however, to be in trust for herself, and the children of the said H. Solomon. Franks afterwards conveyed these five lots to the said widow and the children of the said H. Solomon to take, the widow her dower, and the children according to the intestate laws of this state. The bill then charges that the defendant E. Solomon, although he was the agent of the complainants (they residing in New York, and he in Philadelphia) in respect to the management of the said seven lots, yet, with a view to defraud them thereof, purchased a note of his father's due to the bank of North America, amounting together with interest to about the sum of 1300 dollars, for the sum of 50 dollars; and having instituted a suit thereon and recovered a judgment for the amount so due, he procured the above lots to be sold under a venditioni exponas, for about 1400 dollars, although in truth, he had previously agreed with a certain G. Bickham for the sale of the five lots, for upwards of 3000 dollars; and immediately after the said sheriff's sale, he sold the other two lots to the defendant, F. Gaul, for the price of 1850 dollars. That after the above sales and conveyances by the sheriff to G. Bickham, the judgment under which they were made was upon a writ of error reversed.

The answer of the executors of G. Bickham, denies all knowledge of the allegations in the bill, except that they find by certain papers, to which they refer, that the five lots were sold under the venditioni exponas to the said G. Bickham, and were conveyed by the sheriff to the said G. Bickham and to Jacob Reese and David Lydeg, for the use of the children of the said Jacob Reese in fee, and in case of their dying before they attained their full age, then to the use of the said Jacob Reese. That although the consideration mentioned in this deed was only 610 dollars, yet that 3266 dollars and 50 cents, were in fact paid by G. Bickham to the defendant, E. Solomon, as appears by his receipt. The answer of F. Gaul, states

that he negotiated with a broker for the purchase of the other two lots, which were conveyed to him by E. Solomon for the consideration of 1850 dollars, which was paid to him, and he denies all notice of fraud or contrivance between G. Bickham, or any other person and the said E. Solomon. E. Solomon in his answer, denies that he was the agent of the plaintiff Andrews, the husband of one of H. Solomon's daughters, and of Meyers, who married another of the daughters, whose children are complainants; and he states further, that the sale of these lots took place at the instance, and with the knowledge of his mother, and of H. Solomon the other complainant, to whom the whole of the purchase money received for the above lots was paid. He states also, the total insolvency of his father at the time of his death.

Jacob Reese demurs to the relief sought by the bill for want of equity, and to the discovery of his legal title as well as to the relief, so far as the bill seeks to make him accountable for the fraud imputed to G. Bickham. He also answers the residue of the bill, and states that H. Solomon, the father, purchased the five lots from the state, and that the patent to Franks was granted under a secret trust, for the benefit of the said H. Solomon, the father; that G. Bickham purchased the five lots at the request of the executors of P. Lydeg, deceased, for the use of the two children of the defendant, from whose funds the purchase money was paid to E. Solomon. The answer of the two infant sons of Jacob Reese, by their guardian, is in the usual form, praying the protection of the court. To these answers general replications were put in.

At the hearing of this cause, the deposition of Daniel Addis, was offered by the complainants, and was objected to by the defendants, upon the ground that the facts stated by the witness, came to his knowledge whilst he was a student of Mr. Brown, the attorney who was consulted by Bickham and the defendant E. Solomon, in relation to the mode of securing the title to the aforesaid lots, and that it was in his character as student, that he obtained his information. The witness upon his cross examination, stated, that the declarations of Bickham were not made to him professionally, but that he frequently talked to him upon the business whenever he met him. In support of the objection, were cited [Morris v. Vanderen,] 1 Dall. [1 U. S.] 66; [Du Barre v. Livette,] Peake, 77. On the other side were cited 1 Phil. Ev. 103; Gilb. Ev. 138; [Holmes v. Comegys,] 1 Dall. [1 U. S.] 439; [Vaillant v. Dodeinead,] 2 Atk. 524.

By the Court: An attorney is not permitted to disclose as a witness, the secrets of his client, because in doing so, he would betray a confidence, which from necessity the client must repose in him. All the reasons which apply to the attorney, apply to an interpreter

between the client and the attorney, of whom he is merely the organ. Not one of these reasons apply to the student; no confidence is reposed in him by the client, nor is there any necessity that it should. The court feels no inclination to extend the rule further than it has already gone. The evidence was admitted.

Hopkinson for F. Gaul contended, that the reversal of the judgment cannot affect the title of his client, the act of assembly (1 Laws Pa., Smith's Ed., 61) having declared, that purchasers under a judgment, which is afterwards reversed, shall not have their titles impeached on that account; that there is no imputation of fraud against the defendant, nor is he even charged with notice of fraud, in G. Bickham or Solomon.

The counsel for the complainants contended, that as the sale by the sheriff was merely nominal, all the lots having been previously sold at private sale for a much larger sum than that at which they were struck off to G. Bickham; the act of assembly, which was clearly intended to protect fair bona fide purchasers, under the sheriff, cannot apply. In England the rule in relation to purchasers of chattels at a sheriff's sale, under a judgment which is afterwards reversed, is precisely the same, as that established by this act of assembly; and yet if the sale be not fair, and is not wholly under the execution, the title of the purchaser is not protected. So the same rule applies to sales in market overt and the same distinction takes place. [Hoe's Case,] 5 Coke, 90b; [Manning's Case,] 8 Coke, 96b; [Goodyer v. Junce,] Yelv. 180; [Holford v. Andrewes,] Moore, 573; 19 Vin. Abr. 439, p. 4; 2 Bl. Comm. 450; 2 Inst. 713; [Close v. Gillespey,] 3 Johns. 525; [Mortlock v. Bulter,] 10 Ves. 292.

If G. Bickham was concerned in a contrivance with E. Solomon to defraud the complainants, those for whom he acted, or who claim under him, though without notice are affected by his fraud. [Huguenin v. Baseley,] 14 Ves. 289, 2 Fonb. 158; [Worseley v. Demattos,] 1 Burrows, 479. Chauncey, for Reese and his children, contended, that upon the demurrer, the bill must be dismissed, as to Reese the father; because the bill contains no charge whatever against him. His name is not even mentioned in the bill, and consequently if Bickham was guilty of fraud, still the defendant cannot be made to answer for it. The truth is, that Reese and his two sons were not originally defendants to this bill; but were afterwards made so, upon motion and leave of the court, but no amended bill was filed against them. There being no charge then, of any kind against these defendants, the complainants are entitled to no relief. But if this objection was not in the way, still the plaintiffs could not recover in this suit, because there is not the slightest evidence of fraud proved against

Bickham or Solomon; and if there was, the defendants' title cannot be impeached on that account. Again, if the complainants have any title, it is merely at law.

WASHINGTON, Circuit Justice. From the evidence given in this cause, it distinctly appears, that E. Solomon, the defendant, was the agent of the complainants, for protecting the whole of this property, as well as for the sale of it. That he informed them of the sales he had made of the five lots, and that which he expected to make of the two lots; and he intimated to them, very clearly in one of his letters, that it would be necessary, notwithstanding those private sales, to go through the form of a public sale. He stated to them that he had sold the five lots for 3,200 dollars, and was in treaty for the sale of the other two for 1,600 dollars. No evidence has been given to show that the complainants, or either of them, did, at any time object to the sales of these lots, or to the prices at which they were sold. The sales under the venditioni exponas, though merely formal as to the parties immediately interested in that property, were rendered necessary to protect the titles against the creditors of E. Solomon; for which purpose alone the note was purchased and the proceedings on it instituted by E. Solomon.

Without stopping, for the present, to notice the informality which the proceedings in this cause exhibit, I shall proceed upon the complainants' case as presented by themselves, to inquire where is their equity against any of the defendants, except E. Solomon? The gravamen of the bill is, that although E. Solomon was the agent of the complainants, he nevertheless contrived, covertly, to have their property seized and sold under execution, for about one-fourth nominally of the sum at which he had actually sold it by private bargain. These allegations may, and certainly do afford a very good reason for compelling E. Solomon to account for the purchase money actually received by him; but not for setting aside the sales of this property, sanctioned as they were by the complainants. If the sheriff's deeds passed to the grantees the legal estate in these lots, a court of equity will protect that estate, unless the purchasers were guilty of a fraud, or purchased with a knowledge of a fraud in those under whom they claim. But what evidence is there of fraud in any part of these transactions? It is not even pretended that the price at which these lots were sold, was inadequate to their value; nor is it pretended that the private sales of them were made without authority. If, on the other hand, the sheriff's deeds did not pass the legal estate, then the objection to those conveyances is purely of a legal nature, and consequently the complainants are not entitled to relief in a court of equity.

As to the five lots, the real beneficial purchasers were the children of Jacob Reese, G. Bickham acting as the agent of their guardian for their use. It is said that their title must be affected by the fraud of that agent. Be it so. But there is no fraud proved against Bickham, as has before been stated. Jacob Reese, therefore, and his sons, the cestui que use in the sheriff's deed, have both the legal and the equitable estate in this property. As to the two lots, which were purchased by Bickham for E. Solomon, and by him conveyed to F. Gaul, it is contended, that the title is not protected by the act of assembly, because that act ought not to be construed to apply to purchases made by the plaintiff himself, or to mere formal sales under execution as this was. As to this argument, I give no opinion, but will for the present admit it. Still the complainants cannot succeed in setting aside the sales of these lots, without showing themselves to be entitled to this relief upon some ground of equity. Now, in addition to the observations before made in relation to the five lots, it may be observed, that, as to those conveyed to Gaul, he is not even charged in the bill with notice of any fraud or other circumstance to invalidate his title in a court of equity; and, in his answer, he asserts himself to be a bona fide purchaser, without notice of any of the circumstances alleged against Bickham and E. Solomon.

Having spoken of informalties in the proceedings in this cause, it may be proper to state them more particularly, for the information of the bar. Subsequent to the filing of this bill, the court, upon the motion of the plaintiff, permitted the complainants to amend by making Jacob Reese and his sons defendants, but no amended bill was filed. The original, or rather the only bill filed in the cause, contains no allegations against these new made defendants, nor are their names even mentioned in it. During the argument, and as soon as this omission was discovered, the court gave leave to the complainants to file an amended bill; not to state any new matter, which would have been improper at that stage of the cause, but merely to call upon these new defendants to answer the original bill. But, even if the complainants had made out a proper case for the interference of equity, in reference to the title of Bickham, still the court would be compelled to dismiss the bill as to these defendants, since there is no allegation against them to which they could answer. It is true they have answered, but this does not entitle the complainants to relief against them, since they have not shown in their bill any ground for such relief. Mitf. Eq. Pl. 87.

The preceding part of this opinion was intended to show, that, upon the merits of the cause, the complainants are not entitled to relief against these defendants, and consequently that they cannot suffer on account of the informality just stated. As to the lia-

bility of E. Solomon, to account for the purchase money received by him for the above seven lots, with legal interest thereon, there can be no doubt. The court therefore direct an account as to these sums, and dismiss the bill with costs against the other defendants.

Case No. 379.

ANDREWS et al. v. SPEAR. SAME v. BASSETT. SAME v. CASE. SAME v. KELLY. SAME v. NICHOLS. SAME v. PLATT. SAME v. PRATT. SAME v. PRAY. SAME v. SNYDER.

[4 Dill. 470; 2 Ban. & A. 602; 1 N. W. (O. S.) 77.]

Circuit Court, D. Minnesota. April, 1877.

PRACTICE—TEST CASE—CONSIDERATION OF CAUSES.

Where a number of suits of like nature, and involving the same issues, are pending at the same time, the court may, in its discretion, order that one case be tried and determined as a test case for all, or that the several causes be consolidated and tried together. This rule applies as well to cases in equity as at law.

[Cited in Mutual Life Ins. Co. v. Hillmon, 145 U. S. 293, 12 Sup. Ct. 912.]

Application is made to the court, and affidavits presented by the solicitors for the several defendants, who, to avoid costs and unnecessary expense, ask that these suits, which involve the same issues, and depend upon the same testimony, be consolidated, or one of them be selected as a test case, and proceedings in all others be stayed until such test case is determined; or that the court order that the testimony shall be taken in one case, to be selected by the complainants, and that such testimony be read in every case, or for such other relief as may be just.

John Y. Page, for plaintiffs.

Davis, O'Brien & Wilson, for defendants.

NELSON, District Judge. These suits were brought to test the validity of a patent for an alleged new and useful improvement in wells—commonly known as the "drive well"—for damages for its infringement, and to restrain the defendants from further manufacture and use. The bill of complaint in some of the cases alleges the manufacture of the drive wells, and in others the use. Issue has been joined in all the cases. The same solicitors appear for all the defendants, and agree to enter a stipulation in writing that judgment may be entered in all the cases if the final decision in one shall be in favor of the complainants. It is admitted that one case of each class, when decided, will dispose of all the others of the same class, and that the testimony relating to the issues in one suit of a class will apply to all of the same class.

In view of these admissions and proposed

¹[Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

stipulation. It would be manifestly unjust for the court to compel each defendant to incur the expense of preparing for hearing and argument if it can be avoided. It is not unusual in actions at law, and the reasoning applies equally to equity cases, to grant such applications. The plaintiffs are not injured thereby, but rather benefitted, for they are relieved from the trouble and expense of preparing numerous causes for hearing, where only the same questions are involved. The court can interpose a check to the argument of a multiplicity of these issues, irrespective of any concessions made by the parties, with a view to prevent useless waste of time and expense, and this application is within the spirit, if not within the letter, of section 921 of the Revised Statutes of the United States: "Sec. 921. When causes of a like nature, or relating to the same question, are pending before a court of the United States, or of any territory, the court may make such orders and rules, concerning proceedings therein, as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

When the solicitors for the defendants sign and file in court consent that judgment may abide the event of a trial in one case of each class, the following order may be entered: "That all the causes of each class abide the event and final determination of the one of that class which the plaintiffs may elect to prepare the evidence in, and set down for hearing and argument, and that whatever decree may be finally rendered in the cause set down for hearing shall be entered in all the causes of that class, and either party shall be at liberty to have the records therein made and entered accordingly, unless, upon proper showing, additional and lately discovered evidence, relevant to the issues, which could not be procured and submitted in time, should be brought forward, and a rehearing asked and granted for that reason.

Ordered accordingly.

Case No. 380.

ANDREWS et al. v. SPEAR.

[4 Dill. 472; 3 Ban. & A. 82; 1 N. W. (O. S.) 165.]

Circuit Court, D. Minnesota. Sept., 1877.

PATENT FOR INVENTION—PRELIMINARY INJUNCTION AGAINST INFRINGERS.

A preliminary injunction in a patent cause was denied where the suit in which it was asked had been pending for many months, and was nearly ready for final hearing, and no

ground for the writ was shown which was not known to the complainants at the time the suit was instituted.

In equity. The bill of complaint was filed November 10th, 1876, an answer filed February 5th, 1877, and the case put at issue March 27th, 1877. The testimony of both parties is being taken before a master, with a view to an early submission of the controversy. An application is now made for a temporary injunction [to restrain the infringement of patent No. 73,425, and based] upon the pleadings, affidavits, and a decision of the United States circuit court in the eastern district of New York, rendered in April, 1876, and certain proceedings instituted in the district court of Hennepin county, Minnesota, on the return of an execution against the defendant unsatisfied, March 14th, 1877. [Application denied.]²

John Y. Page, for complainants.

Davis, O'Brien & Wilson, for defendants.

NELSON, District Judge. I decline to grant a preliminary injunction at this time. The suit was instituted in November, 1876, and, as appears from the papers before me upon this motion, is in preparation for final hearing at the next term, in December. The evidence of witnesses already taken before the master, has been used as affidavits to be considered in disposing of the motion, and I am asked to examine it with reference to the claim for this preliminary injunction in advance of presentation at the final hearing. I do not think, at this late day, after nearly a year has passed since the commencement of this suit, and it is about to be argued and submitted upon the merits, I am required, in the exercise of a sound discretion, to give complainants the preliminary relief asked.

The principal reason urged upon this application is, that a previous decision has been rendered in a suit in the second circuit sustaining the validity of the patent. This court has recognized the great weight to be given such a decision upon an application for an injunction,—American Middlings Purifier Co. v. Christian, [Case No. 307,]—but, inasmuch as it was rendered six months before the commencement of this suit, and the complainants here were parties thereto, and fully aware of the effect of such decision in their behalf, some more persuasive reason must be urged, which will account for this delay, until the case is now about to be submitted and considered upon the pleadings and all the evidence. The pecuniary condition of the defendant is not changed from what it was in March last, and cannot be considered now as a controlling reason for granting the injunction.

The complainants have leave to renew this

¹[Reported by Hon. John F. Dillon, Circuit Judge. and here reprinted by permission.]

²[For reference to other suits involving the same patent, see note to Andrews v. Denslow, Case No. 372.]

application in case the suit is not heard at the next regular term.

Motion denied.

NOTE, [from original report.] As to preliminary injunction against infringers of patents for invention: American Middlings Purifier Co. v. Atlantic Milling Co., [Case No. 305;] Same v. Christian, [Id. 307.]

ANDREWS, (TIERNAN v.)

[See Tiernan v. Andrews, Cases Nos. 14,025 and 14,026.]

Case No. 381.

ANDREWS v. UNITED STATES.

[2 Story, 202.]¹

Circuit Court, D. Massachusetts. May Term, 1842.

OFFICE AND OFFICERS — COMPENSATION—CHANGE IN DUTIES—EXPENSES—PENAL STATUTES—CONSTRUCTION.

1. Every public officer is required to perform all duties, which are strictly official, although they may be required by laws passed after he comes into office, and may be cumulative upon his original duties, and although his compensation therefor be wholly inadequate. In such a case, he must look to the bounty of congress for any additional reward.

2. Where the collector of Ipswich claimed a commission on drafts drawn by him on the collector at Boston, in payment of bounties due to fishermen, under the act of [July 29] 1813, c. 34, [4 Bioren & D. Laws, 582; 2 Story's Laws, 1350; 3 Stat. 49, c. 35,] it was held, that there being no provision, by which a commission is allowed thereon, the collector could not charge a commission.

3. The collector of any port, being authorized by the act of [March 3] 1817, c. 282, § 7, [3 Story's Laws, 1650; 3 Stat. 397, c. 109,] to appoint a deputy, with the approbation of the secretary of the treasury; it seems, that a deputy, so appointed, should receive a reasonable compensation for his services, although no compensation therefor be fixed.

4. All expenditures, made by a collector for office rent, clerk-hire, fuel, and stationery, are to be deemed incidents to his office, and should be allowed as proper charges against the United States; and if he do not keep and transmit yearly accounts thereof, according to the requisitions of the act of [March 2] 1799, c. 129, § 2, [3 Bioren & D. Laws, 237; 1 Story's Laws, 665; 1 Stat. 704, c. 23,] he does not forfeit his right to be reimbursed for such expenditures, but only subjects himself to the payment of the penalty.

[Cited in U. S. v. Flanders, 112 U. S. 88, 5 Sup. Ct. 69.]

5. Penal statutes must be strictly construed, and are never extended by implication.

[Cited in Wilson v. Singer Manuf'g Co., Case No. 17,836.]

At law. Writ of error from the judgment of the district court, of Massachusetts district. The original suit was debt brought upon the official bond of Andrews, formerly collector of the port and district of Ipswich. The United States claimed a balance due for

moneys received by the defendant; and the pleadings put the question, whether any such balance was due, directly to the jury. There was, also, a claim of set-off, by the defendant, for legal and equitable claims, asserted to be due to him; all of which were rejected at the trial, by the ruling of the district judge, to whose decisions on the points raised, a bill of exceptions was taken. The jury found a verdict for the United States for the sum of \$1,142.27; upon which a writ of error was brought by the defendant. [Reversed.]

The bill of exceptions, after reciting the pleadings and issue, proceeded as follows— Which issue being joined as aforesaid, came on to be tried by a jury, duly empanelled and sworn for that purpose. The plaintiffs offered, and gave in evidence, a duly authenticated copy of the bond declared on. The plaintiffs, also, offered and gave in evidence a duly authenticated treasury transcript of the accounts of the said Asa Andrews, by which it appeared, that on the twenty-ninth day of July, in the year of our Lord one thousand eight hundred and twenty-nine, there was in the hands of the said Asa Andrews, to the credit of the United States, the sum of nine hundred and twenty-one dollars and ninety-two cents. The plaintiffs here rested their case.

The defendants then proved, that the said Asa Andrews had, from time to time, during his continuance in the office of collector, as aforesaid, investigated claims for bounties to fishermen under the several laws of the United States, and had paid and disbursed to the said fishermen, in all, the sum of fifty-four thousand seven hundred and ten dollars and eighty-six cents, by drafts upon the collector at Boston, for which service he had received from the United States no compensation beyond the salary of his office, and that his claim for such compensation had been rejected by the treasury department, which rejection was proved. And the defendants prayed his honor, the judge, to instruct the jury, that the said Andrews was entitled to a reasonable compensation for this service, which was proved to be the most laborious duty of the said office. But his honor, the judge, refused so to instruct the jury, but instructed them, that the said Andrews was not by law entitled to any commission or compensation on the amount received by drafts on the collector at Boston, and applied to the payment of such bounty to fishermen, nor to any compensation for such service, beyond the salary of his office, and the commission on such portion of the amount of bounties paid, as was made from his own collection of duties in his district. The defendants then offered, and gave in evidence, the several commissions of the said Asa Andrews, as inspector of the revenue of the port of Ipswich, and proved, that the said Andrews performed the duties of the said office during the whole time that he held

¹[Reported by William W. Story, Esq.]

the office of collector as aforesaid. The defendants further proved the importation of large quantities of distilled spirits into the port of Ipswich, and that he performed all the duties pertaining to the said office of inspector, in reference to said distilled spirits, and prayed his honor, the judge, to instruct the jury, that he was entitled to compensation for his services, so performed, as inspector, in reference to distilled spirits, and to submit to the jury the question, whether he has been paid therefor or not; but his honor refused so to instruct the jury, but did instruct them, that the said Andrews was not entitled, in point of law, to any compensation for his said services, as inspector, beyond his salary as collector, and the fees, if any, allowed by law for such services. The defendants then proved, that the said Asa Andrews had, during the whole time of his continuance in office, employed a deputy-collector, duly appointed and commissioned as such deputy, by him, the said Asa Andrews, which deputy acted in his absence, and sometimes, when he was not absent; and as to deputies offered evidence, tending to show, that he had paid the said deputies, and that he had received no compensation or allowance for the said sums, so paid to the said deputies, and that his claim for such compensation or allowance had been rejected by the treasury department. The defendants further offered, and gave evidence, that the port of Ipswich embraced a long line of sea-coast, and of a character well calculated to afford facilities for defrauding the revenue; and proved by the testimony of several persons, who had been connected with the collection of the customs in the vicinity of the port of Ipswich, and by the late collector of said port of Ipswich, Timothy Souther, Esq., that it is, and has been necessary to the protection of the revenue, that there should be, at least, one subordinate officer in said port of Ipswich. The defendants also proved, that except at times when vessels from foreign ports were in, and were actually discharging, no compensation had been allowed for any subordinate officer. They further proved, that the said deputy-collector had performed the duties of a tide-waiter, or inspector, and that he was the only subordinate officer employed, except while foreign cargoes were discharging.

The defendants requested his honor, the judge, to instruct the jury, that the said Asa Andrews was entitled to be allowed such sums of money as he had paid to the said deputies; but his honor refused so to instruct the jury, but instructed them, that, in regard to any such deputies, they were entitled only to such fees, as by law were appointed for their services; and that the collector, having not made any charge for such services contemporaneously, nor at any time, in his quarterly accounts, rendered during his continuance in office, a demand for any discretionary allowance, which the officers of the treasury might make in the premises, could

not in this suit be sustained. The defendants then proved, that the said Asa Andrews had performed the duties of the office of surveyor of the said port of Ipswich, and that he had received no compensation therefor, and that his claim for such compensation had been rejected by the treasury department; and the said defendants requested his honor, the judge, to instruct the jury, that the said Andrews was entitled to compensation for his said services as surveyor of said port; but his honor refused so to instruct the jury, and did instruct them, that the said Andrews was not entitled to any compensation for such services, further than his salary as collector, as aforesaid, and the legal fees for any duties at any time performed as surveyor, and that it was now too late to receive and sustain the defendant's demands for such services, which were not contemporaneously made, or introduced in any of his quarterly accounts, during his continuance in the office of collector.

It appears, that the defendants made certain charges of payments, from time to time, and at different periods, to weighers, gaugers, inspectors, &c.; but the defendants proved, that payments to such persons were made only at such times as vessels were in and actually discharging. The defendants then proved, that the expenditures of the said Asa Andrews for office rent, fuel, stationery, and clerk hire, during the time in which he held the office of collector, as aforesaid, amounted to the sum of fifteen hundred and fifty-five dollars and seventy cents; and that he had presented a yearly account of the said expenditures to the treasury department, and that no part of the same had ever been allowed to him, but that the said claim and every part of it had been disallowed by the said treasury department. The defendants prayed his honor to instruct the jury, that the said Andrews was entitled to compensation for the said expenditures of office rent, fuel, clerk hire, and stationery; but his honor refused so to instruct the jury, but instructed them that the said Andrews was not by law entitled to any allowance for the said expenditures. The defendants here rested their case, and thereupon the jury returned their verdict for the United States, for the sum of \$1142.27.

The cause was now submitted to the court without argument by R. Choate, for the plaintiff in error, and by Dexter, Dist. Atty., for the United States.

[Before STORY, Circuit Justice, and SPRAGUE, District Judge.]

STORY, Circuit Justice. This cause having been submitted to the court without argument, I am not sure, that I fully comprehend all the grounds intended to be relied upon by counsel, either in objection to, or in support of, the various claims stated in the bill of exceptions. If any of these claims, although not strictly of a legal nature, are yet ex aequo et bono due to the defendant for extra

services rendered, or moneys expended on account of, and for the benefit of the United States, it is very clear, that the defendant is entitled to an allowance and compensation therefor, upon the footing of a quantum meruit under the act of [March 3] 1797, c. 74, § 3, [2 Bioren & D. Laws, 594; 1 Story's Laws, 464; 1 Stat. 512, c. 20.] This was fully settled by the supreme court in *U. S. v. Wilkins*, 6 Wheat. [19 U. S.] 135, 143, 144, and has been repeatedly recognized in subsequent cases, and especially in the case of *Gratiot v. U. S.*, 15 Pet. [40 U. S.] 336, 370, 371. But where duties are required to be performed by a collector or other public officer, strictly official, and falling within the ordinary range thereof, there, although they may be conferred by laws subsequently passed, after he came into office, or may be cumulative upon the original duties of the officer, he must be deemed to take and hold the office cum onere; and however inadequate the compensation may be for his labor and services, he must content himself with the salary and fees allowed by law, and look to the bounty of congress for any additional reward.

Tried by these tests, let us now proceed to consider the various claims of the defendant, stated in the bill of exceptions. The first is for the ascertainment and payment by drafts on the collector at Boston, of the bounties due to fishermen, under the act of [July 29] 1813, c. 34, [4 Bioren & D. Laws, 582; 2 Story's Laws, 1350; 3 Stat. 49, c. 35.] and other prior repealed acts, and subsequent acts still in force, on the same subject. I do not, from the manner in which the ruling of the district judge is stated in the exception, precisely understand whether the learned judge meant to say, that if these bounties had been paid by the defendant, out of moneys of the United States, from the collection of duties in his district, the commissions would have been allowable for this particular service; but that, having been made by drafts drawn by him upon the collector at Boston, they were not allowable on the accounts of those drafts; or whether the learned judge meant only to say, that, as by the act of [March 2] 1799, c. 129, § 2, [3 Bioren & D. Laws, 237; 1 Story's Laws, 665; 1 Stat. 704, c. 23.] for the compensation of officers of the customs, three per cent. commissions were allowed to the collector of customs of Ipswich, on all moneys received by him on account of duties on goods imported into his district, and as no other cases were provided for, therefore, no commissions were payable on account of the payment of bounties to fishermen. If the former was intended to be laid down by the learned judge as law, I should not be prepared to adopt it; for, in my judgment, a payment by the drafts of the defendant on the collector at Boston, would be just as much a payment to entitle the defendant to the three per cent. commissions,

in the sense of the law, as if he had paid the bounties out of any moneys in his own hands, under his official collections. The question, then, would be, whether the three per cent. is provided for by law in either case for the payment of bounties. I have not been able to find any provision for any compensation of this sort, in any act of congress; and if there be any, it has escaped my researches. If any exists, I desire to have it pointed out at the bar, before any final judgment is rendered in this case. But if the other be the true construction of the ruling of the learned judge, then, it seems to me perfectly correct; because, by the act of 1813, c. 34, § 5, as well as by the prior and subsequent acts upon the same subject, it is made a part of the ordinary official duties of the collector of the customs, to ascertain and pay these bounties; and then (as has been already suggested) he must rely upon the salary and fees annexed by law to the office, unless some additional compensation is allowed for this service, which, in a district like that of Ipswich, as will appear from the facts stated in the record, is one of no small labor and responsibility, compared with the other ordinary duties of the collectorship. In such a case, however, the appeal lies to the bounty of congress, and not to a judicial tribunal.

The next claim is for the compensation paid to a deputy collector, by the defendant. The act of 1799, c. 128, § 22, [3 Bioren & D. Laws, 457; 1 Story's Laws, 592; 1 Stat. c. 22.] authorized the collector, in cases of occasional and necessary absence, or of sickness, and not otherwise, to exercise and perform their functions by a deputy. The act of [March 3] 1817, c. 282, § 7, [3 Story's Laws, 650; 3 Stat. 397, c. 109.] authorized collectors, with the approbation of the secretary of the treasury, to employ such deputy collectors as they should deem necessary; and this provision was perpetuated by the act of [May 6] 1822, c. 56, § 4, [3 Stat. 681.] Another act, passed at the same session,—act of [May 7] 1822, c. 107, § 15, [3 Stat. 693.]—authorized the secretary of the treasury to limit and fix the compensation (among other officers of the customs) of each deputy collector, limiting it not to exceed, except for certain enumerated ports, one thousand dollars per annum, and for those ports, not to exceed fifteen hundred dollars, “for any services he may perform for the United States in any office or capacity.” I am not aware of any other act, which expressly provides for a distinct compensation to be paid by the United States to such deputy collectors. Whether the secretary of the treasury has ever sanctioned any allowance to any deputy for the port and district of Ipswich, I do not know; and there is nothing in the record, which leads to any conclusion on the subject. But, if he has sanctioned the appointment of a deputy for that port and district, and the business required it, it would

seem reasonable, that some compensation should be paid by the United States for his services. Perhaps the case of such a deputy, if not otherwise compensated, may have been treated as embraced within the general provision in the act of 1799, c. 129, § 2, which authorizes the allowance of two dollars a day to every other person, than a regular inspector, whom the collector may find it necessary and expedient to employ as occasional inspector, or in any other way, in aid of the revenue. In the act of 7th of July, 1838, c. 169, § 3, [5 Stat. 264,] a limitation is put upon the allowance of compensation to deputy collectors; and the like provision occurs in the subsequent act of the 3d of March, 1841, c. 16, [35,] § 2, [5 Stat. 431.] However, as no evidence is contained in the record upon this particular point, it is impracticable for this court, upon a writ of error, to look beyond the mere ruling of the court below, upon the point of law; and the burthen of proof, to establish an error in the ruling, is upon the plaintiff in error.

In the next place, as to the allowance, claimed by the defendant for performing the duties of surveyor; it appears to me, that he is not entitled to any compensation therefor, upon the principles already stated; because, by the act of 1799, c. 128, § 21, when there is no surveyor assigned by law for a particular port, the collector of the customs is required to perform the duties of a surveyor, as far as may be.

The last objection, and that upon which I have felt the most difficulty, is the ruling of the learned judge upon the point, that the defendant, Andrews, requested the judge to instruct the jury, that he was entitled to compensation for office-rent, fuel, clerk-hire and stationery, which he had paid and expended in his office, as collector, of which he had presented a yearly account to the treasury department, and no part thereof had been allowed to him; but, on the contrary, had been disallowed. But the judge refused so to instruct the jury; but instructed them, that Andrews was not, by law, entitled to any allowance for the said expenditures.

No particular ground is stated in the record for this instruction given by the learned judge; and, therefore, if maintainable at all, it must be upon the general ground, that no allowances are by law to be made for such expenditures; or, if allowable, that they were not in due and proper season presented to the treasury department for allowance. It appears to me very clear, that these expenditures are properly to be deemed incidents to the office of the collector, and, therefore, that they ought to be allowed as proper charges against the United States. The act of 1799, c. 129, § 2, manifestly contemplates the allowance of them. It provides, that, "it shall be the duty of the respective collectors, &c., to keep accurate accounts of all fees and special emoluments received by them; also, of all expenditures,

particularizing the expenditures for rent, fuel, stationery, and clerk-hire; and to transmit annually, within forty days after the last of December, an account, verified on oath or affirmation, to the comptroller of the treasury, &c.; and if any collector, &c., shall omit or neglect to keep an account as aforesaid, or to transmit the same, verified as aforesaid, he shall forfeit and pay a sum not exceeding five hundred dollars, for the use of the United States."

It does not appear, from the bill of exceptions, whether Andrews did, in fact, keep such an account, or transmit it yearly to the department, as required by law. All that the bill of exceptions states, is, "that he had presented a yearly account of such expenditures, to the treasury department, and that no part of the same had been allowed to him," &c. Now, it may be, that this language refers only to the final claim made and disallowed at the treasury department, which is required by the act of 1797, c. 74, § 4, to entitle the party to an equitable set-off, in the present suit. If so, that is not such an account as the act of 1799, c. 129, § 2, requires. It may be, that it was intended to refer to the keeping and transmission of the accounts, as required by the latter act. The language is somewhat equivocal and uncertain. But construing it most unfavorably for Andrews, and that he did omit or neglect to keep and transmit such yearly account every year, as this latter act requires, still I think, that he did not forfeit his right to be reimbursed the amount of his expenditures for these purposes; and, at most, he incurred only the statute penalty, not exceeding five hundred dollars, as an indemnity to the United States, for any loss sustained thereby. Suppose these expenditures for one year had amounted to \$10,000, as in some districts they might, and the accounts were not transmitted until more than forty days had elapsed after the last of December of that year: it would hardly be contended, that the whole claim was extinguished. And yet, such must be the result, if we construe the statute, by imposing a penalty, to have extinguished the claim, as soon as the penalty was incurred. I think that, not a natural, or necessary, or reasonable construction of the statute. It is not said, that the claim shall, by the omission or neglect, be forfeited or extinguished; and for the court so to interpret the statute, would be to enlarge the words, and the intent, and to create penalties beyond what the statute has declared. No rule in the interpretation of penal statutes has ever been carried to such an extent. On the contrary, the general rule universally recognized, is that penal statutes are to be construed strictly. They are never extended by implication. The penalty, itself, is not a fixed penalty. It is not to exceed five hundred dollars. It may be only one dollar. It appears to me, therefore, that the instruction of the learned judge is not correct in

point of law; and has proceeded upon a ground, which the statute does not justify; and which the principles, established in other cases, as to equitable allowances, disclaim. My opinion, therefore, is, that the judgment of the district court must be reversed; and a venire facias de novo be awarded for a new trial of the whole cause at the bar of this court. Judgment reversed.

ANDREWS, (UNITED STATES v.)

[See United States v. Andrews, Cases Nos. 14,453, 14,454, and 14,455.]

ANDREWS v. WAGNER.

[See Andrews v. Spear, Cases Nos. 379 and 380.]

ANDREWS v. WRIGHT.

[See Andrews v. Spear, Cases Nos. 379 and 380.]

Case No. 382.

ANDREWS et al. v. WRIGHT.

[3 Ban. & A. 329;¹ 13 O. G. 969; 3 N. W. (O. S.) 111; 6 Reporter, 193.]

Circuit Court, D. Minnesota. June 20, 1878.

PATENTS FOR INVENTIONS—NOVELTY—UTILITY—ABANDONMENT—VALIDITY OF REISSUE.

1. Reissued patent number 4,372, granted to Nelson W. Green, for method of constructing artesian wells, dated May 9th, 1871, held valid.

[Cited in Green v. French, Case No. 5,757; Andrews v. Cross, 8 Fed. 278; Green v. French, 11 Fed. 591.]

2. The invention therein patented was novel. [Cited in Andrews v. Cross, 8 Fed. 278; Green v. French, 11 Fed. 591.]

3. The invention was patentable and useful. [Cited in Andrews v. Cross, 8 Fed. 278; Green v. French, 11 Fed. 591.]

4. The invention was not abandoned or dedicated to the public. Andrews v. Carman, [Case No. 371,] wherein the same patent was sustained, cited and followed.

[Cited in Green v. French, 11 Fed. 591.]

5. A reissue is prima facie for the same invention as original patent, and, to impeach, in the absence of fraud, it must be shown to be repugnant to original.]

[Cited in Eames v. Andrews, 122 U. S. 47, 7 Sup. Ct. 1077.]

[6. Cited in Andrews v. Long, 12 Fed. 873, to the point that the element of novelty in the process covered by this patent consists in driving the tube tightly into the earth, without removing the earth upward, to serve as a well-pit, as distinguished from boring or excavating.]

[In equity. Suit by William D. Andrews, George H. Andrews, and Nelson W. Green against George B. Wright for damages for

¹[Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

infringement of letters patent No. 73,425; reissue, No. 4,372. Decree for complainants.]

George Gifford, John Y. Page, and Lamprey & Jones, for complainants.

Davis O'Brien Wilson, for defendant.

Before NELSON, District Judge, and DILLON, Circuit Judge.

NELSON, District Judge. This suit is brought to recover damages for an infringement of a patent, reissue No. 4,372, and for an injunction. The defences are: 1. Reissue obtained by fraud, and not for the same invention as the original. 2. Want of novelty, prior discovery and use. 3. Alleged invention for a result or effect, and not patentable. 4. Dedication to the public and abandonment. The original patent is No. 73,425, and, while the charge of fraud in procuring the reissue is not pressed, it is urged that the two instruments are for different inventions. To impeach a reissue, which is prima facie evidence that it is for the same invention, it must appear, in the absence of fraud, that the invention described therein is repugnant to the original. *Middletown Tool Co. v. Judd*, [Case No. 9,536.] The two patents, on examination, show that they were both granted for "a process of constructing wells," and the claim and specifications describe the process, which consists in driving a tube tightly into the earth until it reaches a water-bearing stratum, without removing the earth upward, and attaching to this well-pit a pump, airtight, the tube being perforated at the lower extremity and for a short distance upward to admit the water more freely to the inside. The reissue is not different from the original, and the claim does not include anything more than the patentee was entitled to.

Want of novelty.—To sustain this defence testimony of prior discovery and use is introduced, but a close examination and analysis of this evidence does not satisfy my mind of the existence of the drive-wells, before Green put into practical operation his invention. There is no clear and certain testimony that any one had previously conceived the idea of such a process and adapted it to practical use; it is too shadowy and doubtful. *Curt. Pat. (Ed. 1849), §§ 40-48*. There is no description of Green's process in any of the publications cited, and the claim is not strenuously pressed. It is evident the results noted therein are obtained by boring or excavating, and not by Green's process, and it is also clear that this process was not used in constructing the salt-wells at Syracuse, New York.

Alleged invention not patentable.—The utility of the invention can not be seriously denied. Its practical use, throughout this and foreign countries, attests this fact. It is a simple and cheap method of obtaining a

supply of water, unknown until Green's discovery, and the patent issued is for a process and not a result. Although making a hole in the ground by driving a rod may be a part of the operation Green performs in obtaining a supply of water, his patent describes something more. Before his process, this pit or hole could only be utilized as a well, when by natural forces water flowed into the bottom, and a water-bearing stratum must necessarily be reached where these natural forces will cause a flow of water in such a quantity that the pit becomes a reservoir or produces a stream through the tube as an artesian well. Green, by driving a tube, open at the lower end as described, into the earth, to a water-bearing stratum, with the earth packed tightly about it until the water is reached, and attaching to it a pump, air-tight, constructs a well from which a supply of water is obtained when the pump is worked, and does not rely upon the ordinary operation of natural forces upon the water lying in the earth. The evidence shows that not only an abundant supply of water is thus obtained, but it is inexhaustible. In *Kneass v. Schuylkill Bank*, [Case No. 7,875,] the patented improvement secured and described in the specifications was for copper-plate or copper-plate and type printing on bank-notes, for the purpose of producing a particular effect, viz.: security against counterfeit; and it was urged that printing with types and copper-plate is not new, but had been long in common use before the invention described, and, therefore, the patent is for an effect. The court said: "This is a mistake; * * * the patent is not for the effect, but for the kind of printing by which the effect is produced." And the patent was sustained as a process, although the art of printing with copper-plates and letter-press was old. So here, a hole or well-pit is made, but the invention is for a combination of that operation with others described as necessary to construct a drive-well—a process. Green dispenses with digging and boring, and produces a new combination of operation.

Dedication to the public and abandonment.—The facts were reviewed by Judge Benedict in *Andrews v. Carman*, [Case No. 371,] and I concur in his conclusion, that they do not amount to a dedication, or sustain the defence of abandonment.

Decree for complainants is ordered, and a reference to a master to ascertain damages.

DILLON, Circuit Judge, concurs.

[NOTE. Patent No. 73,425 was granted January 14, 1868, to N. W. Green, and reissued May 9, 1871, (No. 4,372.) For other suits involving this patent, see *Andrews v. Carman*, Case No. 371; *Same v. Long*, 12 Fed. 873;

Same v. Cross, 8 Fed. 278; *Same v. Creegan*, 7 Fed. 477; *Greene v. Gardiner*, 22 O. G. 683; *Andrews v. Bames*, 15 Fed. 109; *Green v. French*, 11 Fed. 591; *Andrews v. Hovey*, 16 Fed. 387; *Green v. French*, Case No. 5,757; *Green v. Barney*, 19 Fed. 420; *Andrews v. Spear*, Case No. 380; *Andrews v. Denslow*, Id. 372.]

ANDROSCOGGIN PULP CO., (MILLER v.)

[See *Miller v. Androscoggin Pulp Co.*, Case No. 9,559.]

Case No. 383.

The ANGELINA.

[Blatchf. Prize Cas. 371.]¹

District Court, S. D. New York. June, 1863.

PRIZE—VIOLATION OF BLOCKADE.

Vessel and cargo condemned as enemy property, and for a violation of the blockade.

In admiralty.

BETTS, District Judge. The above-named vessel, with her cargo, was captured as prize, May 16, 1863, by the United States ship *Courier*, at sea, off Charleston, South Carolina, and was sent into this port for adjudication. She was here libelled as prize, and, no one intervening in court on the return of the monition as duly served, a decree of default was rendered in the suit. The papers found on the vessel namely, an enrolment in Charleston, April 16, 1863, to F. W. Claussen, a citizen of the Confederate States, under the authority of those States, a manifest of the cargo of cotton exported in her for Nassau, and a clearance of the vessel at the port of Charleston, of the same date, prove the vessel and cargo to be enemy property. The testimony of the master of the vessel in preparatorio proves that she was captured, as before stated, about forty miles off Charleston harbor, on the 16th of May, 1863, for having run the blockade of that port; that she carried no colors, but was cleared under the Confederate authority at Charleston; that the crew and the cargo came from Charleston; that the vessel was built there; that she had been waiting there, from April 25 preceding, for a chance to run out; that the master of the vessel and the owners of the cargo knew of the war and of the existence of the blockade; and that the vessel was run out to evade the blockade. The testimony of the other witnesses is to the same effect, the evidence all concurring in the proof that the vessel designedly and secretly escaped from Charleston, in violation of the blockade then existing and in force there.

It is, accordingly, ordered that a decree of condemnation and forfeiture against the vessel and cargo be entered.

¹[Reported by Samuel Blatchford, Esq.]

ANGELINA, The, (DAY v.)

[See Lachenmeyer v. The Angelina, Case No. 7,967.]

ANGELINA, The, (LACHENMEYER v.)

[See Lachenmeyer v. The Angelina, Case No. 7,967.]

ANGELINA, The, (WATSON v.)

[See Lachenmeyer v. The Angelina, Case No. 7,967.]

Case No. 384.

The ANGELINA CORNING.

[1 Ben. 109.]

District Court, E. D. New York. Feb., 1867.

TOWBOAT—UNKNOWN ROCK IN CHANNEL—MISFORTUNE.

1. Where a canal boat was being towed by a steamtug at the end of a hawser, with two other boats, she being the middle one, through the Kills on the north shore of Staten island, and brought up upon a single rock lying some two hundred feet from the end of a dock, the existence of such rock being proved not to be known to persons familiar with those waters, the tow at the time not being in line with the steamtug, but having sagged off inshore, *Held*, that a steamtug is not a common carrier of the vessel she tows.

[Cited in *Powell v. The Willie*, 2 Fed. 97; *The Pierrepont*, 42 Fed. 688.]

[See *The America*, Case No. 282.]

[See, also, note at end of case.]

2. That even common carriers are not held responsible for running upon rocks not generally known, and a fortiori steamtugs would not be.

3. That even though this tow was not in line with the towboat, but had sagged off towards the land, it is immaterial whether this was chargeable to the canal boat or the towboat, for there was nothing to indicate that any danger would be incurred by the sagging of the tow. So long as it was kept at a safe distance from the shore and from all other known objects, there was no negligence in any one which can be held to be the cause of the accident.

[Distinguished in *The Stranger*, Case No. 13,525.]

4. That the facts make out a case of misfortune, where the loss must be borne by the vessel on which it fell.

In admiralty. The facts are stated in the opinion of the court.

Owen, Gray & Owen, for libellant.

Benedict, Tracy & Benedict, for respondent.

BENEDICT, District Judge. This action is brought by John B. Hinckley, the owner of the canal boat Oswego, against the towboat Angelina Corning, to recover \$2,455

[Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

damages, caused by the sinking of the Oswego while being towed through the Kills by the Corning, in May, 1867. The Corning was bound from New Brunswick to New York with a tow of five boats arranged in two tiers. The first tier was composed of three boats, the Oswego being the middle one. The other two boats formed the second tier. The tide was flood, and the wind blew freshly from the N. W. After leaving Elizabeth, the tow passed by Shooters' island on the south side, and then kept towards the Staten island shore, running along that shore as near as was deemed safe in order to take advantage of the slack water there. When the tow had reached about up to the ship yard dock, which is to the west of Mushrose reef, and, according to some witnesses, shortly after the steamboat had changed her course to pass across to the Jersey shore, as is usual with such a tide, but, according to others, before the steamboat had made any such change, the Oswego, being the middle boat in the second tier, suddenly brought up hard and fast on a sunken rock whence it was found impossible to pull her off. She was accordingly left a total loss. No other boat was injured.

This rock on which the Oswego struck, as is made very clear by the evidence, was wholly unknown to navigators and to residents of the neighboring locality. It is not laid down in the charts, and there was nothing to indicate its existence to persons in charge of the Corning. Its position has since been ascertained by actual measurement to be two hundred feet out from the corner of the nearest dock, and, on examination, it proves to be a single stone about five feet square, lying several feet under water at the lowest tides. Around it on all sides the water is deep, and the ferry boats and other vessels have been accustomed to pass with safety inside of it wholly ignorant of the presence of such a danger.

No witness says that prior to this accident it was deemed unsafe for vessels to go as near the shore as this tow did, and on this occasion the striking of the canal boat on the rock was the first notice to any one of the presence of any danger.

These facts, and they are not really disputed, make a case of misfortune where the loss must be borne by the vessel on which it fell. The steamboat was not a common carrier; and to render her liable for the loss of the canal boat, it must appear to have been caused by some negligence on her part. No negligence is here shown. The tow was proceeding at a proper speed where the pilot had a right to suppose it could safely go. No known risk was run, and no needed precaution omitted.

But it is charged that it is the duty of the pilot of a towboat to see that the tow follows straight behind, and that in this case the tow was allowed to hang off some distance to leeward, and thereby the Oswego

got upon the rock. Upon the evidence, I am inclined to think that shortly before the Oswego struck, the steamboat had altered her course to pass to the other side of the Kills, and it is quite certain that at the time of striking the tow was hanging off to leeward; and it is doubtless true, that had it been following directly behind the steamboat, the boats would have passed safely as the steamboat herself did. But whether this is chargeable to the pilot of the steamboat or to the men on the Oswego, is immaterial, for there was nothing to indicate that any danger would be incurred by the sagging of the tow. It is not the case of an undertaking by the pilot to execute an unusual and dangerous manoeuvre. Here the Oswego, when she struck, was where, according to all the knowledge possessed by any one, she could safely go. So long as the tow was kept at a safe distance from the shore, and from all other known objects, there was no negligence in any one which can be held to be the cause of the disaster. It was simply running on a rock which the pilot did not know of, and of which on the evidence he cannot be chargeable with knowledge. For running on rocks not generally known, even common carriers are not held responsible. Story, Bailm. § 516; Ang. Carr. § 182. A fortiori towboats should not be.

In the case of *The Tempest*, [Case No. 13,824,] Betts, J., the towboat was held not liable when a schooner being towed alongside was run on a rock at the foot of Tenth street.

In the case of *The R. L. Stevens*, the same ruling was made, although the stern tow struck a wharf. The present case seems clearly within the principle of those cases, and the result must be the same. The libel is accordingly dismissed.

[NOTE. "An engagement to tow does not impose either an obligation to insure or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance, or that there has been negligence or unskillfulness to his injury in the performance. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services. But there may be cases in which the result is a safe criterion by which to judge of the character of the act which caused it." Mr. Justice Strong, in *The Webb*, 14 Wall. (81 U. S.) 406. If a barge is sunk by contact with ice while being towed by a tug, the owner of the cargo must show negligence on the part of the tug to recover for the loss. *The W. E. Gladwish*, Case No. 17,355. See, also, *The Brazos*, Id. 1,821; *The Mary McKillop*, 23 Fed. 829; *The Snap*, 24 Fed. 292; *The B. B. Saunders*, 25 Fed. 729; *The Bordentown*, 16 Fed. 270; *Molenbrock v. St. Louis & Clarksville Packet Co.*, Id. 878; *Philadelphia & R. R. Co. v. New England Transp. Co.*, 24 Fed. 505; *The Young America*, 26 Fed. 174; *The William N. Beach*, 29 Fed. 303; *Brawley v. The Jim Watson*, Case No. 1,817; *The Lyon*, Id. 3,645; *The Stranger*, Id. 13,525; *The Oconto*, Id. 10,421; *The Fannie Tuthill*, 12 Fed. 446.]

Case No. 385.

The ANGELINE.

[5 Adm. Rec. 202.]

District Court, S. D. Florida. March 25, 1854.

SALVAGE—LICENSED WRECKERS—PILOTAGE—REFUSAL OF ASSISTANCE.

[1. It is the duty of licensed wreckers to offer their services as pilots to vessels in need of pilotage, whether such vessels ask for a pilot or not; and, in the absence of a special agreement, recovery may be had of a reasonable compensation for such services.]

[Cited in *Curry v. The Loch Goil*, Case No. 3,495.]

[2. Licensed wreckers who refuse to furnish pilotage services when asked to do so should not be allowed a greater award for salvage services thereafter rendered than they would have been entitled to for the pilotage, when the necessity for the salvage services resulted from a lack of pilotage.]

[Cited in *Curry v. The Loch Goil*, Case No. 3,495.]

[In admiralty. Libel for salvage by William Watson, Noyes, and others against the schooner *Angeline* and cargo. Decree for libellants.]

W. W. McCall, for libellants.

S. I. Douglas, for respondent.

MARVIN, District Judge. This schooner, measuring about 110 tons, bound from Wilmington to New Orleans laden with fifty barrels of tar, 100 pitch, and 400 rosin, ran ashore on the Carrysfort reef, about seven miles south of the light house, in the afternoon of the 19th instant. She had got ashore about thirty miles to the northward, early in the morning of the same day, when the libellants, Noyes of the sloop *Vineyard*, and Watson of the *Mary H. Williams*, went out to her. At the time they arrived she had been got off. The captain wanted a pilot, and asked Captain Noyes of the sloop *Vineyard* if he could give him a pilot. He answered "no;" they "were not pilots, but wreckers." Not getting a pilot, and not seeing his way out into the gulf, the captain undertook to come to Key West, inside the reef. He got under way and ran about thirty miles, when the vessel got ashore on one of the reefs. The captain now employed the libellants to assist him, and get him off.

The services rendered by the libellants, considered simply in themselves and unaffected by antecedent circumstances, were not of a very highly meritorious character. They consisted simply in taking out of the vessel 130 barrels of tar and rosin, which the master could have easily thrown overboard, and in good weather, heaving the vessel off. She was small, and could be easily managed by the crew of one wrecking vessel. The whole property is worth about \$2,100. Under these circumstances about \$400 would be a reasonable compensation for this service, but for the antecedent circumstances.

Now had the captain, Noyes, when he

boarded the schooner in the morning, surrounded as she was by shoals and rocks, piloted her into the gulf, or to this port, I should not think \$400 would be an unreasonable compensation, and he would in this manner have made as much by piloting this vessel, as he had any reasonable grounds for expecting he could make by getting her off the reef, in case she should get ashore. But it was the duty of the captain, Noyes, under the penalty of a diminution of compensation, to furnish a pilot, and not have replied they "were not pilots but wreckers." The licensed wreckers are pilots; and they are licensed as such to perform pilot service, as to carry out anchors and lighten vessels, and it is expected that every licensed master wrecker knows enough of the coast, and of the reef, to pilot, under ordinary circumstances, any vessel that may require their services. The amount of compensation for piloting, if not agreed upon and settled, is to be ascertained and determined in the same manner, that compensation for salvage service is determined, and the same legal remedies may be resorted to, for the recovery of the one as the other. The wreckers are not bound to pilot vessels, to point out shoals, or channels, or to give information concerning the tides gratuitously and without compensation, any more than they are bound to carry out anchors and lighten vessels without compensation, and the rendering any one of these services, at the request of the master under circumstances implying that it was not intended to be gratuitous, will entitle the wrecker, equally with any other service, to a reasonable compensation. And he is not at liberty to decline performing any minor service for a reasonable compensation in the expectation that any emergency may arise in which he may be called upon to perform greater. In the case of *The Howard*, [Case No. 6, 752a,] decided in 1838, (see files,) Judge Webb said: "He who holds back and quietly looks on at approaching ruin, until his own services become indispensable to the preservation of the property he sees exposed, with the expectation, that his reward will thereby be increased in proportion to the increased dangers, from which the property is ultimately rescued, will find that he is disappointed in the realization of his golden hopes, and that a display of his avarice at such a time, renders him an object of contumely and reproach." And in the case of *The Montgomery*, [Case No. 9,733,] the court said: "A prominent feature in the merit of the salvors, is the promptness with which their services were rendered. This is a quality highly commended in this court upon grounds of policy. A single anchor opportunely carried out, the assistance of a single wrecking vessel for half an hour, will often save a large amount of property from total loss. 'Bis dat qui cito dat.' On the other hand, tardiness in rendering such apparent-

ly slight, but really valuable, services, is severely reprehended."

In the present case, I think it was as much the duty of Captains Noyes and Watson both to offer their services as pilots to the master of the schooner, when they saw, that he needed such services, as it would be their duty to offer their services to lighten his vessel, and carry out his anchors, and get him off the reef, when they saw his vessel to be ashore. It was his duty, if he wanted a pilot, to ask for one, and to manifest a willingness to pay a reasonable compensation for his services; or to refer the amount to the proper legal tribunal; and it was their duty, when they saw the situation of his vessel to be such as to need a pilot, to offer their services as such pilots,—whether he asked for a pilot or not. Under the circumstances, I think one hundred dollars is a reasonable remuneration for the services rendered.

ANGELIQUE, The, (SHANNON v.)

[See *Shannon v. The Angelique*, Case No. 12,705.]

Case No. 386.

In re ANGELL.

[10 N. B. R. 73; 1 Cent. Law J. 363; 6 Chi. Leg. News, 341; 31 Leg. Int. 254; 21 Pittsb. Leg. J. 206.]

District Court, E. D. Michigan. July 9, 1874.

INVOLUNTARY BANKRUPTCY—PETITION—JOINING OF CREDITORS.

[The provisions of section 12 of the act of June 22, 1874, amending section 39 of the bankruptcy act, requiring one-fourth of the creditors in number and one-third in amount to join in the petition, which the section makes applicable to all cases of involuntary bankruptcy commenced prior to the passage of the amendatory act, do not apply to a case in which judgment was given and the warrant served and executed before the passage of the act.]

[Cited in *Re Leland*, Case No. 8,231; *Re Comstock*, Id. 3,077.]

[In bankruptcy. On motion to have the proceedings dismissed. Denied.]

[Frederick E. Angell was adjudged a bankrupt, and the usual warrant served and executed prior to the passage of the act of June 22, 1874, (amending the bankruptcy act.) and, subsequently to the passage of the act, moved to have the proceedings dismissed, according to section 12 of the amendatory act, which provides that the section shall apply to all cases of involuntary bankruptcy commenced prior to its passage.]

Mr. Stacy, for the motion.

Mr. Walker, opposed.

LONGYEAR, District Judge. That the provisions of the recent act requiring one-fourth in number and one-third in amount, of the creditors, to join in an involuntary petition for adjudication of bankruptcy, were

intended to apply, and can and must be applied to all cases commenced between December 1st, 1873, and the passage of that act, in which there has been no adjudication, I entertain no doubt; and it has been so held by the district court for the northern district of Illinois. In re Scammon, [Case No. 12,430.] But the question here goes beyond that. It is whether those provisions were intended to apply, and can be applied, to cases so commenced, which had passed into judgment before the passage of the act. The act cannot be given the application and effect contended for, because it involves the vacating and annulling the judgment of the court, and granting a new trial. No rule of constitutional law is better settled than that, in a constitutional government, with a division of powers, like that of the United States, no legislative enactment can have the effect and operation to annul the judgment of a court already rendered, or grant a new trial, especially as it respects adjudications upon the private rights of parties. "When they have passed into judgment," says Justice Nelson, in *State v. Wheeling, etc., Bridge Co.*, cited below, "the right becomes absolute, and it is the duty of the court to enforce it." *Cooley, Const. Lim.* 93-95, and cases cited; *State v. Wheeling, etc., Bridge Co.*, 18 How. [59 U. S.] 421, 431, and see also the dissenting opinions of Justices McLean, Grier, and Wayne, at pages 437, 449; *Moser v. White*, [29 Mich. 59,] decided by the supreme court of Michigan, at the January term of 1874, not yet reported.

Courts will not presume that congress intended to exceed its powers, or in any manner to invade the domain of the judiciary, unless such intent is clearly expressed by the words used, or by necessary implication. The words used in a statute may be broad enough, and they probably are in the statute under consideration, to admit of such a construction; but the courts will in no case give them a construction that involves the exercise of an excess of power, where, by a more limited application of them, such exercise of power is not involved. In the present instance the enactment in question is given full effect, and in my opinion all the effect congress intended it should have, by applying and limiting it to cases still pending, and undisposed of by adjudication. It is abundantly evident that congress did not intend these provisions to apply to cases already adjudicated, for the following reasons: First. It was not in their power to do so, as already shown. Second. They did not so expressly enact. Third. The provisions can have full and consistent effect without giving them such application. Fourth. They made no provision for the saving of rights accrued, or acts done under adjudications in cases where the proceedings might, under the provisions in question, eventually fail and be dismissed. And this has still greater

force from the further fact that they did make such saving provision in case of a discontinuance of proceedings as provided by section 14. Other reasons will readily suggest themselves, but the foregoing I consider conclusive. I hold, therefore, that the provisions in question apply only to cases where the petition for adjudication is still pending, and not to cases in which adjudications had passed upon the petition before the approval of the act. It results that the motion must be denied. Ordered accordingly.

Case No. 387.

ANGELL v. BENNETT.

[1 Spr. 85.]¹

District Court, D. Massachusetts. June, 1844.

ATTORNEY AND CLIENT—COMPENSATION—SETTLEMENT BY CLIENT—COSTS—ESTOPPEL.

1. The proctor of the libellant, having given notice to the respondent that he should ask only for a decree for costs, cannot at the hearing proceed for damages.

2. A proctor who has commenced a suit for a seaman, upon a just claim, may proceed for costs, after a settlement made by the parties, without his knowledge. And this, too, where the respondent did not know, at the moment of the settlement, that a suit had been commenced; but had previously had notice that the proctor had been employed, and might easily have learned what had been done.

[Cited in *Collins v. Nickerson*, Case No. 3,016.]

[See *The Victory*, Case No. 16,937; *McDonald v. The Cabot*, Id. 8,759.]

In admiralty.

A. Mackie, for libellant.

H. G. O. Colby, for respondent.

SPRAGUE, District Judge. This is a libel in personam for damages, by a seaman, against the master of the whale ship *Jasper*. It was commenced on the 16th of April last. On the 18th, a settlement was made with the libellant, by Mr. Gibbs, the ship's agent, and Mr. Coggeshall, an out-fitter, as he is called, both acting for the master. The counsel for the libellant contends, that this settlement should be set aside, and the cause heard upon its original merits, and that if this be refused, he is at least entitled to a decree for costs.

As to the first point, it is admitted that on the 20th of April, formal notice was given to the respondent, by the proctor for the libellant, that he should thereafter proceed for costs only. It is now urged, that this notice was given under a misapprehension of facts. But there was no revocation of that notice, nor was the respondent in any way informed, until the hearing began, that there was to be anything in contestation, but the costs. He certainly could not then be required to meet any other question. No continuance or post-

¹[Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., and here reprinted by permission.]

ponement of the hearing has been asked; and the libellant cannot now be permitted to proceed, on his original claim for damages.

The matter of costs stands on very different ground; that claim has always been insisted on. The libellant had recently returned from a whaling voyage, for which the whole amount due to him was only four dollars and some cents. He was destitute. His residence was in the western part of New York. He applied to Mr. Mackie, to obtain redress for wrongs alleged to have been inflicted by the master, during the voyage, and on the 16th of April this suit was commenced. On the day following, a warrant was put into the hands of a deputy marshal at New Bedford. On the 18th, while the marshal was in pursuit of the respondent, the libellant being in Coggeshall's store, there stated his pecuniary distress, and his purpose of prosecuting the captain. Coggeshall immediately went to Mr. Gibbs, the ship's agent; and as soon as the latter could procure a formal receipt to be written by a professional gentleman, it was delivered to Coggeshall, who returned to the store, and procured the libellant's signature thereto, upon paying him eight or ten dollars, and Angell forthwith left New Bedford. The master, after this settlement, and while ignorant of it, was arrested on the warrant, at his house, four miles from New Bedford, between two and three o'clock in the afternoon of the same day. No service was made on the mate. The receipt embraced all claims against both the master and mate. It is urged that the proctor ought not to be permitted to proceed for costs, because neither the respondent, nor his agent, had any knowledge that a suit had been commenced, or costs incurred, and that this case does not come under the decisions in *The Planet*, [Case No. 11,204;] *Brooks v. Snell*. [Id. 1,961.] Coggeshall and Gibbs knew that Mr. Mackie had been employed to institute a suit against the respondent, and that he had his residence and office in New Bedford; yet the receipt was obtained, without notice to him, or any inquiry as to what measures he had taken. I am satisfied that the settlement was designedly made, without the knowledge of the proctor, and if there was any want of information, as to what had been done by him in prosecution of the claim, it was a voluntary and intentional ignorance. The actors in this transaction, who by prior authority, or subsequent ratification, must be deemed the agents of the respondent, had ample notice to put them upon inquiry, and the means of full information at hand.

The actual expenses, which had been incurred by the proctor for clerk's and officer's fees, exceeded the whole amount paid to the libellant; according to the principles which have heretofore been recognized and practically applied in this court, he ought to have a decree for costs. Such a rule of proceed-

ing is necessary, not merely for the protection of proctors as officers of the court, but still more for the sake of seamen themselves. They often arrive after long voyages, with just claims against officers of the ship, but without means and without friends. Their owners, who, as common employers, ought to desire equal justice to all who have served them, too often, without inquiry, take part at once against the seamen, and actively endeavor to defeat their claim. Sometimes they even withhold the wages actually due, in order to coerce them, by their necessities, to a surrender of their just rights. See *The Commerce*, [Case No. 3,054,] for the forms of receipts printed on the back of the shipping articles.

If a proctor, after investigating these claims and instituting legal proceedings, may, by a settlement intentionally made behind his back, be defrauded, not only of all compensation for his services, but even of moneys necessarily advanced, it will tend to discourage the honorable practitioner from attempting to vindicate these rights, and to throw the seaman upon those who will speculate upon his necessities. It is desirable, too, that adjustments with seamen should be made under the supervision of some one, both disposed and competent to see that justice is done to them. I am aware that those against whom sailors seek indemnity, are oftentimes more than displeased at the interference of any member of the bar, and attempt to disparage him by epithets, as engaging in a disreputable branch of the profession; but in this court such attempts are utterly futile. I know of nothing more meritorious in the practice of the law, than the obtaining, by fair and honorable means, redress for wrongs and oppression suffered by ignorant, destitute, homeless, and friendless seamen. It is not controverted that the libellant had sufficient grounds for the commencement of this suit.

Decree for costs against the respondent.

See *Collins v. Nickerson*, [Case No. 3,016.]

ANGEVINE, (TYLER v.)

[See *Tyler v. Angevine*, Case No. 14,306.]

Case No. 388.

In re ANGIER.

[10 Amer. Law Reg. (N. S.) 190; 4 Amer. Law T. 62; 4 N. B. R. 619, (Quarto, 199); 1 Amer. Law T. Rep. Bankr. 248.]

District Court, E. D. Pennsylvania. March, 1871.

IN BANKRUPTCY—SALE BY ASSIGNEE OF REAL ESTATE—RIGHT OF DOWER.

[Where a wife's right of dower is established by the decisions of the court against the assignee in insolvency, an exception to the confirmation of the sale of certain real estate, by

the purchaser, on the ground that such sale was subject to the dower right, when it was stated at the sale that the property would be conveyed free from all incumbrances, will be sustained.]

[Cited in *Porter v. Lazear*, 3 Sup. Ct. 61, 109 U. S. 90.]

[In bankruptcy. On motion to confirm the sale of an assignee of certain real estate of the bankrupt. Exception was made by the purchaser against the confirmation, on the ground that the sale did not discharge the dower right of the wife, as the terms of the sale provided. Exception sustained.]

A sale was made by an assignee in bankruptcy of real estate of the bankrupt. It was stated at the sale that the title should be clear of all charge and encumbrances.

On a motion to confirm the sale, an exception was filed by the purchaser, that the wife of the bankrupt if she survived him would be entitled to dower.

George L. Crawford, for the exception.—The case is ruled in principle by *Eberle v. Fisher*, 1 Harris, [13 Pa. St.] 526.

David W. Sellers, for the assignee.—Where the estate of the debtor is divested by operation of law dower is barred. The act of 1867 divests the estate as much as a sale for the payment of debts. The exceptions in section 14 do not save the rights of married women. The act of 1841 did; and hence the ruling in *Worcester v. Clarke*, 2 Grant, [Cas.] 84, does not apply.

CADWALADER, District Judge. The wife's right of dower having been established by the Pennsylvania decisions against the assignee in insolvency, there is no doubt that the purchaser's objection to the title is valid.

Case No. 389.

The ANGLIA.

[7 Ben. 190.]¹

District Court, S. D. New York. March, 1874.

COLLISION WHILE COMING INTO DOCK—STRENGTH OF HAWSER.

A tug was sent in to the far end of a slip, with a hawser, to aid in hauling in a steamship which was backing into the slip. The motion of the steamship was intended to be checked by a spring line, but it parted, and the steamship backed into the tug and injured her: *Held*, that the steamship was responsible for the strength of the line, and was liable for the damages.

In admiralty. This was an action brought by the owner of the tug A. G. Cattell, to recover for the damages occasioned to her by a collision between her and the steamer Anglia, which occurred while the Anglia was backing into her place alongside of a pier in the North river. The libel alleges that the tug was employed to take a hawser from the

¹[Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

steamer and carry it up the dock, and did so, the steamer backing in at the time; and that the steamer backed in so fast and so far, although hailed to stop, that the tug was unable to escape, but was crushed by the steamer's stern. The answer denied any negligence on the part of the steamer, and alleged that the tug was herself negligent, in that, although she knew the steamer was going to back in, she went in herself directly astern of the steamer, instead of going in under her quarter, so as to be out of the way. [Decree for libellant.]

W. R. Beebe, for libellant.

Henry Nicoll, for claimants.

BLATCHFORD, District Judge. The tug went in behind the Anglia, as the latter was backing in, at the direction of the dock superintendent of the line to which the Anglia belonged, to carry to the wharf the hawser from the Anglia. There was nothing improper in her doing so, although the Anglia was all the time backing in. It clearly appears, from the evidence, that the Anglia would not have come back against the tug if the spring line by which the movement astern of the Anglia was being checked had not parted. The Anglia is responsible for the parting of that line. The tug was in a position in the rear of where the stern of the Anglia would have been if she had not, from the parting of the spring line, gone back to a distance greater than was necessary or customary to enable her to lie in her proper and usual berth with reference to the outer end of the pier. The Anglia must be held responsible for the damage, and there must be a decree for the libellant, with costs, with a reference to a commissioner to ascertain the damages sustained by the libellant.

Case No. 390.

The ANGLIA.

[Blatchf. Prize Cas. 300.]¹

District Court, S. D. New York. Dec., 1862.

PRIZE—VIOLATION OF BLOCKADE.

Vessel and cargo condemned for an attempt to violate the blockade.

In admiralty.

BETTS, District Judge. This vessel and cargo were captured by the same United States war vessel, and almost simultaneously with the seizure of the steamer Scotia and cargo. The summary statement of that case tallies so closely, in the leading facts, with this, that a repetition of them will be tautological, unless the judgment of the court is to be reviewed on appeal, when the reasons inducing it will be more largely set forth. The voyage named in the papers in this case

¹[Reported by Samuel Blatchford, Esq.]

is, first, from Liverpool to Nassau, and thence, if required, to ports in the West India Islands, and back to ports in Europe. The whole representation of the adventure, upon the ship's papers, is more formal and mercantile than in the case of the Scotia; but the testimony of the witnesses examined, including the master, the mate and the pilot, concurs in stating, unreservedly, that although the ostensible voyage described on the papers was from Nassau to St. John, N. B., yet the real destination was to Charleston, and that the vessel was captured while attempting to enter that port. All concerned in the voyage knew that the port was blockaded. Upon the general principles declared in the case of the Scotia, a decree of condemnation and forfeiture is also rendered against the steamer Anglia and cargo.

Case No. 391.

The ANGLIA.

The SCOTIA.

[Blatchf. Prize Cas. 566.]

District Court, S. D. New York. Oct., 1863.

PRIZE—VESSELS ENTITLED TO SHARE IN—PRACTICE—PRESUMPTIONS.

1. The proper practice suggested on references to ascertain what vessels are entitled to share in a prize.

2. The right to all prize captures vests primarily in the government; and individuals derive no benefit from them, except by means of positive grant from the public authority.

3. Every vessel of a blockading squadron is bound to do all in its power in the service to be performed, and the law presumes that that obligation is fulfilled, unless the contrary be proved.

4. A rule is different with respect to joint associations or enterprises for war purposes by privateers or cruisers owned by individuals.

5. The doctrine of reasonable or equitable reward has no place in an inquiry as to the distribution of prize money to national vessels under the statutes on that subject.

6. The single fact that a vessel is one of a common force does not constitute her a participant in the prize shares obtained by the separate members of the force.

7. It must also be shown that the vessel was "in sight" or "within signal distance" of the occurrence out of which the taking of the prize was realized.

8. She must have been so situated as to be able, of her own accord, to contribute direct assistance to the captors by deterring the enemy from resistance, or by aiding physically in overcoming such resistance; and the vessel to be aided must have possessed the means of communicating intelligent directions to the one whose aid was needed.

9. The acts of congress on the subject contemplate that the vessels should be in view of each other in order to correctly receive and respond to the signals given.

10. Under those acts, a vessel, in order to be entitled to share in the proceeds of prize property, must show that she was within signal distance of the vessel making the prize, in circumstances which might have justified the cap-

turing vessel in demanding and expecting her assistance.

In admiralty.

BETTS, District Judge. The above vessels having been captured and condemned as prize, the appropriate proceedings were taken to determine the ultimate disposition of the prize proceeds. The right to all captures vests primarily in the government. Individuals derive no benefit from them, except by means of positive grant from the public authority. Hal. Law War, c. 30, §§ 3, 4; 2 Willm. Int. Law, c. 9.

The statutory provisions governing the subject in the United States are very concise, but are in the most essential point deficient in the perspicuity and exactness desirable for practical and useful ends. The first regulation of the matter by congress was in the act of March 2, 1799, (1 Stat. 715, § 6,) and was this: "The produce of prizes taken by the ships of the United States" shall "be proportioned and distributed," and (article 9) "whenever one or more ships of the United States are in sight at the time of any one or more other ships, as aforesaid, are taking a prize or prizes, or being engaged with an enemy, and they shall all be so in sight when the enemy shall strike or surrender, they shall share equally," &c. The act of April 23, 1800, (2 Stat. 53, § 6, art. 7,) repeats substantially the last provision in the same language. The act of July 17, 1862, (12 Stat. 606, § 3, subd. 4,) varies the phraseology in respect to the position of the capturing vessels with relation to each other, and directs that "when one or more vessels of the navy shall be within signal distance of another making a prize, all shall share in the prize," &c.

After the condemnation of the two above-named prizes, the directions of the 4th section of the act of March 25, 1862, (12 Stat. 375,) supplied the governing criterion to be pursued. The prize commissioners in this case were directed by the court "to proceed to take and report the requisite evidence to the court, to the end that a final decree may determine what public ships of the United States are entitled to share in the prize and whether the prize was of superior, equal or inferior force to the vessel or vessels making the capture." The commissioners sent to the court, in effect, their opinion or judgment upon the interpretation and scope of the law, and also a report of the evidence collected by them, determining, in result, that only two vessels, the Restless and the Flag, were entitled to share in either of the prizes, and that those two vessels were entitled to share in both.

It is not material to the case to consider the point discussed on the argument on this application, whether it is within the province of the commissioners to report to the court their judgment or conclusions as to the effect of the testimony taken by them on the ques-

[Reported by Samuel Blatchford, Esq.]

tions brought to their attention, because it is indubitably within the competency of the court to adjudge definitively the subject under inquiry, whether by way of exception to the decision of the commissioners, or as an original point arising out of the proofs.

The two prizes were captured whilst attempting to evade the blockade of the port of Charleston. There is no question as to the justness of the report of the commissioners as to the title of the *Restless* and the *Flag* to participate in the proceeds of the prize taken. The matter of difference and discussion between the counsel relates to the exclusion of the two other vessels from the class of share-takers.

The *Housatonic* and the *Flambeau* were two members of the blockading squadron, stationed off Charleston at the time the *Anglia* and the *Scotia* were captured as prize by the *Restless* and the *Flag*, and claims are interposed in their behalf before the prize commissioners as entitled to share in the distribution of the above prizes. The report of the commissioners is adverse to the claims of the *Housatonic* and the *Flambeau*. The counsel for the latter vessel except thereto, in substance, and appeal to the court against such decision, demanding that those vessels be decreed a title to share in the proceeds of the capture; the *Housatonic* because she was in sight of the prize when taken, and the *Flambeau* because she was within signal distance of both at the same time.

It will be needless now to debate the point of practice, whether under the special enactment of the 4th section of the act of March 25, 1862, (12 Stat. 375.) or according to the regular course of procedure in prize practice, there should be in the first instance a formal reference of the subject by the court to the prize commissioners to obtain their decision explicitly on the point, and then a review thereof before the court, by way of exceptions, as is the accustomed method in admiralty proceedings; because the substantial end to be attained, in either mode of practice, is effected by obtaining from the court a decision at large upon the facts and the law involved in the report of the prize commissioners. It may not be irrelevant to observe, however, that it would conduce to perspicuity and conciseness in this class of references to have them mutual between the government and the captors, and then that the judgment of the court in settlement of differences as to law or fact, arising between the parties on the reference, should be sought for, as in admiralty practice, by specific exceptions filed.

The contestant parties in the present issues are the representatives of the *Restless* and the *Flag*, the vessels which actually arrested the prizes, and those of the *Housatonic* and the *Flambeau*, vessels which composed in part, with the other two, the forces which invested Charleston, and were on their stations adjacent to that port when the prizes

were taken. Accordingly, the broad proposition is raised for consideration in these proceedings, whether on the whole case reported, the *Housatonic* and the *Flambeau* are entitled to share in the proceeds of these prizes.

The prize vessels were both of them captured in Bull's bay. At that time the *Flambeau* was stationed at Maffit's channel, off Charleston, sixteen miles distant from the place of capture. No signals were seen from the capturing vessels by the *Flambeau* at the time of capture. Several witnesses express the opinion that the *Flambeau* was within signal distance of the two prizes, the *Anglia* and the *Scotia*; and other witnesses, equally well situated to judge, express the opinion that neither the *Housatonic* nor the *Flambeau* was in sight, or within signal distance of the prizes or of the captor vessels at the time of the capture. The *Housatonic* is not proved to have been nearer to the scene of the transaction than the *Flambeau*. No evidence is given by the *Housatonic* or the *Flambeau* of any act of co-operation performed by either of them, in the capture of the *Anglia* or the *Scotia*, other than being at their stations in the blockading squadron, at a distance of about sixteen miles; nor is it shown that either of them saw or was seen by the prize vessels or the captor vessels at the time of the capture. The opinion is given by some of the witnesses that the stations of the *Housatonic* and the *Flambeau* were within signal distance, but no evidence is given that either of those vessels was at the time in sight of the transaction, whether that view is measured from the position of the prizes or that of the vessels claiming to share in their proceeds. The opinions given by the witnesses in that respect are not the result of actual experience, but are conjectural and from estimate only; and the statutory provisions are not clear of ambiguity, whether both the capturing and captured vessels are not to be, throughout the transaction, mutually within sight or signal distance.

The entire capture-being, by the principles of prize law, the property of the government, national vessels are not entitled to compensation out of the proceeds, except by express grant. Every vessel of a blockading squadron is bound to do all in its power in the service to be performed, and the law presumes that that obligation is fulfilled, unless the contrary be proved. The rule is different with respect to joint associations, or enterprises for war purposes, by privateers, or cruisers owned by individuals. Wheat. Mar. Capt. 287; Hal. Law War, c. 30, § 7. The doctrine of reasonable or equitable reward has, therefore no place in the inquiry before the court. It must be determined from the proofs before the court, whether the parties who claim an award of compensation out of the prizes, bring themselves within the terms and purpose of the

statutory enactments upon the subject. It is plain that the grant of shares in prize moneys to vessels which are not the direct captors, is one of limitation and restriction. The single fact, that a vessel is one of a common force squadron, or other association or denomination, does not constitute her a participant in the prize shares obtained by the separate members of the body or force. The claimant must show the additional qualification, that her position was in sight, or within signal distance of the occurrence out of which the taking of the prize was realized. If the designations of the vessel, in the several statutes, as being "in sight," or "within signal distance," are regarded as equivalent descriptions, their natural import would seem to be, that the vessel must be so situated as to be of her own accord and discretion, able to contribute direct assistance to the captors, or to comply with any signal call given to her, by determining the enemy from resistance, or by aiding, physically, in overcoming such resistance, and, accordingly, that the vessel or vessels to be aided must possess the means of communicating intelligent directions to the one whose aid is needed. To accomplish that, to any valuable end, it would appear that the acts of congress must contemplate that the vessels should be in view of each other, in order to correctly receive and respond to the notices or signals given. The provisions in the acts of 1799 and 1800 manifest the purpose of congress to limit the distribution of prize shares to such vessels of the navy only as are able to co-operate in promoting captures set on foot in sight of each other—that is, they must be, at least, in a condition to contribute immediate concert of action in the undertaking, if required by an associate vessel. In my opinion, the phrase, "within signal distance" employed in the act of 1862, in place of the prior expression, "within sight," may have been substituted as carrying within it a like import with the antecedent one, with, perhaps, a stronger significance, that proximity of position, in relation to the capturing vessels, must be such as to render intercommunication with the different consorts practicable and intelligible. The mere variation of phraseology, in a revision or re-enactment of statutory law, is not regarded as a revocation of the law, unless plainly so expressed. Sedg. St. & Const. Law, 428-430, and notes.

This construction of the law precludes the claim advanced in favor of the Housatonic and the Flambeau—that they stood, at the time, connected in this service, under the relation of a joint enterprise, and that each is entitled to share in its advantages, upon the principles governing that class of associations.

Under the provisions of the English prize acts, the donation of prize proceeds was made to the takers. The English law courts had regarded the grant as comprehending,

beyond the actual captors, those, also, who constructively contributed to the taking of the prize. But Sir William Scott is inclined to concur in the more recent views of the tribunals, that the limitation of the prize law should not be extended but should be rather more closely restrained to the terms of the acts. The *Vryheid*, 2 C. Rob. Adm. 22. He refers to the case of *The Mars*, note, [see note at end of case,] as fixing the doctrine, that several public ships, occupied in a common purpose, that is, to enforce a blockade, do not share as joint captors in a prize made by one of the number when they are not present at the capture. The *La Flore*, 5 C. Rob. Adm. 268. The same interpretation of the rule is applied by American writers; and the only vessels held to be entitled to share in a prize are those which are in sight at the time of the capture, their presence lending a constructive assistance to the capture. Wheat. Mar. Capt. c. 9, art. 20; Hal. Law War, c. 30, §§ 6, 7. The mere physical ability to discern the prize, or even the seeing her from the mast-head not imparting the ability to contribute assistance in making the capture, does not seem to have been recognized, in any authoritative case, as evidence of constructive assistance to another ship in effecting a capture. Upt. Mar. Warf. & Pr. (2d Ed.) 204-220.

The provision in the act of congress of July 17, 1862, (12 Stat. 606, § 3, subd. 4,) that, "when one or more vessels of the navy shall be within signal distance of another making a prize, all shall share in the prize," &c., affords no indication that the established rules in regard to joint captors in prize cases are intended to be changed, or that investments of enemy ports by fleets or squadrons or united navy forces, are to be deemed joint expeditions or enterprises, and subject to the regulations applicable to naval services of that denomination. It will not be implied, constructively, that assistance has been rendered by a ship not palpably contributing to the capture of another, unless she was within signal distance of the one making the prize, in circumstances which might have justified the capturing ship in demanding and expecting her assistance, and the prize vessel in apprehending her interference. These facts must be affirmatively proved by the vessel claiming to share in the proceeds of the prize property taken.

I think that, in the present instance, the claims of the *Housatonic* and the *Flambeau* have been correctly disallowed by the prize commissioners.

[NOTE. A note to *The Vryheid*, 2 C. Rob. Adm. 22, refers to the case of *The Mars* as follows: "Lords, 1760. This was a case of a French ship taken by one of three king's ships, which, being apprized of the design of the enemy to escape from Port au Prince, had taken their station at different outlets to intercept them. The capture was made by one ship. A claim was given on behalf of the other two to share as joint captors, though not present at the capture, but it was rejected."]

Case No. 392.

ANGLO-CALIFORNIAN BANK v. MAHONEY MIN. CO.

[5 Sawy. 255; 6 Reporter, 705.]¹

Circuit Court, D. California. Sept. 26, 1878.²

CORPORATION—RATIFICATION—DECISION OF COURT
—WHEN OPERATIVE—KNOWLEDGE OF DIRECTORS.

1. Where the bank account of a mining company is overdrawn by its president and secretary, without special authority of its directors, the company will, notwithstanding, be held liable for the overdraft, if their acts in this respect be subsequently ratified by the directors. Such ratification may be made by their ordering the issue of a note of the company for the amount overdrawn.

[See note at end of case.]

2. Where a case is tried by a court without a jury, the decision of the court is not operative and binding, until reduced to form and filed or entered of record. Accordingly, where the district court of the state on the twenty-first of June announced its decision declaring that the election of directors of a mining company, then in office, was illegal and void, and that they should be removed from office, and on the same day its findings and decree carrying this decision into effect were prepared and dated, but were not filed with the clerk until June 22: *Held*, That the decree did not take effect until thus filed; and that until then the ousted directors were officers de facto, capable of ratifying the action of its president and secretary in overdrawing its bank account, and of ordering a note of the company to be issued for the amount.

3. The fact that the directors, or some of them, were informed of the decision announced by the court when they passed the resolution ordering the note to be issued, does not impair the efficacy of the resolution as a ratification of the action of the president and secretary in making the overdraft.

[See note at end of case.]

[At law. Action by the Anglo-Californian Bank, Limited, against the Mahoney Mining Company on a promissory note. Trial to the court. Judgment for plaintiff. The defendant afterwards appealed to the supreme court, and the judgment was affirmed. Mahoney Min. Co. v. Anglo-Californian Bank, 104 U. S. 192.]

The facts appear in the opinion of the court.

Wm. H. Sharp, for plaintiff.

Wm. M. Stewart, for defendant.

FIELD, Circuit Justice. The plaintiff is a corporation created under the laws of Great Britain. The defendant is a corporation formed under the laws of California. This action is brought to recover the sum of six thousand three hundred fifty-one dollars and seventy-two cents, alleged to be due from the defendant to the plaintiff, with interest from June 21, 1877. It was commenced in a district court of the state, and, on petition of the defendant, was removed to the circuit court

of the United States. The complaint contains two counts, one for moneys loaned the defendant and moneys expended for its use; the other for an amount due upon a promissory note of the defendant for seven thousand five hundred dollars, bearing date the twenty-first of June, 1877, payable in gold coin one day after date, with interest at the rate of one and one half per cent. a month until paid.

It appears in evidence that from the original organization of the Mahoney Mining Company, up to the twenty-second of June, 1877, the Anglo-Californian Bank acted as its treasurer. Its moneys were from time to time deposited with the bank, and drawn out on checks of the company signed by its president and secretary. The account taken from the books of the bank, the correctness of which is not disputed, shows a series of deposits made by the company from January 8, 1874, to June 5, 1877, inclusive, and a series of its checks paid by the bank from January 19, 1874, to June 27, 1877, inclusive. Upon this account a balance appears to be due the plaintiff at this latter date, after proper allowances of interest, amounting to the sum demanded in this suit. Of this sum only thirty-two dollars and thirteen cents were paid after the removal of the directors, as hereafter mentioned.

On the twenty-first of June, 1877, at a special meeting of the directors of the mining company, held in the afternoon of that day, its president informed them that the account of the company at the bank was overdrawn to the amount of six thousand three hundred and nineteen dollars and fifty-nine cents, and that the managers of the bank required either the money, or a note of the company. A resolution was thereupon adopted authorizing the president and secretary to execute the note in suit. It was made for the sum of seven thousand five hundred dollars, to cover not merely the amount overdrawn, but other anticipated advances. It is admitted by the counsel of the plaintiff that the note can be enforced only for the amount then due, with subsequent interest to date, and he asks a recovery thereon only to that extent.

The liability of the defendant for the amount overdrawn is denied on the ground that its president and secretary were not empowered to overdraw its account with the bank, and thus incur a debt for the company without special authorization of its directors; and that the attempted ratification of their action in this respect by the passage of the resolution on the twenty-first of June, 1877, and the execution of the note in suit, was ineffectual for any purpose, on the alleged ground that the directors had been at that time by judicial decree removed from office.

It may be true, as contended by counsel, that the president and secretary of the defendant were not empowered to overdraw

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²[Affirmed by supreme court in Mahoney Min. Co. v. Anglo-Californian Bank, 104 U. S. 192.]

its account, and that without special authority of its directors they could not in this way impose a liability upon the company. We do not deem it important to question the correctness of the position; we are inclined to the opinion that it is sound. The company will, however, be held liable for the amount, if the acts of its president and secretary in this respect were subsequently ratified by its directors. Such ratification might have been made directly by a resolution in terms approving of their action, or it might have been made indirectly by ordering the payment of the overdraft, or the issue of evidences of the liability of the company for the amount in the form of a note or bond. The latter mode was pursued; and it accomplished the purpose designed, if the directors who acted in passing the resolution mentioned were then in office. That resolution was a clear recognition and approval of the conduct of the president and secretary, if the directors were at the time capable of acting. The question, therefore, is whether they were then in office.

It appears that in a suit instituted in a district court of the state to remove the directors, a decision was rendered on the twenty-first of June, 1877, at eleven o'clock in the forenoon, declaring that the election of the directors then in office was illegal and void, and that a meeting called for an election of directors on a subsequent day was legal and valid; and that the findings and decree of the court carrying this decision into effect were prepared and dated the same day, but were not filed with the clerk and entered of record until the following day, June 22. The question, therefore, is: when did this decree operate to oust the directors from office? when, in other words, did it take effect? For until then the parties ousted were officers de facto, holding under color of an election, having charge of the affairs of the company, and capable of binding it in all matters legitimately devolving upon directors of the company. *Baird v. Bank of Washington*, 11 Serg. & R. 411; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 21 Pa. St. 131.

It seems to us clear that the decree did not take effect until it was regularly filed, or entered of record. Until it left the possession of the judge of the court, he could change it in any and all particulars; he could add to it, or limit, or reverse it. By the oral decision he had only announced his opinion; that opinion did not take the form of an authoritative decree until it had been filed with the clerk, and thus became a matter of record. Until then it was not binding upon any one. The case was tried by the court without the intervention of a jury, and in such cases its findings must precede the entry of the decree, and the statute requires that they shall be filed with the clerk. *Code Civil Proc.*, § 632.

The case cited by counsel from the supreme court of Vermont (*Town of Huntington v. Town of Charlotte*, 15 Vt. 50) does not, in our judgment, militate against these views. The opinion of the court in that case had reference to the formal enrollment of the decree, for it says that the decree was, for all the purposes intended, good when passed, that is, when reduced to form, and approved by the judge; and the question was, whether the omission of the clerk to formally spread it on the records prevented it from taking effect at the time when it was thus rendered. The court held that it did not; that the efficacy of the judgment did not depend upon the action of a functionary who had nothing to do with its rendition, and who, by law, was vested with no power or authority but the mere ministerial duty of enrolling it. We see nothing to question in this decision, but it has no application to the case at bar. Here there was nothing with reference to which the clerk could act at all until the findings and decree were filed by the district judge. Until then there was no legal form given to the decision of the court. The findings prepared required, under the statute, the signature of the judge, and their previous filing was essential to the entry of any judgment. The clerk could not add the signature of that officer, even if he could have drawn up in form the conclusions which the court had announced. See *Whitney v. Belden*, 4 Paige, 140; and 2 Daniell, Ch. Pr. 1217.

The fact that the directors, or some of them, were informed of the decision announced by the judge of the district court, when the resolution was passed, does not change the efficacy of the resolution as a ratification of the action of the president and secretary in making the overdraft. They knew that the decision was not necessarily final; that it might possibly be changed upon petition of counsel, or upon the judge's own motion. They knew at least that a decision announced was not a decree entered, and they were not required to govern their action as though the one was equally operative as the other upon their position and rights as directors.

It is also contended by counsel of the defendant, that the resolution was ineffectual as a ratification, on the alleged ground that it was passed while an order, made in another suit by a state court, was in force restraining the parties from acting as directors. That case was subsequently abandoned; and it is stated by counsel of the plaintiff here, that the order was at the time discharged. But assuming that it was not discharged when the resolution was passed, we do not see how it can be held to have affected the plaintiff, not a party to the suit. The parties disobeying the order may have been proceeded against as for a contempt in the state court, but the order could not impair the efficacy of their action with a third party.

Upon a careful consideration of the whole

case, we have come to the conclusion that the plaintiff is entitled to recover against the defendant upon the note for the amount of the overdraft, as shown by the account, and expressed in the resolution of the twenty-first of June, 1877, namely, the sum of six thousand three hundred and nineteen dollars and fifty-nine cents, with interest at the rate specified. Findings will be filed to that effect, and judgment entered thereon.

[NOTE. The judgment in this case was affirmed by the supreme court. *Mahoney Min. Co. v. Anglo-California Bank*, 104 U. S. 192. Touching upon the liability of the mining company for the amount of any overdraft checks of its president and secretary, Mr. Justice Harlan, speaking for the court, said that the mining company had power, under its charter, to borrow money "for use in its corporate business, and since an indebtedness thus created would, in the usual course of business, be evidenced by the checks of its president and secretary, the presumption should be indulged, not only that those officers, in making an overdraft, did not exceed their authority, but that the moneys thus obtained were paid over to or received by the company. * * * That presumption, if not, under the special circumstances of this case, conclusive, might have been overthrown by affirmative proof of want of authority, express or implied. * * * There is, however, no such proof in this case. * * * And the finding that 'no resolution or special authority of the defendant was shown authorizing its president or secretary, or either of them, to overdraw its account in bank,' fairly interpreted, means nothing more than that no proof was made, either way, on that point.]"

Case No. 393.

The ANGLO NORMAN.

[4 Sawy. 185.]

District Court, D. California. Feb. 8, 1877.

CARRIER OF PASSENGERS—"SEEN DANGERS"—CONTRIBUTORY NEGLIGENCE.

1. The carrier of passengers is bound to exact care in providing the proper means of approaching his vessel, and of ascending to or descending from it. But this duty only arises where by contract or usage he is required to be in readiness to receive his passengers.

2. Where a passenger voluntarily encounters "a seen danger," and receives an injury in consequence of his own carelessness or awkwardness: *Held*, that he is guilty of contributory negligence, and cannot recover.

In admiralty.

C. T. Botts and D. T. Sullivan, for libellants.

C. Temple Emmet, for claimant.

HOFFMAN, District Judge. I have carefully perused the voluminous depositions taken in this case, and the elaborate briefs of the advocates.

I see no reason to modify the opinion intimated at the hearing, to the effect that the gangway, in passing over which the accident occurred, was not such a means of getting on board his vessel as the carrier was

bound to provide. His contract and his duty as a carrier exacted the exercise of the utmost diligence and the employment of every means in his power to insure the safety of the passengers. The duty of a carrier of passengers requires him to exercise this diligence, not only in regard to the construction of his vehicle and its management after the passenger has come on board, but also in providing proper means of approaching it, and of ascending to and descending from it.

Thus, when a steamer took on board passengers from a hulk which the latter were obliged to cross to get on board, the carrier was held liable for injuries sustained by a passenger by falling down a hatchway negligently left uncovered.

If, then, the libellant in this case had repaired at the usual or appointed hour to the customary place of embarkation, and finding no other means of getting on board had, with due care, attempted to use the gangway constructed as described in this case, and had been injured in the attempt, I should have little doubt that the carrier would have been liable. It was not so obviously unsafe and dangerous as to indicate fool-hardiness on the libellant's part in attempting to use it rather than lose his passage. Any person of ordinary caution and prudence would probably have made a similar attempt. It had frequently been used on previous occasions by visitors to the ship, and twice by the libellant himself and his wife.

But the question in the case is, had the libellant the right, under the circumstances, to demand and expect that the carrier should be prepared to receive him as a passenger, and make that careful provision for his safety which the law exacts of him when he has entered upon the performance of his contract? The vessel lay at a wharf at the upper end of Darling harbor, above Darling harbor bridge, through which she passed by a draw-bridge. This wharf belonged to a railroad company, and was used exclusively in its business. The *Anglo Norman* was the first vessel of her size which had ever lain at the wharf; she was under charter, and had gone there to receive her cargo. The wharf was, as one of libellant's witnesses remarks, in "an out of the way place." It was approached by means of the railroad track which ran along it, and it could only be reached by climbing up some four feet and using the apertures between the timbers of which the wharf was constructed as steps. The testimony is clear that except in case of steamers and coasters having their own wharves, sea-going vessels almost invariably received their passengers after they hauled into the bay opposite the town, the passengers being conveyed to them in wherries, or, if numerous, in a tug. It is urged that the libellant had no knowledge of this usage. But it was his business to ascertain

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when and how, according to the custom of the place, passengers were to go on board the vessel.

It appears to me that, under these circumstances, the libellant had no right to expect that the carrier should make the same provision for his safe ingress to the vessel as if the wharf had been in the usual place from which passengers were received on board, and the gangway the only means of getting on board furnished or contemplated by the carrier. I do not mean to assert that the libellant is to be regarded as a trespasser. He is to be regarded rather as a visitor, but not as entitled at that time to exact of the carrier the performance of his contract with that extraordinary diligence which the stringent rules of law require the carrier of passengers to exercise.

Undoubtedly, if the gangway had contained some secret defect, if the planks had been rotten or insecurely fastened, so as to create an unknown and unsuspected danger, the carrier would have been responsible. But it was exactly what it purported to be. The danger, if any, of using it with due circumspection, was apparent. That that danger was not great is shown by the fact that it was used on several previous occasions by the libellant and other visitors to the ship.

It would seem that if the accident had occurred to the libellant on any of his previous visits, he would have had the same right to recover as he now contends for, which would be in effect to declare that at all times after the passengers had engaged their passage, the ship was bound to furnish and maintain the same commodious and perfectly safe means of getting on board that she would be bound to provide after she had announced her readiness to receive the passengers, and to enter upon the performance of her contract, or after she was in such a position as, by the usage of the port, it would become her duty to receive them.

But if this view be erroneous, and if it be admitted that the ship was guilty of some negligence, it seems clear, under the authorities, that the libellant was guilty of contributory negligence. His negligence consisted either in attempting to use the gangway at all, if it was as unsafe as he now contends, or else in his manner of using it. It has already been observed that the insufficiency of the gangway, if it was insufficient, was apparent. That insufficiency consisted in its narrowness and the absence of rails.

The libellant, therefore, voluntarily encountered a "seen danger." The case seems closely analogous to that of the miner who persisted in working after being apprised that the supports of the mine were insecure, or to the numerous cases where passengers have attempted to alight from railroad cars when in motion. In some of these cases, the injured party has been held guilty of contributory negligence, notwithstanding that the carrier was in fault in not stopping, or in

running by the station. In this case, the libellant was under no necessity of using the gangway. He could have waited and come on board the ship as the other passengers did, after she had come round to the bay opposite the town, or he could have demanded that other means of coming on board should be provided. There is some evidence tending to show that he was informed that the vessel was not ready to receive him. This he denies. It is apparent from all the circumstances that the master did not then expect passengers to come on board, or consider himself bound to provide for their reception.

It would seem clear, from the libellant's own testimony, that he attempted to use the gangway "in a careless, awkward manner." He ascended it nearly abreast of his wife, as he says, holding her arm, or as some of the witnesses assert, arm in arm. The chief danger lay in its narrowness. If he used it at all, he was bound to use it in a prudent and cautious manner, and with such circumspection as its obvious condition required. Some of the witnesses testify that he admitted after the accident that it occurred by his own fault. That he was talking and laughing with his wife, and holding on to her arm, and through his own inattention he stumbled or lost his balance.

The libellant denies having made these admissions, but I think it clearly appears from all the circumstances of the case that he was awkward or careless in the mode of traversing the gangway. On any other supposition it is difficult to account for the accident. It had been frequently used by himself, and others, on previous occasions, and seems to have been broad enough for safety, if the requisite care had been observed.

I have little doubt that, under the evidence, a jury would find the libellant guilty of contributory negligence. If this be so, he cannot recover.

The damages that in any case I should feel justified in awarding would not be considerable. I cannot ascribe the subsequent miscarriage of the libellant's wife, more than two months afterward, to this accident. In a married life of less than two years, she had already experienced two miscarriages, and the length of time that intervened between the accident and its supposed effect render it highly improbable, if not absolutely impossible, that the latter could have been caused by the former. An award of damages founded on such an hypothesis would rest upon a conjecture of a possibility rather than upon proofs of a fact.

ANGLO NORMAN, The (MARTINEZ v.)
[See Martinez v. The Anglo Norman, Case No. 9,174.]

ANGUS, (DEAN v.)
[See Dean v. Angus, Cases Nos. 3,702 and 3,703.]

ANILIN v. COCHRANE.

[See Badische Anilin and Soda Fabrik v. Coch-
rane, Case No. 719.]

ANILIN v. CUMMINS.

[See Badische Anilin and Soda Fabrik v. Cum-
mins, Case No. 720.]

ANILIN v. HAMILTON MANUF'G CO.

[See Badische Anilin and Soda Fabrik v. Ham-
ilton Manuf'g Co., Case No. 721.]

ANILIN v. HIGGIN.

[See Badische Anilin and Soda Fabrik v. Hig-
gin, Case No. 722.]

Case No. 394.

In re ANKETELL.

[19 N. B. R. 268.]

District Court, D. New Jersey. July 25, 1879.

BANKRUPTCY—CONDITIONS OF DISCHARGE—PROPER
BOOKS OF ACCOUNT.

[A merchant miller whose business averaged \$60,000 a year running through several years, who kept no other books than one showing his aggregate monthly payments for grain in one column and his sales in another, with nothing to show what sums were expended in carrying on his business and supporting his family, is not entitled to a discharge in bankruptcy, under Rev. St. § 5110, requiring a merchant or tradesman to keep "proper books of account" as a condition precedent to such discharge.]

In bankruptcy.

Specifications against discharge.

C. T. Glen, for opposing creditor.

Jos. Coult, for bankrupt.

NIXON, District Judge. The opposing creditors have filed fourteen specifications against the discharge of the bankrupt, several of which, if sustained, very seriously affect his moral character. It is not my intention to examine them seriatim, but it is due to the bankrupt to state that I have read the voluminous testimony with care, and whilst it is clear that he has done and said many things that cannot be approved, I am not convinced by the evidence that they have been done or said with a fraudulent intent. Section 5110 of the Revised Statutes enumerates the various grounds for which, under the bankrupt act, the court will refuse a discharge. It states under the seventh subdivision that no discharge shall be granted, or if granted shall be valid, "if the bankrupt, being a merchant or tradesman, has not at all times, after March 2, 1867, kept proper books of account." The fourteenth specification against the discharge alleges, in substance, that proper books of account

have not been kept in the present case. This, is a question of fact, not one of fraudulent intent, and each case must be largely determined by its circumstances; what might be deemed proper books of account in one business, might be fairly considered fatally defective in another.

It is reckoned an important provision of the law, having in view a three-fold object: (1) to enable the debtor himself to ascertain at any time, by an examination of his financial creditors; (2) to have such a complete record of all his business transactions, that his creditors upon his call may be able to determine his ability to meet his engagements and undertakings; and (3) in case of bankruptcy, to assist the assignee in the administration of the estate, enabling him to trace out the dealings of the debtor, the causes of his failure and the honesty of his acts. The business of the bankrupt brings him within the definition of a tradesman. He was a merchant miller, purchasing grain and grinding it into flour and feed and retailing the manufactured articles from a store. The amount of his business averaged about sixty thousand dollars a year, running through several years. His book-keeping was peculiar and to the last degree unsatisfactory. He kept no cash-book or statement of cash receipts and disbursements. He had in his ledger an account with "merchandise," showing in one column his aggregate monthly payments for grain, and in another an aggregate monthly account of his sales. The difference between these columns he called profits. But his books do not show what moneys were expended by him in carrying on the business, nor what sums were taken out for his household and family expenses. It is quite clear that they did not reveal to him—and much less to others—the actual condition of his affairs; that he had no idea of his insolvency until about the time that he stopped payment, although he was not then able to pay to his creditors more than ten cents on the dollar. Books thus kept do not answer the requirements of the law. A cash-book, although important in exhibiting the nature and character of the receipts and disbursements of the business, is not indispensable, provided a cash account appears in the books, showing all the transactions.

Judge Blatchford recently held in *Re Hannahs*, [Case No. 6,032,] that in the absence of a cash-book, it must be clearly shown by the bankrupt that the entries, which would there appear, appear elsewhere in his books as entries of cash, and that the state of his cash receipts and payments can be ascertained by the books he did keep. The bankrupt's books fail to supply the deficiency here, and without looking at any other specifications or expressing any opinion in regard to them, the discharge must be refused.

Case No. 395.

In re ANKRIM.

[3 McLean, 285.]

Circuit Court, D. Michigan. Oct. Term, 1843.

CONSTITUTIONAL LAW — EX POST FACTO LAWS — FRACTIONAL PART OF A DAY—BANKRUPTCY.

1. A petition under the bankrupt law, filed on the 3d March, 1843, the day the law was repealed, is within the saving of that act.

[Cited with approval in *Salmon v. Burgess*, Case No. 12,262.]

[2. See *The Ann*, Case No. 397, as to the time an act takes effect.]

[See note at end of case.]

3. Formerly acts of parliament were held to take effect from the commencement of the session.

4. And by this relation penalties amounting to forfeiture of life were incurred. This was afterwards remedied by statute.

5. The act repealing the general bankrupt law, saved all cases commenced before the passage of the repealing act.

[Cited in *American Wood-Paper Co. v. Glen's Falls Paper Co.*, Case No. 321a; *Re McKenna*, 9 Fed. 29.]

6. If by a fiction of law this act can be made to relate to any time before the actual passage of it, it is liable to the same objection as the English former rule.

[Cited in *American Wood-Paper Co. v. Glen's Falls Paper Co.*, Case No. 321a.]

[See note to *The Ann*, Case No. 397.]

7. The maxim that the fraction of a day is not recognized in law, cannot be made to operate cruelly and unjustly.

[Cited in *The American Wood-Paper Co. v. Glen's Falls Paper Co.*, Case No. 321a; with approval in *Salmon v. Burgess*, Id. 12,262.]

[See note to *The Ann*, Case No. 397.]

8. A liberal construction may be given to the repealing act, in favor of the remedial proceedings under the general bankrupt law.

[Cited with approval in *Salmon v. Burgess*, Case No. 12,262.]

9. An application for a discharge in this case, is but the extension of the original proceeding.

[Cited in *Re Brockway*, 12 Fed. 71.]

In bankruptcy.

Barstow, for plaintiff.

Joy, for defendant.

Opinion of the Court.

At the suit of his creditors, the petitioner having been declared a bankrupt, filed a petition for his discharge on the 3d March, 1843, and the only question in the case is, whether it was filed in time. This question has been certified to this court, under the bankrupt act, from the district court. The act repealing the general bankrupt law, was passed the 3d March, 1843, and provided that "(the repeal)," "shall not affect any case or proceeding in bankruptcy, commenced before the passage of that act." In *Matthews v. Zane*, 7 Wheat. [20 U. S.] 164, the court say, "the known rule being, that the

statute, for the commencement of which no time is fixed, commences from its date." In England, it was long held that "every statute begins to have effect, unless a time for its commencement is therein mentioned, from the first day of that session of parliament in which it is made." *Baco. Abr.* 636, Let. "C.;" and this was applied to criminal as well as civil cases. In the case of the *King v. Thurston*, 1 Lev. 91, by this relation, an act was made murder, which was not so when the act was committed. And this rule of construction was sanctioned by the house of lords. *Panter v. Attorney General*, 6 Brown, Parl. Cas. 486. The monstrous injustice of this was remedied by the statute of the 33 Geo. III. c. 13, which declared that statutes should have effect only from the time they received the royal assent. It is unaccountable that this construction should have been continued by the English courts down to the year 1772. Nothing could show more forcibly with what pertinacity enlightened judges adhere to an established construction of statutes. This is not objectionable, where no injustice is done to private rights by the construction. But where, as in the above case, the law was made to have a retrospective effect, even to the forfeiture of life, it is a reproach to the tribunals of justice. In our government, such a statute would be ex post facto, and in violation of the constitution of the United States. The injustice of this construction in regard to civil rights, is equally clear, except where the provision is of a remedial character. Chancellor Kent (1 Comm. 455) says, "a retroactive statute would partake in its character of the mischiefs of an ex post facto law, as to all cases of crimes and penalties; and in every other case relating to contracts or property, it would be against every sound principle."

The rule of construction in this country, is that a statute takes effect, if not otherwise provided, on the day of its passage, including that day. Now this embraces the principle repudiated by the British statute. And no better reason is given than that the fraction of a day cannot be recognized in law; and as the statute was passed on the 3d of March, that day must necessarily be included.

That to notice the fraction of a day would be productive of inconvenience, is readily admitted. In most cases where no rights are impaired by the statute, there could be no ground of complaint; but suppose a legislature should make a certain act a capital offence, and the law should take effect on the day of its date, could an individual be punished under it, for an act done on the same day, but before the statute was, in fact, passed. If, in such a case an individual could be punished, it would be in virtue of a fiction of law; and there is no difference in principle, in a fiction that shall give the act a retroactive effect of half a day or half a

¹[Reported by Hon. John McLean, Circuit Justice.]

year. In the one case, as well as in the other, when the act complained of was done, it was innocent, but a statute, subsequently passed, makes it penal. And if punishment in the one case can be inflicted, it may be in the other. The only difference is in time, not in principle.

A rule of construction which leads to such a result, cannot be a sound one. Like many technicalities which have grown out of judicial action, the fiction is sustained neither by justice nor reason. So far as relates to crime, the only reasonable and just rule of construction would be, that until after its promulgation the law cannot take effect. Any thing short of this might well be compared to the edicts of the Roman emperor, who elevated them so high that the people could not read them. Indeed, our modern legislation would be more cruel, unjust, and revolting. By great effort, possibly, the edicts might have been read, but no human effort can read that which belongs to the future, and which depends upon contingencies. But after the law is passed, who can have notice of it until it shall be published.

Remedial laws are not objectionable on this ground. They only remove a technical objection, and give effect to a bona fide transaction, as was the intention of the parties. But to all other legislation affecting personal rights, the objection holds. In the case of *Pugh v. Duke of Leeds*, Cowp. 714, there was much discussion whether the words in a lease, "to commence from the day of the date," meant inclusive or exclusive of the day it bore date. Lord Mansfield, after a laborious discussion, overruled his former decisions, and came to the conclusion that the words might be construed to include or exclude the day of the date, as from the context might appear to have been the intention of the parties. In that case, as the validity of the lease depended upon its taking effect on the day of its date, and as the court presumed it was the intention of the parties to make a valid lease, they held that the lease took effect on the day it was dated. But prior to that decision the general view had been, that "from the day of the date," in an instrument, excluded the day of the date.

All who are acquainted with the history of legislative action in congress know that bills passed on the 3d of March, in what is called the short session, are signed by the president late in the evening of that day, and are not published until some days afterwards. But the repealing act in question provides, "that it shall not affect any case or proceeding in bankruptcy commenced before the passage of that act." Now suppose by a fiction the repealing law would take effect so as to include that day; still the saving goes to the passage of the act, and not to the time it took effect. Where the computation of time in a statute is to be from an act done, the first day should be excluded. Ex

parte *Dean*, 2 Cow. 605, 606; *Homan v. Liswell*, 6 Cow. 659. But this cannot be considered an original application for the benefit of the act. The petitioner having been declared a bankrupt on the 3d of March, 1842, he applied for his discharge. This is a proceeding depending upon the procedure of his creditors and inseparably connected with it. In fact and in law, it must be considered as a continuation of the former proceeding. In this view no doubt can be entertained, as the petitioner was declared a bankrupt before the repeal of the bankrupt law.

There is nothing in this application to prevent the court from giving a liberal construction of the saving in the repealing act, with the view of carrying out the remedial provisions of the bankrupt law. Upon the whole, I think the petition for the discharge, filed the 3d of March, 1843, was within the statute, as the decree of bankruptcy against the petitioner, in the form presented, constitutes a part of those proceedings; and that, consequently, the district court has jurisdiction of the petition, and may act upon it as the law authorizes. This opinion may be certified to the district court.

[NOTE. The supreme court of Vermont held that a petition filed March 3, 1843, was too late. In *re Welman*, 20 Vt. 653; In *re Howes*, 21 Vt. 619. Contra, see *The Ann*, Case No. 397.]

Case No. 396.

The ANN.

[Blatchf. Prize Cas. 242.]¹

District Court, S. D. New York. Oct., 1862.

PRIZE—VIOLATION OF BLOCKADE.

Vessel and cargo condemned for a violation of the blockade. Spoliation of papers by the master. Part of the cargo contraband of war.

In admiralty.

BETTS, District Judge. This vessel and cargo were captured by the United States naval forces stationed off Mobile, Alabama, June 29, 1862, and were sent thence to this port for adjudication. A libel was filed against them July 17 thereafter, and, on the 9th of September, the owners, British subjects, residents in England, intervened, by their agent, and claimed the vessel and cargo as neutral property, contesting the legality of the seizure, and denying that Mobile was a blockaded port, or that they had lawful warning of such fact. On the hearing of the cause in court, counsel for the claimants appeared and contested the condemnation upon the law and facts of the case.

The substance of the case, on the preparatory proofs, is, that the vessel was fitted out in England, with a cargo consisting in part, of articles contraband of war, and that her destination was to ports in the West Indies,

¹[Reported by Samuel Blatchford, Esq.]

and from the last one, Havana, to Mobile, and thence back to England. The war between the United States and the rebel states, and the blockade of the southern ports, were well known in England when the vessel was fitted out and despatched. On her arrival at Havana it was reported that the blockade at New Orleans and Mobile had been raised by the United States. The report was not credited on the vessel, and it was determined to run her into Mobile. She attempted to make the entry secretly and covertly. When the blockading vessels lying off the port were discovered, the master destroyed his bills of lading, his private accounts, and the ship's entries.

The vessel was run in past the blockading fleet and Fort Morgan, and was there attacked by the United States forces and captured. She was anchored, and was unloading, when she was first attacked, and worked herself further in the harbor, but, being unable to get out of the reach of the attacking force, was abandoned by the master, the supercargo, and most of the crew, who went to Charleston. The master and two engineers embarked from Charleston for England in the steamer Memphis, and, on getting out of Charleston, that vessel also was captured and sent into this port. These officers were examined as witnesses in this suit, in preparatio, on the arrival of the Memphis at New York. They made a clear and unreserved disclosure of the facts above recapitulated.

The case is free from all ambiguity. The voyage undertaken in England was with full knowledge that Mobile was under blockade. The vessel was, notwithstanding, despatched with her cargo, of which a valuable part was contraband of war, to convey it to the use of the enemy, and make her return directly to the owners in England. A decree of condemnation and forfeiture of the vessel and cargo is ordered to be entered.

Case No. 397.

The ANN.

[1 Gall. 62.]⁴

Circuit Court, D. Massachusetts. May Term, 1812.

INTERNATIONAL LAW — JURISDICTION OVER TIDE WATERS — EMBARGO ACT — CONSTITUTIONAL LAW — WHEN STATUTES TAKE EFFECT.

1. Every nation has exclusive jurisdiction over the waters adjacent to its shores, to the distance of a cannon shot or marine league.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867.]

[See 1 Whart. Int. Law, § 32; Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559.]

2. A departure from any place within the jurisdictional limits of the United States, although such place be not within any port, is

⁴[Reported by John Gallison, Esq.]

within the provisions of the embargo act of 22d December, 1807, [2 Stat. 451,] c. 5.

[See note at end of case.]

3. Where no other time is fixed for the operation of a penal statute, it takes effect from the time of its passage; and ignorance of the existence of such act forms no legal excuse for a violation of it.

[Cited in U. S. v. Arnold, Case No. 14,469; Smith v. Draper, Id. 13,037; Lapeyre v. U. S., 17 Wall. (84 U. S.) 197; U. S. v. Chong Sam, 47 Fed. 883.]

[See note at end of case.]

[Appeal from the district court of the United States for the district of Massachusetts.]

In admiralty. The brigantine ANN was seized by the collector of the port of Newburyport, and libelled in the district court, for that said brig, on the 12th day of January, 1808, departed from said port and from the limits and jurisdiction of the United States, and proceeded on a foreign voyage, to wit, to the island of Jamaica, in the West Indies, contrary to the act of the 9th of January, 1808, c. 8, [2 Stat. 453.] It appeared that the ANN sailed from Alexandria, in the District of Columbia, with a cargo of flour, on the 22d day of December, 1807, bound for Newburyport. On the 31st of December, the brig arrived at Martha's Vineyard, where the captain and crew heard of the embargo. On the 12th of January, 1808, the brig arrived off the port of Newburyport, and anchored between two and three miles from Newburyport bar, (which is the limit of the port of Newburyport,) and about the same distance from the neighboring land. A part of the crew were here discharged, and a new crew [obtained] in their stead, and also a supercargo came on board. After taking in some provisions, and stores, and water, the brig sailed on the 13th of January for Jamaica, where she arrived in about 27 days, landed and sold her cargo, and returned to the United States with a cargo of rum; and was afterwards seized. It also appeared that [Isaac] Tenny, one of the claimants, had full notice of the transactions while the ANN lay off Newburyport, and assisted, or at least assented thereto. [Affirmed.]

G. Blake, for the United States.

S. Dexter, for claimant.

[Before STORY, Circuit Justice, and DAVIS, District Judge.]

STORY, Circuit Justice. As the ANN arrived off Newburyport, and within three miles of the shore, it is clear that she was within the acknowledged jurisdiction of the United States. All the writers upon public law agree that every nation has exclusive jurisdiction to the distance of a cannon shot, or marine league, over the waters adjacent to its shores, (Bynk. Qu. Pub. Juris. 61; 1 Azuni, [Mar. Law,] 204, § 15; Id. p. 185, § 4;) and this doctrine has been recognized by the supreme court of the United States. [Church v. Hubbard,] 2 Cranch, [6 U. S.] 187, 231. Indeed

such waters are considered as a part of the territory of the sovereign. It is said in behalf of the claimant, that the embargo was not designed to operate upon vessels, unless they were within the ports of the United States. But the language of the act of 22d December, 1807, c. 5, [2 Stat. 451] is, that an embargo be laid on all ships and vessels in the ports and places within the limits and jurisdiction of the United States. Now the Ann was certainly in a place within the jurisdiction of the United States, and I do not feel at liberty to narrow by construction the express words of the Legislature.

A further objection has been taken to the allegations in the libel; but upon examination I find, that though very irregularly made, there is a substantial statement of the offence within the 3d section of the act of 9th Jan. 1808. But the main objection urged in behalf of the claimants is of a more important character. The act, under which the brig is libelled, received the signature of the president on the 9th of Jan. 1808, [2 Stat. 453,] and on that day became a law. But it is admitted, that it was not known at Newburyport on the day when the Ann sailed, and consequently that the claimants could not take notice of it. Now it is contended, that though a statute takes effect from its passage, yet a reasonable time must be allowed for its promulgation, so that the citizens may have notice of its existence, and that no person can be liable for an offence committed against such act, until such a time has elapsed, as will enable him, with reasonable diligence, to ascertain its prohibitions, otherwise an innocent man might be punished for actions, which were innocent for aught he knew, or could by possibility have known, at the time of their being done. And it is perfectly immaterial, whether such punishment be inflicted on his person or his property. In illustration of this doctrine, passages have been read from Blackstone's Commentaries (Bl. Comm. 44, 46) on the elementary principles of natural and civil law, and also from the constitution of the United States, where it prohibits the enactment of any ex post facto laws. I was much pressed by the argument of the learned counsel on this point. It would seem founded in the principles of good sense, and natural equity. And it is very certain, that the Ann was not by any law subject to forfeiture, (whatever might be the case as to the claimants in person) until the act of 9th Jan. 1808. The argument perhaps scarcely has its full weight, when applied to the present case, because the claimants were acting manifestly in violation of the original act, laying an embargo, and could not, as to that act, have any pretence to allege their own ignorance. But this circumstance ought not perhaps to vary the legal result. I will therefore consider the question, as though it stood open between parties perfectly innocent of any intended violation of law. At common law,

all acts of parliament, unless another period is fixed, took effect, by relation, to the first day of the session: so that if an act had been brought in at the close of the session, and passed on the last day, which made an innocent act criminal, or even a capital offence, and if no day was fixed for the commencement of its operation, it had the same efficacy as if it had passed on the first day of the session; and all, who during a long session, had been doing an act, which at the time was legal and inoffensive, were liable to suffer the punishment prescribed by the statute. To be sure, this doctrine seems flatly unjust; but, as Christian says, (1 Bl. Comm. 70, note 4,) it is agreeable to ancient principles. Lord Coke lays down the position in 4 Inst. 25, and cites 33 Hen. 6, 17, which, upon examination, I find, fully supports it. The same doctrine is explicitly avowed in Brook's Abridgement, (Brook, Parliament, pl. 8, 6; Relation pl. 43,) and even applied to an attainder; is ruled in Plowd. Comm. 79b, and recognized in several other reporters, ([Standen v. University,] W. Jones, 22; [Henly v. Jones,] 1 Sid. 310, and cases cited; [Latless v. Patten,] 4 Term R. 660, note a;) was held by all the judges of England in Panter v. Attorney General, (6 Brown, Parl. Cas. 486;) and finally was declared too firmly fixed to admit of question in Latless v. Patten, 4 Term R. 660. The whole current of authorities therefore flows uniformly in one channel; and parliament listening at length to the voice of reason, by Stat. 33 Geo. III. c. 13, declared that the date of every statute should be endorsed on its receiving the royal assent, and from that time only should it have effect. 6 Bac. Abr. Gwillim St. (C.) 370.

Since the adoption of the constitution of the United States, which prohibits the passing of ex post facto laws, it seems to be considered, that statutes take effect immediately from the time of their date or passage, and not before; in the same manner as they now do in England. But we shall hardly find a case, in which the promulgation of them has been held necessary, to give them operation. So early as 39 Edw. III., this precise objection was taken; and Sir Robert Thorpe, then chief justice, answered, "although proclamation be not made in the county, every one is bound to take notice of that which is done in parliament; for as soon as the parliament hath concluded any thing, the law intends that every person hath notice thereof, for the parliament represents the body of the whole realm; and therefore it is not requisite that any proclamation be made, seeing the statute took effect before." 4 Inst. 26. The same point is recognized as law in Com. Dig. "Parliament," c. 23, and Hale on Parliament, 36, and in Bac. Abr. Stat. A. It seems, therefore, a settled doctrine, that a statute takes effect from the time of its passage, and needs no promulgation to give it operation. Against principles thus sol-

emply adjudged, I cannot find a single opposing authority. I am aware of great difficulties in sustaining the reason of these principles; but sitting here, I am bound to pronounce the law as I find it, though I cannot but yield with reluctance to authorities, when they impose restraints on general equity. Decree affirmed.

[NOTE. Act Cong. Dec. 22, 1807, c. 5, (2 Stat. 451.) was repealed by Act March 1, 1809, c. 24, § 19, (2 Stat. 533.) In *Burgess v. Salmon*, 97 U. S. 381, it was held that a law increasing the duty on tobacco, which was approved by the president in the afternoon, does not apply to tobacco on which the duty was paid under the former law on the forenoon of the same day. As to such tobacco, it is an *ex post facto* law. See *In re Ankrum*, Case No. 395; *American Wood-Paper Co. v. Glens Falls Paper Co.*, Id. 321a.]

ANN, The, (BELL v.)

[See *Bell v. The Ann*, Case No. 1,245.]

ANN, The, (UNITED STATES v.)

[See *United States v. The Ann*, Case No. 14,456.]

Case No. 398.

The ANNA.

[6 Ben. 166]¹

District Court, E. D. New York. July, 1872.²

SALVAGE—DERELICT—APPORTIONMENT OF SALVAGE—SPECIAL AGREEMENT OF MASTER.

1. The brig A. came into collision with another vessel, about 50 miles from Sandy Hook, at night, in a thick fog, when it was blowing hard. She received injuries, which led her master and crew to think she was about to sink, and they left her and got on board the other vessel. The next morning, about 7 A. M., the fog cleared off, and the master of the A. saw her about eleven miles off, but made no effort to return to her. The bark W. S., bound to New York, came to the A., and put on board of her a mate and one man, who got sail on her, and proceeded towards New York, taking a pilot about 10 A. M., and a tug about 11 A. M., which for the agreed sum of \$600, towed the A. to New York, reaching the dock about 9 P. M. The A. was worth \$3,500, her freight amounted to \$1,500, and her cargo was worth \$25,589, making in all \$30,589. The master of the W. S. was sailing her under an agreement with her owners, to make this voyage on shares, he to navigate her, victual and man her, and pay half her port charges, and to receive half the earnings: *Held*, That, whether this was strictly a case of derelict or not, it was the case of a vessel abandoned at sea, where no evidence was given of an intention on the part of her master to return to her, and the awards, which have been given in cases of derelict, might well be looked to, as affording some guide to the judgment.

2. That \$6,000 was a proper sum to be awarded as salvage, from which should be deducted the \$600 paid to the tug by the claimants.

[Cited in *The S. A. Rudolph*, 39 Fed. 333; *The Scow*, 46 Fed. 403.]

¹[Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

²[Affirmed by the circuit court in *The Anna*, Case No. 401.]

3. That the master, by reason of the agreement between him and the owners, should receive \$500 more than otherwise would have been his share, and that the award be apportioned as follows:

To the master of the W. S.....	\$2,300
" " owners " " " ".....	1,800
" " mate " " " ".....	800
" " seaman who went with him..	200
" " 3 " " staid on the W. S., in proportion to their wages..	300

[Cited in *The S. A. Rudolph*, 39 Fed. 333.]

[In admiralty. Libel by the owners of the bark Wylie Smith to recover salvage of the brig Anna and her cargo. Decree for libellant. Affirmed, under title of *The Anna*, Case No. 401.]

Goodrich & Wheeler, and W. R. Darling, for libellants.

Scudder & Carter, for claimants.

BENEDICT, District Judge. This is an action on behalf of the master and owners and crew of the bark Wylie Smith, to recover salvage of the brig Anna, and her cargo.

It appears that on the night of the 9th of April, 1872, the brig Anna came into collision with the bark Narragansett, off the Woodlands, in a thick fog and blowing hard. The master of the Anna, who was her owner, says the collision was a violent one, and shook her from stem to stern, and the blow was so violent that she leaked all over her house and deck. On the supposition that she would sink forthwith, all hands on board of her at once abandoned her and made for the bark, which they reached in safety. The wind had been blowing hard for about three hours before the collision, and continued to blow during the night with a heavy sea on. About four o'clock A. M. the wind went to the westward and moderated. The fog cleared off at about 7 A. M., when the Anna was discovered in sight of the Narragansett, about eleven miles off. The evidence fails to show that the owner of the Anna had any intention or desire to return to his vessel. No attempt was made to do so. About the same hour the Wylie Smith discovered the Anna abandoned; and, proceeding to her, placed on board of her a mate and a man, who undertook to get her into New York. The bulwarks were found broken on the starboard side from the main rigging forward, the jib boom broken and hanging across her bow, and the bowsprit split, and fourteen inches of water in her. She was not seriously injured, and could without difficulty sail to New York if properly manned. She was then about thirty miles southeast of the Highlands, with no land in sight but several vessels to be seen a long distance off at sea. The mate of the Wylie Smith got sail upon the brig, and proceeded towards New York, with the wind southwest but hauling to the westward, the Wylie Smith herself having proceeded on her voyage to New York. About 10 A. M. a pilot boarded the Anna, and about 11 A. M. a tug, cruising

for business, approached, with whom a bargain was made by the salvors to tow them to New York for six hundred dollars.

They reached the dock in New York about 9 o'clock P. M. The value of the brig was \$3,500, the freight amounted to about \$1,500, and the cargo is valued at \$25,589.

It is necessary only to allude here to the considerations which govern in awarding salvage. The amount is to be determined upon the consideration of all the circumstances, having reference not only to the labor and risk on the part of the salvors, and the advantage to the owners of the property saved, but also to the interests of commerce. In cases of derelict, one reason for a liberal award is stated to be that the property having been abandoned as lost, it does not lie in the mouth of its owner to complain of the reward paid to strangers, who return his property to him. And this consideration has been adverted to as having equal force whether the vessel abandoned is in a sound or wrecked condition. The rule of the ordinance was applied to a sound vessel abandoned when pursued by pirates, and subsequently found derelict. The Saint Jean Baptiste, 2 Giroud & C. 375.

Another consideration of force in this case arises out of that public interest, the protection of which lies at the foundation of the law of salvage. This brig was abandoned in near proximity to the entrance of a great sea-port, and in the track of vessels of every description inward and outward bound. Being left floating, with some sails still up, and with no one on board to set her lights, to keep her on her course, or to answer or give hails, she was a very dangerous thing. The presence of such an object in this locality at any time, if known, would justly cause alarm, and might well occasion great loss of life as well as of property. For the taking in charge and saving of a wreck so situated, the reward should be such as to insure at all times the rendering of any amount of labor, the incurring of any risk and the deviation by any vessel from any voyage in order to supply the wreck with a crew, and make her presence safe.

If, in this case, one of the ocean bound steamers had fallen in with the Anna, and turned about to tow her to a place of safety, I should not have hesitated to award liberal compensation for the detention, expense, and importance of such services, without much reference to the amount of the property absorbed thereby. But these claimants were so fortunate as to have this service (which some vessel must have rendered, if their property was ever to be restored) performed by a sailing vessel which was not required to deviate from her course, or to lose any considerable amount of time; and which, while she parted with her chief mate and a man, thereby increasing her own risk, did not sustain any loss. It is therefore possible to give her a liberal reward without absorbing

the half or one-third part even of the property saved.

But it has been contended that this is a case of derelict, and in such cases one-third is always to be given. The law is otherwise. *Post v. Jones*, 19 How. [60 U. S.] 161. Whether therefore this be a case of strict derelict or not is of no importance; it is certainly the case of a salvage of a vessel abandoned at sea, where no evidence is produced of an intention on the part of her master to return to her. The awards which are made in the cases held strictly derelict, may therefore well be looked to as affording some guide to the judgment in this case.

According to the fixed regulations governing maritime courts, in many parts of the continent, salvage never exceeds one-third of the value saved, with the exception that it may be increased to one-half, when the salvage is accomplished with unusual exertions, and the value of the property is small. German Mercantile Law, 748. In France the Code de Commerce is silent upon the subject, and the Ordinance of 1681 still governs and furnishes the rule there applied, according to which, following the Roman law, one-third is awarded whenever property is found abandoned in open sea, or has been raised from its bottom. The Rhodian law distinguished between these two cases, giving one-fifth when the property was found abandoned but floating, and when property was raised from the bottom one-half to one-third, according to the depth of the water, thus recognizing that in cases of derelict, as well as others, the amount of labor expended should be taken into account. In modern cases the amount varies. In the great majority of instances the award approaches nearly to one-third. In a late case of a derelict saved without much labor, time, or risk, two-fifths were given where the value was small. *Georgiana*, [Case No. 5,355.]

In the case of *The Viscega*, Shipp. Gaz. April 30, 1859, where a derelict, valued at £1,450, was conducted into a harbor by a steamboat and a lifeboat with seven men, with little labor or loss of time and no danger, the award was £500.

In the case of *The Majestas*, Shipp. Gaz. March 31, 1858, a derelict, found five or six miles from the harbor, and conducted in with no difficulty by a tug in one day, on a value of £16,000, £2,000, or one-eighth, was given to the salvors.

In the light of these rules, and in view of the considerations above adverted to, I consider that the sum of \$6,000 should be awarded as the salvage in this case.

From this sum must be deducted \$600, the amount of the tug's bill settled by the claimants.

The next question in the case arises between the owners of the *Wylie Smith* and her master, respecting the apportionment of the award between them, in view of the fact that the master was not sailing on monthly

wages, but had an agreement with the owners to make this voyage on shares—he to navigate the vessel, victual and man her, and pay half the port charges, and to receive half the earnings. As to this agreement, it is to be noted that the master was not made owner pro hac vice. His agreement was only for a single voyage, for which the vessel had a charter. His position was more nearly that of a master receiving a definite sum, i. e., half the charter money, for navigating and victualing and manning the vessel during the voyage, than of an owner. It is clear, therefore, that the owners of the Wylie Smith, whose vessel was used and put at risk, are entitled to share in the salvage. But it is equally clear that part of the ordinary risk of the owners was, by the agreement between them and the master, shifted to the master. In case of disaster arising from the absence of the mate and seaman, the master would have lost, not only his services for the voyage, but also his advances for the crew, provisions, and port charges. Without undertaking to determine the exact divisions of risk which arose from this agreement, it will be just, because of it, to give master \$500 more than would otherwise have been his share.

The owners will, therefore, receive \$1,800; the master, \$2,300; the mate, who navigated the Anna, \$800; the seaman who went with him, \$200; the remaining \$300 to be divided among the three other men, in proportion to their wages.

Case No. 399.

The ANNA.

[6 Ben. 340.]¹

District Court, S. D. New York. Feb., 1873.

COLLISION IN HUDSON RIVER—VESSEL AT ANCHOR.

A schooner, lying at anchor off Caldwell's in the Hudson river, was sunk by a collision with a tow, which passed her in the night. Her owners filed a libel against two steamboats, which, fastened alongside each other, had towed some boats by the schooner that night. The schooner alleged that she was struck first by one of the two steamboats and then by the boats in tow. The steamboats alleged that, while there was a slight collision between one of them and the bowsprit of the schooner, the blow which did the injury to the schooner was given by the boats of another tow, which passed up the river ahead of them: *Held*, That, on the evidence, the schooner had failed to establish that the blow which caused her to sink was inflicted by the two steamboats or the boats in tow of them, and that the libel must be dismissed.

In admiralty. This was a libel by the owners of the schooner Tryall, to recover for the sinking of the schooner in the Hudson river, off Caldwell's, on the night of December 18th, 1870. The schooner was at anchor. Her story was, that the Anna, with the Car-

rie alongside, and having a tow of boats astern, came up the river and attempted to pass between the Tryall and the west shore, and that the Carrie struck the schooner and went by her, and the boats in tow also struck her, and that from the effects of such collision she sank. The story of the Anna and the Carrie was that a tug was going up ahead of them with a tow of boats astern; that those boats struck the Tryall; and that, after she got free from them, she swung around so that her bowsprit just touched the paddle-box of the Carrie, but not with force enough to do any injury.

R. D. Benedict, for libellant.
C. Van Santvoord, for claimant.

BLATCHFORD, District Judge. A careful consideration of the evidence in this case fails to satisfy me of the truth of the allegation of the libel, that the steamboat Carrie struck the libellants' schooner and carried away her bowsprit, and that afterwards a barge in tow of the two steamers struck the port bow of the schooner, and that the two collisions did so much injury and damage to the schooner that she sank. That the schooner was at anchor, and was struck and sunk, is undisputed. It is also not denied that the Carrie came in contact with the jib-boom of the schooner. But, the collision described by the master of the schooner as the first one of the two collisions, is described by him as a blow by the guard of a boat on the round of the port bow of the schooner, in a direction which took the schooner's bowsprit square off to the bow. The evidence satisfactorily shows that no such blow was given by the Carrie. Then, again, it is very apparent that the two blows which did the damage were given by a vessel and her tow, which, to the eyes of the men on the schooner and on the sloop to the westward of her, was the first tug and tow in order which came up from below. That there was such a tug and tow just ahead of the Anna and the Carrie and their tow cannot be doubted. It was this first tug and tow that hit the schooner and did the damage. This first tug, or a barge alongside of her, first hit the schooner, and then a boat in the hawser tier behind, in tow of such tug, hit the schooner. These blows, so disastrous, naturally caused excitement, and the passage of the Anna and Carrie close behind was not noticed by those on board of the schooner and the sloop. The witnesses all, on both sides, say that it was the first tug and tow that hit the schooner, and did the damage. That was not the Anna and the Carrie. The contact with the Carrie did no damage. On this view the testimony can all be reconciled. On any other view, wilful false swearing must be imputed to the claimants' witnesses. The libel must be dismissed, with costs.

¹[Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

Case No. 400.

The ANNA.

[Blatchf. Prize Cas. 332.]

District Court, S. D. New York. March 26, 1863.

PRIZE—SAILING UNDER ENEMY'S FLAG.

Vessel and cargo condemned as enemy property, sailing under the enemy's flag, and under passes from the enemy.

In admiralty.

BETTS, District Judge. The libel, filed March 5, 1862, alleges the capture of the steamer and cargo, as prize, November 22, 1861, in Mississippi sound, between Biloxi and Ocean Spring, by the United States steamer New London. The vessel was appraised by a naval survey, December 26, thereafter, and appropriated to the use of libellants, and the cargo was transmitted by another vessel to this port, for adjudication. A decree by default was rendered against both vessel and cargo, March 24, 1863, and the vessel's papers and the proofs in preparatorio have been laid before the court, to determine the liability of the captured property to confiscation.

The steamer was enrolled and licensed to citizens of the Confederate States, under the laws of those states, July 1, 1861, and was in the employ of such citizens when seized. The master testifies, on his examination, that the vessel was, when captured, sailing under the Confederate flag, and had no other on board; that he is a citizen and a resident of a Confederate state; that the vessel was engaged in trade between the ports of Pascagoula and New Orleans; that he was part owner of the vessel, and had an adventure in the cargo; and that he knew of the war and that those ports were under blockade. The witnesses examined, all of them, knew of the war and that those ports were under blockade.

It being thus demonstrated that the vessel and cargo were enemy property, sailing in the interest of the enemy, with the aid of passes from and protection of the flag of the enemy, the property captured is plainly prize of war; and, no defence being interposed, a decree of condemnation and forfeiture is directed to be entered.

Case No. 401.

The ANNA.

[10 Blatchf. 456.]

Circuit Court, E. D. New York. Feb. 25, 1873.

SALVAGE—DERELICT—APPORTIONMENT—DISCRETION OF THE COURT.

1. A vessel, having been in collision and injured, was abandoned by her master and crew.

¹[Reported by Samuel Blatchford, Esq.]

²[Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

as sinking, about twenty miles to the eastward of Sandy Hook. She was afterwards discovered by another vessel, and brought safely into New York, with her cargo. The value of the saved vessel and her freight and cargo was \$34,589.06. The district court allowed \$6,000, as salvage, which included \$600 paid by the salvors to a tug, for towing the saved vessel; *Held*, that, on all the evidence, the allowance was not excessive.

[Cited in *The Loveland*, 5 Fed. 108.]

2. The discretion of the district court, in fixing the amount of salvage, is not to be overruled, when no principle of law has been violated, unless the error is very clear.

[In admiralty. Libel by the owners of the bark Wiley Smith to recover salvage of the brig Anna and her cargo. Decree for libellant. Case No. 398. Claimants appeal. Affirmed.]

William R. Darling, William W. Goodrich, and Charles Donohue, for libellants.
Townsend Scudder, for claimants.

WOODRUFF, Circuit Judge. The evidence shows, that the brig Anna, having come into collision with another vessel, at about 11 o'clock in the night of the 9th of April, 1872, and been injured, her master and crew, under the apprehension that she was sinking, escaped from her to the colliding vessel, and were brought into this port, to which she was bound. At the time of the collision, she was about twenty miles to the eastward of Sandy Hook, the night was very foggy, "the thickest," her master and owner testifies, that he ever saw, it was blowing hard, from the southwest, and she was under "close reefs." Contrary to the expectation of her master and crew, she did not sink, but, in the morning, she was discovered by the master and crew of the brig Wiley Smith, tossed by the waves, driven off ten or fifteen miles further from Sandy Hook, and near to the Long Island shore, and in great danger of going on the Long Island beach, upon which, the master of the Wiley Smith says, she would have driven within an hour. The wind had somewhat abated, but it was still blowing fresh from the southwest. Perceiving that she was a vessel in distress, the Wiley Smith was hove to, and sent her mate and one of her crew on board, (the Wiley Smith having, in all, captain, mate, and four seamen,) and it was agreed, that the mate and man should remain on board and endeavor to save the injured vessel. They succeeded in getting her under sail, and directed her towards this port, and, after making some progress, were hailed by a tug, with the master of which they bargained for towage to New York, for six hundred dollars, and she was towed in. The Wiley Smith also arrived here in safety. The Anna was conceded to be of the value of \$7,500, though she was afterwards sold for less, and the net value of her cargo was \$25,589.06, and the freight was \$1,500, as was also conceded, making, in all, \$34,589.06. The libels herein being

filed by the owners, master and crew of the Wiley Smith, for salvage, the district court allowed to them the sum of \$6,000, (including therein the sum paid for the service of the tug.) The claimants of the Anna and her cargo have appealed to this court, claiming that the allowance is excessive.

The discretion of the district court, in fixing the amount of salvage, is not to be overruled, where no principle of law has been violated, unless the error is very clear. The amount allowed is, no doubt, liberal, if the time and service by the Wiley Smith, or even her danger, were alone considered; while, on the other hand, considering the state of the weather, the probable destruction of the Anna, the diminution of hands on the Wiley Smith, the hazard of her own insurance, and the importance of the service to the owners of the Anna and her cargo, it does not seem to me extravagant. Very true, she might possibly have been saved by other means. Possibly, her master, on arriving in New York, in the morning, might have gone, or sent a vessel, in search of her, and, perhaps, have procured one for a much less compensation. But this is a mere conjecture. He and his crew had left her, believing that she was sinking, and it does not appear that they thought otherwise, until they saw her under sail, in the hands of the finders. That, whether regarded as finders of a derelict, or salvors of a vessel being driven on shore, the libellants are entitled to salvage, is not, and cannot be, denied. To this it is not necessary to cite the authorities, numerous as they are on that point.

A narrow and inadequate appreciation of such services as were here rendered would not sufficiently encourage vessels and their crews to depart from their own voyage, to save the property, and, as the case may be, the lives of others. Confessedly, the share of the property allowed is greatly less than the early practice of courts of admiralty would have sanctioned, and, in the changed condition of navigation, it is properly so; but, I do not feel warranted in saying, that the share allowed, (but little over one-sixth,) is so great, that this court should reduce it.

Let the libellants have a decree for the sums awarded, with costs.

Case No. 402.

The ANNA.

The REVERE.

The ANNIE DEAS.

[Blatchf. Prize Cas. 337.]

District Court, S. D. New York. April 16,
1863.

PRIZE COURT—DISTRICT ATTORNEY'S FEES—COSTS.

1. The question of the allowance of costs and fees to the district attorney for services in prize cases considered.

2. The prize court is, and always has been, in the United States a component part of the admiralty court.

3. In prosecuting in prize cases, the district attorney acts as the law officer of the government, and not in any other capacity.

4. As the district attorney is compensated by fees and emoluments limited by law to a fixed salary, he cannot have any additional allowance for extra services within the scope of his appointment, unless such extra reward is expressly authorized by law.

5. The act of August 6, 1861, [12 Stat. 317.] in regard to the compensation of the district attorney, discussed.

6. The act of March 25, 1862, § 3, [12 Stat. 375.] does not abolish the restrictions on the compensation of the district attorney, or give to him for his personal use the amounts taxed to him for services in prize cases.

7. The acts of July 17, 1862, [12 Stat. 607.] and March 3, 1863, [12 Stat. 741.] show that the restrictions on the compensation of the district attorney are still in force.

8. The court will not apportion to the district attorney, by a direct decree, the amount of the costs taxed for his services in each prize suit which ought to be paid to him toward his aggregate salary.

9. The court will tax the costs of the district attorney in prize cases, under the existing laws, on the written assent of the counsel for the captors, and the deposition of the district attorney, proving the performance of the service and its reasonable value, and will leave it to the disbursing officers of the treasury to see that no more is retained by that officer than the sum given him by law.

In admiralty.

BETTS, District Judge. The three above-named suits having terminated some time since by decrees of condemnation of the several vessels and their cargoes, the district attorney presented his several bills of costs therein to the court for taxation, attesting, by his own deposition, the actual rendition of the respective services charged by him in each case or proceeding and their just value; and he submitted, with each bill of costs, a written admission of the counsel for the captors, of service upon him, by the district attorney, of a copy thereof, and his assent to the correctness and justness of the items as charged.

Having information that congress, in closing its late session, adopted some enactments which might have a bearing materially affecting the allowance of costs to the officers of the court in prize proceedings, and especially those to be taxed to the district attorney of this district, I deferred acting upon the above taxations until authentic copies of such legislation might be furnished to the court. This delay was not under an expectation that congress had varied the law governing the destination of the forfeited funds to the captors and navy pensioners, but that they might have made more clear their intentions in respect to the method by which the restriction or limitation of the compensation to the officers of court is to be observed and carried into effect through the

action of the court in the matter of taxation.

It does not appear, on the examination of these proceedings in congress, that any positive change is declared in the former provisions of the law in that respect, or that any other duty devolves upon the court than that of taxing costs according to the meaning of the law as it stood at the time the services were rendered; and it belongs exclusively to the executive department having the subject in charge, to determine the amounts of proceeds from the confiscated property which are legally payable to the district attorney. The last enactments, however, are considered to afford important confirmation of the construction heretofore placed by the court on the law of costs which fixes the allowances to the district attorney, and to afford a guide to the court in the matter of their adjustment. The interpretation of those laws is not before the court for judicial adjudication in this proceeding of taxation. The subject arises incidentally, and the determination of the court acts upon the disbursing departments suggestively only, leaving them free, upon their own responsibility, to award the sum assessed, or to limit that sum to such allowance as, in their judgment, the law authorizes them to allot, pursuant to its express provisions or authoritative construction.

With that function I do not presume to interfere, and have explicitly, in each taxation, reserved the subject for the action of the appropriate officer of the government with whom rests the adjustment of the accounts of the public servants who receive or disburse public money.

In support of the rate of allowance claimed by the district attorney, he submits, in writing, his own views and those of two eminent counsel, upon the intent and proper construction of the laws applicable to the subject. A cardinal position assumed in the argument I cannot accede to.

I. It is argued that the district attorney does not act in the prize court in the character of prosecuting officer in a court of law but rather in an executive capacity, exercising military functions and would not, accordingly, be placed here under restrictions applicable to his powers or compensation merely as law officer of the district court.

I think it definitely determined, in the usages of our jurisprudence before the adoption of the constitution, that the prize court was in existence, as a component part of the jurisdiction of the admiralty court, whether organized under the authority of the several states or colonies, or that of the confederation, (5 Wheat. [18 U. S.] Append. 106,) and became so by direct recognition of the supreme court, on the establishment of the federal constitution, (Const. art. 3, § 2; [Talbot v. The Achilles,] 3 Hopk. Works, 132,

Pamph. 61; Talbot v. 3 Brigs, 1 Dall. [1 U. S.] 95; Jennings v. Carson, [Case No. 7,281,] and cases at large there cited; State v. Brailsford, 3 Dall. [3 U. S.] 5; Glass v. The Betsey, 3 Dall. [3 U. S.] 16,) and subsequently by express designation of congress, (2 Stat. 761, § 6,) in these words: "And in the case of all captured vessels, goods and effects, which shall be brought within the jurisdiction of the United States, the district courts of the United States shall have exclusive original cognizance thereof, as in civil causes of admiralty and maritime jurisdiction." This position is necessarily affirmed, by implication, in the recent decisions, on appeal, by the supreme court, in numerous prize cases. The Hiawatha, 2 Black, [67 U. S.] 635.

The district attorney is a statutory officer, created on the first organization of the government, and appointed in each district, in the words of the law, "to prosecute, in such district, all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the supreme court in the district in which that court shall be holden." 1 Stat. 92, § 35. In this district the present officer was in commission at the commencement of the existing war, and has officially instituted in his own name all the prize suits brought in this court since the war. It is also manifest that congress regards the functions of the district attorney as a portion of his official powers in prize cases. 10 Stat. 168, § 3.

II. These officers are compensated, as a class by fees and emoluments, limited to a sum not exceeding \$6,000 per annum, and in proportion for a less period, retainable by them, for their own personal compensation, from the entire earnings and receipts coming into their possession from the incomes of their respective offices and official acts during such period. To receive any other or greater compensation is declared to be a misdemeanor. 10 Stat. 166, 168, 169, § 3. The statute above recited was an affirmation and re-enactment of various anterior provisions of law respecting the compensation of public officers by fees and perquisites to limited amounts, and that method of payment is specifically applied to various officers serving in courts of justice, and enforced against them in the restrictions placed upon the quantum of emoluments allowed.

The supreme court, in a cause carefully considered, by a unanimous decision, held, that a compensation derived by a public officer from fees and emoluments, limited to a fixed amount, was virtually a salary restriction, which cut up by the roots all additional allowances for extra services within the scope of his appointment, unless such extra reward were expressly authorized by law, (Hoyt v. U. S., 10 How. [51 U. S.] 139;) and the same doctrine was recognized sub-

¹[Decided in the Pennsylvania admiralty court prior to 1789.]

sequently, (*Converse v. U. S.*, 21 How. [62 U. S.] 464.) The provisions of positive law in that respect, for more than forty years, have been signally emphatic and peremptory. 5 Stat. 349, § 3; *Id.* 510, § 2.

III. A strong manifestation of the purpose of congress, and of the understanding of the district attorney of this district, that the compensation of this officer was and should continue subordinated to the restrictions before stated, exists in the terms of the act passed (at the instance of this officer as appears in his brief on this hearing) August 5, 1861, which changes the mode of his compensation to one by a salary of \$6,000, in lieu of fees, &c., as theretofore, and super-adds, in a distinct section, the provision "that the accounts of said attorney, from and after the fourth day of April last, shall be adjusted and settled in the same manner as the same would have been adjusted and settled had this act been in operation on and after that day," necessarily importing that all moneys realized through perquisites or fees payable to the officer should continue, as theretofore, to be accounted for by the district attorney with the secretary of the interior as public funds, to the use of the government, except such part as had been disbursed by the secretary of the interior in satisfaction of the charges fixed upon the officer, and should be wholly withdrawn from his personal perquisites. This statute was passed after numerous prize actions had been commenced and prosecuted in this court to final decrees, through the district attorney's office, and it is to be inferred that the emoluments and costs arising to this officer from the source of business were within the contemplation of the act of August 6, 1861, as a portion of proceeds subject to settlement and adjustment before the interior department, by him in his capacity of receiver of public moneys, and to be assigned to other public use, according to law; nor can it be justly presumed that congress would divert such moneys to any purpose, in defeat of the beneficiary devotion of one moiety of them to the navy pension fund, and the other to the actual captors personally, by permanent law, (Act April 23, 1800; 2 Stat. 52, 53, §§ 5, 9; 12 Stat. 607, § 11.) unless such intention be expressly declared by law.

IV. Beyond the considerations already suggested, tending to show the purpose and policy under which the law fixed the compensation of the district attorney of this district at a sum not exceeding \$6,000 per annum, the limitation seems to be in accordance with broad, general principles. It is to be noted that no public functionary, holding civil office under the United States within this district, is paid an annual compensation for personal services exceeding that amount, however multifarious, onerous, and important those services may be. The circuit judge of the United States presiding

in this and two adjacent states, over four separate circuit courts, and at the same time discharging the duties of judge of the supreme court also; the subtreasurer of the United States; the collector, postmaster, marshal, naval officer, &c., have their compensation limited to that amount without regard to the multiplicity or diversity of the items of service exacted of them in each instance, (more than quadrupled by the exigencies of war,) and receive no augmentation of reward therefor, except it be granted directly for specific cause, the rule being that no increase of pay is allowed for the performance of any act within the scope of the employment of the appointee when serving for a fixed compensation. *Hoyt v. U. S.*, 10 How. [51 U. S.] 141. No cause is manifest which should change the principle with regard to the allowance of surplus payments to the district attorney, to be retained and appropriated to him as personal compensation. No like legislation exists for further rewards to such classes of officers, including even the heads of departments, than their salaries, because of any addition of labors or responsibilities, however manifold, imposed upon them under the necessities of the war. The general law recognizes no other method of relief to incumbents in office for overcharge of duties, than by supplying the aid of increased agents, deputies, assistants or clerks, for carrying on the public business.

V. The argument is pressed with great earnestness, that the act of March 25, 1862, § 3, imports that congress intended to abrogate all restrictions of compensation to district attorneys derived from their services in prize cases, and that those earnings are granted to the attorneys without abatement or regard to the sum total to be received, and should be taxed to them in that sense with a view to such emoluments being paid to them personally, irrespective of the fee-bill of February 26, 1853, and prior laws, or the special act of August 6, 1861, affecting the district attorney of this district.

It is to be noticed, however, that no language is employed in the act of March 25, 1862, expressly granting to district attorneys a compensation to be adjusted and determined by the court for services in prize proceedings, additional to the salaries or limited pay already fixed by law; nor does the provision of section 3, in terms rescind or qualify the restrictions of the amounts payable to those officers personally. The implication from the frame of the act, if it does not amount to an indirect repeal of the first clause of the act of August 6, 1861, is not destitute of force and plausibility, that the leading intent of congress was to introduce into this novel course of practice a further scale of emoluments, in part to help raise the earnings of the attorneys in the different districts towards the maximum allotted by law to the office; and further, in part, in respect to districts producing sur-

pluses beyond the stated compensation of the office, to assign portions of the proceeds for services in prize suits, by distribution, to the judiciary fund, in relief of expenses borne by the government in carrying on prosecutions in its name for the pecuniary benefit of navy pensioners and captors. The presumption is enhanced by the consideration that the income to the marshal remains under the old limitation, and all received by him exceeding \$6,000 per annum is paid into the judiciary fund, notwithstanding his personal services and pecuniary responsibilities are greatly augmented by the war; and the surplus over his maximum pay, derived from proceedings in prize sales, must draw very large sums from the naval pension fund and the portion distributed to the individual captors—objects eminently favored by congress in the destination of prize funds.

Whether such object had influence or not in the form of the enactment, congress evinced emphatically, at the same session, by a declaratory act, that they did not use the language then employed with the design that it should convey unlimitedly the emoluments received from prize suits to the personal benefit of those officers:

1. An act was passed July 17, 1862, (12 Stat. 603, § 12,) with a proviso declaring "that the annual salaries of district attorneys, prize commissioners, and marshals shall, in no case, be so increased, under the several acts for compensation in prize, as to exceed, in the aggregate, the following sums, and any balance beyond the several sums shall be paid into the treasury, viz., district attorneys, \$6,000; prize commissioners, \$3,000; marshals, \$6,000." This language would seem to make the limitation of the entire amount of compensation of each officer, for every service assigned to their respective offices, as precise and stringent as could be enacted; and the last expression of the legislative will is the one which must prevail in the execution of the law.

2. It is, moreover, manifest, by the provisions of the act approved March 3, 1863, §§ 11, 12, providing, among other things, for the payment of costs to district attorneys, that, when congress intends that the limitation in respect to costs, appointed in the fee-bill of February 26, 1853, shall not apply to costs subsequently granted to such officer, that purpose will be expressly signified by the law giving the costs; and that, otherwise, the restriction will embrace the new grant.

VI. The adjustment by the court of a just and suitable compensation to be received by the prize commissioners, the district attorney acting for the United States, and the counsel for the captors, "for their several and respective services in each prize case or proceeding," (Act March 25, 1862, § 3,) plainly does not presuppose that such varied services are to be performed in presence of the court, or with its personal cognizance.

Many of the services will, in their nature, have been essentially constructive. The compensation will necessarily rest on the basis of a quantum meruit. This, in the judicatories of the state, is a matter inquirable into by testimony, and determinable in open court. *Stevens v. Adams*, 23 Wend. 57; in error, 26 Wend. 451; *Wilson v. Burr*, 25 Wend. 386; *Stow v. Hamlin*, 11 How. Pr. 452; *Sedg. Dam.* 102, 103. The court, in regard to claims important in amount, or resting on extrinsic circumstances, would, in cases of dubious facts, be obliged to resort to references or other methods of investigation, admitting of proofs to be given in support of or in opposition to claims for quantum meruit compensation, the leading and affirmative evidence being required from the claimants. That mode of investigation would be but imperfectly employed by a judge sitting out of court, and acting only as a taxing officer.

VII. The manner in which compensation in prize suits is made payable in this district to the attorney, by section 3 of the act of March 25, 1862, evidently precludes the court from assigning the amount to the officer by a direct decree; because, first, it is to be preliminarily determined by the proper executive department whether the compensation of the district attorney is solely a salary, and then whether the entire amount is to be defrayed out of the prize fund created during the year in which the service was rendered, in the proportion the amount derived from each suit or proceeding bears to the salary of the officer for the particular year. Such apportionment must not only be perplexing and uncertain to be carried out by the judge, for want of facts necessary to make the computation, but must also be exceedingly complex and embarrassing and frequently impracticable of determination by a judge on taxation, because suits and proceedings in prize, in many cases, now after the lapse of more than two years, are found still pending in the courts undetermined; and no means are supplied for discriminating the part of the fund obtained from each proceeding in suit, which might be applied to the costs of the officer in making up his share.

VIII. The court accordingly decided, at an early day, that it lay with the disbursing officers of the government to adjudge the amount of compensation granted to the district attorney, and the prize commissioners by existing laws, and the method of its distribution and payment to them; and that the province of the court was limited to the mode and amount of taxation or adjustment of those particulars, apart from the assignment or payment of such costs.

The third section of the act of March 25, 1862, was deemed peremptory in its direction that the costs should be allowed by the court to the district attorney in prize proceedings, without regard to antecedent limitations of his compensation, but the power might be

vested in the departments to enforce, on its disbursement, the restrictions on his personal compensation directed in prior provisions of law. That authority may be implied in the provisions enacted July 17, 1862, and March 3, 1863, or in an implied repeal of the third section of the act of March 23, 1862, in its application to the attorney of this district, or in the continuing, in this respect, of the law of taxation, subject to the governance of the act of February 26, 1853. Act Aug. 6, 1861, (12 Stat. 317, § 1.)

That rule will be still adhered to, and the court will not assume the responsibility of attempting to interfere with the discretion of the secretaries of the treasury, interior, or navy, in adjudging what proportion of the proceeds of prize property is by law payable to the district attorney. The taxation or adjustment of the costs of the attorney is made by the judge upon the written assent of the counsel for the captors, and the deposition of the district attorney proving the performance of the service and its reasonable value, no objection being interposed thereto from any party; and it lies with the disbursing officers of the treasury to see that no more is retained by the officer than the sum given him by law.

Should any question touching the exposition of the laws of costs on this subject be brought before the court for judicial examination and decision, the court would not feel itself committed on that question by this course of taxation.

Case No. 403.

The ANNA v. The GOLDEN HORN.

The GOLDEN HORN v. The ANNA.

[36 Leg. Int. 294; 14 Phila. 521.]

District Court, E. D. Pennsylvania. July 14, 1879.

COLLISION—BETWEEN STEAM AND SAIL—FOG.

[When a master of a steamship knows that another vessel is in his front, enveloped by a fog, and goes forward without properly heeding her fog signals, and knowing further that in all probability there would not be sufficient time to avoid a collision when she came in sight, is guilty of negligence, which will render his vessel liable for an ensuing collision.]

In admiralty.

Charles Gibbons, Jr., and J. Warren Coulston, for the Anna.

James B. Roney, for the Golden Horn.

BUTLER, District Judge. On the 15th of May, 1879, near five o'clock in the afternoon, the German ship "Anna," and the English steamship "Golden Horn," underweigh at sea, in latitude 36° 53' north, and longitude 74° 12' west, came into collision, injuring each other seriously. On the 21st of May,

[Opinion reprinted from 36 Leg. Int. 294, by permission.]

the "Golden Horn" was libelled, for compensation to the "Anna," and three days later the "Anna" was libelled for compensation to the "Golden Horn." At the time of collision the wind was east northeast. The "Anna" was closehauled, going north, half west, and the "Golden Horn" about east. The evidence taken relieves the "Anna" from the imputation of fault, contained in the libel against her. Holding her course steadily, until danger became apparent, she then made every available effort to avoid it. The libel filed against her must, therefore, be dismissed. Is the "Golden Horn" responsible to the "Anna"? It was her duty to keep out of the "Anna's" way. She did not, and is, therefore, responsible; unless the circumstances existing at the time, excuse her. She avers they do; that a dense fog prevailed, concealing the approach of the "Anna," until it was too late to avoid the collision; that she was proceeding with proper caution, omitting no duty; and that the result was therefore the consequence of inevitable accident. If this averment be true, she is not responsible. But the burden of proving it rests on her. Has she borne this burden successfully? That a fog existed is undisputed. Its extent, or density, is in controversy; and the testimony of the witnesses from the respective vessels, is in direct conflict, regarding it. Those from the "Golden Horn" say it was so dense that a vessel could not be seen more than a few lengths off; that with a proper, vigilant look out, the "Anna" was not seen until within three or four lengths; and those on the "Anna" say it was so light as to admit of seeing a vessel at the distance of a mile and a-half; and that they plainly saw the "Golden Horn" at that distance. It is difficult to reach a satisfactory conclusion respecting the fact here involved. The circumstance that both vessels were signalling, as it is usual and proper to do in case of dangerous fog, to some extent supports the respondent's witnesses. But the existence of a comparatively light, or ordinary fog, would as well account for the signals as a dense one. Proper care, as well as the terms of the statute, would forbid their omission under such circumstances. And the weight of the direct testimony seems to be against the respondent. A careful consideration of all the evidence has not satisfied me that the "Anna" (with a vigilant lookout from the "Golden Horn,") could not have been seen earlier than she was, and in time to avoid the collision. While it seems probable that the fog was not so light as the libellant's witnesses represent, I am not satisfied that it was so dense as stated on the other side. The truth doubtless lies between these conflicting statements. This view of the case is fatal to the defence. But if the respondent's allegations respecting the fog, were accepted, the result would not be different. Passing by all other questions, arising on this view of the case, and

coming directly to that of her duty at the time the "Anna's" horn was heard, and subsequently when she appeared to view, it seems quite plain that the respondent was in fault. The horn was twice heard; the second time very distinctly off her starboard bow. What was then done is not clear. There is evidence that her speed was reduced and her helm put to starboard; but looking at all the witnesses say on this subject, and the ship's log, it is quite uncertain whether the speed was reduced when the horn was heard, or when the vessel was subsequently seen. What the master says should have been done was "to put the helm hard a starboard, and let the engines go dead slow * * * in order to ascertain where the horn was. * * * We do not know how the vessel is going by hearing her horn, she might be going either way—might be going directly opposite from what we were going." Whether the helm was put hard a starboard, and the engines reduced to "dead slow," need not be determined, for taking the master's statement respecting the density of the fog, and the impossibility of knowing the "Anna's" locality and course at the time, it would seem quite plain that prudence required him to stop at once instead of simply decreasing his speed. With knowledge that a vessel was in his front, enveloped in fog, so dense as he represents, and knowing, as he must or should, that there might not, and probably would not be time to avoid collision after it came in view, to go blindly forward was negligent, if not reckless. He understood the distance at which a vessel could then be seen, was familiar with his ship, the working of her engine, and the space required to stop or turn. This distance, as the sequel proved, (accepting his statement,) was not sufficient to enable him to keep off. Under such a condition of circumstances as the master describes, I repeat, it would seem quite plain that common prudence required him to stop, when the horn was heard. Had he done so the collision would have been avoided. That there was time to do so, is reasonably clear; and that no effort was then made is equally clear. But taking the distance from the "Anna," when she first came in view, to be as stated by a majority of the respondent's witnesses, I am not satisfied that the space was not then sufficient to enable the respondent to keep off. According to this testimony the "Anna" was still some twelve hundred feet away. It would seem quite reasonable to believe that the respondent could have stopped within this distance, or so far changed her course, as to avoid the collision. I think the weight of the evidence—and all of it comes from the respondent's witnesses—is that the engine was not reversed when the "Anna" first came to view. The master was below and had to be sent for. Whether the messenger went when the second horn was heard, or afterwards when the vessel ap-

peared, is uncertain. That the engine was not reversed until the master came on deck, and gave the order, is certain; and at this time, he says, the "Anna" was but one and a-half lengths away. Reversing the engine then, his vessel stopped, as he states, by the time the other was reached. Had it been done when the vessels were three lengths apart, the collision (according to this statement) could not have occurred.

I need not dwell on the case. Sufficient has been said to explain the reasons which impel the court to overrule the defence. The answers of the assessors respecting the duty and custom of steam vessels, placed as the "Golden Horn" was at the time she heard the "Anna" signal; and the power of the former to avoid the collision on seeing the latter, at, or near, a distance of twelve hundred feet, sustain the views I have expressed on these points; and will be found annexed hereto. A decree must be entered for the libellant.

ANNA, The. (OOLOGAARDT v.)

[See *Oologardt v. The Anna*, Case No. 10,545.]

ANNA, The. (UNITED STATES v.)

[See *United States v. The Anna*, Cases Nos. 14,457 and 14,458.]

Case No. 404.

The ANNA KIMBALL.

[2 Spr. 33; 23 Law Rep. 724; 8 Pittsb. Leg. J. 353.]

District Court, D. Massachusetts. April, 1861.¹
MARITIME LIENS—FREIGHT—POSSESSION—WAIVER OF LIEN.

1. Maritime liens do not depend upon possession.

2. But if the owner of a vessel part with the possession of goods by delivering them to the consignee, he thereby loses his lien for freight.

[See note at end of case.]

3. An agreement between the shipper of goods and the carrier, by which a credit is given for the freight beyond the time of delivery, is a waiver of the lien for freight.

[See note at end of case.]

[In admiralty. Libel in rem by Edward Kimball, owner of the ship *Anna Kimball*, against the ship's cargo, (Alexander Duncan and others, claimants,) to enforce a lien for freight. Decree for claimant. Reversed by the circuit court in *Kimball v. The Anna Kimball*, Case No. 7,772, and decree entered for libellant which was afterwards affirmed by the supreme court in *The Kimball*, 3 Wall. (70 U. S.) 37.]

¹[Reported by John Lathrop, Esq., and here reprinted by permission.]

²[Reversed by circuit court in *The Kimball v. The Anna Kimball*, Case No. 7,772, which decree was subsequently affirmed by the supreme court in *The Kimball*, 3 Wall. (70 U. S.) 37.]

This was a libel to enforce an alleged lien on the cargo of the ship *Anna Kimball*, for non-payment of the balance due upon the charter of the ship, amounting to about \$10,000. The terms of the charter and the other facts appear in the statement of the pleadings, and in the opinion of the court. The defence was placed upon two grounds: 1st. That the terms of the charter making the balance of the charter money due at the end of the voyage, payable one-half in five days, and one-half in ten days after the discharge of the homeward cargo, were inconsistent with the retention of the cargo as security for the payment of such balance. 2d. That the libellant had, during the voyage, received from the charterers their two notes on six months for \$10,000, and that the credit thus given was inconsistent with the retention of the cargo necessary for the preservation of the lien, and that it therefore amounted to a waiver of the lien. To this ground of defence the libellant replied, that shortly after taking the charterers' notes, they became insolvent; and that he then offered to return them the notes, which they refused to receive, and that he had always been and was now willing to give up the notes.

R. H. Dana, Jr., for libellant.
Bartlett & Thaxter, for claimant.

SPRAGUE, District Judge. Maritime liens do not depend upon possession. This rule is almost universal, but there is one exception. If the owner of a vessel part with the possession of goods by delivering them to the consignee, he thereby loses his lien for freight. Such is the law at least in this circuit, it having been so declared by the circuit court, and followed by this court. And it has been held, that if an agreement be made between the shipper of goods and the carrier, by which a credit is given for the freight beyond the time when they are to be delivered to the shipper, the lien for freight is thereby waived; for in such case the carrier, being bound to deliver the goods before the freight is payable, must, in the performance of that contract, divest himself of the possession, and transfer it to the consignee without payment of the freight, and the lien must be thus terminated. In the present case, the libellant, on the 31st of August, 1857, took two notes for \$10,000, payable in six months, for freight.

This necessarily gave a credit until the expiration of those notes. It was a new contract entered into by the parties for adequate consideration; both expected that the ship would arrive several months before the maturity of the notes, that is, before the freight would be payable, and both must have contemplated that the cargo would be delivered to the consignee upon arrival. There is no part of the agreement which indicates that the carrier was to hold on to the goods until the maturity of the notes,

and the parties must have understood that the cargo would be delivered in the usual time after arrival. It could not have been contemplated, that the owner of the goods should be kept out of the possession and control of them for several months, because he had for an adequate consideration obtained a credit for that time for the freight. The credit upon such a condition would be an injury rather than a benefit. This ship did not arrive as early as was expected, but she arrived more than a month before the expiration of the credit.

The cargo was in a condition to be delivered to the consignee, and the delivery was duly demanded by him before the freight was payable; but the carrier refused to deliver it unless the freight was first paid. This refusal was wrongful. He had by a valid agreement given a credit for the freight which had not then expired, and by so doing had agreed that he would deliver the goods and relinquish his lien, without payment of the freight; and he cannot, by violating his agreement and holding on to the goods, place himself in a situation to maintain a suit to enforce the lien which he had agreed to relinquish.

[NOTE. This decree was reversed by the circuit court in *Kimball v. The Anna Kimball*, Case No. 7,772, and the circuit court decree was affirmed by the supreme court in *The Kimball*, 3 Wall. (70 U. S.) 37. Mr. Justice Field, speaking for the court, held that the clause in the charter party requiring a delivery of the cargo within reach of the ship's tackle does not contemplate such a delivery as to discharge the cargo from the lien for freight, but only its unloading from the ship. "The clause was intended for the benefit of the charterers. It gives them ample time to examine the goods, and ascertain their condition, and decide whether they will take them and pay the freight, or decline to receive them;" and especially is the lien preserved by another clause in the charter party which binds the cargo for the performance of the covenants contained therein, of which the payment of the charter money is one. "The notes were given before the termination of the voyage, and, consequently, before the balance of the charter money became due. Treating them as an advance of a portion of the freight, they could be recovered back; or their amount, if paid, if the vessel did not arrive. Freight, being the compensation for the carriage of goods, if paid in advance, is in all cases, unless there is a special agreement to the contrary, to be refunded if from any cause not attributable to the shipper the goods be not carried. * * * The notes were drawn so as to mature near the time of the anticipated arrival of the ship; and, according to the statement of the broker who made the arrangement, they were given for the accommodation of the shipowner, and were to be held over or renewed in case they fell due before the arrival." This is sufficient to repel "any presumption of a discharge of the claim of the shipowner, and of his lien upon the cargo in this case, by his taking the notes of the charterers." *The Kimball*, 3 Wall. (70 U. S.) 37.]

ANNA KIMBALL, The, (HARRISON v.)
[See *Harrison v. The Anna Kimball*, Case No. 6,132.]

ANNA KIMBALL, The, (KIMBALL v.)
[See Kimball v. The Anna Kimball, Case No.
7,772.]

Case No. 405.

ANNAN v. The STAR OF HOPE.

[Hoff. Op. 460; 9 Wall. (76 U. S.) 203.]

District Court, D. California. 1859.¹

SHIPPING—GENERAL AVERAGE—EXPENSES—VALUATION OF SHIPPING—REPAIRS.

[1. Where consignees, in discharge of their duty as such, cause a general average to be adjusted and stated by an experienced despacheur, their expenses in so doing should be contributed for in general average, when the adjustment is affirmed by the court against objection.]

[See note at end of case.]

[2. When a ship arrived in port, it was found that damages had been sustained by the vessel and cargo, which were to be made good in general average, and it became necessary to collect from the shippers the estimated amounts for exact security therefor before delivering the goods, which was accordingly done by the consignees. *Held*, that their commissions at the customary rate of the port for such collections and payments should be contributed for in general average.]

[See note at end of case.]

[3. The value of a vessel at the port of delivery is not a proper measure of her contributory value for the purposes of general average; and, in the absence of evidence, the amount of insurance may be taken as her value.]

[See note at end of case.]

[4. Where the incapacity of a ship renders it necessary to seek a port of distress, repairs of a permanent character which would have been incurred irrespective of benefit to the cargo, and expenses incidental to such repairs, should not be contributed for in general average.]

[See note at end of case.]

[5. Where cargo is sold to raise funds to pay for repairs, the loss of such sale should be contributed for in general and particular average, in proportion to the amounts expended for repairs chargeable in general and particular average respectively.]

[See note at end of case.]

[6. The expense of heaving down preparatory to repairing a vessel, and of staging during the repairs, should not be brought into general average unless the repairs are so chargeable.]

[See note at end of case.]

[Libel by W. C. Annan and others against the ship Star of Hope to recover the value of goods which the ship had failed to deliver. A contribution in general average was ordered, and the case is now heard on exceptions to various charges in the commissioner's report. Overruled. This was affirmed by the circuit court without opinion. Reversed by supreme court in *The Star of Hope v. Annan*, 9 Wall. (76 U. S.) 203. See note at end of case.]

[¹The ship Star of Hope sailed Feb. 10, 1856, from New York for San Francisco with a full cargo of divers kinds of merchandize

¹[Affirmed by circuit court without opinion. Reversed by supreme court in *The Star of Hope*, 9 Wall. (76 U. S.) 203.]

including 500 casks and packages of spirituous liquors and 40 or 50 kegs of gunpowder prepared as 'patent safety fuses.' There were also 244 1-2 tons of coal shipped by the owners and stowed next to the liquors. On the 14th of April following it was discovered that great quantities of smoke and vapor were issuing from the fore and after hatches of the ship. She was proceeding on her voyage, at the time the discovery was made, in latitude forty-six degrees south, longitude fifty-three degrees west, but the weather was squally and the sea was rough. Precautions, such as are usual on such occasions, were immediately adopted: the hatches were fastened down, and 'everything made tight,' in order to check as much as possible the progress of the fire, at least until a port of succor could be reached. Great alarm was felt, and the fears of all were much increased by the fact, well known to all, that the cargo contained prepared gunpowder, and large quantities of spirituous liquors. Under the circumstances the crew refused to continue the voyage, and the master determined very properly, as the parties agree, to make for the bay of San Antonio, on the southeast coast of Patagonia, as the nearest anchorage, and at the end of four days the ship arrived off that bay, and set the usual signal for a pilot. Throughout that period the signs of fire continued to increase, and in getting up the chains, so as to be ready to cast anchor without delay, they were found to be quite hot, and there were other indications of fire, which greatly heightened the general alarm. Unwilling to run into a bay, unknown to him, without a pilot, the master set his signal as aforesaid, and waited three hours for one, but no one came, and it became evident that none could be expected, as the coast was wild and desolate. Something must be done, as the alarm increased as the impending peril became more imminent. Haul off, the master could not, as the wind and waves were against any such movement. He could not resume the voyage for the same reason, and also because the crew utterly refused their co-operation; nor could he with safety any longer attempt to 'lie to,' as the ship was gradually approaching the shore, and because she was exposed both to the impending peril of fire on board, and to the danger, scarcely less imminent, of shipwreck from the wind and waves. Nothing, therefore, remained for the master to do, which it was within his power to accomplish, but to run the vessel ashore, which it is agreed by the parties would have resulted in the 'certain and almost instant loss of vessel, cargo and all on board,' or to make the attempt to run into the bay without the assistance of a pilot. Evidently he would have been faithless to every interest committed to his charge if he had attempted to beach the vessel at that time and place, as the agreed statement shows that the weather was rough, that the wind was high and blowing towards the land

with a heavy sea, and that the shore was rocky and precipitous. What the master did on the occasion is well described by the parties in the agreed statement in which they say he at length determined, as the best thing to be done for the general safety, and especially for the preservation of the cargo and the lives of those on board, to make the attempt to run in without a pilot, preferring all risks to be thereby incurred rather than to remain outside in the momentary apprehension of destruction to all, and the parties agree that he was fully justified in his decision as tested by all the circumstances, although the ship in attempting to enter the bay grounded on a reef, and before she could be got to sea again sprung a leak and sustained very serious injuries in her bottom. Great success, however, attended the movement, notwithstanding those injuries, as the water taken in by the ship extinguished the fire, and the ship remained fast and secure from shipwreck until the winds subsided and the sea became calm. Repairs could not be made at that place, and the parties agree that the injuries to the ship were such as fully justified the master in returning to Montevideo for that purpose, as that was the nearest port where the repairs could be made. He arrived there on the twenty-seventh of the same month, and it appears by the agreed statement that the just and necessary expenses incurred by the ship at that port to enable her to resume the voyage were \$100,000, including repairs, unloading, warehousing and reloading of the cargo, and that the master, being without funds or credit, was obliged to sell a considerable portion of the cargo to defray those expenses. Repaired and rendered seaworthy by those means the ship, on the 11th of September, in the same year, resumed her voyage and arrived at her port of destination on the 7th of December following, and the master, without unnecessary delay, delivered the residue of the shipments in good order to the respective consignees, as required by the contract of affreightment."']

HOFFMAN, District Judge. In this case libels were filed by various shippers to recover the value of goods which the ship had failed to deliver. The liability of the ship was not contested, nor was it denied that the amount due the shippers for short delivery, or non delivery, were [was] to be diminished by the amounts due from them respectively for their shares of a general average contribution. The object, therefore, of the litigation was to obtain a decision of the court on the question, whether certain damage sustained by the ship by reason of a stranding, or the expense of repairing such damage, was to be made good by a general

average contribution, or was particular average on the ship. The cause was submitted on an agreed statement of facts, and under a stipulation that after the decision of the court, as to the principle question, the general average should be stated and adjusted by a commissioner, in accordance with such decision, and the amounts to be recovered by each libellant should be subject to the deduction of the sums so ascertained to be due from them respectively, as their proportional shares of the general average contribution. The commissioner having stated the general average in accordance with the principles declared in the opinion of the court heretofore delivered, exceptions are now filed to various charges, and adjustments contained in the statement reported by him.

The first exception is to the allowance of various items contained in schedule B. of the statement. These items are for expenses and disbursements incurred in stating the general average. It appears by the agreed statement of facts, that Annan & Embury, who had become the assignees and successors in interest of Annan, Talmage & Co., the charterers of the ship, claimed and obtained the control of the vessel and cargo on her arrival at this port. They collected the freight, received the goods deliverable to themselves, and delivered the goods belonging to other shippers—first obtaining from them the amount of their general average contribution or security therefor. They, also, in the discharge of their duty as consignees, caused a general average to be adjusted and stated by an experienced despacheure—in the course of which proceeding the expenses and charges mentioned in Schedule B. were incurred. As the ship-owners or insurers were dissatisfied with the principles on which the adjustment was made, suit was brought in this court, in the form and under the circumstances above mentioned, to procure a judicial determination of the point in controversy. The decision of the court was in favor of the average as adjusted and stated by the despacheure, or rather, of the correctness of the principle on which the same has been made. The commissioner, therefore, to whom it was referred to state the average, was not required to enter into the details of the various charges, allowances, accounts, etc., necessary to be ascertained and liquidated before a statement of a general average can be made. But the statement already made was, by consent, adopted by him, and reported to the court, subject to any exceptions which might be taken. In that statement are included the expenses of making the adjustment, the propriety of including which, is the question raised by the exception under consideration.

It is not denied that as a general rule, the expense of adjusting a general average forms a part of the losses to be made good

^1[This statement of the facts of the case is taken from the opinion of Mr. Justice Clifford in *The Star of Hope*, 9 Wall. (76 U. S.) 203.]

by contribution. But it is said that this statement was abortive, and not the adjustment by which the rights of the parties are determined; that the statement made under the direction of this court is the only one that can have such an effect, and that, therefore, the expenses of attempting to make a previous statement must be rejected. But it is obvious that all those expenses were necessarily incurred for the general benefit. The expense for stationery, clerk hire, warehousing, opening, examining, and appraising cargo; for drayage of the same, insurance, notary's fees for preparing affidavits, and for the services of a professional adjuster in examining, stating and adjusting general average, were all indispensable to the ascertainment of the sums due from the various interests, in general average contribution. Had those expenses not been incurred, or those services not been performed, they would have been necessary under the order of this court, and before any decree in the cause could have been made. Instead of referring the cause to one of the ordinary commissioners of the court to report a statement of the general average, a reference to a competent professional adjuster would have been necessary, and the expenses above alluded to would have been incurred. All the interests have thus been directly benefited by these expenses, incurred for the common advantage and the determination of the only point on which a difference of opinion existed, has been made easy and expeditious. The decision of the court has moreover determined in effect that the statement so made was correct in the only point on which its correctness was disputed—which furnishes an additional reason why the expenses incident to making the statement should be carried, as is usual, to general average account. I am inclined to think that even if this were not so, and the court had declared the principles on which the adjustment had been made to be erroneous, the expenses of such attempted adjustment ought to be allowed in general average. It is of the utmost importance to commerce that settlements of this kind should be made without resort to suits at law. In practice, average statements are made by a class of persons who, in every commercial city, make that business a profession, and whom it is the universal custom to employ where an average contribution is to be stated and adjusted. The expense of examining and appraising goods, auditing and liquidating claims, etc., is necessarily considerable, and must be incurred before the data or elements of the calculation can be obtained. When, therefore, the master or agent of the ship, in good faith, and according to custom, engages the services of a competent and reputable adjuster, and incurs the expense preliminary or incidental to an adjustment, it seems equitable

that such expenses should be paid for in general average, notwithstanding that the principles of the adjust may afterwards be found to be erroneous by a court. If such expenses be not allowed, the practical result might be that in all cases of general average suits at law would result, for the master would not incur the expense necessary to an adjustment by a despacheur, if such expenses would have to be borne by himself whenever any of the parties refused to assent to the correctness of the adjustment. He would naturally prefer that a suit should be at once brought, and the average adjusted by the court, in which case the expense would be contributed for, rather than incur the risk of being himself obliged to defray the whole expense of an attempted adjustment by despacheur. For these reasons I incline to think that such expenses should, in all cases, be placed to general average account. But, under the circumstances of the case, there can, I think, be no doubt that the expenses and charges referred to should be contributed for in general average.

It is objected, however, that the allowance of commissions, for collecting and paying general average is at all events inadmissible. This charge is made by the consignees of the ship under whose direction the general average was adjusted. Its amount appears to be the ordinary charge established by usage and sanctioned by a rule of the chamber of commerce of this city. If the services have been, or are to be rendered, and if the expense properly forms a part of and is incidental to the adjustment, settlement and final liquidation of a general average contribution, it ought, on principle, to be allowed, for it is an expense incidental to, or necessarily consequent upon the loss or damage which gave rise to the general average. When the ship arrived and it was found that damages had been sustained by the vessel and the shippers, which were to be made good in general average, it became necessary to collect from the shippers either the estimated amounts due from them respectively, or to exact security therefor before their goods were delivered to them. This was done by the consignees of the ship, as appears by the agreed statement of facts. It cannot be said that the amounts found to be due from each shipper are now to be collected under the decree of this court, by deducting them from the amount otherwise recoverable for short delivery, for it does not appear that all the shippers have libelled for non-delivery; and it is plain that as only a portion of the cargo was sold to obtain funds, the owners of the remaining portion have received their goods and have no claim upon the vessel. They are liable, however, to the vessel and the other interests to make good their proportionate share of the losses incurred for the common safety. These

amounts must, therefore, be collected, and the customary commission for such a service ought to be allowed. In the stipulation on file, it is agreed that "from the amounts, if any decreed to be due to Annan & Embury (who were charterers and freighters as well as consignees of the ship) should be deducted not only the amounts due from them for freight under the charter party, but also the amount of the moneys paid or secured to be paid to them by the several consignees of the cargo as their proportion of the general average upon their respective portions of the said cargo, and the decree to be entered in their favor shall be only for the sum remaining after such deduction." They are thus treated in this stipulation not only as having collected or being bound to collect the general average contributions, but it would seem as insurers of those portions of the contributions for which they have taken security, for there is to be deducted from the amount due them for short delivery—not only the amount of contributions paid in by the various consignees of cargo, but also the amounts secured to be paid, but which are not yet collected. It seems to me that under these circumstances the customary mercantile commission for collecting the general average ought to be allowed, notwithstanding that in part such collections are to be made from themselves.

The second exception refers to the amount at which the contributory value of the ship is stated in the adjustment, or rather to the basis of the valuation. The valuation adopted is that at which she was insured. It is contended that her value at this port (admitted to be \$40,000) forms the proper basis for estimating her contributory value. The principle on which the contributory value of the vessel, in general average, is estimated, is to ascertain her true value to her owner. But this value is neither increased nor diminished by an accidentally small or great demand for shipping at the port of delivery, as the vessel is ordinarily not intended to be sold, but to return to her home port. It is clear that the amount which is saved to her owner ought not to be estimated by the amount for which she could be sold in a foreign port where there may be no demand for, or no means of purchasing similar vessels. As the amount expended for repairs, in the course of the voyage, must be deducted from the contributory value, it is evident that if the value in a remote foreign port be taken as a basis for the calculation, that value may often not be equal to the expense of repairs, and thus the ship would contribute nothing. The rule usually adopted is to estimate the value of the ship at the commencement of the voyage, deducting therefrom a certain allowance for wear and tear, deterioration, etc. In New York and Pennsylvania the amount deducted is one-fifth; but such a deduction

is necessarily arbitrary and unequal in its operation, and it seems is not adopted in New York, where the true value can be ascertained. It is stated by a recent writer, on the law of shipping, (Dixon, p. 501,) to be frequently "the best guide for determining the contributory interest of the ship, to make the valuation in its policy of insurance the basis of the calculation; but in such cases it is to be considered whether the ship was insured at her full value, including outfit, provisions, advanced wages and premium, net freights, etc., without profit, and after deducting the probable wear and tear, and the gross freights. In the first case the outfit, wear, tear, and premium are to be deducted." It does not appear on what basis the valuation in the policy was fixed. But the exception taken is founded on the idea that her value at this port is to be taken as the basis of the calculation; a mode of estimating her value which seems to me to be erroneous. I shall, therefore, overrule the exception, with liberty, however, to the claimant to except to the valuation as fixed—on the ground either that her true value at the commencement of the voyage, with the proper deductions for wear and tear, has not been ascertained; or on the ground that the proper deductions have not been made from the valuation in the policy, if that be taken as the basis of the calculation, provided always that that valuation include outfit, advanced wages and premium, etc., as mentioned in the work above quoted.

The third exception relates to certain repairs—the expenses of which are charged to the ship as particular average, and some of which are subjected to the customary deduction of one-third new for old. With respect to the repairs charged to the ship as particular average, it is contended that the rule is: "that only the repairs over and above those required to remove the incapacity of the ship to proceed on her voyage will be considered as having enured to her benefit and to be chargeable to her alone, but that all other repairs are to be made good in general average." But a moment's consideration will show us that this is not an accurate statement of the rule. It has already been decided that the damage by stranding, or the expense of repairing such damage, did not in this case form the subject of a general average contribution—but was to be borne by the ship as particular average. It was admitted that it was necessary to seek a port of distress—by reason of the incapacity of the ship to pursue her voyage. If then, the principle contended be applied to this case, it must be applied to all others where the ship necessarily seeks a port of refuge for repairs. In all such cases the ship is incapable of continuing her voyage, otherwise the deviation is unjustifiable, and the repairs made are always necessary to remove her incapacity to proceed. But such repairs are always re-

puted particular average. "If masts or rudder be carried away in a storm, or by lightning, it will be for the benefit of all parties concerned that they be replaced, but it was never yet contended that the owner of goods was to bear any part of the expense." Per Mr. J. Livingston; *Walden v. Le Roy*, 2 Caines, 262. It is obvious that if all repairs necessary to enable the ship to proceed are for that reason to be brought into general average, it will be difficult to imagine a case where repairs made in a port of distress will not be contributed, for the fact that the vessel is obliged to seek such a port and to make such repairs, will demonstrate that they were necessary to the further prosecution of the voyage. The true rule is stated by Mr. J. Bayley, in *Plummer v. Wildman*, 3 Maule & S. 482, the case chiefly relied on by the counsel for the claimant: "If the repairs were merely such as were necessary to enable the ship to prosecute her voyage home, and were afterwards of no benefit to her, such repairs would properly come under the 'head of general average.'" The observations of Lord Ellenborough which precede those of Mr. J. Bayley, plainly referred to the particular circumstances of the case before him. It appears by the report, that the repairs which it was claimed should be paid for in general average were temporary and for the mere purpose of completing the voyage, and that when the vessel reached home, she was repaired more effectually. The true rule on the subject is thus laid down with his usual perspicuity, by Mr. Ch. Kent: "The cost of the repairs so far as they accrue to the ship alone as a benefit and would have been necessary in that port, on account of the ship alone, are not average. But if the expense of the repairs would not have been incurred but for the benefit of the cargo, and might have been deferred with safety to the ship to a less costly port, such extra expenses are general average." 3 Kent, Comm. 303. The test proposed by Mr. Phillips (2 Ins. § 1300) is: "How much of the repairs are temporary, and how much are permanent." In this case the repairs to the ship rendered necessary by the stranding were obviously of a permanent character. They consisted chiefly of caulking, coppering, painting, etc. But to effect these repairs certain incidental expenses were such as surveys, etc., wear and tear of materials, cordage, blocks, boat hire, etc. These expenses being incidental to and part of the cost of the repairs which are charged to the ship, should, it seems to me, on obvious principles, be charged to the same account. The repairs themselves being particular, and not general average, all the expenses of making them should also be reputed particular average. With respect to the expense of raising funds (i. e., loss on sale of cargo), it is obvious that it being ascertained which repairs of the expenses are general average, and which are particular average chargeable to

the ship, the expense of raising funds to meet those expenses should be charged to particular average and to general average, in the proportion which those accounts bear to each other, or in other words, general average should be deemed to have obtained funds to pay general average expenses, and particular average funds to defray particular average expenses—and the premium or cost of obtaining them should be borne by each, according to the amounts deemed to have been raised for the benefit of each. This, I understand to have been done. *Peters v. Warren Ins. Co.*, [Case No. 11,034.]

With respect to the deduction of one-third new for old, it is to be observed that this deduction is an arbitrary and sometimes not a very equitable allowance made for the supposed advantage accruing to the owner from having old materials replaced by new. The exception in favor of ships on their first voyage, which obtains in England, has not been annulled in America. Phil. Ins. § 1431. The reason of the rule being that the owner is presumed to be benefitted to the extent of one-third by the repairs, it follows, that in estimating the contributory value of the ship, there must be deducted from her value at the commencement of the voyage the cost of the repairs, less one-third new for old. For to that extent the repairs are presumed to have added to the permanent value of the ship.

The question thus raises, what expenses belong to repairs? It seems to be the usage to include in the expense of repairs, from which one-third is to be deducted, not merely the cost of materials and labor, but also the incidental charges necessarily incurred in making the repairs. In the case of *Potter v. Ocean Ins. Co.*, [Case No. 11,335.] Judge Story held that this deduction should not be made from the expense of towing the vessel across the Mississippi, etc., to be repaired, and the cost of assistance in getting her across and boat hire, etc. But there seems to be no such charges in this statement of this case. The boat hire charged being that for workmen, whilst the vessel was hove down. It is claimed that the expense of heaving down preparatory to the repairs, and of staging, etc., during the repairs, should be brought into general average. But if the expense of repairs, etc., be, as has been already decided, particular average, I cannot perceive how I can discriminate between the expense of the repairs themselves and the necessary expenses incidental to them. The expense of heaving a ship down, and of staging to the workmen, seems to be as much a part of the cost of repairing her bottom as that of the plank, or copper, or oakum used for the purpose. Had any of these expenses been incurred for the purpose of merely temporary repairs, of no permanent benefit to the ship, and which it would be necessary subsequently to replace, they should undoubtedly have been brought into general average. But all

the repairs seem to have been of a permanent character; and being such, all expenses of making them should be carried to account of particular average unless the disaster which rendered them necessary was such as to give rise to a general average contribution, a point already decided adversely to the claimant by this court.

A decree in conformity with this opinion must be entered.

[NOTE. The circuit court affirmed this decree on appeal, whereupon an appeal was taken to the supreme court, which reversed the decree. *The Star of Hope v. Annan*, 9 Wall. (76 U. S.) 203. Mr. Justice Clifford, in delivering the opinion, said:

"Where the ship is voluntarily run ashore to avoid capture, foundering, or shipwreck, and she is afterwards recovered, so as to be able to perform her voyage, the loss resulting from the stranding, says Mr. Arnould, is to be made good by general average contribution; and the writer adds that there is no rule more clearly established than this by the uniform course of maritime law and usage. 2 Arn. Ins. 734; *Lewis v. Williams*, 1 Hall. 474. Sustained, as that proposition is at the present day, by universal consent, it does not seem to be necessary to refer to other authorities in its support, nor is it necessary to enlarge that rule in order to dispose of the present controversy; but, to prevent any misconception as to the views of the court, it is deemed proper to add that it is settled law in this court that the case is one for general average, although the ship was totally lost, if the stranding was voluntary, and was designed for the common safety, and it appears that the act of stranding resulted in saving the cargo. *Columbian Ins. Co. v. Ashby*, 13 Pet. (38 U. S.) 331; *Caze v. Reilly*, Case No. 2,533; *Sims v. Gurney*, 4 Bin. 513; *Gray v. Waln*, 2 Serg. & R. 229; 1 Pars. Shipp. 372; *Merithew v. Sampson*, 4 Allen, 192. Undoubtedly the sacrifice must be voluntary, and must have been intended as a means of saving the remaining property of the adventure, and the lives of those on board; and, unless such was the purpose of the act, it gives no claim for contribution; but it is not necessary that there should have been any intention to destroy the thing or things cast away, as no such intention is ever supposed to exist. On the contrary, it is sufficient that the property was selected to suffer the common peril in place of the whole of the associated interests that the remainder might be saved. 1 Pars. Shipp. 343.

[Suggestion is made that the act of stranding of the vessel in this case was not a voluntary act, as the reef where she grounded was not visible at the time, and was unknown to the master, but the agreed statement shows that in undertaking to run into the bay the master knew that the chief risk he had to encounter was the stranding of the ship, and the precautions which he took to guard against that danger show to the entire satisfaction of the court that the disaster was not altogether unexpected. As the ship advanced, the lead was constantly employed, showing eight fathoms at the first, then seven, then six only, and so on, the depth continuing to diminish at each throw of the lead until the ship grounded and remained fast. Grant that the master did not intend that the ship should ground on that reef; still it is clear that he was aware that such a danger was the chief one he had to encounter in entering the bay, and the case shows that he deliberately elected and decided to take that hazard, rather than to remain outside, where, in his judgment, the whole interests under his control, and the lives of all on board, were exposed to imminent peril, if not to certain destruction. Under these circumstances, it

is not possible to decide that the will of man did not in some degree contribute to the stranding of the ship, which is all that is required to constitute the stranding a voluntary act, within the meaning of the commercial law. 2 Arn. Ins. 785; *Emerigon*, 324. Suppose the storm outside the bay was irresistible and overpowering, still it does not follow that there was no exercise of judgment, for there may be a choice of perils when there is no possibility of perfect safety. *Sims v. Gurney*, 4 Bin. 525; 2 Pars. Cont. (5th Ed.) 325, and note *v.* Destruction of all the interests was apparently certain if the ship remained outside, but the master, under the circumstances, elected to enter the bay, without the assistance of a pilot, knowing that there was great danger that the ship might ground in the attempt; but his decision was that it was better for all concerned to make the attempt than to remain where he was, even if she did ground, and the result shows that he decided wisely for all interests, as damage resulted to none except to the ship, and she would, doubtless, have been destroyed if she had continued to remain outside of the bay. *Rea v. Cutler*, Case No. 11,599. * * *

"Brief consideration must also be given to the exceptions taken by the claimants, to the report of the commissioner, which were overruled by the court. They are three in number, and they will be considered in the order in which they were made.

"(1) That the commissioner erred in charging the ship or freight with any part of the expenses incurred by the charterers in the *ex parte* adjustment procured by them prior to the order of reference to the commissioner. Unusual difficulty attends the inquiry, on account of the indefinite character of the exception, and the uncertain state of the evidence; but, the conclusion of the court being that the case is one for general average, it seems to the court that those expenses constitute a matter to be adjusted between the charterers and the libellants, irrespective of the controversy presented in this record, unless the results of that adjustment were adopted and used by the commissioner. Influenced by these suggestions, the exception is sustained, but the matter is left open for further inquiry when the mandate is sent down.

"(2) That the commissioner erred in assuming that the valuation of the ship as given in the policy of insurance is the proper basis of her contributory value in the statement of the amount for general average. As a general rule, the value of the ship for contribution, where she had received no extraordinary injuries during the voyage, and has not been repaired on that account, is her value at the time of her arrival at the termination of the voyage, but if she met with damage before she arrived, by perils of the sea, and had been repaired, then the value to be assumed in the adjustment is her worth before such repairs were made. Neither party gave any evidence as to the value of the ship prior to the disaster except what appears in the policy of insurance, and, under the circumstances, it is difficult to see what better rule can be prescribed than that adopted by the commissioner. *Hopk. Av.* (3d Ed.) 104; 2 Arn. Ins. 812; *Patapasco Ins. Co. v. Southgate*, 5 Pet. (30 U. S.) 604; *Clark v. United Fire & Marine Ins. Co.*, 7 Mass. 370; *Dodge v. Union Marine Ins. Co.*, 17 Mass. 471. Strictly speaking, the rule is the value of the ship antecedent to the injuries received, but, as that requirement can seldom be met, the usual resort is her value at the port of her departure, making such deduction for deterioration as appears to be just and reasonable. 1 Pars. Shipp. 448; *Mutual Safety Ins. Co. v. The George*, Case No. 9,982. No proof on that subject, except the policy of insurance, was offered by either party, and, inasmuch as ships are seldom insured beyond their actual value, the exception is overruled.

["(3) That the commissioner erred in carrying into particular average certain expenses incurred by the master at the port where the repairs were made, which should have been regarded as the proper subject of general average. Considerable difficulty also attends this inquiry for the want of a more definite statement of the grounds of the complaint. We think it plain, however, that the exception must be sustained, as some of the matters charged as particular average, in whole or in part, ought clearly to have been included at their full value among the incidental expenses necessarily incurred in making the repairs; but, in view of the circumstances, we shall not attempt to do more than to state the general principles which should regulate the adjustment in the particulars involved in the exception, and leave their application to be made in the case by the court below, where the parties, if need be, may again be heard.

[Whatever the nature of the injury to the ship may be, and whether it arose from the act of the master in voluntarily sacrificing a part of it or in voluntarily stranding the vessel, the wages and provisions of the master, officers, and crew, from the time of putting away for the port of succor, and every expense necessarily incurred during the detention for the benefit of all concerned, are general average. *Abb. Shipp.* 601; *Plummer v. Wildman*, 3 *Maule & S.* 482; *Walden v. Le Roy*, 2 *Caines*, 263; *Henshaw v. Marine Ins. Co.*, *Id.* 274; *Nelson v. Belmont*, 21 *N. Y.* 38; *The Mary*, *Case No.* 9,188. Repairs necessary to remove the inability of the ship to proceed on her voyage are now regarded everywhere as the proper subject of general average. Expenses for repairs beyond what is reasonably necessary for that purpose are not so regarded, but it is not necessary to examine the exceptions to the rule with any particularity in this case, as the parties agree that all the expenses incurred were necessary to enable the ship to resume her voyage. The wages and provisions of the master, officers, and crew are general average from the time the disaster occurs until the ship resumes her voyage, if proper diligence is employed in making the repairs. *Padelford v. Boardman*, 4 *Mass.* 548; *Potter v. Ocean Ins. Co.*, *Case No.* 11,335. Towing the ship into port, and extra expenses necessarily incurred in pumping to keep her afloat until the leaks can be stopped, are to be included in the adjustment. 2 *Phil. Ins.* (3d *Ed.*) § 1326; *Orrok v. Commonwealth Ins. Co.*, 21 *Pick.* 469. Surveys, port charges, the hire of anchors, cables, boats, and other necessary apparatus, for temporary purposes in making the repairs, are all to be taken into the account, as well as the expenses of unloading, warehousing, and reloading the cargo after the repairs are completed. *Potter v. Ocean Ins. Co.*, *supra*; *The Mary*, *supra*. Repairs in such a case cannot be made by the master unless he has means or credit; and if he has neither, and his situation is such that he cannot communicate with the owners, he may sell a part of the cargo for that purpose, if it is necessary for him to do so in order to raise the means to make the repairs. Sacrifices made to raise such means are the subject of general average, and the rule is the same whether the sacrifice was made by a sale of a part of the cargo or by the payment of marine interest. *Orrok v. Commonwealth Ins. Co.*, *supra*; 1 *Fars. Shipp.* 400."]

Case No. 406.

The ANNAPOLIS.

District Court, D. California.

[Cited in *Pacific Coast Wrecking Co. v. The Eastport*, *Case No.* 10,646. Nowhere reported; opinion not now accessible.]

Case No. 407.

The ANN ARBOR.

[*N. Y. Times*, Dec. 21, 1854.]

District Court, S. D. New York. Dec. 20, 1854.¹

ADMIRALTY—JURISDICTION—CANAL BOAT—CONTRACT OF CARRIAGE.

[An action in rem against a canal boat for a breach of contract of carriage from Rome to New York via the Erie canal and Hudson river, is not within the jurisdiction of a court of admiralty.]

[Cited in *The E. M. McChesney*, *Cases Nos.* 4,463, 4,464.]

[See note at end of case.]

[In admiralty. Libel in rem by Giles Hawley against the canal-boat Ann Arbor for breach of a contract of carriage. Dismissed. Affirmed by the circuit court. *Case No.* 408.]

Mr. Tracy, for libelant.

Kirkland & Birdseye, for claimants.

Before INGERSOLL, District Judge.

The libel in this case is filed to recover the value of a quantity of butter shipped on the 5th or 6th of Dec., 1852, on board of the canal boat then lying in the Erie canal at Rome, Oneida county, to be carried to the city of New York, and there delivered. It is alleged that 449 tubs of butter were shipped, and only 427 delivered, and that the canal boat is responsible in admiralty for the loss. The claimants deny that more than 427 were shipped, or that the boat is liable in admiralty if they were lost. The evidence was given by one witness that he kept the tally of the tubs as they were shipped or had it kept; that 449 tubs of butter went on board; that the weight was marked on each tub, and that the weight of all was 50,552 pounds. Evidence was given, however, that some butter was put on board when he was not present, and one of the libelants, in obtaining a clearance at the collector's office at Rome, represented the weight to be 46,594 pounds. The captain of the boat, his wife and son, who came with the boat to New York, all testified that it did not appear to have been disturbed on the voyage, and could not have been without their knowledge, and all that was carried to New York was safely delivered to the consignees.

Held BY THE COURT, that it is not shown by sufficient proof that these 22 tubs were ever put on board, but what was put on board was safely delivered. That it therefore was not necessary to decide the question of jurisdiction, but, without having sufficiently considered that question, the impressions of the court are against the right of the libelants to proceed against the boat. The canal boat was not built to navigate

¹[Affirmed by circuit court in *The Ann Arbor*, *Case No.* 408.]

tide waters, but the Erie canal, and is not a ship within the definition in Benedict's Admiralty, 215, not being a locomotive machine. When a ship is libeled in admiralty court for the breach of maritime compact it is upon the ground that the ship itself contracts—and if such a canal boat as this, while on the Erie canal, up in Oneida county, can enter into and bind itself by a contract so as to come within the control of a court of admiralty, I do not see but that any vessel or thing capable of containing freight, built and designed to make headway on the New York Central Rail Road by means of the wheels of the rail road cars, can in the same county enter into and bind itself by a maritime contract and come under the control of a court of admiralty, provided it is so constructed that when it arrives at Albany it can be launched from the wheels of the railroad carriage into tide water and be towed by a steamboat to New York.

Libel dismissed, with costs.

[NOTE. This decision was affirmed by the circuit court. Case No. 408. It will be noticed that the remarks of the learned judge in this case on the question of jurisdiction are obiter dicta, as he distinctly says, and seem open to objection on several grounds. The reference to tide waters as determining the admiralty jurisdiction was doubtless an inadvertence, for ever since the decision in the case of *The Genesee Chief*, 12 How. (53 U. S.) 457, it has been uniformly held that the admiralty jurisdiction extends to all public navigable waters, whether subject to tides or not. In the principal case, however, the only natural public waterway (the Hudson) was tide water. Aside from this, the objection to the jurisdiction arises under three questions: (1) Is the Erie canal, in connection with the Hudson river, a public navigable water of the United States? (2) Is a canal boat having no locomotive power in itself a vessel subject to admiralty process in rem for breach of a contract of carriage? (3) Is a contract of carriage entered into with the owner of such a boat in an interior county of New York for the transportation of cargo, via Erie canal and Hudson river to New York city, a maritime contract?

[1. The first question must be answered in the affirmative, unless the artificial nature of the waterway is fatal to the jurisdiction, for the test is said to be whether the water is such that on it commerce can be carried on between different states or nations. The *Genesee Chief*, supra; *The Daniel Ball*, 10 Wall. (77 U. S.) 557. In the case of *The Montello*, 11 Wall. (78 U. S.) 411, it was held that the Fox river, in Wisconsin, was navigable water of the United States, within the meaning of the act of congress regulating the licensing of coasting vessels. It appeared that there had been a considerable interstate commerce on the river in its natural state in boats of draft towed by animal power, but several short portages were necessary. The acceptance of the ordinance of 1787 had been imposed on the state as a condition of admission to the Union, and that ordinance provided that all navigable rivers leading into the Mississippi and the St. Lawrence and their portages should be public highways. The court held that capacity of the waters for use in their natural state for the purposes of commerce is the test of navigability, rather than the extent and manner of that use. The river had been improved by canals and locks, and steamboats plying on it were held

subject to the license act. Objection to the jurisdiction had been taken below and overruled. In the case of *Ex parte Boyer*, 109 U. S. 629, 3 Sup. Ct. 434, the admiralty jurisdiction was held to extend to a case of collision in the Illinois and Lake Michigan canal, though it was wholly artificial, and wholly within the body of the state, and subject to its control. The canal had been built by the state with the aid of a land grant from congress, declaring that it should be public highway free of toll for the government of the United States, and for their property and persons in their service; and this on the ground that the canal was in fact a highway for commerce, so that vessels could pass on it from ports in one state to those in another.

[2. It seems well settled that the character of the thing injured by a maritime tort is immaterial. The jurisdiction depends wholly on the navigability of the waters where the injury occurs. *The Ceres*, Case No. 2,555; *Albany Dredging Co. v. The Gladiolus*, Case No. 132; *Waring v. Clarke*, 5 How. (46 U. S.) 441. In cases of contract the admiralty jurisdiction depends wholly on the subject-matter, whether maritime or not, and not on the locality. *Waring v. Clarke*, supra. In *The E. M. McChesney*, Case No. 4,463, Blatchford, District Judge, held that a canal boat having no motive power of its own was liable in rem for a breach of a contract for the carriage of grain from Buffalo to New York by way of the Erie canal. This decision was affirmed by Waite, Circuit Justice, in Case No. 4,464. The contract was made while the boat lay in Buffalo creek, and purported to be a bill of lading. The court held that, since part of the voyage was on the Hudson river, the contract was maritime. In *The Hezekiah Baldwin*, Case No. 6,449, a canal boat, without motive power of its own, and fitted as a floating elevator, was held subject to a maritime lien. In *The General Cass*, Case No. 5,307, Longyear, District Judge, held that lighters without motive power were subject to a maritime lien for towage rendered in the home port. Towage of a steam dredge and her scows is a maritime service for which a lien attaches. *The Alabama*, 22 Fed. 449. A maritime lien for supplies can be enforced against a steam dredge having no power of locomotion in itself. *The Pioneer*, 30 Fed. 206. A contract for the repair of a pleasure barge without motive power of its own is maritime, and a lien given by state statutes for such repairs in the home port is enforceable in admiralty. *The City of Pittsburgh*, 45 Fed. 699.

[3. On the authority of *Ex parte Boyer*, *Waring v. Clarke*, and *The E. M. McChesney*, supra, it would seem that a contract of carriage by a canal boat from some point on the Erie canal to New York city was a maritime contract, of which admiralty has jurisdiction.]

Case No. 408.

The ANN ARBOR.

[4 Blatchf. 205.]¹

Circuit Court, S. D. New York. Sept., 1858.²

MARITIME LIENS—CANAL-BOATS—CONTRACT OF AFFREIGHTMENT.

A canal-boat, exclusively adapted to canal navigation, and having, of itself, no power, as respects navigation upon public waters, is not subject to a maritime lien, in the admiralty, for a breach of a contract of affreightment.

[Cited in *U. S. v. The Ohio*, Case No. 15-915; *The E. M. McChesney*, Id. 4,463;

¹[Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

²[Affirming an unreported decree of the district court.]

Salvor Wrecking Co. v. Sectional Dock Co., Id. 12,273. Distinguished in Maltley v. Steam Derrick Boat, Id. 9,000.]

[See Buckley v. Brown, Case No. 2,092; Jones v. Coal Barges, Id. 7,458. Contra, The General Cass, Id. 5,307.]

In admiralty. This was a libel in rem filed in the district court, against the canal-boat Ann Arbor, for the breach of a contract of affreightment in respect to certain tubs of butter, shipped by that craft, from Rome, (N. Y.) on the Erie canal, to the city of New York. The district court dismissed the libel, [The Ann Arbor, Case No. 407,] and the claimant appealed to this court, where further proof was taken.

Charles Tracy, for libellants.

Edwin W. Stoughton and Benjamin F. Dunning, for claimant.

NELSON, Circuit Justice. I think that the proof, including that taken in this court, leaves the question of fact doubtful, whether the tubs of butter claimed not to have been delivered at the port of destination, were shipped upon the canal-boat at Rome, as averred in the libel. The proof is too doubtful to found a decree upon it for the libellants. I am, also, inclined to think that the canal-boat is not a ship or vessel, upon the North river, or other navigable waters within the admiralty jurisdiction, subject to maritime liens in the admiralty, for breaches of contracts of affreightment. These boats are exclusively adapted to canal navigation. Of themselves, they have no power as respects navigation upon public waters, any more than a raft, an ark, or a mud-scow.

Decree affirmed.

ANN BARTON, The, (WESTCOTT v.)

[See Westcott v. The Ann Barton, Case No. 17,431.]

ANN CAROLINE, The, (WELLS v.)

[See Wells v. The Ann Caroline, Case 17,389.]

Case No. 409.

The ANN C. PRATT.

[1 Curt. 340; 16 Law Rep. 92.]

Circuit Court, D. Maine. April Term, 1853.*

SHIPPING—BOTTOMRY—FRAUD—VALIDITY OF BOND—IMPLIED LIEN—SUBSTITUTION OF PARTIES.

1. Under the 34th admiralty rule, the underwriter, who has accepted an abandonment, which divests the original claimant of all interest, may be admitted to intervene and become the dominus litis, in a suit in rem.

[Cited in The Monticello v. Mollison, 17 How. (53 U. S.) 156; The Manistee, Case No.

¹[Reported by Hon. B. R. Curtis, Circuit Judge.]

²[Affirmed by supreme court in Carrington v. The Ann C. Pratt, 18 How. (59 U. S.) 63. Reversing decree of the district court in Carrington v. The Ann C. Pratt, Case No. 2,445.]

9,027; The Potomac v. Cannon, 105 U. S. 634; The Manitoba, 30 Fed. 133.]

2. A bottomry bond, given for a larger sum than was advanced, for the purpose of deceiving the underwriter on the vessel, is void.

[Cited in The Irma, Case No. 7,064.]

3. Such a bond cannot be allowed to stand as security for the sum actually advanced.

[Cited in The Irma, Case No. 7,064.]

4. Bottomry is a peculiar contract, differing essentially from a loan with security, and is inconsistent with the existence of the lien implied by the marine law to secure advances to a master in a foreign port to make necessary repairs.

[Cited in The Unicorn, Case No. 9,849; The Irma, Id. 7,064; The D. B. Steelman, 48 Fed. 582; The Wexford, 7 Fed. 630; Force v. Providence W. Ins. Co., 35 Fed. 769. Followed in Morrison v. The Unicorn, Case No. 9,849.]

5. When the express contract of bottomry is void for fraud, no recovery can be had upon the footing of an implied contract and lien.

[In admiralty. Libel on bottomry bond by Nehemiah Carrington against the brig Ann C. Pratt, Leonard B. Pratt, claimant. Decree for libellant for his implied lien, the bond being void for fraud. (Not reported.) Claimant appeals. Reversed, and libel dismissed, with costs. The libellant then appealed to the supreme court, where the circuit court decree was affirmed, sub nom. Carrington v. The Ann C. Pratt, 18 How. (59 U. S.) 63.]

This was an appeal from a decree of the district court in a cause of bottomry. The brig Ann C. Pratt sailed from Frankfort, in the state of Maine, Nov. 7, 1850, commanded and owned by Leonard B. Pratt, on a voyage to the Western islands, and thence to such other port or ports as the master should determine to visit. She arrived at Terceira on the 29th of November having encountered severe gales and been obliged to throw over a part of her deck-load. She sailed thence for St. Michael, and arrived in sight of that island on the 31st of December, but owing to gales of wind and thick squally weather, was unable to come to anchor until the 11th of January; and from that day she lay in an open roadstead until the 13th of January, when, the master being on shore with the ship's papers, she was struck by a heavy squall, parted her cables and all her other fasts, and was driven to sea with no anchor on board. Richard R. Airey, the mate, took the command, and determined to run for St. Thomas, whither the master had, before the disaster, concluded to go from St. Michael. The propriety of this determination was questioned by the claimant, and much of the evidence bears on this question. The brig arrived at St. Thomas on the 6th of February; a survey was called, and pretty extensive repairs were ordered by the surveyors. Money to make these repairs was advanced by the libellant, and a bottomry bond taken, signed by Airey. Other facts, necessary to the determination of the case, are stated in the opinion of the court.

Before CURTIS, Circuit Judge, and WARE, District Judge.

CURTIS, Circuit Justice. There is a preliminary question in this case, which must be first disposed of. On the return of the process, in the court below, Leonard B. Pratt appeared and claimed the brig as sole owner. In that capacity, he was admitted by the court, contested the action upon answer and proof, appealed from the decree, and entered his appeal in this court. After the appeal had been claimed, an abandonment, which he had previously made of the brig to the company that had underwritten a policy of insurance on her, was accepted by the underwriters, who applied to the court, by petition, on the fourth day of the term at which the appeal was entered, setting forth these facts, and praying for leave to intervene. The question is, whether, at this stage of the cause, this can be allowed. The thirty-fourth admiralty rule of the supreme court regulates the exercise of the right of intervention by third persons, in some cases, where that right exists, "according to the course of admiralty proceedings;" but it does not determine in what cases third persons are entitled thus to be heard. The forty-third rule does declare, as well as regulate, the exercise of the right of intervening, *pro interesse suo*; but it extends only to an interest in any proceeds in the registry, and has no application to a case where the third person seeks to come in as sole owner of the *res* and contest the suit.

In the absence of any direct authority, it would seem to be quite clear, that a court of admiralty, no more than a court of equity, would take notice of mere voluntary assignments of the subject in dispute, made *pendente lite* by the respondent. It cannot suffer its proceedings thus to be incumbered or affected. It is clear, also, that when there is a change of ownership, by operation of law, as in case of death, the same objection does not exist, and that it would be in conformity with its practice, to admit the representative to appear. By a rule of the supreme court, passed in 1821, such a case is specially provided for in that court. It does not extend to the circuit or district courts, but is of importance, as showing the propriety of admitting a representative in an appellate court. It must be observed, however, that it is only as a representative, as having become clothed with the rights of the original claimant by succession, that the third person is admitted. Now, the case before me does not belong to either of these classes of cases. It is not an assignment by operation of law, nor is it a mere voluntary assignment *pendente lite*. The policy was underwritten, the disaster occurred, and the right of abandonment existed, in point of law, before the suit was begun. The inchoate right of the assured to recover, as for a constructive total loss, could only be

perfected by making an abandonment; and when duly made and accepted it relates back to the time of the disaster, and clothes the underwriter with all rights which at that time belonged to the owner. I do not consider an abandonment, made to perfect the previously existing rights of the insured, as resting on the same ground as a voluntary assignment; nor that the legal operation of such a transfer should be treated by the admiralty as similar to a *sale pendente lite*. I can perceive no particular inconvenience in allowing the underwriter, who has accepted an abandonment, to intervene and be admitted a party to the suit, as having succeeded to the rights of the original claimant, and that, thereupon, the appeal would be heard, as in other cases. But this is a case in which the underwriter claims to have succeeded to all the rights of the original claimant in the subject proceeded against, and that the latter is consequently completely divested of all interest, and should be, of all control over the suit, as in case of death or bankruptcy; and if admitted, he must *dominus litis*.

The thirty-fourth rule seems well enough adapted to such cases. Unless this construction be put upon it, I perceive no provision even for the death of a party, after an appeal to this court; and as this court does not possess power to remit an admiralty cause to the district court, and there is no rule expressly providing for a supplemental libel to be filed here, some rule to prevent the abatement of suits is needful; and I shall hold this thirty-fourth rule to be applicable to all such cases. The order which was entered at a former day, *de bene esse*, may, therefore, stand.

Having disposed of this preliminary question, I proceed to consider the merits of this case. There are some points in the case which are too clear to require me to pause upon them. That the mate succeeded to the command, in the emergency which occurred, there can be no doubt. The presumption is, that he was a person of competent skill and ability to discharge his duties; and if he was, and fairly exercised his judgment and discretion, all interested were bound by his acts. Upon these points, I perceive nothing in the evidence which would impeach his conduct. There is a difference of opinion among the experts; but it is far from satisfying my mind, that the respondents can avail themselves of the determination of the mate to carry the vessel to St. Thomas, as a defence to this bond. I deem it unnecessary to detail the evidence bearing on this part of the case. It is equally clear, that the mate, as temporary master, had the power, in a fit case of necessity, to take up a loan on bottomry; and that the lender, in such a case, is not held to see to anything more than an apparent necessity for the repairs. The authority of the mate, as temporary master, is essential to enable him to give such a bond. Like oth-

er agencies, he who seeks to acquire a right through a bond thus executed, must see to it that the person assuming to act as master, is rightfully master. But if he be master, it does not impose any new duty of diligence upon the lender, that he became such by reason of a casualty in the course of the voyage. When the owners appoint the mate, they are supposed to contemplate such casualties, and to agree that the mate shall exercise all the needful powers of master, in case they occur; and third persons may rightfully treat with him as master, when he has thus become such. *The Kennersley Castle and The Rubicon*, 3 Hagg. Adm. 8, 9; *The Alexander*, 1 Dod. 280.

The real difficulty of the case begins when we have advanced beyond these questions, and reached the bond itself. The amount actually lent by the libellants was \$3877.25. The bottomry bond was given in the sum of \$4591.42. Two sets of accounts and vouchers were made out, the one corresponding with the truth of the case, the other with the fictitious amount of the bottomry bond, and both sets were sent to the father of Captain Pratt, accompanied by letters of advice from the libellant and Airey, informing him that the bond was given for this larger sum, and the false account and vouchers sent, to enable the owner to make a claim therefor on the underwriters upon the vessel. A bill of exchange for the true sum was drawn by Airey, at the same time the bond was given. The frankness with which this scheme is explained to the father of Captain Pratt, by a mercantile house apparently of good standing, may induce the belief that such practices are not infrequent; but if so, they are not therefore the less reprehensible, nor is it the less necessary that they should be looked at in their true light, and visited with their just consequences, when they appear in a court of justice. This is a fraudulent bond, and the court will not lend its aid to enforce it. Even if the third person, on whom it was designed to impose, had sustained no confidential relation to either of the parties to this transaction, still the bond would be void. The juster is entitled to protection from actual fraud; and the protection is given, by refusing relief to either party to the fraudulent arrangement, not on account of any merit of his opponent, but for the sake of public morals, and of the right of the party sought to be defrauded. This doctrine has been applied in numerous cases, even at the common law. Thus, a secret promise to pay to one creditor more than the composition paid to others for signing the deed, (*Leicester v. Rose*, 4 East, 372; *Wells v. Girling*, 1 Brod. & B. 447;) or to procure signatures to a petition for the discharge of an insolvent, (*Payne v. Eden*, 3 Caines, 213; *Case v. Gerish*, 15 Pick. 49;) or to prevent fair competition at an auction sale; or a sale on execution, (*Doolin v. Ward*, 6 Johns. 194; *Gardiner*

v. Morse, 25 Me. 140;) or a promise to give more for goods than the price a friend, who had been prevailed on to buy them for the defendant, had paid, (*Jackson v. Duchaire*, 3 Term R. 551; *Pidcock v. Bishop*, 3 Barn. & C. 605,)—are all void at law, though both parties before the court participated, and the fraud was directed against a third person. But in this case, the underwriters had a relation to the vessel and to Airey at the time this bond was given. A disaster had occurred, calling for repairs. If their amount should prove to be sufficient to justify an abandonment, and it should be duly made, or made and accepted, it would relate back, by operation of law, to the time of the disaster; and from that time, Airey would be the agent of the underwriters. This has actually happened; and in the posture in which the case now stands before the court, Airey, when he gave this bond, acted for account of whom it might concern, and it has turned out to concern the underwriters. I have no hesitation in pronouncing the bond to be void for fraud. Nor can the bond be suffered to stand as security, even for the sum actually advanced. I adopt the language of Kent, J., in *Sands v. Codwise*, 4 Johns. 598, as expressing the true rule:—"I presume there is no instance to be met with of any reimbursement or indemnity afforded by a court of chancery to a particeps criminis in a case of positive fraud. In *Smith v. Loader*, Prec. Ch. 80, the party advancing money to an agent, under a combination with him to cheat the principal, lost his whole security from the principal for the money actually advanced to his agent. It is fit and proper this result should take place, as a contrary course might afford countenance to fraud, by giving it a partial effect." This is the settled rule in courts of chancery. *Bates v. Graves*, 2 Ves. Jr. 294; *Attorney General v. Vigor*, 8 Ves. 283; *Boyd v. Dunlap*, 1 Johns. Ch. 482. And it is as fit and applicable in a court of admiralty, which administers equity in maritime affairs.

One other question remains. Can the libellant be allowed to sustain the suit, upon the footing of a lien upon the vessel, under the general maritime law of Europe and America, for the sum actually advanced by him for repairs and supplies? The original libel is in a cause of bottomry, and propounds the bottomry bond, and seeks to recover upon it the whole principal sum, together with the marine interest, at the rate of ten per cent., stipulated for in the bond. The answer contested the validity of the bond, as being fraudulent. By an amendment, allowed to be filed at the hearing in the district court, an article was introduced, propounding a claim for the true amount advanced, together with the maritime interest; and upon this article, the court below declared that a lien existed in favor of the libellant, by operation of the general admiral-

ty law, and decreed accordingly. The claimant appealed. That such a lien would have attached upon this vessel, by operation of law, if no bottomry contract had been made, is clear. But two very grave questions arise, Whether the contract for a bottomry loan, followed by the execution of the bottomry bond, and the institution of a suit to enforce it, are consistent with the existence of that lien, by operation of law; and whether the bond, being pronounced to be fraudulent, the court will aid the lender to recover what, independent of the fraud, would justly have belonged to him?

In considering the first of these questions, I must take it to be true, that the lien created by the maritime law may be, and is, waived by the creditor, by any act or contract which is inconsistent with an intention to receive or retain that lien. The cases of *The Nestor*, [Case No. 10,126,] and *The Chusan*, [Id. 2,717,] were discussed and decided upon an admission of the correctness of this position, which is supported by *Ramsey v. Allegre*, 12 Wheat. [25 U. S.] 611, and *The William Money*, 2 Hagg. Adm. 136. The inquiry is, whether what was actually done in this case is consistent with an intention to obtain or hold the lien, which the law maritime creates in favor of the lender of money to the master, for making necessary repairs in a foreign port? The original libel states that the master, being in want of money, and having no other adequate means of procuring the same, borrowed of the libellant the sum of \$4,591.42, upon the bottomry and hypothecation of the said brig, her tackle and apparel, and said sum was accordingly advanced and paid by the libellant, at the rate of ten per cent. premium for the maritime risk, and that in fulfilment of the agreement of bottomry, the master executed the bond. Airey testified that he made an agreement with the libellant, not in writing, to furnish funds to repair the brig, and to give him a bottomry bond on the vessel, to secure the payment of what he might advance. "He was not willing to furnish the funds, unless I would do as we talked." So that, in point of fact, the libellant was unwilling to deal upon any other footing than that of a contract of bottomry; and both parties, from the beginning, contracted solely with reference to such a bond. Now, this is a contract of a peculiar character, distinguishable, by very marked characteristics, from an ordinary loan. Pothier, *Contrat a la Grosse*, n. 6, says, "It differs from all other contracts; it forms a particular species by itself." Boulay-Paty, in his notes to Emerigon on Bottomry, (volume 2, p. 417, c. 1, § 2,) uses the following emphatic language: "It is neither a sale nor a partnership, nor a loan, properly speaking, nor insurance, nor a compound of different contracts, *undique collatis membris*,—but it is a contract having a specific name,—*un contrat nomine*,—and a character peculiar to it-

self." And Emerigon, in the text, (ch. 1, § 4,) has an elaborate dissertation on "the difference between the contract of bottomry, of loan, of partnership, and insurance;" and he points out five distinct particulars in which a contract of this kind differs from a loan, the most important of which are, the risk taken by the lender, and the premium paid for that risk. To a certain extent, the same view of this contract is taken in the case of *The Atlas*, 2 Hagg. Adm. 51. Indeed, so important is the difference between the contract of bottomry and a simple loan, that it has generally been deemed essential that it should be contracted for at the outset, and before the advances were made, (as it was in this case,) to support a bond when actually given. *The Virgin*, 8 Pet. [33 U. S.] 538; *The Augusta*, 1 Dod. 283; *The Hebe*, 2 W. Rob. Adm. 146; *The Wave*, 4 Eng. Law & Eq. 589. This being so, it seems to me impossible to maintain that the parties intended that a lien, by operation of law, should exist, for the security of a simple loan, to make repairs, in this case.

One method of determining whether both the implied lien and the express hypothecation, by way of bottomry, can be intended to exist together, is to consider that the first has for its object to secure the repayment of a loan of money, which is absolutely to be repaid, either upon demand, or at a stipulated time, and for which the master may pledge the security of the vessel, the owners, and himself; while a loan on bottomry does not oblige the owner personally, is to be repaid only on condition of surviving the perils, the risk of which the lender assumes; and constitutes, as the writers on maritime law have so emphatically declared, an obligation of a distinct and peculiar kind. It is true, that in both cases liens exist; but the one is implied by law, the other is created by the act of the master; the one is security for a debt of the owners and the master, the other is a right to receive a sum of money out of the thing at risk, in case it should survive the perils, the hazard of which is assumed by the lender; the one is merely a collateral security for a simple loan; the other is a transaction standing quite by itself, not capable of being analyzed into a loan and a mortgage to secure it, and a contract of insurance, and another of partnership, *undique collatis membris*, but simply a contract of bottomry, unlike all of them, and resembling nothing, and being consistent with nothing, but itself. There is one analogy derived from courts of chancery, which is entitled to some consideration. It is the case of a purchaser, who has taken a mortgage on the estate sold, to secure the purchase-money. It will be seen at once how far short of the case now before me this is; for there, both the equitable lien implied by law, and the security created by act of parties, operate to secure one and the same con-

tract to pay the purchase-money. Yet it has been, and still is, the subject of grave doubt, whether the implied lien can stand with a mortgage. *Fish v. Howland*, 1 Paige, 20; *Little v. Brown*, 2 Leigh, 353; *Boos v. Ewing*, 17 Ohio, 500; *Manly v. Slason*, 21 Vt. 275; *Case of An Hostler*, *Metcalf's Yelv.* 66, note. And it is settled, that any act of the parties, showing an intention not to rely on the implied lien, prevents its operation. *Brown v. Gilman*, 4 Wheat. [17 U. S.] 255. Having entered into a contract, in its nature and incidents wholly distinct from a simple loan, secured by a lien implied by law, the maxim, *expressum facit cessare tacitum*, applies. In my judgment, he who loans money on bottomry, makes a contract, which is to be followed out through all its remedies, as such; and when it proves to be voidable for fraud, and is avoided, he cannot treat it as a simple loan, secured by a maritime lien, and thus charge it on the property which he failed to obtain a right to, by the only contract which was made. In accordance with this, is the eighteenth rule of practice in the admiralty, prescribed by the supreme court. "In all suits on bottomry bonds, properly so called, the suit shall be in rem only, against the property hypothecated, or the proceeds of the property, in whosoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct, has avoided the same, or has subtracted the property, &c., in which latter cases the suit may be in personam against the wrongdoer." I apprehend that this points to the only remedy which the lender has, when the bond is void for the fraud of the master, and the lender has not participated in that fraud. If he has participated, it is at least questionable, whether the court would exert itself actively, to give him a remedy for his actual advances, even if a maritime lien was implied by law. If the bond itself, which created an express lien, cannot be allowed to stand as security for the money advanced, can he, by changing merely the form of his remedy, recover on a lien implied by law?

I know of no precedent for this; and analogous cases may be found, which are inconsistent with it. Thus, if a policy of insurance be void for fraud of the insured, the law will not allow the premium to be recovered back, though, in the absence of fraud, it implies a promise to repay it. *Schwartz v. United States Ins. Co.*, [Case No. 12,505;] *Felse v. Parkinson*, 4 Taunt. 640; *Tyler v. Horne*, and *Chapman v. Frazer*, *Marsh. Ins.* 661; *Waters v. Allen*, 5 Hill, 421. In point of principle, I am of opinion, that the fraud is an answer to the substance of the claim, for a restoration of the money advanced, and that it is not material through what forms of remedy the recovery is sought. But it is not necessary to go to this extent in this case. It is enough, that the bond, being fraudulent, cannot be en-

forced: and that, in point of fact, no such loan, as raises an implied lien, was made. The result is, that the libel must be dismissed, with costs.

[NOTE. On appeal, the supreme court, by Mr. Justice Nelson, affirmed the circuit court decree, declaring the bottomry bond void for fraud, and said: "It is insisted, however, that the security should be held valid for the amount actually advanced, conceding it to be void for the excess. It is true that a bottomry bond may be good in part and bad in part, and may be upheld even in cases when taken for a sum in the aggregate larger than that which properly constitutes a lien upon the vessel within this species of security. There are many cases to this effect. *Abb. Shipp.* 126, note; *The Aurora*, 1 Wheat. (14 U. S.) 107; *M'Cutchen v. Marshall*, 8 Pet. (33 U. S.) 228. These are cases, however, in which the items rejected were not properly chargeable on the ship, or were embraced within the bond from inadvertence or mistake, and entirely consistent with the good faith of the parties in the transaction. They stand upon widely different principles from those where the objectionable items are fictitious, and inserted in the bond with intent to defraud third persons. The entire security in such cases becomes tainted with the fraud, and a *particeps criminis* is not allowed to come into court to enforce it, even for the money advanced or expended; for to permit it would afford countenance to the fraud by giving partial effect to it. * * * It is insisted, however, assuming the bond to be void and inoperative, that the lender is then remitted to his implied lien, the same as if no bond had been given. How this might be in a case where the instrument was defective and void, for want of authority to execute it, or for any other cause consistent with the good faith of the parties, it is not now necessary to inquire, or express an opinion. But we think it clear that no such principle can be admitted in a case where the bond has been avoided on the ground that it was entered into in bad faith, and with intent to defraud, on the part of the lenders. Any other conclusion would be giving to a party the benefit of his own turpitude, which the law forbids. *Carrington v. The Ann C. Pratt*, 18 How. (59 U. S.) 63.]

ANN C. PRATT, The (AIREY v.)

[See *Airey v. The Ann C. Pratt*, Cases Nos. 113a and 114.]

ANN C. PRATT, The (CARRINGTON v.)

[See *Carrington v. The Ann C. Pratt*, Cases Nos. 2,445 and 409.]

Case No. 410

The ANN D. RICHARDSON.

[Abb. Adm. 499.]¹

District Court, S. D. New York. April, 1849.*

SHIPPING — DELIVERY OF GOODS — LIEN FOR FREIGHT — BREAKING UP OF VOYAGE — SALE OF CARGO.

1. As between the owner of the cargo and the ship-owner, the delivery of the cargo at the port of destination is a condition precedent to the right to freight; and without such delivery

¹[Reported by Abbott Brothers.]

²[Affirmed by circuit court in *The Ann D. Richardson*, Case No. 411.]

the acceptance of the cargo at an intermediate place by the owner of the cargo, is necessary to enable the ship-owner to recover either full or pro rata freight.

[Cited in *The Joseph Farwell*, 31 Fed. 848.]

2. The master, although agent for the ship and cargo to the extent of being empowered, in a case of extreme urgency, to sell either or both, is not authorized to accept the cargo on behalf of its owner short of the port of delivery.

3. The laying claim to the proceeds of a sale of a cargo made by the master at an intermediate port, or the bringing suit for such proceeds, does not amount, in law, to a voluntary acceptance of the cargo, or to a ratification of the act of the master in breaking up the voyage.

4. Where a vessel puts in at an intermediate port in distress, and it is there found that a portion of the cargo has been rendered worthless by perils of the sea, while the residue is not of sufficient value to warrant continuing the voyage, and such portion is therefore sold by the master and the voyage broken up, no claim for freight, either in full or pro rata, or upon a quantum meruit, can be maintained by the ship-owner against the shipper.

[Cited in *The Joseph Farwell*, 31 Fed. 847; *The L'Amérique*, 35 Fed. 844.]

5. Upon what principles the general average should be adjusted in such a case, as respects the contribution due from the cargo.

In admiralty. This was a libel in rem, by Robert Taylor against the bark *Ann D. Richardson*, to recover the proceeds of a sale of goods shipped on board the bark by the libellant.

The facts are stated in the opinion of the court.

Francis B. Cutting, for libellant.
Daniel Lord, for claimants.

BETTS, District Judge. The facts upon which the points in contestation in this cause arise, are these: The libellant shipped at Philadelphia, on March 18, 1847, on board the bark *Ann D. Richardson*, for Londonderry, a cargo consisting of wheat flour, Indian meal, corn, and navy bread, for which the usual bills of lading were executed by the master, engaging to deliver the cargo to the consignees in the bill of lading named, they paying stipulated freight therefor. The vessel sailed the next day on her voyage. She was new and staunch, but before leaving sight of the Capes made water at the rate of one hundred strokes the hour. It appears, however, upon the evidence, that she was fully seaworthy when she sailed, and that the amount of leakage she exhibited was usual in new vessels, and did not affect the cargo or her seaworthiness. On the 27th of March she encountered a heavy gale from the S. E., which continued to the 30th, and then increased to extreme violence. The bark was thrown on her beam ends, her masts were cut away, and she lay waterlogged. The crew, with great labor, freed her of water, and rigged spars and endeavored to work the vessel to Bermuda, but being unable to make that port, they put into St. Thomas, on the 23d of April, as a port of necessity. A survey was there held

of the cargo. A portion of the corn, (537 bushels,) was found in a putrefying state, and was thrown overboard as valueless. The chief part of the residue of the cargo had been wet and damaged by the stress of weather to such a degree that it could not safely be transported to the port of destination, and the master was advised by the surveyors to sell the whole cargo remaining, that not injured not being deemed of value to justify carrying it to Londonderry. It was accordingly sold on the 11th of May, at auction, for \$7,730.02.

The claimants allege this sum is subject to an average charge of \$582.08; and they also contend that the vessel is entitled to full freight and primage for the whole voyage, amounting to \$4,562.26, and the balance, \$1,712.85, they are willing to pay over to the libellant. They deny their liability for any thing beyond that sum. The vessel was repaired at St. Thomas and ready to receive a cargo and prosecute her voyage, by the 2d of June. She did not offer to proceed to Londonderry with the sound portion of the cargo, nor did she provide any other vessel in her place. She was employed on a different service. The libellant was not present in person or by any authorized agent at St. Thomas, and was no way consulted in the disposition of the cargo and breaking up the voyage.

Three questions were discussed upon these facts: 1. Whether the owner of the vessel was entitled to full or pro rata freight, or any freight for the transportation of the cargo to St. Thomas. 2. Whether he was justified in selling the cargo and breaking up the voyage at the latter port. 3. What average the cargo of the libellant was legally liable to pay.

In arguing the case, the counsel have examined minutely the doctrines obtaining in the English and American courts, and it is strenuously contended for the ship-owner that upon the well-recognized principles of American law, full freight was earned in this case, and that the acts of the master, under the emergency, must be regarded as the acts of the libellant, by which the vessel was deprived of her cargo, and prevented completing the voyage undertaken. If this position is not sanctioned by the court, it is urged that the libellant, by demanding the proceeds of the cargo and bringing suit to recover them, adopts and confirms the sale made by the master.

It is not to be controverted that the English rule, applicable to a voyage so circumstanced, debars the ship-owner of all claim to freight. The case of *Vlierboom v. Chapman*, 13 Mees. & W. 230, presents a statement of facts covering all the essential features of this case. A cargo of rice was shipped at Batavia for Rotterdam, by the bill of lading to be delivered there on payment of a stipulated freight. The ship encountered a severe hurricane, and it became nec-

essary to throw part of the cargo overboard and to take the vessel, in a damaged state, to the Mauritius. The cargo was there examined, and it was found necessary, without delay, to sell the whole, otherwise it would become utterly worthless from the progress of rapid putrefaction. The rice was sold at Mauritius by agents, to whom the master, acting bona fide, confided the ship and cargo; and the proceeds were remitted to the ship-owners. The plaintiff, (owner of the cargo,) had no agent at Mauritius, and neither of the parties was present at any part of the transaction, nor had any knowledge thereof until after the sale of the cargo. Thus far the two cases are brought under the same range of facts. The English suit, however, seems to have been an amicable one, as the defendants did not retain freight money, nor set up an absolute charge for it.

The question submitted to the court was, whether the defendants had any lien or right of deduction or set-off against the proceeds of the rice, either for the freight in the bill of lading, or for pro rata freight, or for any freight on a quantum meruit. The plaintiffs' point was, that under the above circumstances, the defendants were entitled to no set-off for freight. The defendants' point was, that they had a set-off or lien, for freight, to the extent of £1,413.0.4, the produce of the sale, or, at all events, to some extent. The court decided, that if the master might be regarded the agent of the owners ex necessitate, so as to validate the sale, he was not such agent with a right to accept for them a delivery of the cargo at Mauritius, in place of Rotterdam, and that the plaintiffs not having transported the cargo conformably to their contract, were not entitled to full freight, nor to pro rata freight, as for a part performance accepted in lieu of a full one. It was also decided, that there was no foundation for a quantum meruit claim or allowance of freight. The court grounded their reasoning and decision very much upon some American cases, cited by Judge Story, in his edition of *Abbott on Shipping*, (page 328.)

The argument for the defendant in this case now is, that the doctrine of the American decisions was misapprehended, and that the rule to be deduced from them is, that the ship-owner, under like circumstances, is entitled to full freight, or at least to pro rata freight. In the case of *Miston v. Lord*, [Case No. 9,655,] decided in the United States circuit court for this district, in September, 1848, the doctrines of the case of *Vlierboom v. Chapman*, were recognized in so far as the authority of the master to sell cargo under similar circumstances was involved. As between owners and underwriters, he may, on general authority, have an implied power to do what is fit and right to be done, with ship or cargo, in case

of emergency. *Park Ins.* (Ed. 1842,) 345. But the court regarded it a fundamental principle of the contract of affreightment, that as between the owner of cargo and ship-owner, no right to freight accrued except upon performance of the contract by the ship, unless the terms of the contract were dispensed with by the owner of the cargo; although such discharge need not be by express agreement, but might be implied or inferred from his acts. This is believed to be the rule of maritime law adopted and enforced in the European and American courts. *Pothier Traite du Contrat de Louage*, No. 59; *Boulay Paty*, tit. 5, § 16; *Pardessus*, pt. 4, tit. 14, c. 2, No. 718; *Abb. Shipp.* 492, note 1; *Vlierboom v. Chapman*, 13 *Mees. & W.* 239; 3 *Kent*, [Comm.] (6th Ed.) 218; *Hurtin v. Union Ins. Co.*, [Case No. 6,942.]

The delivery of the cargo at the port of destination is considered a condition precedent to the right to freight, and without that, the acceptance of the cargo at an intermediate place, by the owner of it, is necessary to enable the ship-owner to maintain a claim to full, or pro rata freight. *Caze v. Baltimore Ins. Co.*, 7 *Cranch*, [11 U. S.] 358; 3 *Kent*, [Comm.] 228, 229, note a; *Abb. Shipp.* 534, note 1; *The Nathaniel Hooper*, [Case No. 10,032.] The case of *The Nathaniel Hooper* demonstrates that the rule in admiralty is in consonance with that at common law on the subject. [Case No. 10,032.] The case is not affected by the later decision in *Jordan v. Warren Ins. Co.*, [Case No. 7,524,] for there a voluntary acceptance of the cargo by its owner was made; but a claim to the proceeds of sale, or bringing suit therefor, does not amount in law to a voluntary acceptance of the cargo, or to a ratification of the act of the master in breaking up the voyage; nor is the master, though agent for the ship and cargo to the extent of being empowered in a case of extreme urgency to sell either or both, ex officio an agent of the ship, authorized to accept the cargo short of the port of delivery and break up the voyage. *Miston v. Lord*, [Case No. 9,655.]

The points in the case now under consideration, not involved in the decision in *Miston v. Lord*, [supra,] or in *Vlierboom v. Chapman*, [supra,] are, that a portion of the cargo on the arrival of the vessel at St. Thomas was sound and in a condition to be transported to the port of destination, but was sold by the master together with that which was injured and perishing, and that the vessel was repaired within a reasonable time at St. Thomas, and placed in a condition to perform her voyage, but did not offer to complete it.

Most unquestionably the master was not bound to take on board and attempt to carry forward, the putrid and worthless portion of the cargo, nor was it his duty to receive that which had been so injured as to be liable

to putrefaction, or to occasion disease or discomfort to her ship's company, or injury to the sound cargo in its transportation. Those principles are stated and enforced with earnest perspicuity in the two American cases before cited. *Jordan v. Warren Ins. Co.*, [Case No. 7,524;] *Miston v. Lord*, [supra,] circuit court, 1848. When the whole cargo is so damaged that it cannot be transported without endangering the safety of the ship or crew, or cannot, from its perishing state, be probably so preserved as to endure transportation at all, the ship need not proceed with it, or offer to do so; but the remedy of the ship-owner is on his policy for freight, he having failed to earn it, by means of perils insured against or insurable. 1 Phil. Ins. 290. The loss of the cargo must, however, be total, for although damaged to such a degree as to be not worth the freight at the port of destination, this does not amount to that kind of total loss, which authorizes a recovery of the freight on a policy. *Herbert v. Hallett*, 3 Johns. Cas. 93; *Griswold v. New York Ins. Co.*, 1 Johns. 205.

The present action seems framed upon the notion that if the ship-owner, on the facts, would have a right to recover freight on a policy of insurance, he has the same remedy against the owner of the cargo. That is clearly not the law. Considering the condition of the cargo on the arrival of the vessel at St. Thomas, as equivalent to a total loss or physical destruction of it, the plaintiff would be entitled, on insurance of freight, to recover his whole freight for the voyage, (1 Phil. Ins. 290, 427,) yet as against the shipper, he cannot recover freight except on performance of the condition of transporting the cargo and delivering it at the port of destination, conformably to the contract of affreightment.

Independent of this principle, there remained a portion of the cargo in this case, in sound condition; and to entitle the ship-owner to claim freight at all, he must have carried forward so much of the cargo as could be transported. It is no concern of his, whether by so doing the interests of the shipper would be advanced or consulted. He has nothing to do with the question of profit or loss to the shipper; and his vessel having been soon repaired and capable of performing the voyage, it was his duty to complete it, and then he would be entitled against the shipper to full freight on all the cargo delivered, in specie, whatever its condition or value; and might recover against the underwriter for that portion which perished on the voyage, which, for that reason, could not be delivered. I shall, therefore, pronounce against the libellant on that part of his action which claims the recovery of freight in full or pro rata, or compensation upon a quantum meruit.

It is not denied by the libellant that the ship-owner is entitled to a contribution from

the cargo on the general average of losses sustained by the ship. But it has been made a serious question in the cause as to the particulars of valuation and loss which shall enter into the computation and adjustment of that average.

Counsel, on both sides, however, conceding that a readjustment must be made, admit that the better course now is to take general directions from the court respecting the method of stating the average, and to wait until the adjustment is presented, before a decision is asked in detail upon the particulars proper to be included in it. The adjuster may so settle these points as not to leave it desirable to either party to litigate the matter before the court. In the adjustment presented to the court, the ship is credited with full freight for the voyage. This is erroneous. No allowance is to be made on that item beyond the value of the freight on the cargo thrown overboard, and that value will be made contributable, also, in the general average. The cargo, on the question of general average, is not to be charged with any expenses incurred in respect to it, after the voyage was broken up and abandoned.

The charges for reparations made to the vessel subsequently, may properly be referred to as a means of measuring the actual value of her injuries sustained for the common benefit. That allowance has no application to claims for the care and management of the cargo after it ceased to be connected with the vessel for the purposes of the voyage. Services or expenditures of that character have no connection with the ship or the injuries she incurred for the common advantage, and cannot, therefore, be subjects of general average. A decree, with special directions, must be entered according to the foregoing principles.

Case No. 411.

The ANN D. RICHARDSON.

[1 Blatchf. 358, note.]

Circuit Court, S. D. New York. Oct. Term, 1849.¹

SHIPPING—DELIVERY OF CARGO—FREIGHT.

In the case of *The Ann D. Richardson*, on appeal from the district court, in October, 1849, the case of *Miston v. Lord* [Case No. 9,655] was cited and its doctrine applied, and the decree of the district court affirmed. It was held that the master having failed to deliver the cargo according to the bill of lading, and there having been no waiver of performance, either express or implied, by the shipper or his agent at the port of distress, the owner of the vessel was not entitled to freight, notwithstanding the damaged state of the cargo justified its sale by the master at the port of distress; that the agency of the master on behalf of the shipper at the port of distress, arising out of the necessities occasioned by the disaster, was limited

¹[Affirming decree of district court in *The Ann D. Richardson*, Case No. 410.]

to the sale of the cargo; that no case had yet extended it further; and that sound principles forbade any further interference with the rights of the shipper.

[Note. This case was originally published as a note to *Miston v. Lord*, 1 Blatchf. 353. Nowhere reported; opinion not now accessible.]

Case No. 412.

The ANNE.

[1 Mason, 508.]¹

Circuit Court, D. Massachusetts. Oct. Term, 1818.

ADMIRALTY JURISDICTION—PILOTAGE—WRONGDOERS OR MUTINEERS.

1. The admiralty has jurisdiction in personam, as well as in rem, for pilotage earned in piloting ships to, from, or on, the sea.

[Cited in *The Wave*, Case No. 17,297; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (47 U. S.) 421.]

[See *The Wave v. Hyer*, Case No. 17,300; *The Alzena* 14 Fed. 174; *Gottfried v. Miller*, 104 U. S. 521; *The Wave*, Case No. 17,297.]

2. To make pilotage a lien on the ship, the contract must have been made by some person in the employment of the owner, duly authorized to make the contract, such as the master, or the quasi master. But mere wrongdoers or mutineers have no authority to bind the ship.

[Cited in *Packard v. The Louisa*, Case No. 10,652; *Leland v. The Medora*, Case No. 8,237; *Smith v. The Creole*, Case No. 13,032.]

3. Upon the facts, the pilotage in this case, though meritoriously earned, held not to be a charge on the ship.

[4. Cited in *The Clatsop Chief*, 8 Fed. 163, 767, to the point that a proceeding in rem and in personam cannot be blended in one libel.]

In admiralty. This was a libel [against the Anne, George Manners, claimant,] brought to recover a compensation for piloting the British schooner Anne, from Brown's Bank near the American coast, to Boston. The material facts proved on the trial were shortly these:—The Anne was chartered in June, 1818, at Cork, in Ireland, to proceed from thence to Quebec with passengers. On the 10th of June she sailed from Cork with upwards of sixty passengers on board, ostensibly destined for Quebec. Being obliged to put into Padstow and St. Ives, in consequence of bad weather and some injury done to the vessel, she there dismissed as many passengers as exceeded the number limited by law to be carried out of Great Britain in a vessel of her burden, and again proceeded on her voyage on the 16th day of July. After being out some time, the passengers, amongst whom was a son and daughter of the charterer of the vessel, required of the master, that instead of going to Quebec, he should carry them either to New York or Philadelphia; alleging that they had contracted with the charterer to be landed at one of those ports. The master refusing to comply with their request, on the 17th of August they arose upon him in a body, took the vessel out

of his possession, drove him with some violence and threats to the cabin; and having compelled the mate (who was made a defendant in this case) to take an oath, that he would carry the vessel into one of the above-mentioned ports, or into the port of Boston, put him in command. Shortly after this transaction, they began to fall short of provision; and after being upon a very small allowance for many days, and suffering great anxiety from the fear of starving, they fell in at sea with the Reindeer, a small fishing schooner, and obtained from her a supply of provision, and also prevailed upon the libellant, one of her crew, to pilot them into Boston. After arriving there, the mate and crew refused to pay the pilotage, upon the ground that it was a charge against the ship, and the master ought to pay it; and the master refused, alleging that the libellant came on board the Anne at the request of the mate and passengers, who were at that time in command of the vessel; that he made his contract with them, and must now look to them for its fulfilment.

The case was argued by Blake, Dist. Atty., and Blair, for libellant; and W. Sullivan, for claimant.

[Before STORY, Circuit Justice, and DAVIS, District Judge.]

STORY, Circuit Justice. A preliminary exception has been taken to the jurisdiction of the court in this cause, upon the ground, that no suit lies in the admiralty for pilotage, even when the service has been performed on the high seas. It is very true, that the courts of common law have held, (whether rightly in the full extent, is matter with me of extreme doubt) that if the contract be for services to be performed on a navigable river within the body of a county, no suit lies in the admiralty in favor of the pilot for such services. *Ross v. Walker*, 2 Wils. 264; *Abb. Shipp.* pt. 2, c. 5, p. 183. And the high court of admiralty, under the imposing authority of prohibitions, has felt itself compelled to follow, with hesitating steps, in the narrow path thus prescribed by the common law. *The Eleanor*, 6 C. Rob. Adm. 39. But there never has been, as far as I know, a judicial doubt breathed anywhere of the rightful jurisdiction of the admiralty over suits for pilotage on the high seas. And, in point of fact, suits of this nature have been, and are continually entertained by the admiralty. *The Nelson*, Id. 227. Even in times of the most severe hostility, the courts of common law admitted, that the admiralty had jurisdiction over contracts made upon the sea to be performed upon the sea; and if there ever was a case, which came exactly within the terms of this description, it is the present; for the contract was made upon the sea to pilot the vessel into some port of the United States, she being then at least three days' sail from land. But if this were a perfectly new case, un-

¹[Reported by William P. Mason, Esq.]

aided by authority, I should still hold that the admiralty had upon principle a rightful jurisdiction, as well in personam as in rem, for pilotage due for services performed on, from, or to the sea; since it properly arises under a maritime contract, and differs in no substantial respect from the contract for mariner's wages. We may, therefore, safely dismiss this objection.

Upon examining the testimony in this case, which is extremely contradictory in many material respects, I cannot say, that the conclusion drawn by the district judge, as to the real state of facts, is not fully warranted by a decisive weight of evidence. Admitting that the original voyage was to Quebec, and not to the United States, it is difficult to resist the impression, that the master did, in common with the passengers, feel the services of the pilot to be very desirable, if not absolutely necessary. And the pilot was no ways reluctant in complying with the wishes of the parties, if he could be made perfectly secure of his stipulated pilotage. It cannot be disguised, also, that there is no inconsiderable probability, that the intention of some of the parties, and at least of the charterer, was, that the ostensible voyage to Quebec should terminate in a real voyage to the United States. And the provisions of the statutes of 43 Geo. III. c. 56, and 57 Geo. III. c. 157, restricting British, as well as foreign vessels, to a very small number of passengers, when bound to the United States, and allowing a very large number, when bound to the neighbouring British provinces, afford a very strong color to this supposition. Many circumstances, too, admit of an easy explanation in this way, which would otherwise be wrapt up in marvellous mystery and difficulty. In this view, the supposed mutiny, if not the effect of pre-concert, was not so much at variance with the wishes of any of the parties, as to involve any serious opposition, or inflame any very atrocious passions. The master might not have had any very sincere reluctance to acquiesce in a scheme, which he had no particular interest to oppose, even if he had not been previously consulted, as to the change of destination. To be sure, the case under this aspect involves a meditated fraud upon the British laws. But this court is not at liberty to enforce the municipal regulations of a foreign country, or to take cognizance of any frauds attempted on them. I confess that I have always been a good deal staggered by this doctrine. It has appeared to me more consonant with national comity, sound morals, and public justice, that courts of all countries should lend their aid to discountenance frauds upon the revenue laws of other countries, and decline to enforce any agreements entered into for the purpose of evading those laws. An exception might very properly apply, where those laws were in direct hostility to our own policy or laws, or were inconsistent with the principles of general justice. But

the rule is now too stubborn to be controlled, and has been so long established, that it has become almost a formula in our text-books. See Marsh. Ins. bk. 1, c. 3, § 1, and 1 Valin, Comm. art. 49, p. 127; Pothier, Traite D'Assur. note 58; 1 Emerig. 212, 215; Planche v. Fletcher, 1 Doug. 251; Lever v. Fletcher, Park. Ins. (6th Ed.) 313; The Courtney, Edw. Adm. 239; The Leander, Id. 35; The Fortuna, 1 Dod. 81; The Amedie, Id. 84, note. And, indeed, if the contrary doctrine existed, I do not perceive, that it could materially bear on the present case; because there is no pretence to say, that the pilot connived at the supposed mutiny or change of destination; and his services were really beneficial, and rendered bona fide for the common benefit. It was certainly not for him nicely to scan the various rights or duties of the parties; and it would be strange, if services, humanely rendered, were to be treated as crimes, not from any misconduct in the pilot, but from the relief having been afforded to persons, who had brought themselves into distress by their own previous misconduct. I can have no doubt, that the pilot has rendered a meritorious service, and is entitled to a just compensation from some of the parties.

But the principal question remains to be considered, and that is, against whom is the pilotage a rightful charge? The original suit began by a petition in personam against the mate (who at the time of the contract acted as master, the master having been suspended in the command by the asserted mutinous acts of the passengers) and prayed process as well against him as against the ship. Subsequently process was duly issued against the ship; and thereupon the original master, the mate, and the British consul for the owners, severally appeared, and put in a defensive allegation. Whether a proceeding in personam and in rem can be regularly combined, so as to entitle the libellant to a decree in personam, if he fails to establish his claim in rem, need not here be decided; because the parties have, by their own proceedings, waived any question on this head, and confined the ultimate process to the ship only; and if it cannot be maintained against the ship, there must be a dismissal of the present suit.

To make the pilotage a charge on the ship itself, or on the owners, there must be in cases of this nature (for I speak not of pilotage connected with, and forming a part of salvage services) an express or implied contract with the owner, or with his authorized agent. The master is for this purpose an authorized agent; and upon his death or absence the same authority devolves upon the next person properly succeeding to the master in the command of the ship. But it certainly cannot be maintained, upon any acknowledged principles of law, that mere wrongdoers or usurpers of the command of the ship, not acknowledged or appointed by

the owner, can create a lien on the ship, or personally bind the owner by a contract, which they may choose to make, whether it be beneficial to him or not. A fortiori, a criminal usurpation of authority, or a piratical revolt, cannot afford any foundation for a title, which is to bind the ship or owner.

In the cause now before the court, if the transaction is to be taken, as a case of real mutiny, in which the master was forcibly deprived of his lawful authority, and driven from the command of the ship, neither the passengers nor the mate, who succeeded by the appointment of the passengers as master, had competent authority to enter into any contract binding upon the owner; no more, indeed, than any pirate or roving plunderer upon the ocean. If, on the other hand, it is to be taken as a merely feigned and fictitious proceeding, it becomes material to ascertain whether the master, in point of fact, entered into the contract directly or impliedly on his owner's account. For, if the contract, though for the benefit of the ship, was made by the pilot, under a knowledge of all the circumstances, with other persons on their own personal responsibility, I do not see how, because they have failed to perform it, a resulting security falls on the ship. Now, it is very remarkable, that the evidence, sufficiently discordant in other most important particulars, is uniform in this, that the master utterly refused (no matter, whether in pursuance of a preconcerted plan or not) to be accountable for the pilotage. It is very true, that he seems to have been desirous to retain the pilot; but at the same time he explicitly disavowed any agency in the transaction, and gave full notice, that the pilot was to look, not to him, but to the passengers for his recompense. The passengers did accordingly agree to pay it; and the pilot, trusting to their good faith, and, as I am persuaded, notwithstanding the pretence of violence, noways loth, engaged in the duty. The passengers have abused his confidence, and most disgracefully refused him a recompense, which he justly earned; and if any of them were before the court, I should not hesitate a moment in awarding him, as against them, the fullest compensation. It is no very welcome proof of the morality or gratitude of these emigrants thus landed in safety on our hospitable shores, that they should signalize themselves by a paltry artifice to evade a meritorious debt. But how can the court say, under these circumstances, that a contract explicitly declined (as the libellant himself admits) by the master, who alone had authority to bind the ship, and as explicitly entered into with the passengers, is to be deemed a debt due from the owner? The question is not, whether the owner has been ultimately benefited by the service; but whether he has contracted the debt. It is material also, that the libellant does not in

any part of his allegation assert, that any contract was made by the original master; (and if he did, his own testimony would disprove it;) but his claim against the ship is rested on the retainer of the mate, then acting as master. The conduct, too, of the pilot, after the arrival of the Anne in port, evinces in a strong manner his own understanding, that he had no claim on the original master, and consequently no claim through him upon the ship itself. Upon the whole I cannot say, that there is sufficient evidence to warrant me holding, that the pilotage in this case ought to be a lien on the ship; and with the utmost respect for the opinion of the district court, I am compelled to pronounce, that its decree must be reversed. Considering however all the circumstances, I shall direct the reversal to be without costs to either party.

Decree reversed.

ANN, The ELIZABETH.

[See *The Elizabeth Ann*, Case No. 4,357.]

ANNE, The, (JOHNSON v.)

[See *Johnson v. The Anne*, Case No. 7,370.]

ANNE, The LUCY.

[See *The Lucy Anne*, Case No. 8,530.]

ANNE, The MARTHA.

[See *The Martha Anne*, Case No. 9,146.]

ANNE, The MARY.

[See *The Mary Anne*, Case No. 9,195.]

ANNESS, (REISSNER v.)

[See *Reissner v. Anness*, Cases Nos. 11,686, 11,687, and 11,688.]

Case No. 413.

ANNETTE v. The STORM.

[N. Y. Daily T. July 14, 1865.]

District Court, S. D. New York.

COLLISION—TUG ENTERING STEAMER'S SLIP.

[A steam tug is legally chargeable with notice of the time when a steamer is to leave her berth on her regularly appointed and notorious trips, and is negligent in trying to enter the berth at such time, and while the steamer is already in motion, unless driven thereto by stress of weather or casualty.]

[In admiralty. Libel by Robert Annette, owner of the steamer *Thomas E. Hulse*, against the steam tug *Storm*, for collision. Decree for libellant.]

Sunbury & Telson, for libellant.

Beebe, Dean & Donohue, for claimants.

Before BETTS, District Judge.

This was a libel for a collision between the steamboat Thomas E. Hulse owned by the libellant and the steam tug Storm. The collision occurred in broad day light near the mouth of the slip between piers No. — and —, in the North river, on the — day of —, —.

Held BY THE COURT, that the Storm was legally chargeable with notice that the Hulse was in motion attempting to depart from her berth upon her regularly appointed and notorious destination to Fort Lee. That the Storm was only seeking the slip which she attempted to enter as a casual place of shelter without any legal priority of right or privilege to the occupation of it, in preference to the Hulse, and without being driven into it by stress of weather or by any compulsion or casualty. That, prima facie, the Hulse was entitled by a free and undisturbed passage out of the slip from which she was in the act of departing; and that the proceedings of the Storm in entering the said slip at the same time, thus crowding upon her and intercepting the movements of the Hulse, was unjustifiable and wrongful.

Decree therefore for libellant, and with a reference to compute damages.

Case No. 414.

The ANN GREEN.

[1 Gall. 274.]¹

Circuit Court, D. Massachusetts. Oct. Term, 1812.²

PRIZE — SHIP'S PAPERS AND CREW — EVIDENCE — WAR — NEUTRAL SHIPPER — DOMICIL — SALVAGE — FREIGHT.

1. In prize causes the first hearing is to be on the ship's papers, and the preparatory evidence of the ship's crew. If these acquit or condemn, there is an end of the cause. If they present a case of doubt or difficulty, further proof is admissible by order, or by plea and proof. Further proof sometimes allowed to the captors.

2. If the captured crew do not give up papers on the first examination in preparatory, the court will not admit them afterwards. If a witness suppress material facts on his examination in preparatory, he shall not be permitted to supply the defect by a supplementary affidavit. The commissioners to take the answers on the standing interrogatories should not rest satisfied with general answers, but require full and minute details of all material facts.

3. The national character of a party depends upon his domicile. What constitutes such domicile. A British subject domiciled in the United States, though temporarily absent in a British island, is as to purposes of trade held to be an American merchant.

[Cited in Burnham v. Rangeley, Case No. 2,176.]

¹[Reported by John Gallison, Esq.]

²[Affirming an unreported decree of the district court.]

4. The question of enemy or friend depends upon the domicile of the party. A shipment made to Canada by a British subject domiciled in the United States, but temporarily at Jamaica, in his character as a British subject, does not, if made in time of peace, affect the property with a hostile character, if war breaks out pending the voyage. But it is otherwise, if such shipment be made pending a known war.

[Cited in The Amado, Case No. 12,005.]

5. In general no claim is admitted in prize causes, in opposition to the ship's papers; but this rule is relaxed in favor of shipments made in peace.

6. Where a neutral is engaged in a trade, which is exclusively confined to the subjects of a country, and interdicted to all others, and cannot avowedly be carried on in the name of a foreigner, such a trade is so purely national, that it must follow the situation of the country, as to peace or war, and be deemed hostile or neutral accordingly; and in such a trade, it is immaterial whether the shipment be made in time of peace or war. The trade between Jamaica and Canada proved not to be of such a character. In time of war property cannot change its character in transitu; nor can property shipped, to become the property of an enemy, be protected by the neutrality of the shipper.

[Cited in The Sarah Starr, Case No. 12,352; The Delta, Id. 3,777.]

7. In order to entitle to salvage, as upon a recapture or rescue from an enemy, the property must have been taken from the actual or constructive possession of the enemy.

8. Captors are not in general entitled to freight on the capture of neutral property on board of an enemy's ship, unless the goods are carried to the port of destination, within the intent of the contracting parties. But if the property be ultimately bound to the market, where the captors carry the ship, or the proceeds are to go there indirectly, a direct communication being prohibited, freight is due to the captors. The captors are entitled to their expenses in all cases of further proof.

[On appeal from the district court of the United States for the district of Massachusetts.]

In admiralty. This was a proceeding on the prize side of the court, on an allegation of prize by the libellant, commander of the privateer Gossamer, against the ship Ann Green and cargo. The ship and all the cargo, excepting fifty-six puncheons of rum, were condemned as enemy's property, no claim having been interposed therefor in the district court. The fifty-six puncheons of rum were claimed on account of Lewis Simond, Charles Wilkes, and Henry Cullen of New York, the asserted owners; and upon a full hearing of the cause in the district court, a decree of restitution passed, subject to freight and the captor's expenses. An appeal was interposed by the captors, and upon the hearing of the cause, which in the first instance was ordered to be upon the ship's papers, and the preparatory examinations, an interlocutory order passed for further proof to be made by the claimants, and that the evidence, which had been irregularly taken for the district court, might upon the final hearing be offered to this court. The facts of the case, so far as respects the present claim, are, that the ship sailed with

her cargo from Jamaica for Quebec on the 20th day of June, 1812, and was captured and brought into Boston on the 1st day of August, 1812. A libel was filed, and the deposition in preparatory of the supercargo, Mr. Fish, was taken before the commissioners on the 3d day of August, and returned to the district court. On the 14th of the same August, upon application of the claimants, the examination of Mr. Fish was remanded to the commissioners for further answer on the last interrogatory. The new examination was taken on the 15th of August, and came up in the cause. Upon the original examination, the supercargo to the 12th interrogatory answered, "that the rum was shipped by various merchants living at Jamaica, and consigned to various persons at Quebec, whose names appear in the manifest, and papers delivered to the captors. He knoweth them not personally; but believeth them to be British subjects. The ownership of the rum he cannot declare, but must refer to the papers delivered up to the captors, to ascertain the ownership." To the 14th interrogatory he answered, that he knoweth not of any papers, &c., except those delivered to the captors. To the 16th interrogatory he answered in the negative, that there was no suppression or concealment of any papers, and to the 32d interrogatory he answered, "that he has declared the whole of his knowledge relating to the premises." On his supplementary examination to the last interrogatory, he stated, that after his former examination, and on the same day, he found, in the letter bag of, and on board the ship, fifteen letters, which he produced, and which he supposed had been taken possession of by the captors. That he verily believed those letters were placed in the letter bag at Jamaica, before the ship's departure for Quebec, and that they had ever since remained there. That on the 11th or 12th of August, Mr. Wilkes, one of the claimants, called on him in Boston, and asked, if he had not on board fifty-six puncheons of rum, shipped by Mr. Henry Cullen, or had any letters sent by Cullen; that upon examination of the covers of said letters, Cullen's hand-writing was recognised on two, which were directed to Messrs. John Mure & Co., Quebec, which were then opened and read in the deponent's presence. In one letter was contained a bill of lading signed by the deponent for fifty-six puncheons of rum shipped by Cullen in said ship to be delivered at Quebec; and the other contained two enclosures. That the deponent allowed Wilkes to retain them until this day, when they were returned to him, as he believes, unaltered. That the residue of the letters remain sealed. That the deponent hath no doubt, that the said fifty-six puncheons of rum, at the time of their shipment as aforesaid, and if restored, did, do, and will belong to the house of Simond & Co. of New York,

because he knows it was the general opinion in Falmouth in Jamaica that Cullen was the agent of said house, doing business there as their agent, and not on his own individual account, and that about three weeks before he sailed he knew that Cullen had sent home a vessel, belonging to the house aforesaid, in ballast, although he had a great quantity of rum belonging to the said house then on hand, but could not ship it to the United States. Upon the order for further proof, it was proved that Mr. Cullen was a native of Scotland, and came to New York to live in 1795, being then about nine or ten years old. That on the 10th day of May, 1804, he was naturalized at New York, where he resided until the year 1808. That he was admitted as a partner of the house of Simond & Co. consisting of the claimants, on or about the year 1807, and they, having debts due to them to a large amount, sent him out to Jamaica in 1808, to collect the same. That he was absent at Jamaica about six or seven months, and then returned to New York; and went out a second time in March, 1810, and resided there about a year, and then returned to New York; and went out a third time in October, 1811, and had not yet returned. During all this time the affidavits of the claimants stated, that he was absent upon necessary business, connected exclusively with the collection of the debts due to the company; and there were many corroborative affidavits, which showed the general impression among all his acquaintance at New York, that he did not contemplate a residence at Jamaica for purposes of trade.

In the manifest of the cargo, fifty-six puncheons of rum were stated to be shipped by Henry Cullen, but no consignment was mentioned. No bill of lading appeared to have been found on board, except that which was produced upon the supplementary examination of Mr. Fish. In that the rum was consigned to Messrs. John Mure & Co., and the accompanying letters addressed to them contained instructions to sell and remit the proceeds, or to pay to the orders of Messrs. Simond & Co. The first letter of 26th of June said, "I owe Lewis, Simond & Co., of New York, a considerable sum, and I shall in all probability apply the proceeds of this shipment to the liquidation of that debt." The second letter of the 28th of the same month enclosed a letter to be forwarded to Messrs. Simond & Co. and said, "I now request that you will remit the nett proceeds of these fifty-six puncheons to Lewis, Simond & Co. of New York, or honor their drafts as they shall appear." The enclosed letter to Messrs. Simond & Co. after stating the shipment of the fifty-six puncheons by the Ann, contains the following expressions: "I am shipping about fifty puncheons in the Aid, Capt. Redmayne, on my account, consigned to Messrs. Bruce de Penthiou, Buzett, & Co., London, and the nett proceeds of this

shipment also shall be paid to your order. These two shipments, I regret to say, are all that I am able to apply this year to the liquidation of the heavy debt I owe." Connected with the claimants' affidavits was a letter from Cullen to Messrs. Simond & Co., dated Falmouth, 7th of June, 1812, in which he said, "I am getting from all our correspondents about 100 puncheons rum only, half of which I ship in the ship Ann Green, Capt. Fish, to Quebec, consigned to John Mure & Co., as British property, that is to say, in my own name alone, the other half to Bruce de Penthiou, Buzett & Co. I write this week by the ——— British Packet, to B. de Penthiou, B. & Co. for insurance on both these shipments."

Blake, Dist. Atty., for the captors.

1. The supplemental examination of Fish was irregular. *The Speculation*, 2 C. Rob. Adm. 293. 2. Cullen, the shipper, is a British subject. His allegiance to that government is, by its laws, inalienable. His naturalization, as a citizen of the United States, cannot extend beyond the limits of the United States. Cullen avows himself a British subject, for he says, "I ship in my own name, as British property." *The Bernon*, 1 C. Rob. Adm. 102; *The La Virginie*, 5 C. Rob. Adm. 98; *The Indian Chief*, 3 C. Rob. Adm. 24; *The Citto*, Id. 38; *The Embden*, 1 C. Rob. Adm. 16; *The President*, 5 C. Rob. Adm. 277; [*Baring v. Clagett*], 3 Bos. & P. 207; *The Herman*, 4 C. Rob. Adm. 228; *The Vigilantia*, 1 C. Rob. Adm. 12; *The Betsey*, Id. 97; *The Chester*, 2 Dall. [2 U. S.] 42; *Arnold v. United Ins. Co.*, 1 Johns. Cas. 363, 364, and note b.; Act March 27, 1804. 3. But, admitting Cullen to be an American citizen, yet having, as a British subject, engaged in a trade allowed to British subjects only, he loses the benefit of his American character, so far as respects such trade. 4. The property was taken in transitu. Whatever might have been done with it, if found in Jamaica upon a conquest of that island, may be done with it, when found on board an enemy's ship. It is true, that by the treaty, goods, &c., are not to be confiscated. But in this case, no process of confiscation is necessary. *Bynk*, 23, 25, 51, by Duponceau. 5. The captors are entitled to salvage, if the rum is restored. Had it gone to Canada, it would have been confiscated as enemy's property. The claimant therefore is benefited by the capture. *The War Onskan*, 2 C. Rob. Adm. 299. The rum is of the same value here as in New York. 6. The captors are entitled to freight. *The Diana*, 5 C. Rob. Adm. 64.

Jackson, in reply, for the claimants.

In this case, the claimants as well as the captors are to be favored, being both citizens of the United States. (As to Blake's first point, Story [Circuit Justice] told Jackson he need not insist). 2. Naturalization by our laws has all the effect of a naturalization by

act of parliament in England. As to us, the original character ceases altogether. Cullen's house of trade in this country is enough to show him not a British subject. Between citizens, this is a question of municipal law; between a citizen and a foreigner, it would be a question of public law. 3. It is assumed that none but British subjects can ship on a British bottom from Jamaica to Quebec; the fact is otherwise. There is no case or statute to support this assertion, and the contrary appears from Mure & Co.'s letters. In *The Princessa*, [2 C. Rob. Adm. 49,] Sir W. Scott takes it for granted, that a Spanish subject only could ship specie, but he gives no authority for the supposition. 4. *Bynkershoek*, in the passages cited, speaks only of choses in action. An American army invading Canada, and finding my property there, could not take it as British property. *The Packet De Bilboa*, 2 C. Rob. Adm. 133. 5. The case of *The Packet De Bilboa* gives no salvage, but directs only the expenses to be paid. In this case there is no recapture. 6. No freight is due, unless the cargo is brought to the original port of destination. *The Fortuna*, 4 C. Rob. Adm. 278. By the appeal, the captor's right to freight is taken away, even if he had any before. The property is here as much beyond the reach of the owner, as it would be in some neutral country. It is in a foreign port. Carolina is foreign as to Massachusetts. So are England and Ireland foreign to each other, as to the same point. The freight from Boston to New York is now greater than from Jamaica to that city.

[Before STORY, Circuit Justice, and SHERBURN, District Judge.]

STORY, Circuit Justice, after a recapitulation of the facts. Such are the facts disclosed in the evidence; and various objections have been argued, and ingeniously argued, which I shall now proceed to consider. In the first place it is contended, that the supplementary examination of Mr. Fish, and the accompanying letters, ought to be rejected. It is undoubtedly the practice of the prize courts to confine the first hearing of the cause to the papers found on board of the ship, and the preparatory examinations. If they acquit or condemn, there is, in general, an end of the cause. If they present a case of doubt or difficulty, further proof is admissible, and this may either be by the common order for further proof, or the more solemn proceeding by plea and proof. But doubts either of condemnation or acquittal may sometimes arise from extrinsic facts presented by the claimant or the captors, and the discretion of the court is sometimes exercised in the admission or rejection of such facts. The prize courts are however very solicitous to preserve the simplicity of their proceedings, and therefore, if the case appear very clear and satisfactory upon the original evidence, they yield with great reluctance to the admission of extrinsic circumstances.

The evidence of papers invoked from other causes, and of papers found on board other ships, does not come within the restriction, and in other instances of pregnant suspicion, or reasonable doubt, the courts will not suffer a rule, founded upon the mere convenience of practice, to exclude the captors from the benefit of diligent inquiries. *The Sarah*, 3 C. Rob. Adm. 330; *The Romeo*, 6 C. Rob. Adm. 35; *The Vriendschap*, 4 C. Rob. Adm. 166. But it is a rule, which every principle of law and of policy requires should not be relaxed, that, as the evidence to acquit or condemn must, in the first instance, come from the ship's papers and preparatory examinations, no papers should be allowed, which are not produced at the first examination. What would be the consequence of a different practice? That parties would, at the first examination, make formal answers, and after full time was given to know the difficulties of the case, papers and evidence would be manufactured to meet them. Good faith on the contrary requires, that every paper should be disclosed at the first; that parties should tell the whole truth; and that every inducement to concealment or suppression of evidence should be completely discountenanced. And I wish it to be distinctly understood, that if parties will attempt to cover up the real transactions, or withhold them, until counsel can be taken, they can never be permitted in a prize court to supply the first defects. *The Anna*, 1 C. Rob. Adm. 331; *The Speculation*, 2 C. Rob. Adm. 293.

In the present case, I think the supercargo, Mr. Fish, has acted with very great impropriety. It is perfectly frivolous to pretend that he did not know but that the captors had these fifteen letters. Where was the ship's letter bag when the ship was captured? Was it given up to the captors? If it had been so, the whole papers would have been before the court; for the prize-master has sworn to the delivery of all ship's papers delivered to him. It is not even now pretended, that the captors had these letters; on the contrary, the evidence is, that they were in the ship's letter bag, and had always remained there on board of the ship. Where was the letter bag kept? No account is given of it; and to suppose that it was not concealed and suppressed, is to suppose that the captors voluntarily relinquished all benefit of evidence, which might go to the condemnation of the property. I have no doubt, therefore, that there was a premeditated suppression and concealment by the deponent, and that, at the time of his first examination, the letter bag was in his possession. Yet he has answered on the subject in a manner, which no honest man can approve. I regret to say, also, that the second examination proves incontestably, if it be credited at all, that Mr. Fish did not tell the whole truth at that time. How slight and vague are his answers to the interrogatories as to the property and papers! Yet, on his second exami-

nation, he has not only new knowledge of facts, but he states that he has no doubt that Messrs. Simond & Co. are the real owners of the rum, and that Cullen acted as their agent; and he relies upon circumstances within his knowledge at Jamaica, to corroborate the opinion. Now let me ask, why were not these facts and circumstances disclosed at the first examination? The witness does not pretend, that the light has just dawned upon him. I must conclude, therefore, that he did not choose to declare all that he had the means of knowing. If he has acted in so unjustifiable a manner, I do not think it any severity to receive his testimony with great hesitation.

I cannot, however, in this connexion, omit to remark, that with very few exceptions, the preparatory examinations are not taken with that fulness and exactness, which the interrogatories require. It is the duty of the commissioners, not merely to require a formal direct answer to every part of an interrogatory, but to require the witness to state the facts with all the minuteness and detail, which belong to them. The commissioners should not be satisfied with a general answer. They know the object of the examination, and it is their indispensable duty to procure a full and explicit and circumstantial answer to every question. If this were always done, much of the uncertainty which now is found in prize causes at a first hearing, would be completely obviated.

But to return. Though I directed this second examination to be admitted under the order for farther proof, it was not that I was satisfied with its legality; on the contrary, I then entertained and still entertain great doubts, if of itself it can be relied on for any purpose; certainly, if any material fact depended upon it, I should not feel safe in the admission. If I do not absolutely reject it, it is only in deference to the entire respect which I feel for the order of the district court. As a general rule, I should pronounce for the inadmissibility of the evidence. I shall leave it therefore where I find it, as it does not materially enter into the judgment which I have formed.

I come now to consider a second objection, which is, that the property must be considered as British property, because, taking the whole evidence together, Cullen was domiciled in Jamaica, and acting in the character of a British subject. It is certainly made out in the evidence, that Cullen has been for four years last past resident a considerable portion of his time at Jamaica; and his letter of the 7th of June shows, that he made the shipment as a British subject. As to the domicile, it is undoubtedly true, that length of time, connected with other circumstances, may go very far to constitute a domicile. "Time," says Sir William Scott, "is the grand ingredient in constituting domicile. I think that hardly enough is attributed to its effects. In most cases it is unavoidably

conclusive." The *Harmony*, 2 C. Rob. Adm. 322. Upon a residence therefore for temporary purposes, there may be engrafted all the effects of permanent settlement, if it be continued for a great length of time, and be attended with conduct, which demonstrates that new views and new connexions have supervened upon the original purposes; but, on the other hand, mere length of time cannot of itself be decisive, where the purpose is clearly proved to have been temporary, and still continues so, without any enlargement of views; and even the shortest residence, if with a design of permanent settlement, stamps the party with the national character. The *Indian Chief*, 3 C. Rob. Adm. 12; The *Diana*, 5 C. Rob. Adm. 60; The *Boedes Lust*, 5 C. Rob. Adm. 233. The question, after all, results in an inquiry into the intention and conduct of the party; and it is extremely difficult to lay down any general rule upon the subject. If Mr. Cullen were domiciled at Jamaica, at the time of the shipment, he would be liable to all the consequences of a British commercial character; for no principle is better settled, than that the property of a person settled in the enemy's country, although he be a neutral subject, is affected with the hostile character. It is quite immaterial in this view, what was the original or acquired allegiance of Mr. Cullen. A native American citizen is just as much within the scope of the principle as a foreigner. In examining the testimony however, I think it is difficult to resist the impression, that Mr. Cullen's absence was originally for temporary purposes. It is expressly shown, that he went out to collect the debts of the company, and there is no part of the evidence that points to a distinct trade disconnected with those debts. I admit that his connexion in a house of trade in New-York would not alone protect him; for he may at the same time possess the commercial character of several nations. The *Jonge Klassina*, 5 C. Rob. Adm. 297, and The *Vriendschap*, 4 C. Rob. Adm. 166, are full to this point. But when his original purposes are shown to be temporary, and the whole transaction was in a time of peace, I do not think the presumption from length of time so forcible.

It is said, that Mr. Cullen was originally a British subject, and that native allegiance easily returns; and *La Virginie*, 5 C. Rob. Adm. 98, is cited in support of the position. Without pretending to be satisfied with that decision, which with all possible respect for the learned judge, I must say upon the evidence furnished in the report, was rather strained, I accede to the doctrine, that fewer circumstances are necessary to constitute domicile in case of native subjects, than of foreigners: and that as native allegiance easily reverts, so the presumption against the party is much heightened by the shipment being made from a port of his native country. Still, however, it is but a presump-

tion, and if clearly done away, I do not think that a single principle is overturned by a disregard of that circumstance. It is also said, that this shipment was made by Cullen in the character of a British subject, and that this furnishes distinct proof of his having returned to his native allegiance. I agree that such would ordinarily be the case; but a distinction has been taken in the authorities between a time of peace and of war. Much greater laxity is allowed to mercantile transactions in peace than in war. Disguises and covers are allowable in the former, which would not be tolerated in the latter. I do not know that a single case has been decided, in which the assuming a national character in time of peace, to avoid municipal duties or regulations, or to avoid the effects of impending war, has been held to bind the party, where it has not been in fraud of the belligerent who makes the capture. Now it is very clear, that Mr. Cullen did not assume the British character, to evade either the municipal or belligerent rights of the United States. We all know that the introduction of the produce of the British islands into the United States was prohibited. It could only go to British ports. A war was impending; and either to avoid alien duties or British captures, Mr. Cullen might have assumed the British character *pro hac vice*. Indeed, if the letters produced upon the supplementary examination were admitted to have full effect, this inference would be apparent from the language which is used. These letters are as merely colorable as any that could be offered. If Mr. Cullen had gone on, after the war, making shipments in the British character, I have no doubt that he would have been affected with its penal consequences. But the question now is, if the shipment made in a British character, without being engaged as a general merchant, and without the intention of evading any other but the municipal or belligerent rights of the enemy, shall conclude the party as to his domicile, I cannot say that where the proof is otherwise satisfactory, this circumstance alone ought to draw after it that consequence. I think that great indulgence usually is granted to neutrals and to citizens, as to transactions in time of peace, and at the commencement of a war; and if they contravene no municipal or national policy, I am not prepared to say that this indulgence is inconsistent with law. The *Vrouw Elizabeth*, 5 C. Rob. Adm. 2; The *Vreede Scholtys*, Id. 5, note. It is also said, that no claim ought to be admitted, which stands in opposition to the papers, and that Mr. Cullen stands in them as sole proprietor; and he traded as a British subject. The general rule certainly is, that no claim shall be admitted against the evidence of the ship's papers; and the reason of the rule is, that fraud may be suppressed and discouraged. If a party will undertake to cover his property with a particular charac-

ter, he shall be bound to its consequences. But an exception as old as the rule itself is, that it applies to cases during open war, and not before the commencement of it, or in time of peace. Parties have been permitted to claim, who in time of peace, or even just before the commencement of war, to elude or deceive the enemy, have assumed neutral or even enemy's colors. It is a stratagem, which if practised in peace, to the injury of a foreign nation, no other thinks itself bound to redress; and if, on the eve of a war, to elude the enemy, it has not been deemed an infringement of national rights. I believe the cases are not uncommon in the books for the property under such circumstances to assume altogether a fictitious or hostile name. *The Vrow Anna Catharina*, 5 C. Rob. Adm. 15, 161; *La Flora*, 6 C. Rob. Adm. 1; *The Vrow Elizabeth*, 5 C. Rob. Adm. 2, 5, note.

But does this property stand altogether documented in opposition to the claim? I think not. It is claimed by the house of *L. Simond & Co.* and is documented in the name of one partner of that house; and this with a view not to defeat American but British rights. But even if it had stood documented as British property, I think it would be entitled to very favorable considerations. Its real character is now shown, and I entertain no doubt, that the property did belong to Messrs. *Simond & Company*. Its being found on board a British ship, even with British documents, does not prevent me from looking at the interest of the real owners, and decreeing under the circumstances of the case in their favor. *The Vreede Scholtys*, 5 C. Rob. Adm. 5, note. Very different considerations would have applied, if the shipment had been made after knowledge of the war. I think therefore that this part of the case has been fully answered, and that the facts disclosed show that *Cullen* was at *Jamaica* for a temporary purpose only, that of collecting debts, and that no act there done has impressed him with a renewal of British character.

Another objection of a more general cast has been urged. It is, that admitting that *Cullen* was domiciled in the United States, still the trade was hostile, and such as exclusively belong to British subjects, and therefore the property is confiscable. There can be no doubt, that a trade may be hostile, and affect the party with condemnation, although he be a neutral, or citizen of our own country. Such is the common case of a citizen engaged in trade with the enemy; and according also to British doctrines, a participation in the coasting or colonial trade of the enemy. To these doctrines, as to the colonial and coasting trade, I am not called upon to give any assent, and I by no means wish to be considered as acquiescing in them. Whenever Great Britain shall be a neutral, perhaps there will not be any hardship in enforcing her own doctrines against her;

but as to other neutrals, the question will deserve great consideration. But however it may be, as to the general colonial trade, I think that it may well be admitted as a principle of national law, that where a neutral is engaged in a commerce, which is exclusively confined to the subjects of a country, and is interdicted to all others, and cannot be avowedly carried on in the name of a foreigner, such a commerce is to be considered as so entirely national, that it must follow the situation of the country. The property is considered as so intimately incorporated into the commerce of the country, that it receives its character solely from that commerce. In this view, though the property may be neutral, yet the commerce, in which it is engaged, may be hostile, and induce a confiscation. Such I understand to be the opinion of Sir William Scott in *The Anna Catharina*, 4 C. Rob. Adm. 107, *The Princessa*, 2 C. Rob. Adm. 49, and *The Rendsborg*, 4 C. Rob. Adm. 121, and I am not disposed at all to question the sound policy or principle, which dictated those decisions: and I admit further, that in such a trade it is quite immaterial whether the shipment be in peace or in war. The question then will be, whether the trade between *Jamaica* and *Quebec* be such a trade; for if it be, then it must be followed with all the consequences, which I have stated. It is affirmed on one side, and denied on the other. I should have been glad that the learned counsel, who made this objection, would have furnished me any statutes or authorities of the British government in proof of his position. I am aware, that between British colonies the trade is confined in general to British ships. The statute of 7 & 8 Wm. III. c. 22, prohibits in general the exportation of any goods or commodities from any British colony, except in British ships. But goods, which may be exported in British ships, may be exported from one colony to another. And by the St. 12 Car. II. c. 18, § 2, no alien, unless naturalized or a denizen, is allowed to exercise the trade of a merchant or factor in any British colony. These are the only provisions, which I have been able to meet with in those works, which seemed best adapted to convey the information, (*Reeves, Shipp.*; 6 Com. Dig. "Trade;") but they by no means establish the position in its full extent. They show extreme caution and jealousy as to the plantation trade, but by no means show that none other than a British subject would be allowed to export in a British ship from one colony to another. I do not understand, that the captors can produce any evidence to this effect; and certainly unless they do, no inference ought to be drawn against the claimants. If further proof on this point had been urged, I should have required it. As it has not been, and the cause has come to a final hearing, I feel myself bound to declare, that I have no evidence of such an

exclusive trade, as affects with a hostile character the property in question. It has been further argued, that this capture, being made while the property was in transitu, and war intervening, it is to be considered as enemy's property, because it would have become such upon arrival at the port of destination; and at all events it would have been liable to seizure and confiscation. As to the fact that the property was taken in transitu, I do not perceive how of itself it can affect the rights of the parties either way; nor do I perceive how this property was to have become enemy's property on its arrival. The case proved is, that it was American property consigned for sale only, and not a consignment where the property was, at the time of shipment or of arrival, to belong to the consignee. The cases are, as I think, settled upon just principles, that decide that in time of war, property shall not be permitted to change character in its transit; nor shall property consigned, to become the property of the enemy on arrival, be protected by the neutrality of the shipper. Such contracts, however valid in time of peace, are considered, if made in war or in contemplation of war, as infringements of belligerent rights, and calculated to introduce the grossest frauds. In fact, if they could prevail, not a single bale of enemy's goods would ever be found upon the ocean. The *Vrow Margaretha*, 1 C. Rob. Adm. 336; The *Carl Walter*, 4 C. Rob. Adm. 207; The *Jan Frederick*, 5 C. Rob. Adm. 128; The *Constantia*, 6 C. Rob. Adm. 321; The *Atlas*, 3 C. Rob. Adm. 299; The *Anna Catharina*, 4 C. Rob. Adm. 107. Where however the contract has been made during peace, it has received a more liberal consideration; and the case of *The Packet De Bilboa*, 2 C. Rob. Adm. 133, so much relied on by the captors' counsel, clearly shows that the property, notwithstanding a consignment to a party, who afterwards becomes an enemy, if made at the risk of the shipper, in peace, will be protected. Indeed that case, in some respects, goes the whole length of the present.

As to the other suggestion, that the property would on arrival have become subject to confiscation, as American property; and therefore is to be considered precisely as if it had arrived and been confiscated, I certainly know no principle of law which would allow me to condemn in such a case. If an American vessel be captured and recaptured, the argument that it had become enemy's property, would be much stronger, and yet it has never been allowed to prevail. Even supposing that upon arrival this property would have been liable to confiscation, and certainly by the law of nations the government would have a right of confiscation, (*Bynk. Ques. Pub. Jur. c. 7.*) I am not aware how I can hold that to be done, which might by possibility have been done. It has not been the modern usage to extend the right of confiscation of enemy's property found in

a country at the beginning of a war; and I may say, that in general it has been reluctantly admitted. That it would be insisted on in all its rigor, I shall not deem myself obliged to presume. As between Great Britain and the United States there is a stronger reason not to presume it, inasmuch as the 10th article of the treaty of 1794 prohibits it, as to debts and money in the funds and in banks, and declares it unjust and impolitic. But there is no necessity of adverting to this consideration, for I am well satisfied, that if upon arrival at Quebec, the property would have been liable to confiscation, that circumstance, so far from opening a ground of condemnation, would rather incline the other way. The argument on this head is therefore wholly inadmissible.

It has been next contended, that the captors are entitled to salvage, if the property is deemed American, because it has been saved from the grasp of the enemy; and *The War Onskan*, 2 C. Rob. Adm. 299, has been cited, to prove that salvage is due in all cases, where a benefit is conferred. I rather think that the position is laid down too broadly, for upon that footing a person giving information of the war might be entitled to salvage; yet no such claim has ever been admitted; and though rescue from the attack of an enemy, by approaching with a superior force, would be a clear case of salvage; yet it has been denied. In order to entitle to salvage, as upon a recapture or rescue, the property must have been in the possession, either actual or constructive, of the enemy. *The Edward and Mary*, 3 C. Rob. Adm. 305; *The Franklin*, 4 C. Rob. Adm. 147. There is no case where military salvage has been allowed, merely from stopping a ship going into an enemy's port: and the case of *The Packet De Bilboa*, 2 C. Rob. Adm. 133, 138, and *The Franklin*, 4 C. Rob. Adm. 147, are clearly the other way. I shall adhere to those decisions, because they are founded in fair and equitable principles.

It has been further contended, that at all events the captors are entitled to freight and expenses. The general rule undoubtedly is, that the captors are not entitled to freight, unless the goods are carried to their original destination, within the intent of the contracting parties. But it is argued that this is an intermediate case, and within the equity of the decision in *The Diana*, 5 C. Rob. Adm. 67. In that case, the goods were destined to Amsterdam, with an intention that they should, in specie or in proceeds, ultimately be remitted to England; and the court held, that as the goods were brought to London, to the port to which the claimant would have sent them directly, if he had not been prevented by the policy of the Dutch government, which refused the exportation of the produce of its colonies to any but the mother country, the freight was due. It has been argued on the other side, that the case is inapplicable, because New York

would have been the port of destination, if the parties could have lawfully pursued their voyage thither; and that Boston being a port of another state, cannot be within the reason of the case, any more than any other foreign port. I readily admit that the cases do not run upon all fours, but the principle strikes me as fully applicable. The parties would have brought the property directly into the United States, if they could. They contemplated the remittance of the proceeds to the United States. I say to the United States, because it will hardly be contended that if the proceeds had been remitted to Boston for the use of the claimants, it would not have been as much within their intention, as a remittance to New York. In a commercial view, these cities must be considered from their proximity almost as one. Nor can I consider Boston as a foreign port in any view connected with this question. It is as much a port of the same country, as a port in Scotland is of Great Britain. And though Sir William Scott appears in *The Diana* to rely somewhat upon the circumstance, that London was the port to which the claimants would have pointed as the destination; yet in *The Vrouw Henrietta*, 5 C. Rob. Adm. 75, note, be held, that where the goods were unloaded at Plymouth, and the claimant resided at London, the freight was payable, and he overruled the distinction now contended for. For myself, I have no hesitation to declare, that independent of all authority, where the proceeds of the goods were ultimately intended for this country, and they had been saved from the grasp of the enemy by the capture, I should allow a full and complete freight. It is in vain to shut our eyes against the real benefit conferred on the claimants.

As to expenses, independent of all other circumstances, as this was a case of further proof, they ought to be allowed to the captors. The questions, too, which have been argued, were very properly brought before the court, and I am glad that the sum in controversy will enable the parties, if dissatisfied with my judgment, to apply to the highest tribunal. In allowing the expenses I have the authority of Sir W. Scott, if the allowance require any authority, in the case of *The Packet De Bilboa*. And I take a pleasure in declaring, that however lightly the English courts may affect to treat our decisions, I shall not hesitate upon this or any other occasion to acknowledge my obligations to the learning and sagacity of that eloquent and able judge. I affirm the decree of the district court, and order the freight, at the price in the bill of lading, and all the expenses of the captors, of both courts, to be a charge on the goods.

Restored.

ANN, The HARRIET.

[See *The Harriet Ann*, Case No. 6,101.]

Case No. 415.

The ANNIE.

[Blatchf. Prize Cas. 209.]¹

District Court, S. D. New York. Sept. 20, 1862.

PRIZE—ATTEMPTED VIOLATION OF BLOCKADE—
PROCEEDINGS SUSPENDED.

Condemnation withheld, and proceedings suspended for sixty days, to allow the libellants to produce testimony in support of the libel, there being no testimony from witnesses present at the capture.

In admiralty.

BETTS, District Judge. The facts appearing upon the pleadings and proofs show that this vessel and cargo were captured April 29, 1862, off Mobile, by the United States war steamer *Kanawha*. The cargo was sent into this port as prize, on board the steamer *Baltic*, where it was libelled for condemnation July 17 thereafter, and the process of attachment thereon was filed August 5, 1862. The sloop was left at Ship Island, and it does not appear that she has been proceeded against further where she was arrested, or that she has since been brought within the territorial jurisdiction of the court.

Pursuant to the act of congress of March 25, 1862, the prize commissioners examined the above cargo in this port, and on the 12th of July reported to the court that it "was perishing, or perishable, or deteriorating in value," and recommended its sale. The court, thereupon, on the same day, on motion of the United States district attorney, made an interlocutory order, directing a sale of the cargo to be made by the marshal, under execution, and the proceeds to be deposited in court.

The alleged cargo of the vessel was thus duly arrested in this suit, and on the return day of the process, no party intervening, the United States attorney moved for the default of the cargo, and that the proofs in preparatorio in court be opened, and that the court proceed to render judgment of condemnation against the property arrested. Under these circumstances, the pleadings and proofs in the case are submitted to the consideration of the court.

There is in the case, as presented to the court, the absence of all proof showing a legal act of capture of the vessel. Such legal arrest cannot be implied from the mere fact of possession or from default in claiming the property on its prosecution before the court in this district. Preliminary to all right of prosecution there must be proof of the actual arrest of the res under color or claim of right; and this must be evidence given by witnesses to the act. *Pratt's Prize Pr.* 45, 46; 1 *Wheat.* [14 U. S.] *Append.* 496.

The case of *The Actor*, [Case No. 36,] decided in this court in July term last, involves the principle presented in this case. Reasonable excuse was presented for the non-pro-

¹[Reported by Samuel Blatchford, Esq.]

duction of witnesses present at the capture, and the court ordered a respite of further proceedings in the cause for a year and a day, to enable the libellants to furnish the required evidence.

The present transaction occurred off Mobile, in April last, and all the evidence before the court indicates that the captured crew were at Ship island when the cargo was transmitted to this district. The active continuance of hostilities at that remote point has probably diverted the attention of the libellants from the posture of this case, particularly as no one has intervened to claim the cargo or vessel.

It is, therefore, ordered by the court, that proceedings in the cause be suspended for sixty days from this day, and that the district attorney take measures to produce testimony in this suit in support of the libel against the vessel, or show cause why it be not dismissed for want of prosecution.

[NOTE. At a subsequent hearing this vessel and cargo were duly condemned. The Annie, Case No. 418.]

Case No. 416.

The ANNIE.

[Blatchf. Prize Cas. 222.]¹

District Court, S. D. New York. Oct. 3, 1862.

PRIZE—VIOLATION OF BLOCKADE.

On further proof, vessel and cargo condemned for a violation of the blockade.

In admiralty.

BETTS, District Judge. Further proofs are this day submitted to the court by the district attorney in the above cause, pursuant to the order made September 20, 1862. [See the Annie, Case No. 417.] The papers found on board of the vessel consist of a provisional register, executed by the British consul general in Cuba, to Alexander Borrowman, of Edinburgh, Scotland, presently residing at Havana, April 1, 1862, certifying the vessel to be of foreign build; a declaration, signed and sworn to the same day, before the said consul general, by the said Borrowman, that the vessel was built at Mobile, Alabama, her foreign name being Southern Republic, and that she is wholly owned by Borrowman; shipping articles with a crew, dated at Havana, April 1, and 5, for a voyage from that port to Matamoras and back to Havana; and numerous letters addressed from Mobile to Havana, some accompanying the present adventure, and others of general correspondence. All of these letters are dated immediately previous to the capture of the vessel, and all of them which relate to her or her business speak of the blockade, and of her being employed to run it out of that port, and of such being the usual course of navigation between Cuba and Mobile.

A witness present at the capture of the ves-

sel and cargo testifies, on his examination in preparatorio, that the sloop and her cargo were seized on the 29th of April last, coming out of the port of Mobile, in a dark night; that she was bound to Havana, and was endeavoring to escape the blockading forces investing the port; that the cargo was owned by residents of Mobile; and that the captain of the vessel well knew of the blockade, and had previously run it in the same vessel. Letters and papers transmitted from the shippers of the cargo to the consignees speak unreservedly the same language, and show a full knowledge of the illicit employment of this vessel, and the active violation at that port and at contiguous places of the existing blockade as a regular pursuit.

This testimony having been supplied in the cause within the period limited in the former order, and being in no way refuted or discredited, a decree of condemnation and forfeiture of the vessel and cargo, returned by the marshal as attached in this suit, must be entered against them.

Case No. 417.

The ANNIE.

[Blatchf. Prize Cas. 335.]¹

District Court, S. D. New York. March 26, 1863.

PRIZE—ATTEMPTED VIOLATION OF BLOCKADE.

Vessel and cargo condemned for an attempt to violate the blockade.

In admiralty.

BETTS, District Judge. The United States steamer State of Georgia seized this vessel and cargo February 24, 1863, at sea, near Little River inlet, off the coast of North Carolina. They were sent to this port for adjudication. A libel was filed, and a warrant of attachment and a monition thereon were issued and served on the same day. A regular default was moved in court, March 24, on the return of the above processes, for want of due appearance thereto.

The papers found on board of the vessel on her arrest were a certificate of British registry, issued at Nassau, N. P. December 30, 1862, to John Christopher Rehming, of the same place, as owner of the vessel, she being of foreign build, to wit, of Massachusetts, United States of America; an assignment of ownership indorsed upon the registry, January 25, 1863, by Joseph Roberts, of the same place, with a registry of Samuel Hawes as master, of the same date; a crew-list executed on the 20th of January by the said Hawes, as master and others named, for a voyage from Nassau to Philadelphia, and back to Nassau; and a clearance, on the same day, to the same master, from Nassau to Philadelphia, with a cargo of 2,200 bushels of salt and a package of tea. No other papers were found on board.

¹[Reported by Samuel Blatchford, Esq.]

¹[Reported by Samuel Blatchford, Esq.]

except a private letter of a family character, apparently addressed from Kemptville, January 27, 1863, to the care of Messrs. Sawyer & Menendez, Nassau, with the following paragraph in it: "I hope you will succeed in running the blockade." On filing in court an affidavit in the above suit, made by Isaac Halleck, an acting master's mate, attached to the United States vessel-of-war, State of Georgia, that he was present at the capture of the above prize, that persons on board of her, when she was being pursued by the State of Georgia, abandoned her before her arrest, and that no person was found on her when she was apprehended, and on motion of the libellants, the court ordered that the examination of the said master's mate, in preparatorio, should be taken by one of the prize commissioners. The testimony of Halleck having been thus taken and duly returned to the court, it is made satisfactorily to appear, that on the 24th of February last the above named schooner Annie and cargo were captured as prize by the United States steamer State of Georgia, the witness being present; that when first discovered from the State of Georgia, the schooner was steering about south-west, under way, with all sails set; that her course was altered to the west, on the appearance of the State of Georgia in sight; that her crew all abandoned her at anchor in a boat, into which they seemed to transfer trunks or luggage; that the Annie and her cargo were seized off Little River inlet, on the coast of North Carolina, about a quarter of a mile from the land; that that coast was under actual blockade; that none of the crew of the prize were afterwards apprehended, so as to be produced in court as witnesses; and that the lading was chiefly salt.

Most plainly the schooner was wide of the ordinary course from Nassau to Philadelphia, and was caught in the act of entering a blockaded port. There is not a shadow of proof that she was on an innocent voyage. On the contrary, the case is replete with violent presumptions that she was seeking an illicit trade with an enemy port, in evasion of a well known and efficient blockade of it by the United States naval forces. These presumptions of fact are also of judicial cognizance. The Apollon, 9 Wheat. [22 U. S.] 374; Peyroux v. Howard, 7 Pet. [32 U. S.] 342.

The vessel and cargo are, accordingly, condemned to forfeiture.

Case No. 418.

The ANNIE.

[Blatchf. Prize Cas. 612.]¹

District Court, S. D. New York. Nov. 22, 1864.

PRIZE—VIOLATION OF BLOCKADE.

Vessel and cargo condemned for a violation of the blockade.

¹[Reported by Samuel Blatchford, Esq.]

In admiralty.

BETTS, District Judge. The steamer Annie was sent into this port for adjudication, as prize of war, on the 9th of November instant, in charge of a prize-master. She was captured at sea, October 31, 1864, off the coast of North Carolina, by the United States vessels-of-war Wilderness and Nippon, and was libelled, as lawful prize, within this district, and attached on due process of law issued upon the libel filed against her, and made returnable before the court on the 22d day of November, 1864. On that day the warrant of attachment was returned by the marshal, in open court, as served upon the vessel and cargo, and, on motion of the United States attorney, proclamation was duly made in court of her attachment and seizure thereon, and, no one appearing thereupon, on like motion, a judgment, by default of all parties interested in the vessel and cargo, was declared and rendered, and a final decree was pronounced against the same, in due course of procedure, according to the rules and practice of the court. Thereupon, the preparatory proofs taken in the cause, and other documentary evidence found upon the prize vessel, or pertinent to the suit, were produced before the court by the United States attorney, and submitted to its consideration, with a prayer for judgment of condemnation and forfeiture against the said vessel and cargo as lawful prize of war.

The testimony so produced and submitted to the court was direct and satisfactory to the effect following: Albert Connop, examined in preparatorio before the prize commissioners, in this port, on the 14th day of November instant, testified that he was master in command of the ship, at the time of her seizure, on the 31st of October last; that she was captured off Cape Fear river, North Carolina, for having run the blockade of a Confederate port; that she attempted to escape the capturing vessels, the Wilderness and the Nippon, which fired at her twenty-five or thirty guns; that she was English built; that the voyage on which she was captured commenced at Halifax, and was to have terminated at Nassau; that the outward cargo consisted chiefly of provisions, and was discharged at Wilmington, North Carolina; that she had on board, when captured, 500 bales of cotton, 30 tons of tobacco, and 8 barrels of turpentine, all having been taken on board at Wilmington, and the cotton and tobacco having been shipped by a brother of the owner of the vessel to him at Nassau; that the previous voyage was from Bermuda to Wilmington, and thence to Halifax; that on that voyage she carried into Wilmington a general cargo, the particulars of which he could not state, and brought out cotton and tobacco, which she delivered at Halifax; that she was owned by Alexander Collie, of London; that he does not know who were the owners of the cotton and

tobacco; that he himself owned the turpentine; that bills of lading covering all of the cargo, except \$50,000 in specie, were thrown overboard during the chase of the prize; that he knew that Wilmington was under blockade when he entered and left that port; that the vessel had previously violated the blockade of Wilmington while under the command of the witness and her previous masters; that the specie was thrown overboard during the chase of the vessel, and that the vessel was built for Collie.

The first mate, Trehane Fickell, and the chief engineer, William Helme, of the prize vessel, were also examined in preparatorio, on the same day with the master, Connop. They substantially concur with him in the allegations that the vessel went into Wilmington, and came out of that port, in violation of the blockade on the voyage in question, with full knowledge of its existence and enforcement, and with intent to evade it. It would be a useless surplusage of details to recapitulate the proofs at large.

The only paper evidence of the ownership of the prize ship, secured and brought into court from the capture, is an English certificate of registry, issued from the custom house at London, January 14, 1864, to Francis Muir. The testimony in preparatorio proves that the vessel was under British equipment as to officers, men, and flag, and was sailed in the interest of British subjects.

The result is unequivocal, on the proofs, that the vessel was studiously and openly employed, at the time of her capture, in violating the blockade imposed by the United States government on enemy ports in the rebel states, and was captured in the act of evading the blockade of the port of Wilmington, North Carolina. It is accordingly adjudged that the vessel and cargo be sentenced to condemnation and forfeiture for such offence, and that a decree to that effect be entered.

ANNIE DEAS, The.

[See The Anna, Cases Nos. 400 and 402.]

ANNIE DEAS, The.

[See The Tubal Cain, Cases Nos. 14,211 and 14,212.]

Case No. 419.

The ANNIE DEAS.

[Blatchf. Prize Cas. 305.]¹

District Court, S. D. New York. Dec. 31, 1862.

PRIZE—VIOLATION OF BLOCKADE.

Vessel and cargo condemned for violation of the blockade.

In admiralty.

BETTS, District Judge. This vessel and cargo were captured by the United States gunboat Seneca, off Charleston bar, November 20, 1862, as prize of war. The vessel, being unseaworthy, was appraised by the

¹[Reported by Samuel Blatchford, Esq.]

board of naval survey, and left at Port Royal, South Carolina, in charge of Admiral DuPont. The cargo was transported to this port for adjudication, and was here labelled, December 12, 1862, and, on the return of the attachment and monition in open court, a default and a decree thereon were, on motion of the United States attorney, duly entered in court against the cargo and the valuation of the vessel on such appraisal.

The master, the mate, and one seaman, captured with the vessel, were examined by the prize commissioners in preparatorio. No papers of the vessel were produced in court with the proofs. The master testifies that he is a native of England, but resides with his family, in Charleston, South Carolina. He was present at the capture of the vessel and cargo, on the night of November 20, 1862, about five miles from Charleston, while the vessel was coming out of Charleston. There were then in sight a large number of the United States blockading squadron. The witness does not know the names of the owners of the vessel, but was told that they reside in Nassau, New Providence.

He was appointed her master, November 2 or 3, 1862, by Mr. Johnson, her agent, at Charleston. The crew were all British subjects, and were all, except the mate, who belonged to the vessel, previously hired at Charleston. The voyage was to have ended at Nassau. The cargo consisted of 125 barrels of spirits of turpentine and 68 of resin. The master says that he has no papers relating to the vessel; that all of them were thrown overboard just previous to her capture; and that the bills of lading were thrown overboard also. He knew of the war, and that Charleston was under blockade at the time. The mate says that he is a native of Maryland, and a resident of North Carolina, and that when the vessel was captured she was endeavoring to run the blockade of Charleston.

This resume of the evidence placed beyond question the wilful and studied culpability of the voyage in question. The vessel and cargo were deliberately employed to violate the blockade of Charleston, and illicitly run a cargo of enemy products out of that port. Let there be a decree of condemnation and forfeiture of the cargo, and for the appropriation of the appraised value of the vessel.

Case No. 420.

The ANNIE H. SMITH.

[10 Ben. 110.]¹

District Court, S. D. New York. Oct., 1878.

DISAGREEMENT AMONG SHIP OWNERS — SALE OF SHIP ON APPLICATION OF HALF OWNERS—CHARACTER EVIDENCE—MORTGAGE.

1. The admiralty has jurisdiction to order the sale of a vessel on the application of the own-

¹[Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

ers of one-half of her, in case of a disagreement between them and the owners of the other half. But such disagreement must be such as prevents the present employment of the ship, and the owners asking for a sale must either propose a different employment of the ship, or, if they merely object to the voyage or the master proposed by the other moiety, their objection must be based on reasonable ground.

[Cited in *The B. F. Woolsey*, 7 Fed. 116.]

[See note at end of case.]

2. The owners of half of a ship applied to the court for a decree of sale. It appeared that, at the time of filing the libel, the ship was loading in New York under a charter for San Francisco. Some of the owners of the vessel resided in New York and some in Maine, and, when she had been in New York before, some of her business had been done by S. & Co., who, together with the father of S., owned and controlled one-half of the ship. S. had accepted this charter while the vessel was yet at sea, after a conference with his father who was in Maine, and made some effort to consult with the Maine owners. After the charter had been accepted L., who represented the owners of the other half of the ship, came to New York and, having inquired of S. if she was chartered and received an evasive answer, then informed S. that, as representing the owners of the other half, he did not wish the ship chartered. S. then told him the ship was chartered. L. did not then repudiate the charter or take any steps to prevent the signing of the charter party by the master, which was done after the arrival of the ship in New York. There was dissatisfaction on the part of L. and those owners who acted with him as to the agency of S. & Co. or the father of S., and as to some previous transactions in reference to the ship; and after the vessel was partly loaded, L. and the other owners for whom he acted filed a libel against the ship and the owners of the other half to obtain a sale: *Held*, that, under the circumstances of the case, the libellants had not shown sufficient grounds to call on the court to exercise the discretionary power of sale.

3. That evidence tending to show that as to part of the vessel, to which L. held the legal title, the master of the vessel held an equitable interest by reason of which he had intervened in the cause and answered, opposing the sale, was admissible in order to show to the court all the circumstances in the face of which it was called to exercise its discretion.

In admiralty.

R. D. Benedict, for libellants.

W. W. Goodrich and W. R. Beebe, for respondents.

CHOATE, District Judge. This is a suit of ligation and partition brought by the owners of a moiety of the ship Annie H. Smith, against the ship and the owners of the other moiety. The libel prays a sale of the ship under the decree of the court and the distribution of the proceeds among the owners. That the courts of admiralty have jurisdiction of such a suit, seems to be settled by authority, so far as this country is concerned. There are three reported cases in which the court has entertained such a suit, and granted the relief here prayed for. They are the case of *The Hope* in the district court of South Carolina in 1793, [Case No. 12,927,] the case of *The Seneca* in the circuit court for the eastern district of Penn-

sylvania in 1829, [Case No. 12,670,] and the case of *The Vincennes* in the district court of Maine, in 1851, [Case No. 16,944.] These decisions have received the emphatic approval of eminent text writers as being in accordance with the principles of the maritime law. Story, Partn. § 438; Ben. Adm. (2d Ed.) § 274; 2 Pars. Shipp. & Adm. 343; Dun. Adm. Fr. p. 67; 2 Kent, Comm. 370.

In the case of *The Seneca*, [supra,] Judge Hopkinson, of the district court, denied the relief on the ground that the court had not jurisdiction, and the English court of admiralty has also declined to exercise this power, but the great weight of authority is in favor of the jurisdiction; and in cases where the relief is shown to be necessary, the sale by decree of the court seems to be the only practicable means of restoring the ship to its proper use as a vehicle of commerce, and therefore highly beneficial to those public interests which are peculiarly the care of the admiralty. The fact that the power is not exercised in England may be accounted for, perhaps, by the well known restrictions to which the jurisdiction of the English admiralty courts was subjected in early times through the jealousy and the greater power of the other courts. This power of sale, so far as the cases have gone, has only been exercised where the owners are equally divided in respect to the employment of the ship or appointment of the master. Where they are unequally divided, the rights of the majority and minority owners respectively are for the most part well settled. The majority in interest have the right to employ the ship in navigation, notwithstanding the objection and protest of the minority and their refusal to join in the adventure, but in such a case the minority may require security for the safe return of the vessel. If the majority in interest unreasonably refuse to employ the ship, it has been suggested that a sale may be enforced. *Willings v. Blight*, [Case No. 17,765.]

Of the cases where a sale has been decreed upon a disagreement between equal moiety part owners, the case of *The Seneca* [supra] is the only one reported with sufficient fullness to show the particular circumstances under which the power was exercised, and the views of the court as to the reasons and grounds for the exercise of the power to decree a sale as between the equal part owners, which reasons and grounds must, of course, limit and control the action of the court, in ordering or refusing a sale in each case presented to it. In the case of *The Seneca*, [supra,] the respondent was owner of one-half of the vessel, was in possession of her, and had made several voyages in her as master, to the dissatisfaction of the owners of the other half, whose interest the libellants had purchased; and he had projected another voyage, and insisted on fitting her out at great expense, and upon going in her as master. The libellants on the other hand

had refused to incur any expense for the outfit of the vessel for a voyage to be conducted by the respondent. They had appointed or attempted to appoint another master, and were ready and willing to employ the ship. It is obvious that the disagreement between the part owners in that case was such in its nature and effect, under the circumstances in which the vessel was placed, that it operated effectually to prevent the present use or employment of the vessel at all in navigation. The parties being equal in their right to control the employment of the ship and the appointment of the master, the effect of the disagreement was, as Mr. Justice Washington distinctly points out [Case No. 12,670] that "the vessel must remain unemployed, since neither owner can otherwise than tortiously send her to sea against the will of the other."

I think, also, that it is clear from the report of the case, that it was the opinion of that learned judge, that the power of the court to interfere and order a sale depends upon this as an essential and controlling element: that in the situation of the parties and the ship, as existing when the suit is brought, the ship cannot rightfully be sent to sea by either party. And it also appears from the authorities upon which he relies as supporting his opinion, that such is the ground or one of the chief grounds upon which the power to sell rests, as the same has been declared or recognized in the foreign maritime codes to which he refers. Thus he cites with approval, the following statement of the provisions of the Roman Marine Code: "(1.) That the opinion and decision of the majority in interest of the owners concerning the employment of the vessel is to govern, and, therefore, they may on any probable design, freight out or send the ship to sea, though against the will of the minority. (2.) But if the majority refuse to employ the vessel, though they cannot be compelled to it by the minority, neither can their refusal keep the vessel idle, to the injury of the minority, or to the public detriment; and since, in such a case, the minority can neither employ her themselves, nor force the majority to do so, the vessel may be valued and sold. (3.) If the interest of the owners be equal, and they differ about the employment of the vessel, one-half being in favor of employing her, and the other opposed to it, in that case the willing owner may send her out." He also cites the 6th article of the Marine Code of France, said to have been published as early as 1681, as follows: "No person can constrain his partner to proceed to the public sale of a ship held in common, except the opinions of the owners be equally divided about the undertaking of some voyage." And he also cites and accepts as just and reasonable, Vallin's commentary on this rule, as follows: "The case excepted in this article is where the opinions of the parties are equally divided on the undertaking of some

voyage, upon which we may remark, that the question is not of two equal opinions, of which one is to leave the vessel without any kind of voyage, and the other to undertake such or such a voyage, there being no doubt in that case, that the opinion favorable to a voyage ought to prevail, saving the right to discuss the projected voyage; but solely of the case of two opinions equally divided upon the particular enterprise projected by one moiety of the persons interested, and rejected by the other moiety; whether that moiety proposes, on its part, another voyage, or confines itself to a disapproval of it, provided, nevertheless, that it gives plausible reasons for its conduct; otherwise this would have the air of an absolute refusal to permit the vessel to be navigated, which justice could not tolerate, being contrary to the object of the vessel, to the original intention of the parties, and the interests of commerce." The particular point of disagreement in the case of *The Seneca*, [supra,] was, as to who should go as master; and Mr. Justice Washington held that although not expressly mentioned in these foreign codes, the case was within their reason, because a disagreement as to the master operated as effectually as a disagreement as to the voyage to be undertaken, to prevent the ship from being sent to sea; and he held further, that if the moiety objecting to a master, honestly entertained an objection to him, on the ground of their want of confidence in his skill or integrity, they did assign a plausible reason for their conduct. From this case, therefore, and the authorities on which it rests, may be deduced these rules, as governing and limiting the exercise of this power of sale on the application of a moiety of the owners: First, that the disagreement must be such as prevents the present employment of the ship in navigation; and, secondly, that the objecting moiety asking for a sale, must either propose a different employment of the ship, or, if they merely object to the voyage or the master proposed by the other moiety, their objection must be based on reasonable grounds. And this result is entirely in accordance with the principles applied by courts of admiralty in dealing with the rights, duties and powers of part owners of ships, whether equally or unequally divided in opinion, and which are well expressed by Judge Peters, in the case of *Willings v. Blight*, [Case No. 17,765:] "It is a principle discernible in all maritime codes, that every encouragement and assistance should be afforded to those who are ready to give to their ships constant employment, and this not only for the particular profit of owners, but for the general interests and prosperity of commerce. If agriculture be, according to the happy allusion of the great Sully, 'one of the breasts from which the state must draw its nourishment,' commerce is certainly the other. The earth, the parent of both, is the immediate foundation and support of the one, and ships are the

moving power, instruments and facilities of the other. Both must be rendered productive by industry and ingenuity. The interests and comforts of the community will droop, and finally perish, if either be permitted to remain entirely at rest. The former will less ruinously bear neglect and throw up spontaneous products; but the latter requires unremitting employment, attention and enterprise, to insure utility and profit. A privation of freight, the fruit and crop of shipping, seems therefore to be an appropriate mulct on indolent, perverse, or negligent part-owners. The drones ought not to share in the stores acquired and accumulated by the labor, activity, foresight and management of the bees. Although the hive may be common property, it is destructively useless to all if not furnished with means of profit and support by industry and exertion, which should be jointly applied by all before they participate in beneficial results. Nor should the idle and incompetent be permitted to hold it vacant and useless, to the injury and ruin of the industrious and active."

Turning now to the facts of this particular case, it will be seen that the libellants' case does not come in either particular within the rule thus established by the case of *The Seneca*, [Case No. 12,670.] the disagreement between these part owners does not operate to prevent the present employment of the ship, nor do the libellants, the party objecting to the employment of the ship proposed by the other moiety, either propose any other employment, or allege or show any plausible grounds for objection to that proposed by the other party. The libel alleges, as to the points of difference between the parties, as follows: "That the owners of said ship are unable to agree in reference to the business and employment of said vessel. That, while the vessel was at sea on a voyage to New York, the libellants notified the respondents that said vessel must not be chartered, and the said respondents agreed that some arrangement should be made between the owners of the vessel with reference to the employment and control of her after her arrival in the port of New York. That thereafter the said vessel arrived in this port, where she still remains, but that the respondents refuse to make any reasonable arrangements with the libellants as to the management of her. * * * That the master of the said vessel is acting with the said respondents, and that the respondents, with said master, intend to send the said vessel from this port on a voyage to the port of San Francisco, from which voyage these libellants have expressly dissented."

It will be seen that the averments of the libel are very indefinite as to the nature of the libellants' dissatisfaction. They express no want of confidence in the integrity and skill of the master, nor do they ask for his removal. They allege the prohibition by

themselves of the chartering of the vessel, and the intention of respondents to send her to sea upon a voyage from which they have dissented; but they do not allege the grounds of their objection to the voyage proposed, nor allege that they intend to use her in any different employment. The libel, therefore, might be open to objection, under the rules above stated, as not making out a case; but the cause has been tried and argued, without reference to the sufficiency of the pleadings, and will be considered and determined, upon the evidence independently of any want of averment in the libel.

A brief statement of the history of the transactions between the parties in reference to this ship is necessary to the understanding of the points raised.

On the 10th December, 1875, Nickerson & Rideout, ship builders of Calais, Maine, entered into a written agreement with Capt. Bartlett, a shipmaster, to build a ship of certain dimensions, description and materials. The agreement was in form between Nickerson & Rideout of the first part, and Bartlett and the several "undersigned" of the second part. In point of fact, no subscribers were found to sign and become parties to it till long afterwards. Nickerson & Rideout agreed that the hull, spars and iron work should be finished and delivered at Calais on or before November 5th, 1876, free of all liens. The parties of the second part agreed to take the proportional parts set opposite their names, and to pay for the same at the rate of \$33 per ton in certain installments, the title to vest in the subscribers in proportion to the several interests and amounts paid. It also provided that Nickerson & Rideout should pay no commission for superintending the construction, and Nickerson & Rideout joined with Bartlett in a guarantee that the subscribers should not have to take any larger proportion of the vessel than that for which they signed. Capt. Bartlett signed the agreement without adding to his signature any amount. In fact this agreement was devised by Bartlett and the builders as a scheme for getting a ship built for Bartlett to command, and with the expectation that they would find other parties to join with them to take shares and thus furnish the means for its construction. The plan was for Capt. Bartlett to superintend the building of the ship without compensation, except such as should result to him from the success of the adventure in his employment as master, and in such interest as he should be able to take in the ship. In June, 1876, Capt. Bartlett interested in the enterprise F. H. Smith & Co., of New York, shipping agents and commission merchants, Wm. H. Smith, the father of F. H. Smith, a New York merchant and ship owner, and Chas. N. Lord, of Bangor, Maine, a banker. They were all personal acquaintances of Bartlett's and had all formerly lived at Bangor. The first to sign the contract was F. H. Smith & Co., who signed for 1-16. Then Lord

signed for $\frac{1}{8}$, and Morse & Co., of Bangor, whom he brought in, for $\frac{1}{8}$. Then one Loughton for 1-32, and W. H. Smith for 3-16. These were all the parties that signed the contract, taking in all 3-64 of the ship. I think the evidence is sufficient to show that it was held out by Capt. Bartlett, as an inducement to F. H. Smith & Co., and to W. H. Smith, to sign, that the firm of F. H. Smith & Co. would be employed to attend to the business of the ship when she should be in New York, and that this was made known to Lord, Morse & Co. and Loughton when they signed the contract. Such employment was in the line of business of F. H. Smith & Co. These parties signed about the same time, about the 19th of June, 1876. The interest of $\frac{1}{8}$ each, taken by Lord and Morse & Co., was subscribed for by them in pursuance of the terms of a written agreement between them and Capt. Bartlett, executed on the same day with their execution of the building contract. This agreement recites that Lord and Morse & Co. "at the special instance and request, and for the special benefit" of Bartlett, had signed the building contract to take one-quarter of the said ship. By it Lord and Morse & Co. agreed that "after the performance of the provisions of the agreement on Bartlett's part, they would convey to him" whatever of said interest in said ship shall remain unsold, "and would reassign" all collaterals named in the agreement not appropriated by the terms and spirit of the agreement. It was then agreed, on Bartlett's part, to keep the interest insured, and to repay any taxes paid thereon by Lord and Morse & Co., and that, whenever Lord and Morse & Co. should sell said quarter, or any less portion, they should deduct from the sum received the following commission: from sale of a quarter, \$1,500; one-eighth, \$800; one-sixteenth, \$400; that commissions and interests on all moneys paid out by Lord and Morse & Co. were to be allowed to them as follows: $1\frac{1}{2}$ per cent on the whole sum paid for the one-quarter, $1\frac{1}{2}$ per cent for advancing every six months, and 10 per cent per annum, payable semi-annually on all balance due, until paid, including in advances all sums paid for repairs and disbursements, and crediting earnings received. Bartlett agreed to pay one-half of all moneys paid out under the contract, with interest and commissions, within two years, and the balance within three years from the date of the contract. Bartlett then agreed to assign to Lord and Morse & Co., as security for his faithful performance of the agreement, all his interest in the estate of one Pollard, valued at \$3,400, and a policy of insurance on his life for \$3,000, which he agreed to keep in force. The agreement then provided that, if Bartlett neglected and refused to pay the interest semi-annually, except when he was at sea, and then within two months after his arrival at his next port of destination, then Lord and Morse & Co. should be enti-

pled to hold the sum of \$4,000 of said collaterals as a forfeiture for the non-payment of interest. Upon the execution of these agreements, Bartlett transferred the collaterals mentioned to Lord and Morse & Co., and Lord and Morse & Co. made their first advances towards building the ship.

Some two months after these transactions Nickerson & Rideout failed. Meanwhile, some further interests had been taken in the vessel. W. H. Smith took a quarter, and there remained 9-64 not taken, on which, by an agreement between Nickerson & Rideout on the one side, and Lord and Morse & Co. and W. H. Smith on the other, these parties had advanced on the 9-64, leaving, however, in Nickerson & Rideout a right to redeem the interest on paying up the advances. The failure of Nickerson & Rideout made it necessary to make arrangements with other parties for completing the ship, and increased the cost of the ship to the subscribers. Proceedings were taken to enforce claims for liens by several parties who had furnished materials for the ship, among others by F. H. Smith & Co., who had an unpaid claim for hard pine, amounting to about \$10,000. W. H. Smith acted in the matter of this claim for a lien for F. H. Smith & Co., and the asserting of this claim caused some dissatisfaction on the part of Lord and Morse & Co. with W. H. Smith. And, after some verbal agreement between them, and some misunderstanding as to what that agreement was, Smith agreed, in writing, not to enforce this lien against their quarter interest. Nickerson & Rideout finally went into bankruptcy, and their right to redeem the 9-64 passed to their assignee. From the time of this difficulty about the hard pine, Lord and Morse & Co. began to entertain some hostile feelings towards the Smiths, and were determined, if they could, to prevent the Smiths, who already owned one-half the vessel, from acquiring any further interest. W. H. Smith was desirous of keeping the whole or a part of the title to the 9-64, on which he, with Lord and Morse & Co., had advanced, but which stood in the name of W. H. Smith for 3-64, Lord for 3-64, and Morse & Co. for 3-64, and he took an agreement from Nickerson & Rideout, assigning him their right to redeem this interest, but never acted on it, probably because their bankruptcy made it evident that he could not get a good title in that way. There was some conversation between him and Lord about the matter, and Lord pretended to him that he would rather have his money, but afterwards, jointly with Morse & Co. and other Bangor owners acting with him, Lord procured one Wilson to purchase the right to redeem from the assignee, and then Wilson paid off the advances of Smith, Lord and Morse & Co., and held the 9-64 for the benefit of Lord, Morse & Co. and the others who joined them in the proportions in which they advanced him the money to purchase and

redeem the interest. The result was that Lord and Morse & Co. prevented the Smiths from getting more than one-half of the ship, and they themselves got control of the other half, except one small interest in one Snow, which they purchased in July last to make their half complete. The proceedings of Lord and Morse to bring about this result as to the 9-64 were artful and cunning, and they outwitted Smith, but they are not chargeable in the matter, as alleged in the answer, with any legal fraud which taints their title. Their proceedings were secret, and it was not till shortly before the filing of this libel that W. H. Smith or F. H. Smith & Co. learned that this share or 9-64 was held in the interest of Lord and Morse & Co., although it was communicated confidentially by Lord to Capt. Bartlett.

The failure of Nickerson & Rideout led to a change in the agreement between Bartlett and Lord and Morse & Co. as to the one-quarter on which they were advancing for his benefit, and by subsequent agreements it was provided that additional sums which they should become liable to pay beyond the price stipulated in the original building contract should be first repaid to them before they should convey to him the quarter interest under the agreement of June 19, 1876.

These additional amounts have never been ascertained, and cannot be so till the lien suits still pending are brought to an end.

The ship was completed and sailed on her first voyage, under command of Captain Bartlett, on or about April, 1877, and she has continued under his command from that time to this, making several voyages. She has been very successful, netting in dividends to her owners \$10,000, besides paying for her copper, which cost \$5,000, all in the period of sixteen months. Her cost was about \$75,000. Her first voyage was from New York, and she arrived in New York again on the 17th of August last. During these voyages Capt. Bartlett has generally acted as the agent of the owners in making charters, disbursing the ship, and generally in attending to her business.

The first charter, however, was made in New York, after consulting all the other owners, by F. H. Smith & Co., who signed the charter as "Agents for the Owners," and they have received and distributed at least one remittance and have attended to disbursing some of the ship's bills in New York, and in February, 1878, rendered an account to the owners. There was some delay in making this distribution by F. H. Smith & Co., owing to some unsettled bills being out, and this delay in the receipt of his dividend was made the ground of some complaint against F. H. Smith & Co. by Mr. Lord, in his confidential correspondence with Captain Bartlett, and he requested Captain Bartlett in future to remit the share of the Bangor owners to him (Lord) direct, and not through F. H. Smith & Co., stating that there

would be no impropriety in his so doing, and that there had never been any agent of the ship appointed except himself, (Bartlett). Indeed, in his letters to Bartlett, Lord constantly recurred to this idea that there had been no agent appointed, and expressed himself dissatisfied with the existing state of things, and further expressed the hope that before long they might get an agent appointed.

By all this, taken in connection with what Lord knew of the understanding at the time of signing the building agreement, and with his conduct in New York with reference to the present charter hereinafter referred to and the power of attorney held by him as hereinafter stated, I understand that his meaning was that, notwithstanding that original understanding as to F. H. Smith & Co.'s doing the business at New York and the fact known to him that F. H. Smith & Co. had from the beginning acted as agent for the owners in New York, as occasion required, yet there was no permanent appointment of an agent and that nothing had been done to bind the owners to continue the business with F. H. Smith & Co. or to prevent their appointing another agent.

But this dissatisfaction, such as it was, was not communicated to the Smiths, although W. H. Smith knew that there was some hard feeling about the old hard-pine business.

In June or July, 1878, the ship was on her way homeward for New York, and it became necessary to make arrangements for a new voyage. On the 7th of July, the captain wrote to F. H. Smith & Co. from Dungeness recommending that she be chartered to arrive for San Francisco. On the 29th of July, F. H. Smith & Co., having obtained an offer from Sutton & Co. to take her for \$16,000 for a voyage to San Francisco, wrote a letter to W. H. Smith, who was then at Bangor, stating the terms of the offer and that it must be closed by August 1, and asking instructions. On the 31st of July, W. H. Smith went to see Morse, one of the Bangor owners, and showed him the letter and asked his advice.

There is some conflict of testimony between Morse and Smith, as to what took place at this meeting, but I think Mr. Smith's account the more probable of the two. Mr. Morse's comment on the offer was, that he thought there was not much money in it, but he would talk with Lord and see him again. Smith waited till late at night, and hearing nothing further from Morse, telegraphed to F. H. Smith & Co. to do what they thought best with the ship. Lord at that time was not in Bangor, and was not consulted. F. H. Smith & Co., on receipt of this telegram, on the next day, Aug. 1, signed the charter on behalf of the owners, and it was executed by Sutton & Co. Sutton & Co. requested them to keep it secret till the ship's arrival.

On the 7th of August, Lord came to New York. He brought with him a power of attorney, executed by all the libellants, authorizing him, so far as their interests were concerned, to remove the captain, and to appoint a new captain in his place, and "to change the agency, management, and control of said ship, as seems to him to be for the interests respectively, and also to settle up the accounts of the ship with F. H. Smith & Co., who have assumed to act as the agents of the said ship heretofore, and to audit their accounts;" also to sell and convey their interests, provided the whole of their interest was sold together, "it being our intention to stand together in the matter of the ownership of said vessel." This paper shows conclusively, that up to that time, F. H. Smith & Co. were assuming to be, and had been suffered by the other owners to act as agents of the ship in New York, and that Lord's declarations in his letters, about there being no agent appointed, mean only what is above indicated. His conversation with F. H. Smith & Co. indicates the same thing. After some general conversation, he asked F. H. Smith if the ship was chartered, a question which he would not have asked except of one, who had, or at least was known to him to be assuming to have some authority to act for the owners in the matter of a charter. Smith, having regard to the request of Sutton & Co., gave an evasive answer, but said she was as good as chartered. Lord went out, and soon after returned with a witness, and said to Smith that they, i. e., the Bangor owners, didn't want the ship chartered till she arrived. Then Smith told him she was chartered, and stated the terms of the charter. Lord said he was sorry. It is insisted, on the part of the libellants, that though the charter is binding on the ship, because afterwards signed by the master, yet that it is not personally binding on them, because F. H. Smith & Co. had no authority to act for them, and because, before the master signed it, they prohibited the making of the charter so far as they were concerned, or, as it is expressed in the libel, they "expressly dissented from it." There is really no essential conflict of testimony as to what passed in the interviews between Mr. Lord, acting for the libellants, and F. H. Smith & Co. on the 7th of August, and afterwards between Mr. Lord and the respondents, and Captain Bartlett, after the ship's arrival, down to the time of the commencement of this suit. And the evidence does not show, in my judgment, that the libellants expressly dissented from the charter in any other sense than this, that they found fault with F. H. Smith & Co. for having made it without consulting them. The evidence does not warrant the conclusion that, when they found it had been made under an assumed authority to act for them in common with all the other owners, they sought or desired to undo or

repudiate what was thus done in their behalf, or that they took the ground that they would not be parties in this new adventure. What they did and what they failed to do, what they said and what they failed to say, concur to this conclusion. In the first interview, Lord introduced the subject by asking Smith if she was chartered. Why did he ask that question, unless he thought F. H. Smith & Co. might have chartered her? If his pretence is true that he knew nothing about any understanding that F. H. Smith & Co. should be the agents, and that they had no existing authority as agents, he would naturally have asked him, "What shall we do with the ship?" but would not have asked him, "Is she chartered?" Again, when at the second interview he said, "Fred, we don't want the ship chartered," the language was only appropriate as addressed to one who had at least some color of authority to act for all the owners. And when, in answer, Smith said, "She is chartered," Lord's reply, which he himself testifies to, "I am sorry," was only appropriate as addressed to one who had some authority to do what was done. It expressed regret and dissatisfaction with what had been done, but recognized it as done. On his theory of total want of authority in Smith, his natural reply would have been, "Why, you can't charter the ship." Again, on the theory of the libellants that the charter became binding on the ship only because of its being signed by the master, the natural thing for the libellants to do, if they found that Smith had without authority signed a charter which was not yet binding, either on the ship or owners, was to have taken measures to prevent its becoming binding, either by instructing Smith that it should not be presented to the master for approval, or by leaving notice to be given to the master on his arrival prohibiting him from signing it. In fact, Lord did nothing of the kind. He knew that the master had not signed it, and that he was expected to arrive in a few days. Still further, if Lord either took the ground that the charter was not binding on the ship, or on the owners whom he represented, it is hardly conceivable that he should not have made some attempt to undo what had been done, at least to the extent of notifying the charterer, whose name was communicated to him, that the charter was void or not binding on his co-part-owners in order to avoid future complications and claims.

He did nothing of the kind, nor did he request Smith to do anything of the kind. The whole evidence tends to show that he acquiesced in what had been done as done, reluctantly, it is true, and with expressions of regret, but still that he acquiesced. It is true that he told Smith that the owners whom he represented had not been consulted, but this is not inconsistent with the intention so plainly appearing upon the other parts of the conversation. It was rather in the

way of blame or fault-finding, that in so important a matter as the chartering of the ship he had not consulted all the owners, than as a distinct assertion that, for want of such consultation, what had been done was of no validity, or that he intended or felt that he had the right to repudiate it. They got into a discussion as to the respective interests which they severally represented. Smith was under the impression that he and his father and his sister held title to a little more than half the ship. Lord told him that he represented half. I see no reason to disbelieve Mr. Smith's statement that up to that time he did not know that the title to the 3-64 part of the 9-64 on which his father had advanced to Nickerson & Rideout, had been transferred by his father, and his impression that the Smiths controlled a little more than half was evidently based on the state of the title previous to that transfer. I see no reason to believe from the testimony that the action of F. H. Smith & Co. and W. H. Smith, in the making of this charter, was actuated by any other motive than that of doing what they thought was for the best interests of all concerned; nor do I see any evidence of a design in what they did unfairly to forestall the action of their co-owners, or to commit them to a charter that they did not approve. F. H. Smith & Co. acted under what they thought was the express authority of the majority interest. The occasion was pressing. Their letter to W. H. Smith at Bangor where the other owners principally were, did not request him to see the owners, but it may well have been within their expectation that he would do so, as in fact he did; and although it can be easily pointed out, that they might have done more to obtain the opinions of all, as by writing a letter to each owner, yet I can not find that what they did was not supposed by them to be a reasonable, fair, and proper attempt under the circumstances, to communicate with the other owners before closing with the offer for a charter which they believed to be a beneficial charter, as the market then was.

Now, I think in the circumstances in which Lord found that his co-part-owners were placed, when he learned that a charter had been made on the 7th of August, especially in view of the authority which, as appears conclusively by the power of attorney held by Lord, all the owners up to that time had permitted or suffered F. H. Smith & Co. to exercise—an imperfect and temporary authority, it may be, but one never up to that time revoked; I say I think that he was called upon as the representative of his co-part-owners to declare himself explicitly and in terms that could not be misunderstood as to whether or not he held the charter binding, and as to whether or not his co-part-owners would join in this new adventure projected on their behalf. Yet nothing that he said or did, conveyed or was calculated to

convey to the minds of the respondents the idea that he held the charter to be void, or repudiated what had been done in their names, and on their behalf. He could not, as between himself and his co-owners, who had assumed to act in his behalf, lie by, and by the use of doubtful expressions as to his intention at that time, afterwards, in case of the success of the adventure, claim that he was entitled to share in the profits on the ground that he had bound himself, and in case of disaster defend against a claim for contribution on the ground that he had not bound himself. For aught that appears if he had declared himself not bound, his co-owners might then have procured from the charterer a release from the charter. Freights were still falling, and other ships could have been procured on terms as favorable for the charterer.

On the 17th of August the ship arrived. F. H. Smith & Co. presented the charter to the master, and he approved it. Afterwards, on the 22d or 23d of August, Lord came to New York again. He saw the master and the respondents. He offered to name a price at which he would buy or sell, and he offered that the Smiths should name a price at which they would buy or sell, but as regards the charter nothing occurred to alter the situation of affairs, except that he learned from the master, that the lay days under the charter would commence on the 25th of August, and he did nothing, but, so far as his action was concerned, allowed the business to proceed till the filing of this libel on the 20th day of September. In the meantime the loading of the ship had commenced, and her bills of lading were issued for about 200 tons of general cargo. The evidence is that freights have been falling ever since this charter was made; that the charter was the best thing that could have been done with the ship at the time it was made, and better than any charter that could be made now; that it is a good charter for the ship, and will bring her to San Francisco in time to avail of what seems to be a fair opportunity for business, in carrying grain from that port. Although in their conversation Lord and Morse have expressed doubt as to the charter being profitable and beneficial to the ship, they have not sustained these opinions by any evidence. The evidence is all the other way. The libel alleges that "while the vessel was at sea on a voyage to New York, the libellants notified the respondents that the vessel must not be chartered, and that the respondents agreed that some arrangement should be made between the owners of the vessel, with reference to the employment and control of her, after her arrival," and that "the respondents refuse to make any reasonable arrangement with the libellants, as to the management of her." As to the averment that the libellants notified the respondents that she must not be chartered, I find that it is not proved, but

that at the time the libellants communicated their wish that she should not be chartered, the charter was then already made, in which the libellants afterwards acquiesced. As to the alleged promise to make some arrangement about the management of the vessel, the facts seem to be as follows: At the interview on the 7th of August, Lord said to F. H. Smith that he was not satisfied with the management or with the arrangements as to the vessel. He did not then explain in what particular he was dissatisfied with the existing management. It was not said in reference to the charter, or, if it was so intended, it was not so said as to convey the idea to Smith that he meant that he wanted any different arrangement made about this charter. Understanding him to refer to the general management of the vessel, Smith told him he didn't know of anything wrong, but did not see why arrangements could not be made if he wanted it. Again, when he saw the captain, Lord told him that he was dissatisfied with the management. With the light thrown on the case by Lord's letters to Bartlett, and especially by the power of attorney which he held, executed by the libellants, it is evident that what was referred to, and which Smith could only guess at, was the matter of the agency of the vessel, a point which Lord had long had in mind, but on which he had not declared himself, for obvious reasons, to the Smiths. Now, as to this matter of the agency of the vessel in New York, and especially as to the continuance of the existing agency, such as it is, of F. H. Smith & Co., which Lord received express power from his co-part-owners, so far as he could act for them, to put an end to by a new appointment of agent, it is to be observed that down to the time of filing the libel, it is not shown that the libellants, or Lord in their behalf, ever stated this point as a point of disagreement to the respondents, or to F. H. Smith & Co., or ever requested them to resign the agency, or ever proposed to the respondents to unite with the libellants in the appointment of a new or different agent; nor is there any evidence of any declaration of the respondents, or of F. H. Smith & Co. that they intend to hold on to this agency against the wishes of the libellants, or that they refuse or would refuse to join with the libellants in the appointment of an agent entirely impartial and satisfactory to both sides.

There has been, at no time up to the present, any dissatisfaction with the conduct of the master, Capt. Bartlett, on the part of any of the owners. There is no proof that the libellants have ever expressed a desire to the respondents to remove the captain, or to have a different captain appointed. The evidence is complete of his skill, and there is no proof of any want of confidence in his skill and integrity on the part of the libellants. No case is made which would

justify his removal, and it is not claimed that there is. The ship was built with a view to his commanding her, as all the owners understood. He gave a year's time to superintending her construction. He has displeased the libellants by joining in resisting this application for the sale of the vessel, which would displace him from command as well as extinguish his right to become the owner of an interest under his agreement with Lord and Morse & Co., of June 19, 1876. But the libellants have suffered him to go on and sign the charter and receive cargo under it, and issue bills of lading, whereby he is personally bound, without any notice to him or the other part owners, of any dissatisfaction with him as master.

The libellants have not proposed to the respondents any different employment of the ship. So far as they have been shown to have expressed any intention as to what they would have done in place of making this charter, it is that they preferred to wait for freights to improve—to lay the vessel up till the fall.

It is proved that the market for ships is very dull, and at a forced sale they are likely to be greatly sacrificed.

The grounds of disagreement between these owners, as shown by the evidence, may be summed up thus:

(1.) They dislike Mr. W. H. Smith, because of his conduct in reference to the hard pine lien, and because they think he was unfair in regard to his agreement about not holding their interest for that lien; and their state of feeling towards him is such that they dislike to own in a ship with him, especially where he holds control of one-half the vessel.

(2.) They are dissatisfied with having F. H. Smith & Co. acting longer as agents of the vessel in New York, because they are identified in interest with W. H. Smith, because they were negligent in making a remittance, and because they made the charter without consulting the libellants, and because they (the libellants) prefer to have another agent disconnected from the Smiths—but this ground of dissatisfaction has never been made a subject of discussion between the parties, and before bringing this suit they never attempted to agree on any other agent.

(3.) The charter under which the vessel now is, was made without consulting all the libellants. The charter, however, is admitted to be binding on the ship, and has been shown to be binding on the libellants, by their acquiescence, and by their not expressly dissenting therefrom.

In any view that is taken of the charter, whether binding only on the ship or, by their acquiescence, on the libellants also, the disagreement as to the charter between these parties is not such as prevents the ship from going to sea under this charter. In the case of *The Seneca*, [Case No. 12,670,] neither

party could, "otherwise than tortiously," that is, otherwise than by some act in violation of the rights of others, take the ship to sea.

In this case, neither party can "otherwise than tortiously" prevent the ship from going to sea. This is obviously so, if all parties are bound by the charter. It is equally so if the ship is bound to the charterer. The libellants may have their right to damages, but I do not see how they could now detain the ship. Again, these libellants, even if their right to separate themselves in this adventure survives their acts as above set forth, cannot, on the principles recognized in the case of *The Seneca*, [supra,] having no employment of the ship to propose on their part, and having wholly failed to show that the enterprise proposed by respondents is not what the ancient codes cited call "a probable design," that is, a well planned and proper enterprise, and one fit for the ship to undertake, are not entitled to prevent the use of the ship by the other half-owners.

As to the alleged dissatisfaction with the agency of F. H. Smith & Co., that clearly would not prevent the use of the vessel, so long as there is a competent master, and in this case it is no obstacle to her going to sea under this charter. And in point of fact, the parties have never disagreed about this matter, since there has been no attempt to agree, and the very point of dissatisfaction urged was never made known to the respondents so that they were called upon to take ground on the question.

As to the dislike of, and distrust towards W. H. Smith, this is not a disagreement as to the employment of the vessel, and though, if it continues to exist, it may be the cause of future disagreement, yet in itself, as a mere feeling, obviously it is of no account in this legal controversy.

It is, however, insisted, that the actual state of feeling between these parties is such, that a separation must be effected some time, if not now—that not to give them relief now is merely to prolong the controversy between them; that it will only compel them to apply to the court in California, or here again on the ship's next return to this port. The answer is obvious enough. This power to order a sale is a power to compel property owners to part with their property against their will. It is, therefore, an extreme resort justified by necessity only, from a regard, first, to the interests of commerce, and, secondly, to the relief of the parties from the distressing predicament which makes their property useless in their hands. The authorities cited above and the reason of the thing clearly show that this is the nature of the power. Now that necessity does not exist, either as to the relief of the public, or of the parties, till they have reached a point of actual present inability, by reason of the disagreement, to use the vessel. So long as that case of necessity is merely threatened, and lies in the future, it is as if it

did not exist, and it may, in fact, never arise. Before this ship reaches San Francisco many things may happen to prevent this dead-lock occurring. The ship may be lost on the voyage. When she reaches there her true policy for the next voyage may be so obvious, that there will not be two opinions about it. The parties may reconcile their differences. It would seem that there ought not to be any great difficulty in disposing of what seems to be the principal point which the libellants insist upon, the establishment of an agency for the ship in which both parties can concur. A little more frankness and candor on the one side in dealing with the matter, and no great sacrifice of interest or feeling on the other, would save these former friends from further litigation and certain loss.

The libellants probably can, if they are bent upon doing so, at the end of this voyage, bring about a dead-lock which shall tie up the ship so that an admiralty court will have to do for the parties what they ought to do for themselves; but this court ought not to anticipate or attempt to provide against such a necessity.

Another question of very great interest, bearing on the nature of this action, was raised in this case. Upon the trial Captain Bartlett was admitted as a party respondent, and he joined in the answer denying the main facts on which the right to the relief prayed for was based. The respondents offered to show that Captain Bartlett had an equitable interest in the quarter of the ship held by the libellants, Lord and Morse & Co., being the same quarter taken in their names for $\frac{1}{8}$ th each, and subscribed for upon the building contract, in accordance with the agreement between Bartlett and Lord and Morse & Co., hereinbefore recited, and dated June 19, 1876.

It was not conceded by the learned counsel for the libellants that Bartlett had such an equitable interest in the quarter of the ship; but, on the contrary, it was claimed by him that the agreement of June 19 was an agreement to sell and convey an interest of Lord and Morse & Co. to Bartlett, on certain conditions, and not an agreement to hold as collateral and by way of security an interest belonging to Bartlett; and it was also claimed that, the time having expired within which Bartlett was to make his payment of one-half of the price, and notice having been thereupon given by Lord and Morse & Co. that his right under the contract was forfeited, such equitable interest had been cut off.

As to the question whether Bartlett has a redeemable interest in the quarter of the ship, it is only necessary for me to say that I have come to the conclusion, as well from the terms of the agreement of June 19, 1876, as from the other evidence of the understanding of the parties, their correspondence, their acts, and their testimony,

that the relation between Bartlett, and Lord and Morse & Co. was that of debtor and creditor, and not that of vendee and vendor; that the interest was held as his, as collateral security for the debt, and therefore was not extinguished by the notice, but that there is no immediate right to redeem, because the amount of the debt cannot yet be ascertained, and his right to redeem is subject to be cut off by a sale under the power contained in the contract.

Aside from this answer made by the libellants' counsel as to Bartlett's interest, it was also insisted that the evidence was incompetent on the ground that in this action the court could consider and take notice only of the legal and record title to the ship; that as, in actions of possession, the court would take no notice of equitable interests, but would decree possession of the ship to those holding the majority of the legal title, so here those having a moiety of the legal title were entitled as of right to a sale, if the essential disagreement between the owners of the two moieties of the legal title existed. The evidence was admitted on the ground, that this power of the court is one to be exercised in its discretion, and with a regard to all the circumstances of the case, and with a view to the effect of the sale on the interests of all concerned, and that it is not a fixed legal right of moiety owners of the legal title, to have a sale decreed upon presenting to the court a case of disagreement as to the employment of the ship.

It is true the legal title to the major part carries with it the right to the possession of the ship, and that right must be recognized and enforced in suits for possession, and the rule is of great convenience and beneficial to commerce in the simplicity and ease with which it is applied. There seems to be no analogy, however, between a right to the possession as an incident of the legal title in a major part, and a right to have a court exercise a power of sale as an incident to legal ownership of a moiety. One is easily conceivable as a personal right; the other is not.

Moreover, if this were an absolute right inhering in a moiety ownership, to have the court order a sale, it is easy to see that it would be not beneficial but most injurious to the interests of commerce, from the ease with which it would be made the instrument of oppression. Thus, if the right is absolute and the court must order a sale, the court could add no condition which might defeat a sale. If it appeared ever so clearly that the libellants were rich and the respondents without means, except their interest in the ship, and the state of the market such that no other bidders could be found, and even that the libellants had brought about the disagreement to force a sale, intending themselves to buy for almost nothing, and thus drive the other party out of their property, yet, on the theory proposed,

a sale must follow with all the absolute certainty with which possession follows the legal title, and the court could not even impose, except by consent of parties, as a condition of the decree, an upset price, since that would be to limit, restrict, and impair an absolute right. Unlike the rule that the right of possession adheres in the legal title to the major part, such an absolute right to a decree of sale would impair the value of all property in ships, by rendering insecure the owners' hold upon it. In truth, this power seems to be a power vested in courts of admiralty, from the necessity of the case, from a regard of the law as well to the public interest, that ships should continue to plough the sea, as to private interests that the parties may recover the beneficial use of their property. From the nature of the power, to be beneficial in its exercise, it should be used with discretion, with caution, and upon a careful consideration of all those interests, public and private, involved. It should not be tolerated that the power be invoked for purposes of oppression. It follows, that the court must receive evidence of all the circumstances that may possibly affect its discretion.

If it appears that the libellants really hold their moiety in trust for the respondents, owing them a duty to follow their directions in the management of the ship, it would hardly be a proper exercise of the power to grant the prayer of the libellants against the protest of the respondents; and in such a case, even if the public interests might suffer to the extent of having one ship idle, that would be more tolerable than to do so great a private wrong. Whether the protection of Captain Bartlett's interest from the ruinous effect of a sale, if his interest be such as he claims, would be a sufficient ground for withholding the decree, if the libellants were otherwise entitled to it, it is unnecessary to decide. But the evidence was properly received as evidence of circumstances bearing on the exercise of the discretion of the court. Libel dismissed, with costs.

[NOTE. For instances in which admiralty courts have refused to order the sale of vessels at the instance of minority owners, see *The Ocean Belle*, Case No. 10,402; *Davis v. The Seneca*, Case No. 3,650.]

Case No. 421.

The ANNIE LELAND.

[1 Lowell, 310.]

District Court, D. Massachusetts. March, 1869.

SALVAGE—ABANDONMENT BY CREW—SALVORS FROM SHORE—AMOUNT.

1. A schooner laden with coal stranded upon the rocks and in a dangerous situation was got off and saved by salvors from the shore at their

[Reported by Hon. John Lowell, L.L. D., District Judge, and here reprinted by permission.]

own risk and responsibility, while the crew were dismantling her by orders of the captain preparatory to abandoning her as a total loss. *Held*, that the salvors were entitled to a more liberal compensation than in many other cases where the property saved was of greater value; and that their merit was not diminished but increased by the fact of the incompetency and perhaps bad faith of the captain.

2. The service was performed by twenty salvors in a few hours and with no danger. On a value of \$11,000 saved, \$2,600 and costs allowed as salvage.

In admiralty. The schooner *Annie* Le-land, with a cargo of coal on board, and bound to Boston, went on shore on Nashawena rocks, in Vineyard sound, on the night of the 10th of September, 1863. The weather was thick, but not otherwise severe, and the vessel was discovered in the morning by the master of a fishing-smack, which had been anchored not far off; and he went on board, and found the master of the schooner determined to abandon her, and agreed with him to strip the vessel and take the rigging, sails, and other movables on board his smack, and carry them to the nearest port. Other persons came from the islands soon after, and among others, Captain Church of Cuttyhunk. To him the master said that his schooner was bilged, and that he was going to New Bedford to note a protest and communicate with the owners, but that he should be glad of assistance to save whatever could be got out of the wreck; and Captain Church returned to the island for shovels and other means of getting out the coal. The master soon after went to New Bedford, which was fifteen miles to leeward, and did not return until night, after his schooner was on her way to the same port. Presently after leaving his vessel, he engaged the services of one or two men connected with a schooner larger than the smack, to aid in the stripping and removal of the anchors, rigging, &c.; and when he arrived at New Bedford he telegraphed to his owners that the vessel was wrecked and lost. When Captain Church came on board again, he had a conversation with the mate, and induced him to sound the pumps, and finding that the vessel was not bilged, at once inferred that she might be got off at high tide. The mate declared that his instructions did not look to an attempt to save the vessel; and after some discussion it was agreed that Captain Church might make the trial at his own risk and expense, the mate proceeding, meanwhile, to dismantle the schooner in obedience to his orders. This agreement did not differ from an ordinary salvage undertaking, in so far as the payment depended on success; but it was understood that, in addition to this contingency, Captain Church was to make good any loss of anchors, chains, or cables, that might result from an unsuccessful endeavor to haul the vessel off. A good many persons had now arrived from the islands with three boats, two of them long-boats; and under Church's orders they got up the port anchor,

and carried it out to the most available place at considerable trouble and some risk, one boat being somewhat injured by striking against the anchor. They then hauled taut on the line, and proceeded to shovel coal out of the after part of the vessel, which was the part that was resting on the rocks, and pumped the water out of the hold. All this time the crew and hired men were sending down the topmasts and unreeving the rigging; and the singular spectacle was presented of strangers busily working to save a vessel which her crew were as diligently rendering unseaworthy. After they had got out as much coal as the boats could safely and conveniently carry, some of the libellants went on shore for dinner, and, returning before the tide had fully risen, found that the remaining salvors and the crew had hauled the vessel off the rocks. They all then set to work and bent on the jibs, rigged a spar to the rudder, which had been unshipped and damaged, carried out a keedge to help sheer the schooner from the rocks, when she took the wind, and got her under weigh. Eight out of the twenty salvors remained on board for twenty-four hours longer, until the vessel arrived at New Bedford, two of whom were needed to steer her, and one to pump, and the others to help work the vessel, which steered very badly. The total value saved was from ten to eleven thousand dollars.

T. M. Stetson, for libellants.

J. C. Dodge, for claimants.

LOWELL, District Judge. The rule of court which was passed in the interest of all parties to salvage suits, that the value should be ascertained before the property is delivered, was not observed in this case; and though this happened through a misunderstanding, yet I remark upon it, that it may not occur again. In such a case, doubtful evidence will be construed most strongly against the owners, because they might have made the facts clear before executing their warrant to deliver.

In awarding the salvage in this case, I find it to be one for a proportionately larger compensation than many others in which the value saved has been more considerable. The owners were in great danger of losing their whole property. It is true, this was largely the fault of the master; but as there is no pretence of any collusion between him and the libellants, they are entitled to say that they have saved the vessel in spite of his incompetency or bad faith, against his instructions, at a very critical time, and by the exercise of the qualities which he should have supplied, as well as of the ordinary skill, labor, and energy expected of persons in their situation.

There is some reason to suppose that the master and his brother were considerable owners in the vessel, and that the master at least was insured against a total loss only. Whether this was the true motive of his con-

duct of not, it is certain that Captain Church assumed more than ordinary responsibility and incurred unusual liability in this case; and upon the principles of the admiralty law, he must be compensated for them. There is no probability that the mate and crew could or would have saved the property without the aid of the libellants. The only chance was of the vessel's floating in spite of them; and as she had already lain over one tide, this chance appears a very slight one. The place was rocky, and she had pounded hard and was found to be much chafed, and a hole might have been made in her planks at any moment. The libellants ask for four thousand dollars, the claimants are said to have offered five hundred: I award two thousand six hundred dollars and costs. The apportionment among the salvors is to be referred to the court before distribution is made.

Decree accordingly.

Case No. 422.

The ANNIE LINDSEY.

[8 Ben. 290.]¹

District Court, S. D. New York. Jan., 1873.*

COLLISION IN THE SOUND—SAILING VESSELS MEETING—CLOSE-HAULED AND FREE.

1. A brig and a schooner came in collision in Long Island sound at night. The schooner was sailing to New York, and the brig was sailing from New York. The schooner saw the brig nearly ahead, and ported her helm. The brig saw the schooner nearly ahead, and first starboarded and then ported. There was a conflict of evidence as to the wind, the witnesses for the schooner claiming that it was nearly south, and those for the brig claiming that it was southeast. Each vessel claimed to have been close-hauled. The schooner had the wind on her port side. The brig had it on her starboard side. The brig struck the schooner on her port quarter. The brig alleged that she starboarded in obedience to a call from the schooner to "keep off." Held: That, on the evidence, the brig was close-hauled.

[See note at end of case.]

2. That, on the evidence of the brig, that she was heading east northeast and saw the green light of the schooner from half a point to a point on her port bow, the vessels were meeting nearly end on, and, under the 11th article, it was the duty of the schooner to port, which she did.

[See note at end of case.]

3. That, if the courses were crossing, there was risk of collision, as the brig was drawing a point on to the course of the schooner, and, under article 12th, the schooner, having the wind on her port side, was bound to keep out of the way of the brig, which she endeavored to do by porting.

4. That, if they were meeting, it was the duty of the brig to port, instead of first starboard-

ing, as she did; and that the excuse which she set up for the starboarding was not established.

[See note at end of case.]

5. That, if the courses were crossing, it was the duty of the brig to keep her course; that, in either view, the brig was in fault, and liable for the damages; and that the schooner was not in fault.

[In admiralty. Libel by Daniel Brown and others, owners of the schooner Sallie Smith, against the brig Annie Lindsey, (Cornelius T. Tompkins, claimant,) for damages caused by collision. Decree for libellant. Affirmed by the circuit court, (not reported; see note at end of this case,) and also affirmed by the supreme court under title of *The Annie Lindsey*, 104 U. S. 185.]

Beebe, Donohue & Cooke, for libellants.
G. M. Speir, for claimant.

BLATCHFORD, District Judge. The libellants, as owners of the schooner Sallie Smith, and carriers of a cargo on board of her, bring this suit against the brig Annie Lindsey, to recover for the total loss of the schooner and her freight money and cargo, through a collision, which took place at about half past eight o'clock in the evening of the 7th of May, 1869, between those two vessels, in Long Island sound, off Eaton's Neck light, whereby the schooner and her cargo were sunk. The schooner was bound to New York from the Connecticut river. The brig was bound from New York to New Brunswick.

The libel alleges that the wind was south half west; that the schooner had her regulation lights set and burning brightly; that she was heading a little south of west, or about west; that the sails of a vessel were made ahead, or nearly so; but no light was discernible; that she was apparently bound in an opposite direction, and, after she was discovered, and when it was apparent there would be a collision unless something was done, the wheel of the schooner was ported, and she opened the other vessel until the red light of such other vessel was seen off the port bow of the schooner; that the wheel of the schooner was kept to port, and the approaching vessel, which turned out to be the brig Annie Lindsey, was hailed from the schooner to luff, but, instead of porting, she was kept away, and her stem struck the port quarter of the schooner, and crushed in her side, so that she sank, with her cargo, in a few minutes; that the wind at the time was free for vessels upon their proper courses bound to the east, but those going west were close-hauled; that the collision was caused solely by the negligence of those navigating the brig, in not keeping a lookout, in not having the proper lights set and burning, in not porting and keeping to the right, when meeting a vessel ahead and bound in an opposite direction, and in starboarding instead of porting; and that the lights of the schooner were seen at a sufficient distance,

¹[Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

²[Affirmed by circuit court, (opinion not reported, and not accessible.) Also affirmed by the supreme court in *The Annie Lindsey*, 104 U. S. 185.]

by those on board of the brig, for them to have avoided the schooner.

The answer alleges that the wind was about southeast; that the schooner, when first seen by the brig, was steering a west by south course; that, just before the collision, the schooner suddenly changed her course to northwest, which brought her across the bow of the brig; that the wind was free for vessels bound to the west; that the brig was sailing close-hauled; that the collision was caused by the fault of those navigating the schooner; that the green light of the schooner was first seen on the lee bow of the brig; that the schooner, as she approached, was going to the windward of the brig, and hailed the brig to keep off, and the wheel of the brig was turned to keep off, and then the schooner suddenly changed her course to the northwest, and called out to the brig to luff; that the wheel of the brig was immediately put hard down, and she luffed, but too late, for the schooner kept off across the bow of the brig, and winged her foresail out, and the brig struck the schooner; and that the wind was on the port side of the schooner and on the starboard side of the brig.

The material points of difference raised by the pleadings are (1.) As to the wind. The libel alleges it was south half west; the answer, about southeast. (2.) As to whether the schooner, after getting to windward of the brig, kept away and crossed the bows of the brig. The testimony is all in the form of written depositions. The witnesses for the libellants are Chase (the master of the schooner), Logan (the mate), and Reed (a hand). There were but two persons on deck on the schooner, Logan, at the wheel, and Reed, forward on the lookout. The master was below.

The witnesses for the claimant are Parritt (the master of the brig), Nicholson (the second mate), and Davis (a hand). Nicholson was at the wheel, Davis was forward on the lookout, and the master also was on deck.

The deposition of Parritt was taken on the 30th of October, 1869. Then Reed and Chase, for the libellants, were examined in June, 1871, and Logan in October, 1871. Then Davis and Nicholson, for the claimant, were examined in October, 1871, and Parrit was, at the same time, examined again.

Reed was forward of the windlass, on the schooner. He says, that the wind was south by west; that the schooner was close-hauled; that he saw a vessel about dead ahead, but saw no light, and reported the vessel to Logan, and told him to swing her off, which was done, until the red light of the brig became visible to him, which was the first light he saw on her; and that he hailed the brig and told her to luff.

Logan, at the wheel of the schooner, says, that the wind was south; that the schooner was heading west by south; that Reed reported a vessel ahead and told him to keep

off; that he ported; that, after that, he looked ahead and saw the red light of the brig; that he saw no other light, at any time, on the brig; and that Reed called to the brig to luff, and he also called to the brig to luff, after Reed had done so.

Chase, master of the schooner, says that the wind was south half west, and that the schooner was heading west half south.

It is to be noted, that neither Logan nor Chase says that the schooner was close-hauled in fact, or how her sheets were hauled. They leave it to inference, from the fact that, according to them, she was sailing only seven points off of the wind.

Parritt, on the deck of the brig, and her master, says, that he was bound east, but could not head his course, and was heading east northeast, and going about seven knots an hour; that he saw a green light right ahead; that, at the same time, his lookout reported a light right ahead; that he heard a man sing out from the schooner to hard up his wheel; that the brig was kept off one point, which opened the schooner's light broad on the weather bow of the brig; that the schooner kept off across the bow of the brig, and sung out for him to luff; that he luffed, by putting the wheel hard down, which caused the vessels to strike; that the schooner, when she kept off, winged her foresail out; that the brig was sailing close-hauled, and had her starboard tacks aboard; that the wind was southeast, and the brig was sailing as near to the wind as a square-rigged vessel could sail; that the schooner changed her course suddenly, from west by south to northwest, which brought her across the bows of the brig, and, when she saw there would be a collision, sang out to the brig to luff; and that, if the schooner had kept her course, there would have been no collision.

Davis was standing forward, on top of the fore-castle, on the brig, as a lookout. He says, that he saw a green light a little on his lee bow, a half a mile off, and approaching, and sung out, "Light ahead;" that he heard a cry from the schooner to keep off, and, directly afterwards, another cry to luff; that, when he heard the cry to keep off, the schooner was going to the windward of the brig, and she suddenly turned and kept off across the bow of the brig; that the brig was close-hauled, on her starboard tack; that, when he first saw the green light, it bore from half a point to a point on his lee bow, and was nearly ahead; that it afterwards got to be half a point on his starboard bow; that the schooner then kept hard off, and crossed his bow, and showed her red light; and that the vessels were very close together, when the cry came to luff.

Nicholson, at the wheel of the brig, says, that he heard Davis report a light ahead, and looked, and saw a green light about a point on his lee bow, and from a third to a half of a mile off; that the wind was east

southeast to southeast, and the brig was close-hauled on the wind, and heading about east northeast; that he heard a man from the schooner, as she came up, sing out, "Hard up your wheel;" that Captain Parritt, at the same time, gave him orders to keep her off; that he started to do so, and turned the wheel, and just then heard a cry from the schooner to luff; that Captain Parritt, at the same time, gave him orders to luff, and assisted him at the wheel; and that he was steering full and bye, and not by the compass.

According to the story of the schooner, as her witnesses tell it, she was heading west by south, or west half south, and saw a vessel ahead, but saw no light on her, and, without knowing that the two vessels were meeting end on, or nearly end on, ported. If the vessels were meeting end on, or nearly end on, so as to involve risk of collision, it was the duty of the schooner to port. The brig, according to her own testimony, was heading east northeast, and saw the green light of the schooner so nearly right ahead that it was not more than from half a point to a point on the port bow of the brig, nearly ahead. I conclude, therefore, on this view, that, under the 11th article, the case was not one where the two vessels would, if both had kept on their respective courses, have necessarily passed clear of each other, but was one in which the vessels were meeting end on, or nearly end on, so as to involve risk of collision. It was, therefore, the duty of the schooner to port. According to her testimony, she did port, and did nothing else, and ported the moment the brig was seen, and swung off until the red light of the brig came into view. That the schooner did port, is testified to by the witnesses from the brig, it being contended by the brig, however, that this was not done until the green light of the schooner was seen half a point on the starboard bow of the brig.

Regarding the courses of the two vessels as crossing, they involved risk of collision, as the brig was drawing a point on to the course of the schooner. On the evidence, I conclude, that, without doubt, the brig was close-hauled and did not have the wind free, and that the schooner was not close-hauled and did have the wind free. Hence, under article 12, the schooner, having the wind on her port side, was bound to keep out of the way of the brig. She endeavored to do so by porting, and ported, as before stated, until she opened the red light of the brig.

As meeting the schooner end on, or nearly end on, so as to involve risk of collision, it was the duty of the brig, under article 11, as much as of the schooner, to port. It is very clear, that, at first, the brig did not port. On the contrary, she starboarded. Her master says that, by the starboarding, she kept off one point, until she opened the green light of the schooner broad on the weather

bow of the brig. The starboarding is sought to be excused by the allegation, that it was done because the schooner hailed the brig to put her wheel hard up or to keep off. This is not confirmed by any witness from the schooner. It would have been a most extraordinary order for the schooner to give to the brig, when the schooner herself was porting. The proper order to be given, if the schooner was porting, was for her to order the brig to luff. The witnesses from the schooner say that they hailed the brig to luff. All the appearance of the green light of the schooner on the starboard bow of the brig that there was, was produced by the starboarding of the brig, the schooner having only ported and not starboarded. On this view, therefore, there was fault in the brig, in starboarding, which contributed to the collision.

As crossing, with her course, the course of the schooner, so as to involve risk of collision, it was the duty of the brig, under articles 12 and 18 (the two vessels having the wind on different sides, and the brig having the wind on her starboard side and not having it free, and the schooner having the wind on her port side, and not being close-hauled), to keep her course, and to permit the schooner to keep out of the way, and not to attempt to keep out of the way herself. It is manifest, that the brig, by attempting to keep out of the way, and by starboarding to do so, thwarted the efforts of the schooner, by porting, to keep out of the way of the brig. The excuse, of the hail from the schooner, to keep off, has been already referred to.

Again, the brig being close-hauled, and having the wind on her starboard side, it was her duty to keep her course, and not to starboard, whether the schooner was close-hauled or not.

In any view of the case, there must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain the damages sustained by them by the collision.

[NOTE. On appeal to the circuit court, the judgment was affirmed, and that court found, inter alia, the following facts: "(5) When the brig was discovered from the schooner, the two vessels were approaching each other end on, or nearly end on, and on courses involving the risk of collision. The brig was close-hauled. The schooner had the wind a little free. (6) A short time before the collision, the lookout on the schooner discovered the brig about dead ahead. He saw no lights, but made out the vessel and her sails, coming, as he judged, from an opposite direction. He at once reported to the man at the wheel, who put the wheel to port and bore off until he opened the red light on the brig. (7) The schooner was not discovered from the brig until after the brig was discovered from the schooner. The lookout was the first to see schooner from the brig, and he called out, 'Light right ahead.' Almost at the same moment a hail was heard from the schooner. The brig's wheel was then put to starboard, and she swung off one point. As soon as this movement could be discovered, another hail

came from the schooner to luff, and the wheel was put to port, but before it could materially affect the course of the brig the two vessels came together, the brig striking the schooner on the port quarter, the jib-boom of the brig passing through the mainsail of the schooner. The schooner sank in a very few minutes with her cargo, and was a total loss. (8) The starboarding of the brig was the direct cause of the collision." (The other findings, and the conclusions of law of the circuit court, may be found in the statement to this case. The *Annie Lindsley*, 140 U. S. 185.) The supreme court held that, as the circuit court did not find that the light seen upon the schooner before the collision was a green light, there was no occasion for the starboarding of the brig under the twenty-fourth sailing rule, (Rev. St. § 4233,) which permits a departure from the ordinary rules when necessary to avoid immediate danger, but that the case was within the sixteenth rule, (Id. § 4233,) which provides: "If two sail vessels are meeting end on, so as to involve the risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other,"—and consequently the brig was liable for having neglected to follow that rule. The *Annie Lindsley*, 104 U. S. 185.]

Case No. 423.

The ANNIE M. SMULL.

[2 Sawy. 226.]¹

District Court, D. Oregon. June 25, 1872.

ADMIRALTY JURISDICTION ON COLUMBIA RIVER—
SEAMEN'S WAGES—DISCHARGE OF CARGO.

1. The U. S. district court for the district of Oregon has concurrent jurisdiction over the Columbia river.

2. A voyage is ended and a seaman's wages become due when the vessel is moored at her final port of destination, and if such wages are not paid within ten days thereafter, the seaman is entitled to admiralty process against the vessel.

[See *Edwards v. The Susan*, Case No. 4,299.]

3. A seaman is not bound to stay by the ship after her arrival at the final port of destination, and assist in discharging her cargo, unless the shipping articles contain a contract to that effect or the established custom of the port requires it.

[In admiralty. Libel by John Johnson and eight others against the *Annie M. Smull* for wages. Decree for libellants.]

John A. Woodward and David Goodsell, for libellants.

Theodore Burmester, for claimant.

DEADY, District Judge. This is a suit for the subtraction of wages brought by John Johnson and eight others to recover the sum of \$578 alleged to be due said Johnson and others for services as seamen on a voyage in the *Annie M. Smull* from New York to Kalama, between December, 1871, and the latter part of May, 1872.

On June 5, process was issued upon the libel, upon which the ship was arrested the same day. Subsequently the owner, Charles Mallory, by the master, intervened for his interest and filed exceptions to the libel,

¹[Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

which, by consent of counsel, were argued and submitted on June 17.

The first exception is in the nature of a plea in abatement, and alleges that the court has not jurisdiction of the suit, because it appears from the libel that the vessel is not within the district of Oregon, but at the time of filing the libel was and ever since has been lying in the Columbia river, off Kalama, in Washington territory.

The question made by this exception turns upon the construction of the constitution of the state and acts of congress defining its boundaries and establishing the judicial district of Oregon.

The constitution of the state (article 16, § 1) provides that its northern boundary shall commence one marine league at sea, "due west and opposite the middle of the north ship channel of the Columbia river, thence easterly to and up the middle channel of said river, and where it is divided by islands, up the middle of the widest channel thereof * * * including jurisdiction in civil and criminal cases upon the Columbia river * * * concurrently with states and territories of which this river forms a boundary in common with this state."

In admitting Oregon into the Union by the act of February 14, 1859, (11 Stat. 383, [Rev. St. § 4530,]) congress assented to this boundary, including the provision concerning concurrent jurisdiction on the Columbia river, and also enacted (section 2 of the act aforesaid) that, "the state of Oregon shall have concurrent jurisdiction on the Columbia and other rivers and waters bordering on the said state of Oregon, so far as the same shall form a common boundary to said state, and any other state or states now or hereafter to be formed or bounded by the same;" and that said river and other waters shall be "common highways" for all citizens of the United States.

By section two of the act of March 3, 1859, (11 Stat. 439), it was provided that: "The said state (Oregon) is hereby constituted a judicial district of the United States, within which a district court * * * shall be established."

In support of the exception, counsel maintains that the state of Oregon is bounded by the middle line of the Columbia river, and that the district of Oregon being in effect declared to be co-terminous with the state, it follows that the *Annie M. Smull* is without the district, and, therefore, not within the jurisdiction of this court; and that the clause in the constitution of the state and act of congress, giving the state concurrent jurisdiction over the whole river, does not affect or enlarge its boundaries, but is in the nature of a special reservation, or grant of power, to the courts of the state, which does not apply to or include this court.

In reply, counsel for the libellants maintain that the clause in question, by giving

the state jurisdiction over the whole of the Columbia river does, in effect, make the north shore thereof the boundary of the state, and therefore of the district as well. No authority directly in point was cited on the argument, nor have I been able to find any.

As the law stands, it is admitted that the boundary of the state and district are identical. It is also clear that congress had the power to give this court jurisdiction, either concurrent or exclusive, over the whole river, of matters within the judicial power of the United States, and that the public convenience requires that it should have it. The only question then to be considered is, has congress done so? In my judgment it has. The argument of counsel for the exception, does not correctly state the terms or effect of the clause concerning the concurrent jurisdiction of the state. It is not merely a special grant of judicial power to the courts of the state over persons and things upon the river, but without the boundary of the state. It is a legislative declaration or enactment that the jurisdiction of the state—that is, its whole sovereign power shall extend to the whole river, subject to the qualification that the jurisdiction of the state or territory on its northern shore, shall in like manner extend to its southern shore. In effect, this makes the northern shore of the river the northern boundary of the state, for its territorial limits and jurisdiction are necessarily the same. Practically, then, so far as the Columbia river forms a boundary common to Oregon and Washington, it is within the territorial limits and jurisdiction of each. In the language of the act of February 14, 1859, aforesaid, it is the common property and "highway" of both. This being so, the river is also within the jurisdiction of the district of Oregon, and therefore this court has jurisdiction of this suit.

What is here said upon this subject is, however, only intended to apply to jurisdiction over matters and things actually arising or situate upon the river. The concurrent jurisdiction is not understood to extend over any islands or dry land within the river. As to such, and probably only such, the middle thread of the river is the absolute boundary line of both state and district.

It is also stated in this exception, that the vessel was "moored at the wharf at Kalama," a town on the Washington territory shore, and some reference was made to this fact in the argument. But I do not perceive on what ground it can be claimed that a vessel which is in fact floating or lying upon or in the river, is to be considered as without the district, because it may be fastened or moored to the northern shore of the river, or to any wharf or other structure erected thereon.

The second exception is a dilatory one, and alleges that process was issued on the

libel prematurely, to wit, "before the said vessel was discharged of her loading and the voyage ended," contrary to the statute, etc. This exception is based upon section six of the act of July 20, 1790, (1 Stat. 133; [Rev. St. § 4530,]) which provides that "as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall then be due according to his contract; and if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen or mariners, touching the said wages, it shall be lawful," etc.

The warrant for the arrest of the vessel was issued June 5. From the amended libel which was filed the same day, it appears that the vessel arrived at Kalama, on or about June 23, when and where the voyage for which the libellants shipped was ended, but it does not appear that the cargo was discharged.

The allegation in the exception that process was issued before the cargo was discharged, and the voyage ended, does not conflict with the one in the libel, to the effect that the voyage was ended when the vessel was moored at Kalama; and for the purpose of the exception it was admitted on the argument that the voyage terminated at that place. But it is insisted by counsel for the exception, that under the act of 1790, supra, process against the vessel cannot issue until ten days after the discharge of the cargo as well as the ending of the voyage.

In *The Mary*, [Case No. 9,191.] it was held that the ten days "begin to run from the time when the wages become due, that is, from the day when the term of service is completed." In *Granon v. Hartshorne*, [Case No. 5,689.] it was held that when the ship had reached her port of final destination, and was safely moored at the berth, that the voyage was then terminated and all sea services on board connected therewith.

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

It does not appear that there was any contract in this case, to stay by the ship until the cargo was discharged, or that there

is any established custom requiring the seamen to do so, and ten days having elapsed from the ending of the voyage before the issuing of process, this exception is not well taken and must be disallowed.

The third exception alleges that the facts stated in the libel are insufficient in this, "that the libellants abandoned the said vessel before her cargo was fully discharged."

The ruling upon the second exception disposes of this one. If the voyage ended with the mooring of the ship at Kalama, the libellants were then entitled to their wages and discharge, whether the cargo was unladen or not.

Besides, this exception is not well pleaded, because, while taken to the sufficiency of the libel, it also sets up a new fact, to wit: that the libellants unlawfully abandoned the ship, and relies upon that rather than the insufficiency of the libel, as a defense to the suit.

Case No. 424.

The ANNIE SOPHIA.

[Blatchf. Prize Cas. 219.]¹

District Court, S. D. New York. Sept. 1862.

PRIZE—ATTEMPT TO VIOLATE BLOCKADE.

Vessel and cargo condemned for an attempt to violate the blockade.

In admiralty.

BETTS, District Judge. This vessel, laden with a cargo of salt, soap, &c., was captured on the 20th of August, 1862, at sea, off Florida or South Carolina, by the United States steamer R. R. Cuyler, and was sent into this port for adjudication. She was libelled for condemnation as prize, September 5, 1862, and, on the return of the motion against the vessel and cargo, September, 23, in open court, the defaults of both were duly taken, no one appearing or intervening for them and a formal decree of default was rendered by the court against them. The ship's papers and the proofs in preparatorio in the cause were submitted to the court, and the district attorney thereupon moved for judgment of condemnation and forfeiture in favor of the libellants against the vessel and cargo.

The vessel had on board, when arrested, a British certificate of ownership, dated December 2, 1858, certifying that she was British-built, and that her owner, Saunders, was a resident of Nassau, N. P.; shipping articles for a voyage from Nassau to Baltimore and back to Nassau, signed by the crew August 10, 1862; a clearance from that port

¹[Reported by Samuel Blatchford, Esq.]

for Baltimore, dated September 16, 1862; and a letter of consignment dated Nassau, August 14, from the owners to Montell & Co., designating the cargo consigned, and the articles to be returned therefor from Baltimore to Nassau. No manifest or bill of lading accompanied the shipment. The preparatory proofs show that the representation of the destination of the vessel and of the object of the voyage was simulated and false, and that the voyage was made up and despatched for any port of the Confederate States into which the vessel could be run. The master was a native of North Carolina, as were also some of his crew. He had a few weeks previously, in violation of the blockade, run a vessel out of Wilmington, North Carolina, to Nassau. He and the owners of this vessel knew all about the war and the blockaded ports. The vessel was not intended to go to Baltimore, and did not steer for that place, but for the blockaded coast, until the capturing ship was observed, and then the schooner shaped her course towards Baltimore. When the master discovered that he was chased, he threw some papers overboard, for fear they might be of injury to the vessel; and the steward testifies that the master, besides the papers, threw overboard a Confederate flag which the schooner had with her. That was done after the schooner was brought to by the steamer, and before the small boat boarded the prize. The two mates assert that they thought the schooner was going to Baltimore, and deny all knowledge that she was to run the blockade. The captain testifies that she was to break the blockade, and the steward says that the captain told the men so after the schooner left Nassau, and before the Cuyler came in sight.

The proof is very clear and satisfactory that the voyage was set on foot and prosecuted with the purpose to run into a blockade port, and the vessel and cargo are, consequently, lawful prize.

Case No. 425.

The ANNIE TEAS.

[Sometimes cited for The Annie Deas, Case No. 419.]

Case No. 426.

The ANNIE W. GREEN.

[Sometimes cited for The Ann Green, Case No. 414.]

ANN, The JULIA.

[See The Julia Ann, Case No. 7,577.]

Case No. 427.

The ANN MARIA.

[1 Paine, 256.]¹Circuit Court, D. Connecticut. April Term,
1813.²**EMBARGO — NON-INTERCOURSE ACT OF 1809—FORFEITURE.**

A vessel which, during the non-intercourse law, took a cargo at St. Croix for Cadiz, with the intention of touching off New-Haven on her way thither, for a supply of provisions, and of terminating her voyage in the United States, if by law it could be done, was held not to be forfeited under the 6th section of that law, which provides against the putting goods on board a vessel with the intention of importing them into the United States.

[On appeal from the district court of the United States for the district of Connecticut.

[In admiralty. Libel by the United States against the ship Ann Maria, owned by Elkanah Atwater, for violation of the non-intercourse laws of 1809. Decree for libellant. Claimant appeals. Reversed.]

D. Daggett and W. Bristol, for appellant.
H. Huntington, D. A., for respondents.

Before LIVINGSTON, Circuit Justice, and EDWARDS, District Judge.

LIVINGSTON, Circuit Justice. This vessel was libelled in the district court of the United States for this district, as forfeited to the United States; for that certain goods of the growth, produce, or manufacture, of a colony or dependency of Great Britain, were laden on board the said vessel at the island of St. Croix, on the 1st day of June, 1811, "with intent to import the same into the United States, contrary to the true intent and meaning of the several acts of congress in such cases made and provided, and with the knowledge of the master or owner thereof."

To this libel a claim and answer was filed by Elkanah Atwater, who owns the ship, and denies that the said goods were put on board with an intention to import the same into the United States. To this claim, there is a general replication on the part of the United States. After a hearing on the pleadings and testimony, the district court decreed the said vessel with her tackle, &c. to be forfeited to the United States, and the claimant to pay the costs of the libellants. From this sentence the claimant has appealed to this court. On the hearing of this appeal, two questions have been made, the one a question of fact, and the other of law.

It is denied on the part of the United States, that the Ann Maria left the island of St. Croix with innocent intentions; and that if she did, still it is contended that her arrival in the waters of the United States

with a prohibited cargo, subjected her to forfeiture.

This being a libel under the 6th section of what is commonly called the non-intercourse act, passed the 1st of March, 1809, [2 Stat. 529,] and revived and continued by an act passed the 28th of June of the same year, [2 Stat. 550,] it must be constantly kept in mind that the actual importation of any of the interdicted articles into the United States on board of this vessel, would not have worked her forfeiture unless they had been put on board with intention thus to import them, and with the knowledge of the master or owner. The court has carefully examined the evidence which has been given in this cause, and feels itself impelled to come to the conclusion that the cargo in question was taken on board at St. Croix, not with the intention of importing the same into the United States contrary to law, but with a design of carrying it to Cadiz; touching off New-Haven in her way thither, for the purpose of obtaining a supply of provisions, and probably of terminating the voyage in the United States if by law it could be done. All the testimony whether documentary or parol, justify this belief—the markets at Cadiz—the conduct of the owner at St. Croix—his bargain with Smith—the clearance from that Island—the bill of lading—the manifest of the cargo delivered to the officer of the revenue schooner,—all speak the same language, and indicate nothing like an intention to violate any law of the United States.

But it is supposed that the arrival of this vessel in the waters of the United States, is not only conclusive proof of an original intention to import the goods on board into this country contrary to law, but is in point of fact such an importation of them, and necessarily renders the vessel liable to forfeiture. The court will not decide, for that question is not before it, whether the cargo of the Ann Maria might not be considered as sufficiently imported into the United States, to have rendered it subject to seizure and confiscation, because were that the case, it would not necessarily draw after it a condemnation of the vessel, whose fate must depend not on the importation of the goods, but on the intention which existed at the time they were taken on board. If at that time there was an intention to commit an offence against the non-intercourse act, the vessel might have been seized if she ever came to this country, although the cargo had been thrown into the sea, or disposed of in any other way.

The only use in the present case which ought to be made of the arrival of this vessel in our waters, is as proof of an original intention to import the cargo into the United States. In that point of view it has been fairly pressed on the consideration of the court, and has not been overlooked in deciding the facts of the case. Although a

¹[Reported by Elijah Paine, Jr.]

²[Reversing an unreported decree of the district court.]

strong circumstance. It is sufficiently accounted for, without imputing to the master or owner any design of violating the laws of his country. It would hardly occur to any American abroad, who might have full knowledge of the non-intercourse act, that it would be unlawful to call on his way to a foreign port, at a port of his own country, to know whether the law were still in force, or for the purpose of getting provisions. Nor can it be supposed that any one would be so foolhardy, if he did know that such conduct was illegal, as to come into the waters of the United States in the public and open manner in which this ship came. But the true question here is, not whether these goods were illegally imported into the United States, but whether they were taken on board with such illicit intention. If the question of fact has been properly disposed of, then whatever in ordinary cases might amount to an importation, if it shall satisfactorily appear that the vessel came without an intention of landing the goods contrary to law, but merely for the purpose of inquiry, and having an ulterior destination in view, it is not perceived how she has committed the offence for which she is prosecuted. Her merely passing through our waters, if it be manifest that no design was harboured of landing her cargo, is an innocent act, and not prohibited by any law. It was the importation into the United States, and the consumption there of English goods, which it was the policy of the law to guard against; and therefore any vessel might take on board such goods, provided at the time no such intention existed; especially if her subsequent conduct did not show that every thing which had been done abroad was merely colourable. If then her conduct while in our waters consisted with the intention declared by her papers, and such is the opinion of the court, what right has the court to say that the ultimate destination of the voyage was not Cadiz? Or how can it be said that she came into the waters of the United States with an intent to import these goods, contrary to the true intent and meaning of the act of congress, when by the evidence it appears that no such intention existed, but that her coming here was altogether for other purposes, and among others for the purpose of leaving our waters immediately, if the act were still in force, and proceeding to a foreign port? The original intention then, which is fully established, as it is supposed to be here, must control what might otherwise be the conclusion of law on such an arrival. If that were innocent, no forfeiture attaches to the vessel.

Under these views of the subject, this court is of opinion that the district court erred in condemning the property. Its sentence must therefore be reversed, and a decree entered that the ship Ann Maria, her tackle, &c. be restored to the claimant.

ANN, The MARY.

[See The Mary Ann, Case No. 9,194.]

Case No. 428.

The ANN RYAN.

[7 Ben. 20.]

District Court, E. D. New York. Sept., 1873.

WHARFAGE—DOUBLE RATES—JURISDICTION—CONSTITUTIONAL LAW—LIEN.

1. The act of the state of New York, passed May 6, 1870, in relation to wharfage, fixed certain rates of wharfage, with the proviso that "all canal-boats navigating the canals of this state, and vessels known as North river barges, shall pay the same rates as heretofore." It further provided that if any vessel should leave a wharf, &c., without paying the wharfage due, after a demand of it, she should pay double rates: *Held*, that a canal-boat, which had been navigating the Erie canal, but was employed in making voyages about the harbor of New York and to Jersey City, was not within the exception as "navigating the canals of this state."

[Cited in Broeck v. The John M. Welch, 2 Fed. 369.]

2. That the act was not contrary to the constitution of the United States, as laying a tax upon tonnage, nor as being repugnant to the power of congress to regulate commerce, in the absence of any law of the United States upon the subject, nor as discriminating in favor of canal-boats owned by citizens of the state.

[Cited in The John M. Welch, Case No. 7,359; Broeck v. The John M. Welch, 2 Fed. 379.]

3. That the admiralty has jurisdiction of a claim for double wharfage under that statute.

[Cited in Ex parte Easton, 95 U. S. 76.]

4. That there is a lien on the vessel for such double wharfage.

[In admiralty. Libel by Henry D. Brookman and others against the canal-boat Ann Ryan for wharfage. Decree for libellants.]

Beebe, Donohue & Cooke, for libellants.

Wilcox & Hobbs, for claimant.

BENEDICT, District Judge. This is an action brought by Henry D. Brookman and others, to recover double wharfage, which presents various questions as to the effect of the laws of the state of New York, upon the subject of wharfage, and in respect to the jurisdiction of the admiralty to enforce a demand like that of the libellant.

The general question as to the jurisdiction of the admiralty over demands for wharfage, I have heretofore examined at length in the case of The Kate Tremaine, [Case No. 7,622.] The opinion in favor of the admiralty jurisdiction expressed in that case, has since received strong support from the action of the court of appeals of this state, in the case of Brookman v. Hamill, 43 N. Y. 555, and I feel it to be unnecessary to say more upon the general subject. Some other questions are, however, raised by this case which have not as yet been considered.

¹[Reported by Robert D. Benedict, Esq., and Benjamin Lincoln Benedict, Esq., and here reprinted by permission.]

The libellant has computed his wharfage at two cents per ton, according to the rate prescribed by the statute of the state of New York, passed May 6th, 1870. He bases his demand upon that act, and seeks a decree in this court for the double wharfage provided for in the last clause of section 1 of the state statute referred to.

To this demand it is objected, first, that if the state of New York can, by law, fix the rates of wharfage payable for the use of wharves in New York and Brooklyn, the vessel in question is not liable to pay at the rate fixed by the act of 1870, because she is an Erie canal-boat.

The state of New York has, by various statutes, from time to time regulated the rates of wharfage chargeable for the use of wharves in New York and Brooklyn, and by the act of 1870 again fixed those rates. This act, however, contains the following exceptive clause: "That all canal-boats navigating the canals of this state, and vessels known as North river barges, shall pay the same rates as heretofore."

The claimant insists that his vessel is within the above exception. But the evidence fails to sustain this position. It is true that the vessel proceeded against is a canal-boat fit to navigate the canals of this state, and that she has been at times engaged in that navigation; but it is conceded that at the time she used the libellants' wharf she was not engaged in that navigation, but was employed in making voyages about the harbor of New York, and to New Jersey. The exception in favor of canal-boats navigating the canals of this state, contained in the act of 1870, was to favor the canal navigation of the state, by keeping down, in the matter of wharfage, the expenses of voyages upon those canals. The exception is therefore limited, in terms, to canal-boats engaged in the employment of navigating the canals of this state.

The vessel here proceeded against, was not so employed, and, consequently, is not entitled to the benefit of the exception.

It is next contended that the statute of the state relied on is unconstitutional because in effect it is a tax upon tonnage. But charges for wharfage are not duties. *Cooley v. Board of Wardens*, 12 How. [53 U. S.] 314. They are, in the state of New York, port charges paid in consideration of the use of private property. Charges of this character are regulated by law upon considerations of public policy. The welfare of the community requires the prevention, by law, of extortionate charges for a service which, while it is a necessity for the ships, can be obtained only of the few persons who may be owners of the wharves. But the circumstance that the rate is regulated by law, does not change the character of the charge, nor bring it within the denomination of a tax upon tonnage.

Again, it is contended that the statute

in question is repugnant to the clause of the constitution which declares that congress shall have power to regulate commerce with foreign nations and among the several states.

It may be that a statute regulating the rates of wharfage, owing to the intimate and necessary connection of the subject-matter with navigation, is a regulation of commerce, but the character of the subject does not appear to be such as to require it to be considered to be within the exclusive legislative jurisdiction of the national government. On the contrary, owing to the differing necessities of the various ports, the varying extent of the demand for wharves, according to locality, and the absence of any uniform rate of cost or value of such property, it seems manifest that legislation of this character stands upon the same footing with the pilot laws; and state laws of that character, when not in conflict with any law of the United States, are upheld by reason of the character of the subject. *Cooley v. Board of Wardens*, 12 How. [53 U. S.] 314, approved in *Crandall v. Nevada*, 6 Wall. [73 U. S.] 35; *Hinson v. Lott*, 8 Wall. [75 U. S.] 152.

In the absence, then, of any law of the United States upon the subject of wharfage, the statutes of the state regulating the rate of wharfage must be held to be not invalid as regulations of commerce.

It is further contended that the statute in question provides an unjust discrimination in favor of canal-boats owned by the citizens of the state, and for that reason is repugnant to the constitution of the United States. The act does make a discrimination in favor of the canal navigation of the state, but it makes none in favor of the citizens of the state. The discrimination is between the employment of the boats, not between the persons owning or navigating the boats. All persons, without regard to citizenship, are placed upon the same footing, and it cannot be said that the statute, either in its language, or its results, creates a discrimination in favor of the citizens of the state of New York.

The remaining question to be considered arises out of the last clause of the 1st section of the statute under consideration, which provides, "That any vessel that shall leave a pier, wharf, bulkhead, slip or basin, without first paying the wharfage or dockage due thereon, after being demanded of the owner, consignee or person in charge of the vessel, shall be liable to pay double the rates established by this act."

In the present case the libellant has proved a demand of single wharfage and a departure from the wharf without payment. He thereupon claims to recover the double wharfage prescribed by the statute. To this demand it is objected that although wharfage be a maritime demand cognizable in the admiralty, the charge imposed by the statute in case of a departure

without payment of wharfage, is simply a penalty imposed by a state law, and not within the admiralty jurisdiction of the United States. But I cannot so consider it. The real effect of the statute is simply to charge vessels using the wharves of New York and Brooklyn with a liability for wharfage at certain fixed rates. If the wharfage be paid at one time it is to be calculated at one rate, if paid at another time at another rate. Whenever paid it is wharfage to be collected by the wharfinger for the use of his wharf. The object of fixing the two rates is to make it greatly for the interest of the vessel to pay her wharfage before she leaves, so that the wharfinger may seldom be driven to his action—a resort which will prove futile in many cases because of the departure of the vessel, and in all cases be barren of results, because of the smallness of this class of demands. But when driven to his suit, the demand is still wharfage, and recoverable as such in the admiralty.

In *Brookman v. Hamill*, [supra,] a demand of double wharfage was adjudicated by the court of appeals as wharfage, and so stated to be. Page 563.

But if the double wharfage prescribed by the statute were wharfage only in name, and in substance a statutory charge imposed by law upon the vessel in a certain event, for the benefit of the wharfinger, it would still be recoverable in the admiralty, for the jurisdiction of the admiralty to enforce a demand does not depend upon the origin of the demand but upon its nature—its maritime character derived from its relation to navigation.

The extra charge allowed by the statute arises out of the use of a wharf by a vessel in navigation—its amount depends upon the extent of that use, and the object of the charge is to insure payment for that use, and thus to facilitate navigation by encouraging the construction of wharves. It is, moreover, dependent upon the right to single wharfage. These features characterize the charge as maritime in character, and if maritime in character, a court of admiralty is bound to take cognizance of it. No valid objection to the jurisdiction of admiralty arises out of the mere fact that the right claimed is given by a state law, as has been expressly decided by the supreme court.

In the Case of *McNiel*, 13 Wall. [80 U. S.] 243, it was adjudged that the state law may give a substantial right of such a character as to place it within the jurisdiction of the admiralty.

The character of the demand in question appears clearly to be such as to require this court to take cognizance of it. As to the question of lien, the demand having been found to be in substance a demand for wharfage, the right to a lien follows of course. According to well settled principles and the rules of maritime law there is no

necessity, therefore, to consider the effect of that feature of the state law which makes the double wharfage due from the vessel herself—that is to say, a lien upon the vessel. There must be a decree for the libellant.

ANN, The SARAH.

[See The Sarah Ann, Case No. 12,342.]

Case No. 429.

ANONYMOUS.

The DOROTHEA FOSTER.

[1 Adm. Rec. 308.]

Superior Court, S. D. Florida. Dec. 5, 1836.

SALVAGE—AWARD—FORFEITURE FOR MISCONDUCT.

[1. Salvors, who, at a critical moment, refuse to perform labor essential to the preservation of the cargo, and who pursue a course embarrassing to others engaged in rendering salvage services in good faith, thereby forfeit all right to compensation.]

[2. Seamen on board a salving vessel, who get intoxicated and refuse to labor, and who hinder the labors of their fellows, thereby forfeit compensation in proportion to the degree and duration of their misconduct.]

[3. A captain or seaman of a salving vessel, who appropriates to his own use some of the property saved, although of trifling value, and without positive wicked intent, thereby forfeits all right to compensation.]

[4. It is the duty of the captain of a salving vessel to promptly bring into port, or forward, all articles received for the purposes of salvage, although of trifling value; but where such articles are afterward voluntarily produced, and it appears that the neglect resulted merely from thoughtlessness, the compensation is not necessarily forfeited thereby.]

[5. Compensation for salvage services, which has been forfeited for a neglect of duty which increased the labors and difficulties of other salvors, should be divided between such other salvors and the claimants.]

[6. Compensation for salvage services, which has been forfeited for a wrongful appropriation of the property by salvors to their own use, should be paid to the claimants.]

[In admiralty. Libel for salvage by Richard Roberts and others against the cargo and materials of the ship *Dorothea Foster*, (James Tilly, claimant.) Decree for libellants, in part.]

Wm. Marvin, for libellants.

A. Gordon, for claimant.

WEBB, District Judge. From the testimony in this case, I am satisfied that important services were rendered in saving a portion of the cargo and materials of the ship *Dorothea Foster*, after she was wrecked, that their services were the sole means by which this property was saved from destruction, and that they were rendered under circumstances of much difficulty and some danger to the salvors. I therefore consider it a case of much merit on the part of most of the actors, and one in which they are entitled to a liberal reward as salvage. In relation to a

few of them, however, I regret that the same favorable opinion cannot be entertained. The conduct of the libellant Bethel, of the schooner *Amelia*, and of the libellant Mott, of the schooner *Single Sailor*, was such, during a part of the transaction at least, as should deprive them of all compensation for their services in reference to this property. Independent of the allegation that they have not accounted for all the property taken by them from the ship, (and which they have not satisfactorily explained, it appears that they and the crews of their vessels refused, at an important moment in saving the cargo, to perform such labor as was deemed essential to its preservation, and pursued a course which was an embarrassment to those who were really engaged in rendering their services in good faith. These libellants, therefore, and the persons connected with them in their respective vessels, are adjudged to have forfeited all right to salvage in this case.

There are also other individuals who acted so badly as to affect their rights. Wm. Pratt, a seaman on board the sloop *Brillant*, by getting intoxicated and refusing to labor during a great part of the time that others were employed, and by interfering with and impeding their labors, has forfeited all right to compensation. And Silas Park and Thomas Roberts, also seamen of the *Brillant*, by getting intoxicated and declining to work a part of the time, have forfeited one half of the compensation to which they would otherwise have been entitled had they acted throughout with fidelity. The court regrets the necessity which impels it to inflict their forfeitures; but if those who make it a profession to save the property of others, when involved in peril, do not act with fidelity, they do an injury instead of conferring a benefit and are entitled to reprehension rather than reward.

There are two other individuals the investigation of whose conduct has produced still greater regret on the part of the court.—Those individuals are Captain Johnson of the schooner *Hester Ann* and Seaman Johnson of the sloop *Thistle*. They rendered their services faithfully it is true, so far as this court is informed, but have forfeited all right to compensation for their services by subsequently appropriating to their own use some of the property which they had been instrumental in saving. It is admitted, the value of the property thus appropriated was very small, consisting only of a few pounds of damaged sugar, and hence the court cherishes the hope that the act resulted rather from a want of reflection as to its consequences, than from wicked or depraved motives; still such acts cannot be tolerated or excused, however free the parties may feel themselves from intentional guilt; and the salvor who comes into court, with his hands thus stained, will invariably find his claims to compensation disregarded. On the part of Captain Johnson, the act is viewed in a much

worse light than on the part of the seamen; because from his station as commander of the vessel better things were to be expected, and it is to his conduct that his men will be disposed to look as a guide for their own.

It appears also from the testimony that Capt. Brown of the schooner *Caroline* received on board his vessel a few articles, (of little value it is true,) which were not brought to this port, and reported the residue of the cargo. These articles he has since voluntarily produced and partially explained his previous neglect, and therefore has avoided a forfeiture of his claims; but the court must take this opportunity to remark that it is imperatively the duty of salvors when they have secured from a wrecked vessel, any property, however small its value, to account for that property without unnecessary delay. In this case, Capt. Brown might have produced the articles secured by him at an earlier period, and their small value affords no sufficient reason for his not having done so, as he could have forwarded them to Key West by the other vessels bound to this port with other portions of the cargo, and with which he was consorted, even tho' they were of too little value to justify his bringing them in his own vessel. His voluntarily accounting for them subsequently however, and his general good conduct throughout the whole transaction in saving the property taken from the ship, is sufficient to satisfy the court that this act proceeded from thoughtlessness rather than design, and therefore, in this case, his rights will not be affected.

The net value of the property saved from this wreck after the payment of duties is estimated by a sale of a part and an appraisalment of the residue to be \$9,208.47. Salvage on that sum, say one moiety, which is the proportion deemed to be just under the circumstances, is \$4,604.23½c. This sum, agreeably to articles of consortship entered into between the libellants, would be divided between nine vessels, to wit, the schooners *Brillant*, *Caroline*, *Fair American*, *Hester Ann*, *Splendid*, *Citizen*, *Amelia*, and *Single Sailor*, and the sloop *Thistle*, and their respective officers and crews, and under that division the proportion to which the schooners *Amelia* and *Single Sailor*, and their officers and crews, would have been entitled, is \$966.97c., and the share of Pratt and half shares of Park and Roberts of the *Brillant* are \$45.23, making the aggregate sum of \$1,012.20c., which is forfeited for bad conduct, but as the cause of forfeiture has mainly been for a neglect of duty and in consequence of which the labors and difficulties of the other actors were increased, it is considered just that the sum of \$1,012.20c. should be divided between them and the owners of the property, which being done will produce the sum of \$4,098 and 12 cents, to be divided between the remaining seven vessels and their officers and crews,

except as regards the shares of the two Johnsons, which are forfeited for an improper appropriation of the property to their own use, and will be paid to the owners of the ship and cargo. The clerk is therefore directed to make out a decree in conformity to this opinion, taking the following statement as his data:

Net amount of sugar, coffee and materials of the ship (duties and expenses of sale paid) is.....	\$4,519 39
Net value of rum according to appraisement, after deducting duties..	4,689 08

Whole value of cargo and materials	\$9,208 47
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Salvage on \$9,208.47 at 50 per ct. is..	\$4,604 23½
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And if divided agreeably to articles of consortship between nine vessels and their respective crews, would give to schooner *Amelia* and crew \$509.62, to Single Sailor and crew \$457.35, to seaman Pratt \$22.61½, and to seamen Park and Roberts each an equal sum, half of which is \$22.61½. These sums, amounting in the aggregate to \$1,012.20, are to be divided between the other salvors and the owners of the property, one half of which (\$506.10) added to \$3,592.01½, the salvage of the seven vessels not forfeited, is \$4,098.11½, which is to be divided between the seven vessels as follows: To those representing the sloop *Brilliant* the sum of \$668.55, to be divided between the owners of the vessel and the officers and crew except Wm. Pratt, who is to receive nothing, and Silas Park and Thomas Roberts, who are to receive only half shares each. To those representing the schooner *Caroline* \$527 and 6c., to be divided between owners of vessel, officers and crew. To those representing the sloop *Thistle*, \$566.52, less \$23.60c. Seaman Johnson's share is forfeited; the residue to be divided between owners of vessel, officers and crew except Johnson. To those representing schooner *Fair American* \$462.50c., to be divided between owners of vessel, officers and crew. To the owners of the schooner *Hester Ann*, officers and crew, (except Capt. Johnson, whose shares are forfeited,) \$605.02c., less \$90.75, said Johnson's part. To those representing the sloop *Citizen* \$527.06, to be divided between owners of vessel, officers and crew. To those representing the schooner *Splendid* \$723.41c., to be divided between owners of vessel, officers and crew. The residue of the cargo and materials of said ship, and the proceeds arising from the sales, say \$4,604.22, being one moiety thereof, to which is to be added one half of the amount of salvage of *Amelia*, Single Sailor, and the shares of their officers and crews, and the share of Pratt and the half shares of Park and Roberts, which are forfeited, and also the entire shares of Capt. Johnson of the *Hester Ann* and Seaman Johnson of the *Thistle*, which are also forfeited, amounting in the whole to the

sum of \$620.45, making the aggregate sum of \$5,224.67, will, after deducting so much as may be necessary to pay the costs and expenses of this suit, be delivered over to the respondent Tilly, the master of said ship, for and on account of all concerned and interested therein.

Case No. 430.

ANONYMOUS.¹

ELDREDGE v. The SEA FLOWER.

[1 Adm. Rec. 149.]

Superior Court, S. D. Florida. Nov. 19, 1834.

SALVAGE—COMPENSATION—AWARD TO CREW OF SAVED VESSEL.

[1. Where a vessel and cargo have been rescued from inevitable destruction by the exertions of salvors, and the value of the saved property is small, one moiety of its value should be awarded as salvage.]

[2. The crew of a wrecked vessel, who are faithful in the discharge of their respective duties, and perform much extraordinary labor in pumping to keep the vessel free, and thus assist the salvors, should be allowed extra compensation.]

[In admiralty. Libel by Thomas Eldredge and others against the brig *Sea Flower* and cargo for salvage, (Nathaniel Hartford, claimant.) Decree for libellant.]

Adam Gordon, for libellants.

William R. Hackley, for respondent.

WEBB, District Judge. From the testimony adduced in this case, it appears most clearly that the property libeled has been rescued from inevitable destruction by the exertions of the libellant and those associated with him. The brig, after being relieved, was found to have sustained very great injuries by thumping upon the rocks, and to be leaking so badly as to make five feet of water an hour. Several of her timbers were broken, her false keel principally knocked off, her main keel split, some of her planks started, her rudder much injured and one of the pintles broken, and in the opinion of her mate, who has been sworn as a witness, she could not have remained six hours longer on the reef, without going to pieces. The mate also states, that her own crew could not have relieved her. And as her cargo was composed of quick lime, it will readily be perceived that all must have been lost, had she bilged while it remained in her hold. The cargo, by a sale of it, since brought into port, has been found to be of little value. The proceeds of that sale are small, and the brig, in her present condition cannot be worth much; the compensation, therefore, to those who have rendered this assistance, must necessarily be small when divided between two vessels and about twenty men; but there are no pe-

¹[Cited without title in *Marvin on Wreck and Salvage*, 236.]

cular circumstances attached to this case which would seem to require that it should be taken out of the ordinary rule; and as one moiety of the property saved under such circumstances, has been in this and other courts, the usual allowance for salvage, that proportion will be decreed in this case. It has been represented to the court that the seamen of the brig have been faithful in the discharge of their respective duties since she has been involved in this difficulty, and that they have performed much extraordinary labor in pumping the vessel to keep her free; and in other ways; and some compensation is asked for them, for that additional labor. I think it right that such compensation should be allowed, not only as a remuneration for their extra services, but as an inducement which may lead others to perform their duties faithfully, and to use every possible exertion to relieve property similarly exposed to danger and loss. Fifteen dollars to the mate, and ten dollars to each ordinary seaman, will be allowed for their extra services in this case. Whereupon it is ordered, adjudged, and decreed, that the brig Sea Flower, her tackle, apparel, furniture, and boats, be condemned, and that after giving five days' notice of the time and place of sale, the marshal proceed to sell the same at public auction for cash, and that he pay the proceeds of said sale into the registry of this court. And it is further ordered, adjudged, and decreed, that the clerk of said court, after receiving the proceeds of said sale, pay one moiety thereof, and also one moiety of the money now in said registry arising from the sale of the cargo of said brig, to the libellant for and on behalf of all concerned, and interested as salvors in said case, and that he also pay fifteen dollars to the mate, and ten dollars to each ordinary seaman of said brig as a compensation for the extra labor performed by them, and that the residue of said monies, after paying the costs and expenses of this suit, be restored to Nathaniel Hartford, master of said brig, for and on account of all concerned and interested therein.

Case No. 431.

ANONYMOUS.

[2 Amer. Law Rev. (1859,) 359.]

Circuit Court, D. Tennessee.

CONFLICT OF LAWS—FOREIGN ADMINISTRATOR.

Payment of a debt, at the domicile of a debtor, to a foreign administrator, is no defence to a suit by the administrator subsequently appointed under authority of the state in which the debtor is domiciled. This decision follows the opinion of Judge Story, in his Conflict of Laws, § 514, and the case of Young v. O'Neal, 3 Sneed, 55. The court distinguish the cases of Doolittle v. Lewis, 7 Johns. Ch. 45, and Nisbet v. Stewart, 2 Dev. & B. 24, the decisions in

which have been supposed to support the opposite view.

[Decided by Trigg, District Judge. Nowhere reported; opinion not accessible.]

Case No. 432.

ANONYMOUS.

[5 Blatchf. 134.]¹

Circuit Court, S. D. New York. Jan. 21, 1863.

WITNESS—ATTENDANCE AND FEES—MILEAGE.

Traveling fees to a witness are allowable only to the extent a subpoena will run; that is, for any distance within the district, but for not exceeding 100 miles from the place of trial, unless the distance is wholly within the district.

[Cited in Beckwith v. Easton, Case No. 1,212; Dennis v. Eddy, Id. 3,793; Haines v. McLaughlin, 29 Fed. 70; Young v. Merchants' Ins. Co., Id. 275; The Vernon, 36 Fed. 116; Buffalo Ins. Co. v. Providence & S. S. S. Co., 29 Fed. 237; Wooster v. Hill, 44 Fed. 819. Disapproved in U. S. v. Sanborn, 28 Fed. 303, 304.]

[See Eastman v. Sherry, 37 Fed. 844; Smith v. Chicago & N. W. Ry. Co., 38 Fed. 321; The Syracuse, 36 Fed. §30.]

Before NELSON, Circuit Justice, and SHIPMAN, District Judge.

In this case, which was a question of the taxation of costs, SHIPMAN, District Judge, with the concurrence of Mr. Justice NELSON, held, that traveling fees to a witness were allowable only to the extent a subpoena would run; that is, for any distance within the district, but for not exceeding 100 miles from the place of trial, unless the distance was wholly within the district.

Case No. 432a.

ANONYMOUS.

[Blatchf. Prize Cas. 206.]²

District Court, S. D. New York. Aug., 1862.

COSTS, FEES, AND COMPENSATION IN PRIZE CASES.

In admiralty.

BETTS, District Judge. Bills of costs are laid before me for taxation in behalf of the district attorney, the marshal, the prize commissioners, and the counsel for captors, made up in prize suits which have been adjudicated in the court. The following principles of allowance will be applied in the taxation of costs in prize cases:

1. No specific tariff of fees having been appointed to the suits by statute, the costs fixed by statute for similar services in admiralty will be allowed in this court, except as otherwise directed by acts posterior to the fee-bill of February 26, 1833.

2. The compensation directed to be made by the act of March 25, 1862, to the officers

¹[Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

²[Reported by Samuel Blatchford, Esq.]

therein named, will be computed and adjusted, as nearly as may be, conformably to allowances by the laws of the United States to employes for like services under the government, or in accordance with established rules and usages of the courts in regard to their officers rendering like services. In cases of doubt or difficulty, evidence may be taken on the question of quantum meruit.

3. The gross costs taxed to any of the officers of court for services in prize cases will be, in collection or payment, subject to all limitations, as to amounts or periods of payment, under the acts of congress in force at the time of such taxation.

4. The method of ascertaining the compensation of any of the officers of court for their services in prize suits, by a percentage on the value of the property coming officially into their possession or under their charge, will not be adopted by the court without express authority of law, or the assent thereto, in writing, by the parties whose interests are to be affected thereby.

Case No. 433.

ANONYMOUS.

[1 Brunner, Col. Cas. 29; 2 Hayw. (N. O.) 378.]

Circuit Court, D. North Carolina. 1805.

INTEREST—LIABILITY OF BAIL FOR.

In a scire facias against bail, interest is not allowed on the judgment rendered against the principal.

At law.

PER CURIAM. This is a scire facias against bail, and the plaintiff's counsel urges that he is entitled, against the bail, to interest upon the judgment against the principal. We are of opinion he is not so entitled; for the judgment upon the scire facias is that the plaintiff have execution against the bail of the judgment against the principal. The very same execution therefore issues against the bail as issues against the principal; and consequently damages arising after the judgment cannot be included. Cases cited, [Fanchaw v. Morrison,] 1 Salk. 208; [Henriques v. Dutch West-India Co.,] 2 Strange, 807, 2 Ld. Raym. 1532; Com. Dig. "Bail," R. 10.

Case No. 434.

ANONYMOUS.

[1 Brunner, Col. Cas. 74; 3 Day, 308.]

Circuit Court, D. Connecticut. April, 1809.

AFFIDAVIT FOR CONTINUANCE — ADMISSIBILITY OF COUNTER-AFFIDAVITS.

After an affidavit in support of a motion for the continuance of a cause, on the ground of the absence of a material witness has been made, the opposite party may make a counter-affidavit

¹[Reported by Albert Brunner, Esq., and here reprinted by permission.]

1 FED. CAS.—68

stating any circumstances that render it impossible or improbable that the evidence of the witness can be obtained within a reasonable time; but such counter-affidavit must not deny the materiality of the evidence.

On motion for the continuance of this cause, the party made an affidavit stating the absence of Joseph Howland, Jr., a material witness, and that he hoped to procure the testimony of the witness at the next court. A counter-affidavit was filed, stating that Joseph Howland, Jr., was gone to foreign parts; that he expected to have no fixed residence, and that he did not expect to return within two or three years.

THE COURT would not continue the cause, and took the opportunity to observe that there was manifest utility in counter-affidavits, as was evident from the present instance. They said, however, that counter-affidavits should not deny the materiality of the evidence expected from the witness, but might state any circumstances that rendered it impossible or improbable that his testimony could be procured within a reasonable time.

EDWARDS, District Judge, said that the English practice was lame in this respect; that it threw great power into the hands of a party, and that this court was perfectly free to establish a better practice. He added that the whole English practice of admitting affidavits was modern.

NOTE, [from original report.] See Hyde v. State, 16 Tex. 454, citing case in text.

Case No. 435.

ANONYMOUS.

[1 Car. Law Repos. 190.]

District Court, D. Massachusetts. Feb. 6, 1813.

[The case reported without title in 1 Car. Law Repos. 190. is the same as Hooper v. The Hiram, Case No. 6,675.]

Case No. 436.

ANONYMOUS.

[1 Car. Law. Repos. 346.]

District Court, D. New York.

[The case reported without title in 1 Car. Law Repos. 346. is the same as U. S. v. Coit, Case No. 14, 829.]

Case No. 437.

ANONYMOUS.

[4 Chi. Leg. News, (1872,) 210.]

District Court, S. D. Ohio.

BANKRUPTCY — FEES OF MARSHAL AS MESSENGER.

[1. The fees to be allowed to a marshal as messenger are those specifically enumerated by law, and such other fees as he shows himself to have earned, the items of which are determinable by analogy to the fees allowed the marshal for similar services.]

[2. Where a marshal sends a process by mail to his deputy in a distant county, he is entitled to be paid mileage on such process; but, where he sends a deputy from the court house to a distant county for service, he is entitled to the reasonable expenses of the deputy, but not to mileage.]

[3. A messenger cannot charge commission on his own cost bill.]

In bankruptcy.

Report of BALL, Register. This matter comes before the court on appeal from the decision of the register at Columbus, to whom this cause was referred, whereby he sustains the exceptions taken by the assignee to the bill of costs of the messenger. The messenger now seeks redress from the court, and the court by its special order, dated October 20, 1871, has referred the matter to me to examine the law and the evidence and report thereon; and having examined all the evidence submitted by each party, and the arguments of counsel for the assignee and of the messenger in person, I have now the honor to make my report.

The charges made by the marshal and accepted to, are as follows:

1st. July 28, 1870. Serving the original order in Mercer Co. with copies of the petition, and mileage.....	\$ 37 75
2nd. July 28. Serving warrant at same time and expenses of deputy.....	78 90
3d. March 17. Serving copies of order and mileage	21 50
4th. March 18. Copy of warrant, mileage, and cost of advertising.....	12 60
5th. March 18. Notice to creditors by mail, service, postage and mileage..	12 90
6th. Apr. 21. Serving order in Mercer Co., copy and mileage.....	21 50
7th. Apr. 21. Copies of inventories, \$5.76, commission for distributions, \$5.56	11 32
8th. Apr. 8. Postage and materials..	1 30
9th. 1870. Two keepers' fees from February 2nd to May 2nd, 90 days, at \$2.50 per day each.....	450 00
Expenses and keeping horses, not ascertained, in addition to these items, he claims in his reply to the assignee, "for care, trouble and responsibility incurred in this case," for 9 months, an allowance of.....	100 00

No affidavit showing the items of his disbursements, that the same were actually paid and were necessary and reasonable, is annexed by the marshal to his fee bill, but for the purposes of this examination, I will assume that the same has been filed. No evidence or statement has been furnished as to the nature of the services involving "care, trouble and responsibility," rendered by the marshal beyond the services necessarily attendant on the service of process, for which he claims an allowance of \$100 beyond taxable costs, and therefore I am unable to express any opinion upon it.

In testing the amount of the costs taxable to the marshal as messenger, the court will be governed by the 47th section of the bankrupt act and by rule 12 of the supreme court, but it was evident that it was not the

intention of congress to limit the fees of the marshal for all services which he may probably render to the four items enumerated in that section, because the section further provides "that for cause shown, and upon hearing thereon, such further allowance may be made as the court in its discretion may determine." In view of the statute and of the rule, and of the authorities cited, it seems to me clear, that rules to be observed in taxing costs to the messenger, are: First. To allow him such fees as are specifically enumerated by law, and secondly, such other fees not included in the enumerated fees as he may show himself to have earned; the items of which are to be determined by analogy to those allowed for similar services rendered by the marshal in this court, in cases at common law and in chancery. I think if he sends process by mail to his deputy in a distant county for service, he is entitled to mileage on that process, and if he sends a deputy from the court house to such distant county for service, he is entitled to be paid the reasonable expenses of such deputy, but in that event he is not entitled to mileage. Believing this to be a correct view of the law, and substantially the same as it has been administered by this court in this district, I now proceed to retax the cost bill under consideration, with this remark, that although the administration of the bankrupt law and its operation on bankrupts' effects are uniform in all the judicial districts of the United States, the duties imposed upon the officers acting under the law, and the taxation of their costs, are not. Neither section 47 nor rule 12 specifies all the services which the marshal as messenger may be called upon to perform, and, therefore, no tariff of fees covering all the acts which the messenger may be called upon to perform, has been prescribed, either by congress or the supreme court, but the taxation of such fees is left to the discretion of the court.

Cost bill as retaxed:-

Jan. 28. 1870. To serving five debts and parties in Mercer Co. with order	\$ 10 00
Jan. 28. Three copies petition on debts. \$6.00, copies. \$2.25.....	8 25
Jan. 28. Warrant of seizure, \$2.00; 1 copy, \$1.50.....	3 50
Jan. 28. To expenses deputy sent to Mercer Co., \$29.30, telegrams.....	31 90
Jan. 28. Wages, deputy in possession, 9 days after seizure, at \$2.00..	18 00
Mch. 18. Serving order adjudication on two parties, \$4; copy, 50c; mileage, \$17.....	21 50
Mch. 18. Preparing notice publication, 40c; paid printers, \$9.60.....	10 00
Mch. 18. Preparing notice 1st meeting, \$7.60; services, \$3.00; postage, \$1.00.....	11 60
Apr. 21. Serving order on two keepers to deliver, \$4; copy, 50c.....	4 50
Apr. 21. Copies of inventories.....	5 76
May 2. 90 days' keeper's fees, at \$2.00 each per day.....	360 00
Total	\$485 01

The messenger is also entitled to be refunded the sum paid for keeping horses, when ascertained.

There is no rule of law or practice, authorizing the messenger to charge a commission upon his own cost bill. There is no analogy between such a claim and a claim for two per cent. against the government allowed him by law, upon his disbursements for the expenses of the courts in the payment of jurors, witnesses and others, out of the funds placed in his hands for such purposes. The charge of \$1.30 for postage and material is, I think, covered by the amounts which I have above allowed. If it should appear that the deputy who was sent to Mercer county, acted as one of the keepers of the property seized, then, inasmuch as such fees are already included in the item of \$360, the item of \$18 above allowed him for nine days should be stricken out, which would reduce my finding to \$467.01. I have been obliged to consider this matter without having all the papers in the cause before me, and was, therefore, obliged to grope somewhat in the dark, and may, therefore, have made mistakes. It seems to be conceded on the part of the assignee, that the marshal performed his duty promptly and faithfully, and to the entire satisfaction of the petitioning creditors, and, therefore, if I have leaned at all it has been on the side of the marshal. His bill of costs, however, is too vague to serve as a precedent hereafter. He should have stated the kinds of processes served and also the number of notices sent by him, and also, what expenses were paid and to whom, so that the court could judge whether they were correct and necessary but it is a matter of long standing, and lapse of time increases the difficulties attendant upon the ascertainment of the exact amounts due him, with judicial certainty.

Respectfully submitted.

Case No. 438.

ANONYMOUS.

[6 Chi. Leg. News, 333.]

[The case reported without title in 6 Chi. Leg. News, 333, is the same as *Piek v. Chicago & N. W. R. Co.*, Case No. 11,138.]

Case No. 439.

ANONYMOUS.

[7 Chi. Leg. News, 26.]

[The case reported without title in 7 Chi. Leg. News, 26, is the same as *U. S. v. Wirt*, Case No. 16,745.]

Case No. 440.

ANONYMOUS.

[9 Chi. Leg. News, 20.]

[The case reported without title in 9 Chi. Leg. News, 20, is the same as *U. S. v. Hazard*, Case No. 15,337.]

Case No. 441.

ANONYMOUS.

[11 Chi. Leg. News, (1879,) 190.]

District Court, W. D. Tennessee.

BANKRUPTCY—WHEN CREDITORS HAVING ADVERSE INTEREST MAY DEFEND.

A creditor or other person having an adverse interest to be affected by an adjudication in bankruptcy, may be admitted to defend. Practice when debtor denies that the requisite number and amount of creditors have joined. To charge suspension of commercial paper is not enough. It should be described or identified.

HAMMOND, J. The long disputed question, whether a creditor or other party having an adverse interest to be affected by an adjudication in bankruptcy, may be admitted to defend against the involuntary petition, has been settled in favor of that right. *Bump*. [Bankr.] (10th Ed.) 51, cites the cases. [In re Boston, Case No. 1,677; Id. 1,678; In re Heusted, Id. 6,440; In re Bush, Id. 2,222; *Dutton v. Freeman*, Id. 4,210; *Clin-ton v. Mayo*, Id. 2,899; In re Derby, Id. 3,815; In re Mendelsohn, Id. 9,420; In re Hatje, Id. 6,215; In re Jack, Id. 7,120; In re Jack, Id. 7,119; In re Scrafford, Id. 12,557; In re Scrafford, Id. 12,556.]

The act, (section 5,021, [18 Stat. 181,]) provides that if the debtor denies that the requisite number and amount of creditors have joined, he shall file a list of his creditors, with their place of residence and sums due them; but it makes no provision for such a list where the debtor admits that fact. Indeed, it says, that if satisfied that the admission is made in good faith, the court shall so adjudge, and its determination shall be final, and the matter shall proceed without further steps on that subject. One of the creditors, who holds an attachment lien, which will be avoided by an adjudication, files a petition, asks to be permitted to defend, and, among other things, denies that the requisite number and amount of creditors have joined, and moves that the debtors be required to file a list of their creditors. I think the case stands as if the debtor himself had denied this fact, and that the alleged bankrupts may be required to file the list of creditors, and it is so ordered.

I am asked by the petitioning creditors to instruct the register whether or not both individual and partnership creditors are to be enumerated, or only partnership creditors; to exclude all secured creditors, except for supplies; to exclude all creditors who have had a preference or levied attachments, which will be avoided. I cannot adjudicate on these questions till they arise by presentation of the facts; and they are not now raised by the record. The case may be referred to the register to take proof and report whether or not the requisite number and amount of creditors have joined in this petition. He will report the facts and the proof he takes, along with his report. These questions, as they are raised before him, may be certified,

or reserved and made by exceptions after his report comes in. The case is not before him as if an adjudication had been made, and perhaps the certification in the ordinary way would not be proper practice, but it can be done by agreement; or the parties can put all the facts in the proof, and bring the questions up by exceptions to his report. The single act of bankruptcy charged, is—suspension of commercial paper. It is well charged, except that the paper is not described as identified, as it should have been. Rump. [Bankr.] (10th Ed.) 35, 423, cites the cases. [In re Randall, Case No. 11,551; In re Hadley, Id. 5,894.]

The defect may be amended.

Case No. 442.

ANONYMOUS.

[1 Cranch, C. C. 139.]¹

Circuit Court, District of Columbia. July Term, 1803.

EQUITY PRACTICE—ANSWER—ATTACHMENT.

THE COURT decided, on a motion of Mr. Woodward, for a rule answer in chancery, that such a rule need not be laid, but an attachment might go, of course, after the fourth day of next term.

Case No. 443.

ANONYMOUS.

[2 Dall. 382.]²

Circuit Court, D. Pennsylvania. April Term, 1797.

JURY—IMPANELING—SPECIAL JURY—TALESMAN.

The court has power to order a tales in special jury causes.

[Cited in Hall v. Perott, Case No. 5,942.]

In a cause marked for trial by special jury, nine jurors only appeared; and the question arose, whether the court (who wished to consider it with a view to establish a precedent) could award a tales, on the application of the plaintiff.

Levy and Ingersoll suggested, that the supreme court of Pennsylvania had so construed the 12th section of the act of assembly (2 Dall. Ed. p. 265) as to exercise the power of ordering a tales in the case of special, as well as of common, juries, whenever the plaintiff required it, and also whenever the defendant required it, if he had a rule for trial by proviso. The same power is exercised in England on general principles. Sell. Pr. 476.

Lewis observed, that the supreme court held, that the Pennsylvania act, and not the English practice, must regulate the proceedings with respect to juries; and the case of a tales in trials by special jury, though admissible at common law, might not have

¹[Reported by Hon. William Cranch, Chief Judge.]

²[Reported by A. J. Dallas, Esq.]

been adopted by the legislature, on account of the inconveniences, which the practice tended to introduce. But whatever may have been the previous law, the legislative rule must be pursued; and *expressio unius est exclusio alterius*.

Rawle conceived, that the 12th section of the judicial act, (1 Swift's Ed. p. 67, [see section 29, 1 Stat. 88,]) settled the question. In the first part of the section, the provision for empannelling juries in general, obviously including both special and common juries; and, as there is the same generality of expression in the latter part of the section, when provision is made for returning a tales, it ought also, by a parity of construction, to be extended to both cases.

PETERS, District Judge. I have no doubt of the power of the court to order a tales in special jury causes. It might have been done, I think, under the act of assembly; but unquestionably it may be done under the act of congress. There ought, however, to be such a discretion in using it, as to prevent any injury to either party; and, therefore, a trial should not be forced on, without a reasonable delay to bring in the jurors that had been regularly selected.

IREDELL, Circuit Justice. The act of congress seems to remove every difficulty. It makes no distinction (and the court can, therefore, make none) between the case of a special and of a common jury. If this provision had not existed, the subject would have occasioned much doubt in my mind.

Case No. 444.

ANONYMOUS.

[1 Gall. 22.]¹

Circuit Court, D. Massachusetts. May Term, 1812.

ADMIRALTY—PRACTICE—AMENDMENTS ON APPEAL.

1. The circuit court has authority to allow amendments in revenue causes or proceedings in rem, brought by appeal from the district court.

[Cited in Jay v. Almy, Case No. 7,236; Kennedy v. Bank of Georgia, 8 How. (49 U. S.) 611; Warren v. Moody, 9 Fed. 673; Irvine v. The Hesper, 122 U. S. 266, 7 Sup. Ct. 1182.]

[2. Cited in U. S. v. Athens Armory, Case No. 14,473, to the point that a proceeding in rem to confiscate property is a civil suit.]

[See The Edward, 1 Wheat. (14 U. S.) 261.]

In admiralty.

[Before STORY, Circuit Justice, and DAVIS, District Judge.]

STORY, Circuit Justice, delivered the opinion of the court:

The question as to the right of this court to grant amendments, in cases of libels, or informations, in rem, for violations of

¹[Reported by John Gallison, Esq.]

municipal laws, brought by appeal from the district court to this court, has been argued several times, as a question of general importance, and the court will now deliver its opinion.

By the judiciary act of 1789, c. 20, § 32, [1 Stat. 91,] it is enacted, that all the courts of the United States, may, at any time, permit either of the parties "to amend any defect in the process or pleadings, upon such conditions, as the said courts respectively shall, in their discretion, and by their rules, prescribe." The language of this section is sufficiently comprehensive to sustain the application for amendments in any cases before the court; but it has been attempted to be restricted to causes of original, and not to be extended to causes of appellate jurisdiction. But we find no such distinction in the statute: and even in appellate courts, proceeding according to the course of the common law, defects apparent upon the record may be amended, when they come within the general purview of statutes. Indeed, in *Rex v. Ponsonby*, 1 Wils. 303, the rule is laid down rather more broadly: "that the superior court, where error is brought, may make such amendments, as the court below may; but that can only be done, when the superior court has the same matter to amend by, as the inferior has." See, also, *Pease v. Morgan*, 7 Johns. 468. There is then, in the nature of an appellate jurisdiction, nothing which forbids the granting of amendments.

2. It is said in the next place, that these proceedings in rem are of a criminal nature, and therefore not amendable. If they are of a criminal nature, the argument is by no means satisfactory; because, at common law, criminal proceedings are amendable in matters of form at all times, and in matter of substance also, while they are in paper. *Queen v. Tuchin*, 1 Salk. 51, 2 Ld. Raym. 1068; *King v. Hill Darley*, 4 East, 175. For as to amendments, at common law, there is no difference between civil and criminal proceedings. The statutes of jeofails were not originally extended to the latter; but this was grounded upon the peculiar wording in some of these statutes, and in others upon express exceptions. Amendments of informations, in personam, are now considered so much as a matter of course, that they are even made on application to the judges at chambers. *Rex v. Wilkes*, 4 Burrows, 2527; *Rex v. Holland*, 4 Term R. 457; 2 Hawk. P. C. c. 25, Indictment, § 97, p. 347. Yet, in these causes, the amendments are generally, if not universally, founded on the common law authority of the courts. But it is not true, that informations in rem are criminal proceedings. On the contrary, it has been solemnly adjudged that they are civil proceedings. *Ketland v. The Cassius*, Case No. 7,743; *U. S. v. La Vengeance*, 3 Dall. [3 U. S.] 297; *U. S. v. The Sally*, 2 Cranch,

[6 U. S.] 406; *U. S. v. The Betsey and Charlotte*, 4 Cranch, [8 U. S.] 443. See, also, *The Fabius*, 2 C. Rob. Adm. 245.

As to the practice of amendments in proceedings in rem, we find a great variety of authorities. *Baldwin v. —*, Bunb. 49; *Lock v. Williford*, Id. 72; *Kennet v. Lloyd*, Id. 58; *Edgell v. Decker*, Id. 252; *Brooke v. Day*, Id. 334. And in *Attorney General v. Henderson*, 3 Anstr. 714, the court, upon inquiry, held, that the practice in revenue informations was, that the attorney general might, at any time, amend as of course. Now it will be found, that excepting under the statute 16 & 17 Car. II. c. 8, § 2, (which extends the benefit of that statute to all informations concerning customs and subsidies of tonnage and poundage, and purely applies to the curing of defects after verdict) these amendments are granted solely upon the footing of the common law. This objection, therefore, cannot prevail.

3. It is said, in the next place, that these causes are in the nature of proceedings, in rem, in the exchequer, and ought not to be varied by amendments, after they have become records of the court below, and can no longer be considered as proceedings in paper. Admitting that these proceedings are in the nature of exchequer informations, it may well be doubted, if the inference assumed be incontrovertible. By the appeal, the judgment and decree of the court below are suspended. [*Penhallow v. Doane*,] 3 Dall. [3 U. S.] 88, 118; *Yeaton v. U. S.*, 5 Cranch, [9 U. S.] 281. The whole cause is to be heard anew, both as to law and fact; and in these particulars is, it seems, a cause de novo in this court. One ground of allowing amendments in any court, is, that the parties are often surprised by new evidence, at the trial, which they could not have foreseen, and therefore, they are allowed to amend in furtherance of public justice. Now this principle applies as forcibly to this court, in the exercise of its appellate, as its original jurisdiction; for the new facts may entirely vary the former case: and if, upon the appeal, no amendment could be made, it would afford temptation to suppress all defence in the court below, and thereby to obtain an unjust advantage in this court, by surprise. But whatever may have been the rules prescribed as to process or forms of pleading, it is very clear, and has been too firmly settled to be shaken, that these proceedings are of admiralty and maritime jurisdiction, (*U. S. v. La Vengeance*, 3 Dall. [3 U. S.] 297; *U. S. v. The Sally*, 2 Cranch, [6 U. S.] 406; *U. S. v. The Betsey and Charlotte*, 4 Cranch, [8 U. S.] 443;) and the principle of these decisions seems confirmed in the admiralty in England (*The Fabius*, 2 C. Rob. Adm. 245.) If then these are admiralty and maritime causes, the appeal must let in all the general principles, which govern such causes. Now, no principle is more exactly settled, than

that upon an appeal in an admiralty cause, it is allowable, under certain restrictions, to allege what has not been before alleged, and to prove what has not been before proved. Clerke's Prax. tit. 54; 1 Brown, Civil & Adm. Law, 500; 2 Brown, Civil & Adm. Law, 436; Cod. lib. 7, tit. 63, §§ 1, 4; Yeaton v. U. S., 5 Cranch, [9 U. S.] 281. And this right to allow new allegations, seems the natural result, from the introduction of new evidence on the appeal. The same practice is familiar in our state courts on appeals; and though it derives countenance from our statutes, yet I apprehend that the true ground why the practice has obtained is, that on the appeal the proceedings are considered as de novo in the appellate jurisdiction.

On the whole, we are well satisfied of our right to grant the amendments, which seem necessary, in the various causes before us, on appeal. But it is an exercise of sound discretion, in which the court will take care, that no unfair advantage shall be taken by one party, and no oppression practised by the other. Considering the nature of informations in rem, the countenance which has heretofore been allowed to amendments in the appellate courts, and the mischiefs which would arise from a sudden change of practice, we shall now allow the amendments asked for: But we do not mean to lay it down as a general rule, that such amendments will be hereafter allowed, as of course, in this court; on the contrary, having the authority, we shall probably limit the exercise of the discretion by general regulations.

Amendments allowed.

NOTE. [from original report.] See *The Caroline* v. U. S., 7 Cranch, [11 U. S.] 496; *The Anne* v. U. S., 7 Cranch, [11 U. S.] 570; *The Hoppet* v. U. S., 7 Cranch, [11 U. S.] 389; *The Adeline*, 9 Cranch, [13 U. S.] 244; *The Divina Pustora*, 4 Wheat, [17 U. S.] 52; *The Harmony*, [Case No. 6,081; *Orne* v. Townsend, [Case No. 10,583.]

Case No. 445.

ANONYMOUS.

[2 Gall. 101.]¹

Circuit Court, D. Massachusetts. May Term, 1814.

COSTS—REMEDIES—MARSHAL'S FEES—ATTACHMENT.

1. The marshal may have an attachment, to enforce the payment of his fees of office, against suitors in the court.

[Cited in *Re Stover*, Case No. 13,507.]

2. So against an endorser on the writ, who by the *lex loci* is liable to respond the costs.

[Cited in *Goodyear* v. Sawyer, 17 Fed. 5.]

J. T. Austin, for the marshal.

[Before STORY, Circuit Justice, and DAVIS, District Judge.]

STORY, Circuit Justice. This is a motion made by the marshal for an attachment against the defendant, who is an attorney of this court, to compel the payment of his fees for the service of sundry writs brought in this court by Susanna Cunningham, a citizen of the state of New York, against Harrison G. Otis and others, which writs were endorsed by the defendant, and were dismissed at a former term of this court.

It has been contended, that this is not a proper process to compel payment of the fees due to the marshal. But on the authority of *Caldwell* v. Jackson, in the supreme court, 7 Cranch, [11 U. S.] 276, we are satisfied, that an attachment may issue to compel the payment of the fees due to officers of the court for the performance of their official duties. And this seems reasonable, inasmuch as the marshal is compellable to perform these duties, and as an officer of the court, a similar process lies against him to enforce the performance. As the affidavits prove the substantial facts, which are not denied, the only remaining question seems to be, whether the same process, which would lie against the party to compel payment of fees, can be maintained against his attorney, who endorses the writ, and thereby becomes liable, under the statute of Massachusetts of 30th of October, 1784, § 11, (1 Mass. Laws, 206,) to the payment of the costs of the suit in case of the avoidance or inability of his principal. As the principal resides without the state, and due application has been made to his attorney in the suits, to obtain payment, it is a sufficient avoidance within the meaning of the statute, even supposing that such avoidance be necessary, where the party plaintiff is not an inhabitant of the commonwealth. We think also that this case is fairly within the equity of the statute, though perhaps not within its words, which seem confined to the payment of the costs of the defendant. The uniform practice of this court has been, to require an endorsement on the writ by the plaintiff or his attorney, if resident within the commonwealth, or by some other responsible person, if the plaintiff were resident without the commonwealth, according to the statute, and with the express understanding, that such endorsement rendered the endorser liable to the payment of the costs of the suit in default of his principal. Where the principal resides without the state, it must be considered, that the endorser makes himself directly responsible to the officers of the court for their official fees—and indeed in point of practice, unless in special cases, the officers of the court have looked to the attorneys upon record for the payment of the fees due for services performed at their request.

We certainly feel no desire to disturb this honorable confidence between all the officers of the court. And in the present case, as the attorney upon record is the endorser of the writ, and must from the non-residence

¹[Reported by John Gallison, Esq.]

of his principal be considered as making himself directly liable for the marshal's fees, upon this ground we hold, that the rule for an attachment ought to be made absolute. Rule absolute.

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Case No. 446.

ANONYMOUS.

[1 Haz. U. S. Reg. (1839), 87.]

WITNESS—COMPETENCY—ATHEIST.

WILKINS, District Judge, in the United States court, has decided that the testimony of an atheist is not admissible.

[Note. Nowhere reported; opinion not now accessible.]

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Case No. 447.

ANONYMOUS.

[Hempst. 413; 1 West. Law J. 246.]

Circuit Court, D. Missouri. Sept., 1843.

CRIMES IN INDIAN COUNTRY—PLACES WITHIN EXCLUSIVE JURISDICTION OF UNITED STATES.

[1. The act of 1790, § 8, "for the punishment of certain crimes," provides among other things that murder or robbery committed on the high seas or on any river, etc., out of the jurisdiction of any particular state shall be punished with death. Other sections of the act provide for the punishment of crimes not including robbery committed within any place under the sole and exclusive jurisdiction of the United States. The act of 1834, § 35, "to regulate trade and intercourse with the Indian tribes," extends to the Indian country so much of the laws of the United States as relates to the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States. *Held*, that since the rivers and other places mentioned in Act 1790, § 8, are not within the exclusive jurisdiction of the United States, robbery committed in the Indian country is not punishable with death under that section, but as larceny under other sections of the act.]

[2. Under treaties with the Indian tribes securing to them local self-government the Indian country is not within the exclusive jurisdiction of the United States.]

[The following charge to the grand jury was delivered in response to a request for instructions as follows: "Is robbery, when committed in the Indian country, indictable as such, and punishable with death?"]

WELLS, District Judge. Is robbery committed in the Indian country attached to the district of Missouri a crime indictable as such, and punishable with death? The 25th section of the act of 1834, "to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," provides, "that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country." If robbery committed in "a place within the sole and exclusive jurisdiction of the United States," be punishable with death, then, if committed in the Indian country, it is also punished with death, and not otherwise.

The 16th clause of the 8th section of the 1st article of the constitution provides that congress shall have power "to exercise exclusive legislation in all cases whatsoever over such district, not exceeding ten miles square, as may by cession of the particular states and the acceptance by congress become the seat of government of the United States, and to exercise the like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." Here is a grant of "exclusive legislation" which is jurisdiction, and here we are to look for the grant of sole and exclusive jurisdiction as to places, to the United States. *U. S. v. Bevans*, 3 Wheat. [16 U. S.] 386. The 3d section of the act of 1790, "for the punishment of certain crimes against the United States," (1 Stat. 112) provides, "that if any person or persons shall, within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons, on being thereof convicted shall suffer death." Other sections provide for other offences committed in the same places, but nowhere provide for the crime of robbery committed in these places, that is, in "forts, arsenals, dockyards, magazines, or in any other place or district of country within the sole and exclusive jurisdiction of the United States." Here is the exercise by congress of the grant of exclusive jurisdiction, "as to places," given by the clause of the constitution above cited; and the terms, "any other place or district of country," refer to territorial objects of a similar character to those enumerated. *U. S. v. Bevans*, supra.

The constitution (article 1, § 8) gives congress the power "to define and punish piracies and felonies committed on the high seas, and other offences against the law of nations." Here there is no grant of sole and exclusive jurisdiction as to place; for everybody knows that the high seas are common to all nations, and that every nation punishes crimes committed thereon. 1 Kent, [Comm.] 186, 187.

"The judicial power shall extend to all cases of admiralty and maritime jurisdiction." Const. art. 3, § 2. Here is no grant of sole and exclusive jurisdiction as to place, although there may be as to certain crimes. *U. S. v. Bevans*, supra, is in point, and Chief Justice Marshall, in delivering the opinion of the court in that case, says:—"Can the cession of admiralty and maritime jurisdiction be construed into a cession of the waters on which these cases may arise? This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended

for the cession of territory, or of general jurisdiction. It is obviously designed for other purposes. It is in the 8th section of the 1st article we are to look for cessions of territory and of exclusive jurisdiction over this district, and over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

"In extending the judicial power in all cases of admiralty and maritime jurisdiction, the 8th section of the act of 1790 provides, "that if any person or persons shall commit upon the high seas, or upon any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which, if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or vessel shall piratically or feloniously run away with such ship or vessel, or any goods or merchandise, to the value of fifty dollars (the section enumerates other piracies), every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death. And the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may be first brought." 1 Stat. This is the section which it is alleged is in force in the Indian country, and by the provisions of which it is said robbery there committed is punishable with death. If the places mentioned in this section be within the sole and exclusive jurisdiction of the United States, then it is in force in the Indian country. But it is the place, and not the crime, which is required to be within the sole and exclusive jurisdiction of the United States.

If this 8th section be but the exercise by congress of the power of extending the judicial power to all cases of admiralty and maritime jurisdiction, the matter, as I conceive, is decided by the case of *U. S. v. Bevans*, 3 Wheat. [16 U. S.] 386, above alluded to; for if, as shown, that grant of power was not intended to give exclusive jurisdiction as to places, then congress could not extend it to that length. And if it be not founded on that power, I confess I am wholly at a loss to know on what clause or provision of the constitution it is based; for, as already shown, if founded on the power to define and punish piracies and felonies on the high seas, and other offences against the law of nations, it would be absurd to claim the sole and exclusive jurisdiction as to the place there mentioned, that is, the high seas. But I think it can be shown that the 8th section of the act of 1790 was not intended by congress to apply to any crimes but piracies; that none of the places mentioned in that section are within the sole and exclusive juris-

isdiction of the United States, or so declared to be; and that the 25th section of the act of 1834 meant, by "any place within the sole and exclusive jurisdiction of the United States, and the laws for the punishment of offences committed therein," the forts, arsenals, magazines, dockyards, and other needful buildings, and the provisions of the act of 1790 applicable thereto.

The crime of robbery, as already mentioned, is not included in any of the provisions for the punishment of crimes committed in "any fort, arsenal, magazine, dockyard, or other place within the sole and exclusive jurisdiction of the United States." Larceny is included, and I presume every robbery includes a larceny. But larceny is not punishable by these provisions with death. In no part of the act of 1790 are "the high seas, or rivers, havens, basins, or bays, out of the jurisdiction of any particular state," spoken of, considered, or treated as places within the sole and exclusive jurisdiction of the United States; whereas the forts, arsenals, magazines and dockyards, places on land, are always enumerated and spoken of as the places within the sole and exclusive jurisdiction of the United States. Nor are the rivers, havens, basins, or bays, out of the jurisdiction of any particular state, ever spoken of as including the internal watercourses of our territories, or of any country, but always as the seas or the high seas, which would wholly exclude the idea of their being internal waters. Thus the 6th section provides for the punishment of misprision of felony "upon the high seas, or within any fort, arsenal, dockyard, magazine, or other place or district of country under the sole and exclusive jurisdiction of the United States." The 7th section provides for the punishment of manslaughter, when committed in any "fort, arsenal, dockyard, or other place or district of country under the sole and exclusive jurisdiction of the United States." The 8th section provides for the punishment of piracy, which includes murder, robbery, &c., "upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state." The 9th section provides for the punishment of any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, by a citizen of the United States, under color of a commission from a foreign state, &c., "upon the high seas." The 10th section provides for the punishment of accessories "upon the land or the seas." The 11th section provides for the punishment of accessories after the fact "upon the land or at sea." The 12th section provides for the punishment of manslaughter "upon the high seas." The 13th section provides for the punishment of maiming "within any of the places upon land under the sole and exclusive jurisdiction of the United States, or upon the high seas." The 15th section provides for the punishment of larceny and

other offences "within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas."

It will thus be seen, the "rivers, harbors, basins, and bays out of the jurisdiction of any particular state," "the high seas," "at sea," &c., in all this statute, seem to mean the same thing. And this is the English statute law and common law. For rivers, harbors, basins, bays, &c. out of the limits of any particular country, are generally denominated "high seas" or "sea" (2 Chit. Crim. Law, 891, 1127; 2 Hale, [P. C.] 12, 16), and are within the admiralty jurisdiction. Not but that there is a distinction, correctly speaking, between "high seas" and "seas," but the distinction is nice, and not frequently attended to. The supreme court has decided, however, that manslaughter, committed in a foreign river above the forts, cannot be punished under the 12th section. Indeed to me it is manifest that congress so understood it, because if the terms "seas," "high seas," and "at sea," do not embrace the "rivers, harbors, basins, and bays within the jurisdiction of any particular state," then there is no punishment for many offences committed in those rivers, basins, harbors, and bays out of the jurisdiction of any particular state, which are yet punishable when committed at sea or on land. Thus it is with maiming, in section 13, which is punishable if committed "within any of the places upon land within the sole and exclusive jurisdiction of the United States, or upon the high seas;" so also of the offences specified in sections 10 and 11. The declaring an offence to be piracy, which is done in the 8th section, or robbery, would of itself show that it must be committed on the seas. "The word itself is derived from a Greek word which signifies to pass over the sea, and refers rather to a place than a specific crime." 2 Chit. Crim. Law, 1127; 3 Just. [Inst.] 113. And the crime, both by the laws of England and America, and by the law of nations, is defined to be "robbery, or forcible depredation on the sea, animo furandi." 4 Bl. Comm. 71; U. S. v. Smith, 5 Wheat. [18 U. S.] 153; U. S. v. Furlong, Id. 184; 1 Kent, Comm. 183. In England, the mouths of great rivers without the limits of any county, where the sea ebbs and flows, are considered as part of the sea, and within the admiralty jurisdiction. 2 Hale, [P. C.] 12, 16.

I think it manifest, from what has been said, that the 8th section of the act of 1790, and which declares robbery, when committed on the high seas, or in any river, basin, or bay, without the limits of any particular state, to be piracy, applies only to the various parts of the sea, and not to any internal rivers or waters, whether in our own territories, the states, or foreign states. It may be said that the words of the act, "any river, haven, basin, or bay, without the limits of any particular state,"

would apply to a river and those waters within the interior of our territories, and so they would; and would also apply to those in the interior of any foreign kingdom; yet no person has ever contended that it was to be so construed. This is further illustrated by the act of 15th May, 1820, the 3d section of which provides, that if any person upon the high seas, or upon any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery in and upon any vessel, he shall be adjudged a pirate. This shows the sense of the legislature, as to the parts of a river in which piracy can be committed, that is to say, where the sea ebbs and flows. The courts of the United States have never claimed any sole and exclusive jurisdiction as to the place under the 8th section of the act of 1790, or under that clause of the constitution which declares that the judicial power shall extend to all cases of admiralty and maritime jurisdiction, but, on the contrary, have expressly disclaimed. U. S. v. Bevens, 3 Wheat. [16 U. S.] 386.

I need not cite authorities to show that the seas are not within the sole and exclusive jurisdiction of the United States. The observations made above are intended to show that all places named in the 8th section are parts of the sea, and consequently, as it regarded crimes committed thereon, the United States have no sole and exclusive jurisdiction. If the 8th section does not apply to places within the sole and exclusive jurisdiction of the United States, then its provisions do not apply to crimes committed in the Indian country, as provided by the 25th section of the act of 1834 above cited. To me it is manifest that congress intended to make no distinction in punishment of offences committed on land; and when it provided for the punishment of offences committed in the Indian country, it had the same object in view. Hence it is provided in the 25th section of the act of 1834, that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country. The places within the sole and exclusive jurisdiction of the United States are the forts, arsenals, dockyards, and magazines, so often mentioned in the act of 1790 as being places within the sole and exclusive jurisdiction of the United States. In regard to offences committed on the seas, it was thought proper to make special provisions; and as piracy, which is robbery on the seas, is an offence against all nations, and is perhaps by all punished with death, on account of its enormity and the difficulty of suppressing it, it was thought proper to punish it by our Code with death. 1 Kent, [Comm.] 183. The act of 1817, "to provide for the punishment of crimes and

offences committed within the Indian boundaries," contained a provision substantially like that in the 25th section of the act of 1834. After its passage, the supreme court in 1818 decided that robbery committed on land was not punished with death; but otherwise if committed on the sea. *U. S. v. Palmer*, 3 Wheat. [16 U. S.] 627. Indeed this was admitted by the United States counsel.

I have examined this case more at length than it might seem to require, because my brother judge decided at St. Louis, on application to be admitted to bail, that robbery committed in the Indian country was punishable with death. For the opinions of Judge Catron I have great respect; but the reasoning in his written opinion in this case does not satisfy me, and no authorities are cited. I will here copy that part of Judge Catron's opinion applicable to the point in which I consider the error to consist.

"The 8th section of the act of 1790," says he, "provides that if any person or persons shall commit upon the high seas, or on any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder or robbery, such offender shall be deemed a felon and suffer death. The crime is to be committed, first, on the water, and second, out of the jurisdiction of any particular state. Suppose the crime of murder or robbery had been committed in a bay, or in a river of Florida, within the country belonging to the Creek Indians, after Florida had been acquired by the United States from Spain, then the murderer or robber would have been punishable with death, because the place where the crime was committed was not within the jurisdiction of any particular state, and because it had been committed in a bay or river. The act of 1817, c. 265, (3 Story's Laws, 1644, [3 Stat. 383,]) provides that if any Indian or other person shall, within the United States, and within any town, district, or territory belonging to any nation of Indians, commit any crime, which if committed in any place or district of country under the sole and exclusive jurisdiction of the United States would, by the laws of the United States, be punished with death, the offender, on conviction, shall in like manner be punished with death. In the case supposed of the commission of murder or robbery on the water in the Indian country, it would clearly be a capital felony, committed in 'a place and district of country' under the sole and exclusive jurisdiction of the United States, and be punishable by the 8th section of the act of 1790. The act of 1817 is as broad as it well can be, when it extends the same punishment to the land. It declares if the crimes shall be punishable with death 'in any place or in any district of country,' &c., the offender shall be punished in like manner as if he committed the same crime on the land and in the Indian country."

The judge then proceeds to say that the offence with which the prisoner was charged, robbery, was committed in the Indian country attached to the state of Missouri; that he had confessed the robbery, and that the crime was therefore not bailable.

I will here remark that the 8th section of the act of 1790, recited by the judge, declares that the person who shall commit the offences therein named, among others robbery, "shall be deemed, taken, and adjudged to be a pirate and a felon," and not merely a felon, as set forth by the judge; and that it also enumerates other offences besides murder and robbery, such as piratically and feloniously running away with a vessel, or any goods or merchandise to the value of fifty dollars; and that the act of 1817 is repealed, and that of 1834 substituted.

The judge says:—"In the case supposed, of the commission of murder or robbery on the water in the Indian country, it would clearly be a capital felony, committed in a place and district of country under the sole and exclusive jurisdiction of the United States, and be punishable by the 8th section of the act of 1790."

Now if he means that "any river, harbor, basin, or bay," in the interior of Florida, and to which the admiralty jurisdiction does not extend, is a place enumerated in the 8th section, and in which piracy may be committed (for all the offences in that section specified are declared to be piracies), then I am constrained to dissent. But if, on the contrary, he means that the mouths of the great rivers where the tide ebbs and flows, and the harbors, basins, and bays, within the admiralty jurisdiction, are the places in the 8th section mentioned, and where piracy may be committed, then I am constrained to deny that they are "places under the sole and exclusive jurisdiction of the United States," as to crimes. The reasons and authorities I have already given. In the territories of Florida and Louisiana, and perhaps others, certain laws, including the act of 1790, were declared to be in force. They are of course yet in force in Florida, and what remains of Louisiana, as purchased of France; and I presume in the other territories. Has any one ever heard of a prosecution for piracy committed in the interior waters of these territories, or of any person being hung for robbery, or running away with goods to the amount of fifty dollars? Certainly nothing of the kind ever took place in the territory of Missouri, where the law was in full force, nor have I ever heard of it taking place anywhere.

If, as declared by Lord Coke, the word piracy "refers rather to a place than a species of crime," and if, as I have already shown, the definition of the crime, both by the laws of England and America, and the law of nations, is "robbery" or forcible depredation *animo furandi* on the seas, it would

look somewhat singular to be punishing persons as pirates for offences committed in our territories two or three thousand miles from any sea; for all the offenses in the 8th section, and many other offences, are declared to be piracies when committed on "any river, harbor, basin, or bay, out of the jurisdiction of any particular state." The offence of larceny (which is included in a robbery) could clearly be punished by the provisions of the 16th section, if committed in any fort, arsenal, dockyard, or magazine, under the sole and exclusive jurisdiction of the United States, and of course could be punished by the act of 1834 if committed in the Indian country; and, according to my brother judge, may also be punished under the 8th section. So we have two laws for the punishment of the same offence, and under each a different punishment. The crime of murder is declared to be punishable when committed in a place within the sole jurisdiction of the United States, and is again declared to be punishable when committed on "any river, harbor, basin, or bay, out of the jurisdiction of any particular state." Now if rivers, harbors, basins, and bays, beyond the jurisdiction of any particular state, are places within the sole and exclusive jurisdiction of the United States, this double enumeration of the places was both idle and mischievous:

Let it be remembered that the act of 1790 was enacted, not for the territories or the Indian country, but was subsequently introduced therein, as far as it was applicable. Now it may well be questioned whether the crime of robbery on the seas, or piracy, can be committed in the Indian country. The place enters essentially into the offence, and an aggravated punishment is annexed to it on that account. It may be likened to robbery on or near the highway, by certain English statutes, to which an aggravated punishment is annexed. The offence could be committed only on or near a highway. 1 Hale's P. C. 535. If we had such an act, and it was declared to be in force in the territories or Indian country, yet if there were no highways, the offence could not be committed there. Here we have the statute of 1790, which provides for the punishment of a great number of different crimes, and is if you please declared to be in force in the Indian country. Among them is robbery on the seas, or in rivers, harbors, basins, or bays, out of the jurisdiction of any particular state, or in other words piracy. If there are no such places in the Indian country, then the offence could not be committed there; or if robbery is there committed on land, it would not be the offence declared in the statute. We have a code of criminal law for the land, that is, for forts, magazines, dockyards, arsenals, &c., which are under the sole and exclusive jurisdiction of the United States. That these are applicable to the Indian country, no one questions. We have also a code

of criminal law for the seas. Now, according to the ingenious reasoning of my brother judge, we are to have a part of those intended for the seas transplanted to the Indian country, which gives them two sets of laws on the same subject, and makes different criminal laws for different parts of the same country enacted by the same authority. Thus if robbery be committed in a fort, arsenal, dockyard, or magazine, under the sole and exclusive jurisdiction of the United States, it is punishable, as a larceny, by fine and imprisonment. But if committed in the Indian country, it is to be punished with death. If a person in the forts, arsenals, magazines, and dockyards run off with goods to the amount of fifty dollars, he is punishable by fine and imprisonment. But if he commit the same act in the Indian country, he is punishable with death. But a difficulty will arise, for as both codes are in force in the Indian country, by which shall we be governed? Crimes committed at sea have great and aggravated punishments denounced against them, because committed at sea. This is especially the case in regard to robbery on the sea, or piracy. 1 Kent, [Comm.] 183. And yet we are to punish them in the same manner, and to the same extent, when committed on land. These consequences must all follow, if my brother judge be correct in his opinion.

The act of 1790 was very unskillfully written. In some of its provisions, the words, if literally and strictly taken, go far beyond what could have been the intention of the writer; and the act has in some respects copied too closely the act of 39 Geo. III., without adverting to the difference in our constitutions. In but few of its provisions can it be taken literally. Thus section 8 provides for the punishment of all murders committed by foreigners within a foreign vessel, although upon the high seas; and so also of piracy. So it must also be in regard to piracy and murder committed on any river, &c., for this would lead us to the punishment of murders committed on rivers in the heart of foreign countries by their own citizens or subjects, where it would be absurd to claim jurisdiction. The act must be construed with an eye to the jurisdiction of the United States and the subject-matter, and then the 8th section will be construed not to apply to any place where the United States have not jurisdiction, nor to a place where piracy, from its nature, cannot be committed. U. S. v. Palmer, 3 Wheat. [16 U. S.] 631, 634.

I have referred to and examined the constitution and laws of the United States to show that the places "under the sole and exclusive jurisdiction of the United States," mentioned in the constitution, the act of 1790, and the acts of 1817 and 1824, were the same, and were places purchased by the United States, with the consent of the legislatures of the states in which they might be, for forts, arsenals, magazines, dockyards,

and other needful buildings; and that the high seas, and rivers, harbors, basins, and bays, out of the jurisdiction of any particular state, were not places within the meaning of those acts, within the sole and exclusive jurisdiction of the United States.

I will now venture a step further. Judge Catron, in his opinion, says:—"In the case supposed of the commission of murder or robbery on the water in the Indian country, it would clearly be a capital felony committed in a place and district of country under the sole and exclusive jurisdiction of the United States, and be punishable by the 8th section of the act of 1790." Now I deny that the Indian country, even technically, either land or water, is under the sole and exclusive jurisdiction of the United States. The United States have not, in any instance within my knowledge, exercised such sole and exclusive jurisdiction. By the acts of 1817 and 1834, above referred to, nothing of the kind is attempted. They both expressly except crimes committed by Indian on Indian, and confine their operation to regulating trade and intercourse, and preserving peace. A sole and exclusive jurisdiction would exclude all Indian laws and regulations, punish crimes committed by Indian on Indian, and regulate and govern property and contracts and the civil and political relations of the inhabitants, Indians and others, in that country. It would be wholly opposed to a self-government by any Indian tribe or nation. This self-government is expressly recognized and secured by several treaties between the United States and Indian tribes in the Indian country attached by the act of 1834 to Arkansas or Missouri District for certain purposes. This may be seen from the treaty with the Choctaws in 1830, and the treaty with the Creeks in 1832, and other Indian treaties. The United States could not, therefore, assume a sole and exclusive jurisdiction over the Indian country without violating their treaties, which treaties are the supreme law of the land. I conclude, therefore, that the Indian country is neither in fact nor in law under the sole and exclusive jurisdiction of the United States. Indeed if congress considered the Indian country as being under the sole and exclusive jurisdiction of the United States, it was wholly unnecessary to extend to that country the laws for the punishment of crimes committed in places under the sole and exclusive jurisdiction of the United States.

Case No. 448.

ANONYMOUS.

[Hempst. 450.]

Circuit Court, D. Arkansas. April, 1845.

COSTS—MARSHAL'S FEES—MILEAGE.

1. The marshal is not entitled to commissions on a forfeited delivery bond.

2. The marshal is entitled to mileage actually travelled, in enabling him to make a return of nulla bona.

JOHNSON, District Judge, holding the circuit court.

The COURT held (1) that the marshal cannot charge any commissions where a delivery bond is given and forfeited; and (2) that the marshal is entitled to mileage on a return of nulla bona for mileage actually travelled by him or his deputies, in enabling him to make that return.

Case No. 449.

ANONYMOUS.

[1 Hall. Law J. 309; 5 Hughes, 32.]

District Court, D. Maryland. 1808.

SEAMEN—ARTICLES OF SHIPMENT—CHANGE OF VOYAGE.

[1. The term "voyage" is a technical phrase, and always imports a definite commencement and end, and therefore the addition of the term "elsewhere" in shipping articles specifying a voyage from Baltimore to Curacoa does not authorize a voyage to St. Domingo, since such term must be construed as subordinate to the voyage specified, and only permits such a change of course as may be necessary to accomplish the voyage designated in the articles of shipment.]

[Cited in *The Brutus*, Case No. 2,060.]

[2. Cited in *Magee v. The Moss*, Case No. 8,944, and *Brown v. Jones*, Id. 2,017, to the point that the term "voyage" is a technical phrase, and always imports a definite commencement and end, and that the term "elsewhere" must be construed either as void for uncertainty, or as subordinate to the principal voyage stated in the preceding words.]

WINCHESTER, District Judge. In this case the libellant claims wages for services rendered in a voyage from Baltimore to St. Domingo, and back, and alleges that the voyage which he stipulated to perform was from Baltimore to Curacoa and back, and not to St. Domingo where the vessel did go contrary not only to the articles, but the express understanding of the parties, and the declaration of the libellant, that he would not ship on a voyage for St. Domingo. The articles exhibited specify a voyage to Curacoa and elsewhere; and under the latitude of the last general words the respondent contends that he was authorized to go to St. Domingo, without proceeding to Curacoa. Taking the fact alleged to be true, that the voyage in view and actually prosecuted, was from its commencement for St. Domingo and not the port of Curacoa; the objection to pay the libellant's wages comes with a very ill grace from the respondent, who shows and rests on his own deception and breach of faith as the foundation of his defense; and the court would reluctantly discover any rule of law so imperative as to compel the sustenance of such a justification.

The act for the government and regulation of mariners contemplates two species of contract between owners and seamen. 1. For a voyage or voyages. 2. For a term or terms of time. The latter is undoubtedly

[Reported by Samuel H. Hempstead, Esq.]

the proper form of articles where the destination of a vessel cannot be specifically known, and where the vessel is employed on what is called a trading voyage, or is in search of freight. The first, to wit, that in which the voyage or voyages are specified, applies to designated ports, or particular kinds of voyages known and understood to be governed in their extent and duration. The term "voyage," like the term "voyage assured," is a technical phrase, and always imports a definite commencement and end. *Nomen loci ubi navis oneratur et nomen loci quo navis tendit.* The voyage from Baltimore to Curacoa is therefore a specified voyage, the labor and hazard of which is known to all parties; and for that voyage the agreement is such as the statute requires. But the terms "and elsewhere" are added to this specification of voyage, and it is insisted by the respondent's counsel, that under these words he was authorized not only to invert the order of voyage specified in the articles, but to go to any other port, as to St. Domingo. If this construction was sound, the provisions of the act of congress, which require a specification of the voyage, when the hiring of seamen is not for a given time, become a dead letter; because there would be no *terminus ad quem*, which is essentially necessary to the legal sense of the term "voyage." The terms "and elsewhere" must therefore be construed as subordinate to the voyage specified, and can only authorize the pursuing such a course as may be necessary to accomplish the principal voyage, or in other words, to import no more than the law would imply as incidental to the main contract. All arguments which rested on the defendant's right to construe these articles as giving him the alternative of several ports, must fail of course. Indeed there is nothing in the words of the contract which, independently of the ground before taken, would warrant, by rules of law or grammatical construction, such an interpretation. The term and is properly conjunctive; and is never construed to be disjunctive unless when coupled with a manifest intent apparent upon the writing itself, that it was used in such sense and for such purposes by the parties. The only intent manifested upon the face of the articles before the court, is such as is fairly to be understood by the words from Baltimore to Curacoa and elsewhere; and it would be doing very great violence to these words to invert the order of ports; for if the respondent is once exempt from the necessity of proceeding to Curacoa, the specified voyage, there is nothing which would restrain his entering upon the most remote and perilous voyage the adventurous and enterprising spirit of commerce could suggest. I do not wish to be understood as giving any opinion, that it is essential to the validity of seamen's articles,

that there should be an insertion of the name of every port to which a vessel may proceed in the course of trade; but that there must be some equivalent specification, such as to a port or ports, island or islands in the West Indies, or to the Mediterranean, or the like. The legal termination of such a voyage is ascertained by the most solemn decisions and able opinions.

But for a moment let us adopt the construction of the respondent's counsel, and admit the words "and elsewhere" to be understood in the alternative, as wished by the respondent, and apply the same rule in favor of the libellants. The clause in the articles runs thus: "We the undersigned have shipped as mariners on board the schooner —, master, for a voyage from the port of Baltimore to the port of Curacoa and elsewhere, at the monthly wages, &c." Admit that the respondent was not bound to proceed on the voyage to Curacoa by reason of the words and elsewhere, which shall be construed to give him an election to go to St. Domingo. The right then is commensurate with the whole case, and considering the word and in its disjunctive character and importing the same as or, it must be construed throughout as a disjunctive; and the articles must then be read thus, for a voyage from Baltimore or elsewhere, to Curacoa or elsewhere; for the port of Baltimore is not more positively described as the port of departure, than Curacoa is as a port of destination. The term voyage is the antecedent to which the disjunctive relates. It would then be open to the libellants to argue and prove that he did not mean to sail from Baltimore but another port, as New York for instance, and not to Curacoa but Cuba. This would be opening the door to all dangers and inconveniences so wisely guarded against by the act of congress, which requires an insertion of the voyage or voyages contemplated. And I would put it to the consideration of the respondent's counsel, whether, (supposing there was no rule of law binding in this case, and it rested upon the sound discretion of the court, and considering the characters who usually foment and conduct disputes in favor of seamen, and the character of the witnesses frequently produced to establish their claims when resting wholly on parol evidence,) the interest of merchants and ship-owners and public morals as well as private justice will not be more effectually subserved, promoted and secured, by the rule I have taken, than the one for which he has argued.

It was decided by my predecessor, that the words "and elsewhere," annexed to a specified voyage, did authorize the proceeding to one other port, but still that the ports must be proceeded to in the order of their specification. I never was satisfied with the first part of that opinion, as I have often incidentally mentioned, but the point has never been directly brought before me until in

this case. I have long combated with my impressions on this question; but on the fullest consideration, I do hold myself bound to declare, that the words "and elsewhere," used as they are in this case, cannot authorize a new voyage, unless such an intent is fairly deducible from some relative expression, and that their true construction is subordinate to the principal voyage. It is due to the memory of Judge Paca, as well as myself, to state briefly the reasons of my opinion. It has been argued, that these articles are to receive such a construction as will comport with the usual course of the West India trade; which is stated to be, to seek the best market without regard to the particular ports specified. I do not know whether such be the usage, nor is it material to inquire, for as applied to the construction of a written contract, and to control legal rights, it is at direct war with every principle of law and policy. The argument from the admission of evidence to explain the course of a voyage does not justify the inference analogically drawn by the respondent's counsel. The duty of a captain is to proceed in the usual route of the voyage to his place of destination. There is a plain distinction between the voyage itself and the route of the voyage. The voyage is characterized by its termini. No evidence is admissible in any case to substitute other termini: but of two routes, it is lawful to show that either is equally safe and common. *Distinguitur iter a viaggio*. In the case before the court, the voyage, for which the seamen shipped, never had any commencement. The vessel sailed direct for St. Domingo, and not for Curacoa. In 2 Emerigon, 34, 35, the construction of these general and indefinite clauses is ably investigated, and unless I had found myself supported by very respectable authority, the decision of Judge Paca would have been adhered to by me until reversed by a superior court. This respectable author declares that these vague and indeterminate clauses are to be interpreted by the principal object spoken of, and in case of doubt are to be understood relatively to law and the usages of commerce. Thus an insurance for time, with permission to trade wherever the captain shall think fit, does not protect against a loss occasioned by smuggling. The assurers answer for no loss arising from the fault of the assured, although smuggling in a foreign court is not considered a crime or legal fault. These clauses, however general in their wording, are always expounded according to good faith, and admit neither of fraud nor surprise; *generaliter probandum est, ubicumque in bona fide iudicis confertur in arbitrium domini vel procuratoris ejus, conditio; pro boni viri arbitrio hoc habendum esse.*¹

¹ NOTE, [from original report in Hall's Law Journal.] A very important decision has taken place in England before the honorable chief

In the opinion of the court, the words of the statute "what port, harbor or creek," were considered very express and equivalent to licensing for a voyage. If this determination does not exactly run on all fours with the case to be decided, its principles are so nearly similar as to render an accurate discrimination very difficult, if not impossible. The voyage or voyages for which seamen ship are required by the statute to be specified in their articles. The term voyage imports navigation from one port to another, and perhaps, if not otherwise expressed, back again. In the plural it imports, a commencing at more than one port, or in other words, at several specified places. The commencement and termination of a voyage or voyages are ascertained by the ports or harbors from and to which a vessel is destined. The terms, "to trade along the coast," or "to every port, harbor or creek," include all the ports, harbors and creeks of a nation, in which a vessel is licensed for coasting trade. But it is not a compliance with a statute which enjoins that the particular ports shall be inserted. To require the insertion of the voyage, is neither more nor less than the insertion of the ports or harbors from and to which the vessel navigates. Of consequence, the unqualified term "elsewhere," applied to a specified voyage, is not designatory of any port or place, nor is it relative to any voyage in the legal sense of the term; it has no specific relation to any port or place whatever; and to apply it to all ports or places in the world would be as inconsistent with justice, as it would be unauthorized by law. This decision is not different from old determinations. The rules, which apply to a right to a private way at land, cannot materially vary from those which are applicable to a contract for service in a voyage at sea. A prescription for a way is not good if it does not say a *quo termino ad quem* the way goes. Resolved [Alban v. Brounsall,] Yel. 164, and this not indefinitely but certainly, [Crossing v. Scudamore,] 2 Lev. 10. As from A to a rectory, the terminus ad quem is uncertain, for the rectory consists of glebe, tithe, parsonage, etc. So, that he is seised of B and has a way through the close of the plaintiff to the Thames, for he ought to say that he has a way from B through the close, etc., to the Thames. [Staple v. Heydon,] Mod. Cas. [6 Mod.] 3.

justice, Baron Eyre, on the construction of the tenth section of the stat. 24 Geo. III., c. 47, (Gossley v. Barlow, 1 Anstr. 23,) regulating the coasting trade, and licensing vessels, and providing that such license shall specify the tonnage, etc., of the vessel licensed, and for what port, harbor or creek, she is about to sail. A license was granted, "to be employed in the coasting trade," generally. In support of this license it was argued that it meant to include all the ports in England, which is the same thing as if it specified every one; and it was agreed that such was the common form of licenses to coasters.

If this case should still be considered doubtful, let the argument *ab inconvenienti* be applied, and what will be the result? The construction I have adopted can never produce inconvenience to the ship owner, since in almost every case he does order the route and destination of her voyage previous to her departure; and it is easy and just to make his agreement with the seamen conform to such orders. If there is a discretionary authority confided to the captain to proceed to other ports, such authority will at least be limited by some bounds; and the articles should be drawn to meet such an alternative voyage, and to conform to the real object of the owner; and this object, so far as the rate and wages would be influenced by it, ought to be communicated to the sailors; or if it is not thought expedient to do so, they should be hired for a term or terms of time, as authorized by the act of congress. While the ship-owners are thus fairly secured against inconvenience, no more than justice is secured to the seamen. Adopt a different rule, and they may unjustly be entrapped into voyages of greater length, more hazard, peril and labor, and of course for which they ought to receive greater wages and greater advance; and of which increased compensation they would be deprived under such general words, too often improperly and most frequently thoughtlessly introduced into their articles.

The considerations of policy and the general rules of law, before stated, have great weight with me. Indeed I think it more desirable, that the principles of mercantile law should be referred to general axioms, than to the unbending authority of particular decisions: and it is therefore my custom not to refer so much to cases or opinions, as to universal principles. But on this occasion I shall add the weight of some opinions from a source to which we resort habitually for our judicial direction. It is stated by Park (title "Deviation") "that it is necessary to insert, in every policy of insurance, the place of the ship's departure and also of her destination;" and in a preceding part of his work, (page 23, Ed. 1787,) when referring to the same rule, he remarks, "this has always been held to be necessary in policies, at least for upwards of two hundred years; and must be so, on account of the evident uncertainty which would follow from a contrary practice, as the insurer would never know what the risk was he had undertaken to insure." Molloy, 6, 2, c. 7, § 14, has laid down this doctrine, that if a ship be insured from London to —, (a blank being left by the lader of the goods to prevent her surprise by an enemy,) if she happen to be cast away, though there be private instructions for her port, yet the insured must sit down with his loss, by reason of the uncertainty." "Such also," says Park, "is now the law and usage of merchants." These opinions and principles are supported by the determination in *Lava-*

bre v. Walter, 1 Doug. 284, in which the voyage insured was described in these words, "at and from port l'Orient to Pondicherry, Madras and China, and at and from thence back to the ship's port or ports of discharge in France, with liberty to touch, in the outward and homeward bound voyage, at the isles of France and Bourbon, and at all or any other ports or places whatsoever; and it shall be lawful for the said ship in this voyage to proceed and sail to, and touch and stay at any ports or places whatsoever, as well on this side as on the other side the Cape of Good Hope, without being deemed a deviation." The ship went to Pondicherry, whence she went to Bengal, back to Pondicherry and sailed thence for, and was captured on her return to l'Orient. Both going and returning she either touched at, or lay off Madras, Masulipatam, Visigapatam and Yanon, and took in goods at all those places. This was held to be a deviation. This case is also very accurately reported in Emerigon, who remarks on the policy, "that however general the words of the policy were, they could not be construed more largely than the specified voyage, which was for Pondicherry, Madras and China." These cases apply to the construction of the loose and indeterminate clauses of maritime contracts; and when fairly investigated will be found no more than a correct application of old and well established rules drawn from *Roccus*, *Stympanus* and *Le Guidon le Mer* to modern cases. But the case of *Woolbridge v. Boydell*, 1 Doug. 16, more immediately resembles the case now before the court in its facts and circumstances than any I have referred to. See *Park*, 260, S. C.

NOTE. [from original report in *Hall's Law Journal*.] The above decision is faithfully copied from a MS. in the writing of its highly distinguished author. As it was not prepared by him for the press, this explanation is due to his memory on the part of the editor.

Case No. 450.

ANONYMOUS.

[6 Hunt, Mer. Mag. (1842,) 355.]

District Court, W. D. Pennsylvania.

VOLUNTARY BANKRUPTCY—ARREST OF APPLICANT
—EXECUTION FOR DEBT.

[A voluntary bankrupt, under the act of April 19, 1841, (5 Stat. 440, c. 9,) cannot be arrested on an execution for debt before his final examination is passed.]

IRWIN, District Judge. By the English statutes of bankruptcy, the bankrupt is free from arrest or imprisonment by any creditor during the time allowed for examination, provided he was not in custody at the time of the surrender, and, if arrested, is entitled to be discharged; and the surrender, if voluntary, protects him from all arrests till his final examination is passed. Our statute of bankruptcy does not expressly confer this

privilege on the bankrupt, but it was not necessary to be so conferred. The person and property of the bankrupt are, by the law, brought within the jurisdiction of the district court, and the court possesses an inherent power in all cases of which it has jurisdiction, to cause its orders and decrees to be respected and obeyed, and to protect its suitors from arrest.

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Case No. 451.
ANONYMOUS.

[31 Hunt, Mer. Mag. (1855,) 206.]

PATENTS FOR INVENTIONS—ENJOINING—INFRINGEMENT—FRAUD—LACHES.

A. invented something which he called "A.'s Patent Kitchener" but he never took out a patent for it; B. was his servant, and in that capacity learned to make the apparatus which he sold by the name of the inventor, as if made by him. A. knew these facts four months before he took steps to protect himself. The court refused an injunction because he had falsely described the invention as a patent, and had allowed so long a time to elapse; and would only permit him to retain the bill for six months with liberty to bring an action.

[Note. Nowhere reported; opinion not now accessible.]

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Case No. 452.
ANONYMOUS.

[37 Hunt, Mer. Mag. 707.]

District Court, D. Maine. March 2, 1857.

FEDERAL AND STATE COURTS—CONCURRENT JURISDICTION.

[Where a ship is attached in a common-law suit in a state court by a lien creditor and is in possession of the sheriff, the subsequent filing of a libel in rem for materials furnished in building the ship does not work a conflict of jurisdiction between the state and federal courts, and the marshal has no power to disturb such possession, but by the statute of Maine, of August 10, 1848, c. 78, § 3, notice by the marshal to the sheriff that he has a warrant of arrest against such vessel operates as an arrest or attachment of the vessel, and the suits in the state and federal courts may be prosecuted concurrently to final judgment.]

[See note at end of case.]

[In admiralty. This was a libel in rem for the purchase price of certain materials furnished for the construction of a ship, which was at the time of filing of libel in possession by the sheriff, by virtue of an attachment issued in a common law suit. Heard on plea to the jurisdiction. Overruled.]

WARE, District Judge. This was a libel in rem by a material man, for the price of material furnished for the building of a new ship, to enforce the lien given by a statute of the state. Before the filing of the libel, a suit had been commenced at common law by another lien creditor, on which the ship was attached, and was in possession of the sheriff.

The right claimed by the libellant is not paramount to that of the attaching creditor, but concurrent with it. The sheriff having the legal possession of the ship, has a right, and is bound to retain it, and the marshal has no authority to disturb him in the possession. Both creditors are prosecuting their rights at the same time, and each in a court having jurisdiction over the suit. There is no conflict of jurisdiction in the case. Each creditor had a perfect right to determine for himself in which jurisdiction he would seek his remedy. The difficulties supposed to arise, if in fact any exist, arise after the judgment and decree in enforcing them, and obtaining satisfaction. But if there were any difficulty in this respect as the law stood under the Revised Statutes [of Maine 1840, p. 558, c. 125, § 35] that is removed by the statute of [Maine, August 10] 1848, c. [78. See note at end of case.] The fourth section of that act provides that if there are several actions against the debtor of this privileged character, seeking to enforce a lien against the vessel, no satisfaction shall be made of any of the judgments obtained until there is a judgment in all, and that these shall be paid concurrently, without any preference of one over the other on account of priority of the attachment. This is precisely what would have been done by a court of admiralty, under the law as it stood in the Revised Statutes, without the supplementary act of 1848. All the creditors standing in the same rank of privilege would have been paid concurrently, and no preference would have been given to the creditor who first filed his libel, or commenced his suit at common law.

The act of 1848 (section 2) directs that all attachments of the ship shall be made by the same officer; and the next section provides that if he is disqualified from serving any writ, that any other qualified officer may serve it, and by giving notice to the attaching officer who has the possession, the same right is acquired against the vessel as if the writ had been served by the first officer. This provision of the law applies precisely to the present case. The attaching officer who had the possession of the vessel was not qualified to serve the libel by an arrest of the vessel; and notice to the sheriff by the marshal, that he had a warrant of arrest against the vessel, would operate as an arrest or attachment of the vessel. There is, therefore, no conflict of jurisdiction in the concurrent prosecution of the two suits in the state court and the admiralty, nor does there arise any conflict of authority for the possession after judgment is obtained in levying the executions. By the direct operation of the law, the possession of the sheriff, so far as is necessary to the satisfaction of a decree under the libel, becomes the possession of the marshal. He holds the vessel for the

satisfaction of the creditor who obtains his judgment in the court.

The counsel for the respondent, in support of his plea to the jurisdiction of the court, is perfectly correct in the position taken, that a court proceeding in rem can only maintain its jurisdiction when it can reach and act directly on the thing. The object and end of the suit is to get satisfaction out of the res., and the judgment of the court is against the thing. Unless, therefore, the court can reach the thing, its judgment would be entirely illusory. But in the present case, the process of the court has reached the thing, or, at least, may reach it effectually by simple notice to the sheriff to hold the ship to respond to any decree the libellant may obtain. This objection, therefore, fails; nor can I see any of the practical difficulties and dangers of a collision of authorities, in carrying the law into execution, and giving to each party his remedy, that have been suggested by the counsel for the respondent. Plea to the jurisdiction overruled.

[NOTE. Rev. St. Me. 1840, c. 125, § 35, provides that material men and laborers shall have a lien for materials and services furnished in building a ship until four days after the launching thereof, and may secure the same by attachment, which shall have precedence of all other attachments. The act of August 10, 1848, c. 78, is as follows:

["Section 1. When any action shall hereafter be commenced to enforce the lien of a creditor upon a vessel for labor performed, or materials furnished for or on account of such vessel, the officer making the first attachment in such case, shall give notice thereof by filing a return of such attachment within twenty-four hours after making the same with the clerk of the town where such vessel shall be, and leaving a copy thereof with any one of the owners or of the master workmen upon such vessel; and it shall not be necessary at any time before the launching of a vessel, to place a keeper on board of the same for the purpose of preserving the attachment made to secure any such lien.

["Sec. 2. In all actions brought to enforce any such lien, as is mentioned in the preceding section, the service shall be made by a sheriff, deputy sheriff, or a coroner, and all subsequent attachments upon such vessel to secure a lien as aforesaid, made before the expiration of the time within which the first attaching creditor might have enforced his lien, shall be made by the officer who made said first attachment.

["Sec. 3. If the officer who made the first attachment as aforesaid shall be disqualified from serving the writ in any such subsequent action, any other qualified officer may serve such subsequent writ, and shall attach the vessel by giving notice thereof to the first attaching officer, and the claimant, in such case, shall have his judgment satisfied out of the proceeds in the hands of the first attaching officer, in like manner and proportion with the other creditors.

["Sec. 4. No satisfaction shall be made upon any execution that may issue in any of the actions aforesaid, until after final judgment has been entered in all of such actions; and said attachment shall be preserved until the expiration of thirty days after such final judgment; and the officer holding the executions issued upon such judgments for service, shall after final judgment in all of said actions, divide and pay over the proceeds in his hands arising from such attachment to the several judgment creditors aforesaid, in proportion to the amounts of

the judgments recovered by them respectively, and not otherwise.

["Sec. 5. All acts and parts of acts inconsistent with the provisions of this act, are hereby repealed."

[The question of the conflicting jurisdiction of federal courts in cases similar to the principal case has been frequently before the federal courts. In *Certain Logs of Mahogany*, Case No. 2,559, (decided in 1827,) a replevin suit had been begun in a Massachusetts state court before the filing of the libel in the federal court, and from a decree in favor of the libellant an appeal was taken. Story, circuit justice, in rendering an opinion affirming the decree, held that the pendency of the replevin suit was no defense against the libel, for the two suits were not on the same cause of action, nor between the same parties, nor of the same nature; for replevin, though in form in rem, acts in personam as to the judgment. In this case the defense was *lis pendens*, and there seems to have been no objection made to the jurisdiction on the ground that the res was beyond the reach of the federal process while in the custody of the sheriff. When a vessel is in the hands of a sheriff under process from a state court, it is beyond the jurisdiction of a federal court sitting in admiralty, and this on the ground that the proceedings in admiralty are in rem, and those in state court in the nature of proceedings in rem, (the case arose in New York,) and therefore the right to maintain the jurisdiction must attach to that tribunal which first exercises it by taking possession of the res. The *Robert Fulton*, Case No. 11,890. This case was decided by Thompson, circuit justice, in 1826, and although its doctrine was questioned by Wells, district judge, in the case of *Ashbrook v. The Golden Gate*, Id. 574, it was cited with approval by Curtis, circuit justice, in *The Oliver Jordan*, Id. 10,503, (decided in 1855,) which was an appeal from the district court for the district of Maine, the circumstances being very similar to those of the principal case. The sheriff of Cumberland county had attached the *Oliver Jordan*, and thereafter a libel for materials under the Maine lien law was filed, and a warrant of arrest issued from the United States district court in admiralty. Objection to the jurisdiction was overruled by the district court, but on appeal it was held that, since the vessel was rightfully in the custody of the state court, the marshal could not lawfully execute the warrant of arrest, and this because the only mode of preventing a conflict of jurisdiction is "to consider persons and property which are in the custody of the law of a state to be withdrawn from the process of the courts of the United States," and vice versa, except where congress has specially provided for an exercise of the supremacy of the United States laws. An early decision by Ware, district judge, had asserted that this rule did not apply when one claim is privileged over another, and that an attachment under process of a state court created a lien subject to the prior incumbrance of a seaman's claim for wages, though the libel was filed after the attachment was made. *Poland v. The Spartan*, Case No. 11,246.

[The principle that, when the state and federal jurisdictions are concurrent, the court which first takes possession of the res has exclusive jurisdiction thereof until such possession is relinquished, was recognized by the supreme court in *Hagan v. Lucas*, 10 Pet. (35 U. S.) 400. In that case slaves had been levied on by a sheriff, but given up on defendant's bond, conditioned to return the property if judgment went against him. The trial court held that under the Alabama law the lien continues after such a bond is given during the pendency of the suit, and the question whether the suit was pending or not was submitted to the jury. Mr. Justice McLean, in affirming the judgment, said: "Had the property remained in the possession of the sheriff under the first levy, it is clear the mar-

shal could not have taken it in execution. The first levy, whether it were made under federal or state authority, withdraws the property from the reach of the process of the other." This was followed in *Pulliam v. Osborne*, 17 How. (58 U. S.) 471, in which the property (slaves) had been sold by the sheriff, and then seized by the marshal. The court said: "In Alabama the bona fide purchaser at a judicial sale made to enforce a statutory lien takes the property discharged of liens of the same description, whether the subject of the sale be land or personal property. The propriety of this rule is fully vindicated by the statement in *Hagan v. Lucas*," supra. In a case arising in Mississippi the court reached an opposite conclusion, but only because by the law of that state a release of the property on the defendant's bond operates to suspend the lien, and a levy by the marshal on property so released was therefore lawful. *Brown v. Clarke*, 4 How. (45 U. S.) 4. In *Peck v. Jenness*, 7 How. (48 U. S.) 612, a creditor made an attachment under process from a New Hampshire state court, and in bankruptcy proceedings thereafter begun in a federal court it was decreed that the attachment was not a lien, and the sheriff was ordered to deliver the property to the assignee. This decree was pleaded by way of estoppel in the state court, but the objection was overruled, and judgment given for plaintiff, which was affirmed by the state supreme court and by the United States supreme court, on the ground that neither state nor United States courts can take property from the custody of the other.

[An important case on this subject arose in Pennsylvania. A sheriff seized a vessel under a foreign attachment in a state court, and thereafter the marshal seized her under admiralty process, although he found the sheriff in possession. The ship was sold in the state court, then sold in admiralty, then replevied by the purchaser under the former sale. Thereupon the purchaser under the admiralty sale filed a libel to regain possession. A decree for libellant was reversed in *Taylor v. The Royal Saxon*, Case No. 13,803, by Grier, circuit justice, who held that the sheriff's possession was conclusive against the jurisdiction of the federal court, citing and distinguishing *Certain Logs of Mahogany*, supra. In the replevin suit the state court gave judgment for the purchaser at the sheriff's sale, and this was affirmed in *Taylor v. Carryl*, 24 Pa. St. (12 Harris,) 261, where it was held that the Pennsylvania foreign attachment procedure was in rem, and among equal jurisdictions that is exclusive which is first attached. The United States supreme court affirmed this decision on appeal. *Id.* 20 How. (61 U. S.) 583; Mr. Chief Justice Taney and Messrs. Justices Wayne, Grier, and Clifford dissenting. This case was followed in *Freeman v. Howe*, 24 How. (65 U. S.) 450, where it was held that property cannot be taken by a sheriff on a process of replevin out of a marshal's hands, although the latter had made the levy on goods not named in his writ. But the marshal would be liable in trespass in a state court. *Buck v. Colbath*, 3 Wall. (70 U. S.) 334. The court, state or federal, which first gets jurisdiction, holds it, to the exclusion of the other, in criminal as well as civil cases. *Taylor v. Taintor*, 16 Wall. (83 U. S.) 366. This was a suit on a forfeited recognizance.

[It seems that a United States court may acquire jurisdiction without a seizure by the marshal. In *Coggeshall v. U. S.*, 2 Wall. (69 U. S.) 383, a revenue officer took possession of a slave ship which entered the port of Newport, and retained it until the marshal seized her. In the mean time a sheriff levied an attachment, but it was held that the vessel was in the custody and jurisdiction of the United States while in the hands of the revenue officer, and that the federal district court had jurisdiction. Where a defendant removes a cause from a state to a federal court, and the plaintiff files an amended

petition, the cause is beyond the jurisdiction of the state courts, and plaintiff cannot get from an appellate state court a reversal of the order of removal. *Home Life Ins. Co. v. Dunn*, 19 Wall. (86 U. S.) 214. After a lawful seizure of the res, it is constructively in the jurisdiction of the court until the determination of the cause, although actually wrongfully removed to another district. *The Rio Grande v. Otis*, 23 Wall. (90 U. S.) 458.

[The principle of *Taylor v. Carryl*, supra, does not apply to libels in admiralty by the owner of a vessel claiming the benefit of the act of congress of 1851, limiting the liability of ship-owners for cargo destroyed by fire, for the United States have exclusive jurisdiction under the act, (Mr. Justice Field and Mr. Justice Gray dissenting.) But, in the absence of such statutory exclusive jurisdiction, the principle is applicable without distinction to seizures in admiralty and by execution or attachment, (*Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355.) See Mr. Chief Justice Taney's dissenting opinion in *Taylor v. Carryl*, supra; also to property in the possession of one court for administration, (*Tua v. Carriere*, 117 U. S. 201, 6 Sup. Ct. 565.) And a seizure by a sheriff of property in the hands of a purchaser at a marshal's sale is void where the process under which the seizure was made was begun while the property was in the custody of the federal court.]

Case No. 453.

ANONYMOUS.

[13 Int. Rev. Rec. 78.]

Circuit Court, S. D. New York. Dec. 29, 1870.

[The case reported without title in 13 Int. Rev. Rec. 78, is the same as *In re Nicolas*, Case No. 10, 256.]

Case No. 454.

ANONYMOUS.

[14 Int. Rev. Rec. 103.]

[The case reported without title in 14 Int. Rev. Rec. 103, is the same as *The Sunnyside*, Case No. 13,622.]

Case No. 455.

ANONYMOUS.

[16 Int. Rev. Rec. (1872) 92.]

District Court, S. D. New York.

CUSTOMS DUTIES—SMUGGLING—INFORMER'S SHARE.

[A person who gives important information to revenue officers, and thereby prevents the smuggling of goods, is entitled to the informer's share of the forfeiture, although the information was given while he was under arrest for suspected complicity in the smuggling.]

[See note at end of case.]

[At law. Suit by the United States against Beare, a member of the importing firm of Smith & Beare, to recover the value of smuggled goods. Beare was also arrested criminally, but by a compromise all proceedings in both suits were stopped. Sisson and the agents of Col. Howe filed claims as informers, which were referred to a commissioner. Heard on exceptions by Sisson to the commissioner's report. Sustained.]

M. M. Budlong, for Sisson.
Stanley & Brown, for Colonel Howe.
Before BLATCHFORD, District Judge.

This is a proceeding by rival claimants to recover the informer's share of moneys paid into the United States court in settlement of a suit under the customs laws. It appears that in March, 1871, the store of Smith & Beare, importers at Nos. 88 and 90 Leonard street, was seized by Colonel Howe's special agents. The books and papers of the firm were examined, and goods of the value of \$9,000 were seized and taken to the custom house. Colonel Howe's agents claimed to be the informers, and filed a claim for the informer's share in the value of the goods. In May, a Mr. Sisson was arrested by the special agents being suspected to have been concerned with Smith & Beare in the transactions. Sisson gave the agents certain information, which he claimed was the cause of the recovery of the money, afterwards received on compromise. Suit was then brought against Beare for \$100,000, the supposed value of the goods supposed to have been smuggled by the house. He was arrested and held to bail in the sum of \$50,000, and was also arrested criminally and held to bail in \$15,000. While the proceedings were pending, Smith & Beare proposed settlement, and offered to pay \$14,000 if the government would stop all proceedings. The offer was accepted by the United States district attorney under the advice of the secretary of the treasury at Washington, and the money was paid into court in November last. Sisson then filed a claim as informer, and petitioned to the court to be declared such, and entitled to the informer's share, which was \$3,500. Colonel Howe's agents also claimed it, and Judge Blatchford referred the case to Commissioner Osborn to take testimony and report who was entitled to the informer's share. The commissioner filed his report in April, reporting in favor of the special agents. Sisson's counsel filed exceptions to the commissioner's report, and the case came on for argument on the exceptions. It was claimed by Colonel Howe's counsel that, assuming Sisson's information to have been important, Sisson being under arrest when he gave the information, was thereby disqualified and could not be adjudged the informer. It was claimed by the other side that the only question under the statute was who gave the information that led to the recovery and that if it was Sisson's that led to the payment of the money, he was entitled to the informer's share, even if he was under arrest at the time, which was denied. After lengthy argument, Judge Blatchford decided that the commissioner had erred on the law, and that Sisson was entitled to share equally with Colonel Howe's agency. Mr. Stanley, Colonel Howe's counsel, then took out a writ of error to the United States circuit court, but

before argument it was amicably adjusted between Mr. Sisson and the special agents, and orders for the discontinuance of the appeal were filed in the United States circuit court this week.

[NOTE. The act to prevent and punish frauds upon the revenue approved March 3, 1863, § 1, (12 Stat. 739,) provides that "this act" shall be construed only to modify, and not repeal, the act of March 1, 1823, (3 Stat. 729, c. 21.) Section 35 of the act of 1823 provides that all penalties and forfeitures incurred thereunder shall be sued for, recovered, distributed, and accounted for in the manner prescribed by Act March 2, 1799, (1 Stat. 627, c. 22.) Section 91 of the act of 1799 (1 Stat. 697) contains the following provision: "All fines, penalties, and forfeitures recovered by virtue of this act (and not otherwise appropriated) shall, after deducting all proper costs and charges, be disposed of as follows: One moiety shall be for the use of the United States, and be paid into the treasury thereof, by the collector receiving the same; the other moiety shall be divided between, and paid in equal proportions to, the collector, and naval officer of the district, and surveyor of the port, wherein the same shall have been incurred, or to such of the said officers as there may be in the said district; and in districts where only one of the aforesaid officers shall have been established, the said moiety shall be given to such officer: provided, nevertheless, that in all cases where such penalties, fines and forfeitures, shall be recovered in pursuance of information given to such collector, by any person other than the naval officer or surveyor of the district, the one half of such moiety shall be given to such informer, and the remainder thereof shall be disposed of between the collector-naval officer, and surveyor or surveyors, in manner aforesaid."]

Case No. 456.

ANONYMOUS.

[29 Leg. Int. (1872), 20.]

District Court, E. D. New York.

BANKRUPTCY—JURISDICTION—CONVERSION OF REALTY INTO PERSONALTY—INCUMBRANCES.

[Under the first section of the bankrupt act of March 2, 1867, (14 Stat. 517, c. 176,) a bankruptcy court has jurisdiction to order a sale of real property of the bankrupt free from incumbrances, which are thereby transferred to the proceeds of the sale, but an application for such an order should be denied when it does not appear who are the incumbrancers, and whether they have had notice of the application.]

[See note at end of case.]

[In bankruptcy. Application for an order to authorize the sale of the Brooklyn Hall and Market, at Fulton street and Myrtle avenue. Denied.]

BENEDICT, District Judge. I am of the opinion that under the first section of the bankrupt act [March 2, 1867; 14 Stat. 517, c. 176] the bankrupt court acquires jurisdiction to order a sale of incumbered property of the bankrupt free from the incumbrances, which incumbrances will be thereby transferred to the proceeds of the sale. I am further of the opinion, that upon the facts, so far as they have been made to appear in support of this petition, it will be for the

interest of the estate to sell the real estate referred to, subject to the first mortgage and free from all other liens or incumbrances. But I am of the opinion that no such order of sale can be properly made without previous notice to all persons claiming to have liens, incumbrances or interests in said property, and that the present application must be denied, inasmuch as it does not appear what persons have liens, incumbrances, and interests in said property, nor that such persons have had notice of this application. Whether the relief in question can be granted on a petition in the bankruptcy court, or should be prayed for by a bill in equity, it is not necessary now to decide.

[NOTE. Act March 2, 1867, § 1, (14 Stat. 517, c. 176.) provides: "The jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. The said courts shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity."]

Case No. 457.

ANONYMOUS.

[1 N. B. R. 122; Bankr. Reg. Supp. 27.]

District Court,¹ District of Columbia. 1867.

BANKRUPTCY — DISCHARGE — PUBLICATION OF NOTICE — DEPOSIT — PROCEDURE — ADVANCES FOR FEES.

[1. If, at the time a bankrupt applies for his discharge, no creditors have proved their debts, and no assets have come to the hands of the assignee, notice to show cause why a discharge should not be granted must be by publication, in such number of newspapers and for such length of time as the court may direct.]

[Cited in Re Bloss, Case No. 1,562.]

[2. A balance of the deposit of \$50 remaining in the hands of a register at the close of a case in bankruptcy is a part of the assets, and should be paid to the assignee, and not to the bankrupt.]

[Cited in Re Elmendorf, 9 Fed. 546; Re Bloss, Case No. 1,562.]

¹[The United States circuit court for the District of Columbia was abolished by Act March 3, 1863, and its jurisdiction conferred upon the supreme court of the district. The statute further provided that any one of the justices of such court "may hold a district court of the United States for the District of Columbia, in the same manner and with the same powers and jurisdiction possessed and exercised by other district courts of the United States." 12 Stat. 763, § 3.]

[3. Where no creditors have proved their debts, and there are no assets, an assignee should nevertheless be appointed, since creditors may appear and assets may be found.]

[4. A judgment due a firm should be scheduled in the firm's name, without setting forth the names of its members; but if their names are set forth, the schedule is not thereby vitiated.]

[5. Where notice of a meeting of creditors is addressed to a creditor by a wrong name, though there is not time to remedy the defect before the meeting, the creditor is not bound by the proceedings at such meeting.]

[Cited in Re Archenbrow, Case No. 504.]

[6. Where the petitioner in bankruptcy has no property except what he claims as exempt, and his creditors are all of one class, he is not required in making up his schedule to use the entire list of forms in bankrupt proceedings; he need use only such as are appropriate to and descriptive of the debts and property he is required to list.]

[7. Where a petitioner in bankruptcy has made advances as security for fees to the register, clerk, and marshal, he is not entitled to reimbursement therefor by the assignee out of the estate.]

In bankruptcy. In divers cases before J. Sayles Brown, register in bankruptcy, District of Columbia, the following questions arose, and having been certified to Judge Wylie, his opinion on each question is appended.

Of Notice to Show Cause Why Discharge Should not be Granted.

If at the time the bankrupt applies for his discharge no creditors have proved their debts, and no assets have come to the hands of the assignee, is notice to show cause required, and, if so, what notice?

WYLIE, J. In such case, the only notice which can be given is that by publication, and such notice is, I think, required by the law. The length of time, and the number of newspapers for the publication, have not been prescribed in the act, but are to be fixed by the court, according to its discretion in each case.

Disposition of Balance of Deposit of \$50.

If a balance of the deposit remains in the hands of the register at the close of a case in bankruptcy, to whom shall he pay it? Is it the property of the assignee or of the bankrupt?

WYLIE, J. It would be part of the assets, and should be paid to the assignee.

Appointment of Assignee, No Debts Proved, and No Assets.

When no creditors have proved their debts, and there are no assets, should an assignee be appointed?

WYLIE, J. I think an assignee should be appointed, nevertheless. There may be creditors who have not proved their debts, and

the assignee might find assets which the petitioner may have overlooked.

Judgment Debts Due Firms Need not be Scheduled to Individual Members of Said Firm.

When a petitioner owes a judgment debt, contracted with a firm composed of several individuals, should the debt be scheduled as due the firm under the name and style by which it is known, or should the individual names of the persons comprising the firm be set out as creditors; or should the individual names comprising the firm be given, and then add,—Partners comprising the firm of A. B. & Co. Which of these forms are admissible, and which is the best practice?

WYLIE, J. Either one of these forms would be good; but the first is the best, for the petitioner might be mistaken as to some of the members of a partnership, or might in fact be ignorant as to the membership of some of the partners. That is his risk, however. It is safest merely to return the partnership debt as due to the firm without naming the individual partners.

Service of New Notice in Cases of Defective Notice—Appearance of Creditor on Defective Notice—Waiver.

When in issuing the warrant or in serving the notices for the first meeting of creditors a mistake has been made in the name of one or more of the creditors, so that he is not addressed by his true name, and there is not time after the discovery of such defect to send notice, may such failure of notice be cured, and if not cured, will it be ground for denying the bankrupt a discharge from the debt due such unnotified creditor?

WYLIE, J. Every creditor must have notice served upon him in the manner prescribed by the act, otherwise he will not be bound by the proceedings. A notice not addressed to a creditor by his name amounts to no notice. The only way in which to cure such error is by issuing and serving a new and correct notice, unless the creditor will voluntarily appear and waive the notice, which, of course, will bind him.

Only Such Forms and Schedules as Are Requisite to Set Forth Assets and Liabilities Truly Need be Used.

When a petitioner in bankruptcy has no property except what he claims as exempt, and his creditors are all under one class,—as for example, creditors whose claims are unsecured,—is the debtor required, in making up schedules of his debts and estate, to use the entire list of forms in all cases laid down in the general orders and forms of proceedings in bankruptcy adopted by the supreme court of the United States, or shall he use

such only of said forms as are appropriate to, and descriptive of, the debts and property he is to list?

WYLIE, J. The petitioner is required to use such only of the forms as are appropriate to and descriptive of the debts and property he is required to list. It would be absurd to require him to file in addition thereto a large mass of forms, all of which are simply blanks. He should state, however, the reason why these were omitted.

Payment of Fees by Voluntary Petitioner—Disbursement by Assignee.

When a petitioner in bankruptcy, who has assets, has made advances as security for fees to the register, the clerk, and the marshal, is he to be reimbursed by the assignee out of the estate for these expenses?

WYLIE, J. He is not. The money he advances is not his own, but should be returned as a part of petitioner's assets and handed over to the assignee. The assignee should be credited with the fees so paid, and not the petitioner.

Case No. 458.

ANONYMOUS.

[1 N. B. R. 216; Bankr. Reg. Supp. 46.]

District Court, S. D. New York.

BANKRUPTCY—WARRANT—SERVICE—ELECTION OF ASSIGNEE.

[1. The direction in a warrant in bankruptcy for service "either by mail or personally" does not confer discretionary power upon the marshal, who must serve all by mail unless the warrant directs him to serve personally certain specified persons; but the register may strike from the warrant the words "either," "or personally."]

[2. If but a single creditor proves his debt, and attends the first meeting of creditors, he is entitled to name the assignee.]

In bankruptcy. The district court of the southern district of New York has decided upon an application made to it under the provision of section 6 of the act, that the words in the warrant (form No. 6) "either by mail or personally," do not confer upon the marshal any discretion as to the manner of service; but, on the other hand, it is the duty of the marshal to serve all by mail, unless directed in the warrant to serve personally certain parties therein specified by name; and that it is competent for the registers, in their discretion, to strike out the word "either" and the words "or personally" from the warrant.

On the return of the warrant, at the first meeting of the creditors, let the creditors who wish to have a voice in choosing an assignee, appear a few minutes before the hour designated for the meeting, and make proof of their respective debts. The registers are furnished with blanks for this pur-

pose, which conform in size and shape to the other papers, and which can readily be filled up and sworn to. It will be observed that it is the majority in number and amount, who, at or before the first meeting, prove their debts, that are entitled to choose their assignee. So that it would appear if but a single creditor attend such a meeting and prove his debts, he is entitled to name the assignee.

Case No. 459.

ANONYMOUS.

[1 N. B. R. 216; Bankr. Reg. Supp. 46; 3 N. B. R. 128, (Quarto, 33.)]

District Court, N. D. New York. July 24, 1867.

BANKRUPTCY—PETITION—ERROR IN JUDGE'S NAME.

In a case of involuntary bankruptcy, leave was asked to present a petition addressed to "Hon. Nye K. Hale, District Judge." *Held*, that the name of the judge must be given correctly, if at all; that it cannot be stricken out as surplusage; and consequently permission to file must be denied.

[Note. No written opinion appears to have been filed in this case.]

Case No. 460.

ANONYMOUS.

[1 N. B. R. (1867,) 219, (Quarto, 1.)]

District Court, S. D. New York.

BANKRUPTCY—DISCHARGE—CREDITORS' MEETINGS.

[In bankruptcy. On the register's certificate requesting an answer to the following question:]

"Suppose the 2d and 3d meetings of creditors have not been held, and no assets come into the hands of the assignee, and that after the expiration of three months from the date of adjudication, the bankrupt applies for his discharge; need the notices make any mention of the 2d and 3d meetings of creditors, or need there be any such?" T. B. Gates, Register.

BLATCHFORD, District Judge. If the bankrupt does not apply for his discharge within 3 months from the date of his being adjudged a bankrupt, the notice need say nothing about the 2d or 3d meetings of creditors. These meetings will then be left to be regulated by the provisions of sections 27 and 28 of the act, [Act March 2, 1867; 14 Stat. 517, c. 176.]

Case No. 461.

ANONYMOUS.

[2 N. B. R. 68, (Quarto, 21.) 1 N. B. R. (1867,) 219, (Quarto, 2.)]

District Court, S. D. New York.

BANKRUPTCY—PROOF OF DEBTS—DISCHARGE—NOTICE.

[1. All proofs of debts are to be sent to the assignee, for him to register, as required by sec-

tion 22 of the bankrupt act, and thereafter returned to the register, and filed in the clerk's office with the other papers, under general order No. 7.]

[2. If the bankrupt does not apply for his discharge within three months from the time of his being adjudged a bankrupt, the notice need say nothing about the second or third meetings of creditors, which should be left to be regulated by sections 27 and 28 of the act.]

In bankruptcy. The following questions were put by Register Gates:

Section twenty-two, general clause one hundred and five, requires register to mail proof of claims to assignee. General clause one hundred and nine, next section: "The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers." What is to be done with this list after it is "made and certified?" and if it is to be sent to the assignee, need the proofs of claims also be sent to him?

If proofs of claims and depositions are to be sent to assignee, what is he to do with them finally? Are they not to be annexed to and filed with other papers at end of case? and if so, how is register to get them? Some have notes and other evidence of debt attached, and unless the parties choose to have copies made, as provided for by the act, these go into the hands of the assignee, with proof of debts. I would like to know what the practice is in these respects.

BLATCHFORD, District Judge. All proofs of debt are, under section twenty-two, to be sent to the assignee for him to register them, as required by section twenty-two. The list to be made by the register, under sections twenty-three and twenty-seven, is the list shown by forms thirty-two and thirty-three, and is a list for a dividend. That list is to be given to the assignee. See Mem. at end of form No. 33. The list can be made from the register kept by the assignee, under section twenty-two. When the assignee has made his register he must return the proofs of debt to the register, and they must, under general order number seven, be filed in the clerk's office, with the other papers in the case.

The register replied: Suppose the second and third meetings of creditors have not been held, and no assets come into the hands of the assignee, and that after the expiration of three months from the date of adjudication the bankrupt applies for his discharge. Need notice make any mention of second and third meetings of creditors, or need there be any such?

To which the judge says: If the bankrupt does not apply for his discharge within three months from the time of his being adjudged a bankrupt, the notice need say nothing about the second or third meetings of creditors. Those meetings will be left to be regulated by the provisions of sections twenty-seven and twenty-eight of the act.

Case No. 462.

ANONYMOUS.

[2 N. B. R. (1869), 141, (Quarto, 53.)]

District Court, N. D. New York.

BANKRUPTCY—SCHEDULE OF CREDITORS—NEWSPAPERS.

[In a bankrupt's schedule of creditors containing debts owing to newspapers, the names of the proprietors of the newspapers should be given, and not the names of the newspapers only.]

In bankruptcy. Register Sprague, of the northern district of New York, stated that a petition has been presented to him for certification, and that the schedule of creditors contained the names of sundry newspapers to which the debtor was owing debts, but the names of the proprietors of the papers were not given, and he was in doubt whether he ought to grant a certificate.

HALL, District Judge, said he was of opinion that the names of the proprietors must be given in order to comply with the act; that the owners of the paper and not the paper were the creditors.

It was also questioned whether a schedule which gave the residence of creditors in abbreviations, as "Mich." for Michigan, "N. Y." for New York, could be certified. The judge remarked that he could not decide the points *ex parte*, but intimated that general order number fourteen did not allow of abbreviations or interlineations in the schedule.

Case No. 463.

ANONYMOUS.

[1 N. Y. Leg. Obs. 349.]

District Court, N. D. New York. March, 1843.

EVIDENCE—PREFERENCE—PRACTICE.

1. An answer sworn to by a bankrupt in a suit in chancery, may be used as evidence against him in bankruptcy.

2. Where it appeared that the bankrupt had, prior to the passage of the act in contemplation of bankruptcy, and for the purpose of giving preferences to certain of his creditors, confessed several judgments to a large amount, upon which executions were issued forthwith, in virtue of which all his property was sold. *Held*, that he was not entitled to a discharge and certificate without the assent of a majority in interest of his creditors, who had not been preferred.

3. It is not put upon the bankrupt to come prepared with such assent on the day to show cause.

In bankruptcy. This being the day to show cause against granting a discharge to the bankrupt, objections were filed by several creditors, charging him with having, on the 5th and 11th of January, 1841, in contemplation of bankruptcy, and for the purpose of giving a preference to certain of his creditors, confessed several judgments to a large amount, whereon he permitted executions to

be issued forthwith, in virtue of which all his property was sold. For the purpose of establishing the truth of the objections, an exemplification of the sworn answer of the bankrupt to a bill lately brought against him in the state court of chancery, was offered in evidence, which answer it was insisted by the counsel for the objectors contained admissions fully demonstrating the truth of the objections and therefore rendered it unnecessary to take a rule for the examination of witnesses. The sufficiency of the admission contained in the answer was not denied by the counsel for the bankrupt; provided the answer was admissible in evidence.

Goodwin & Smith, for objectors.

Myers, for bankrupt.

CONKLING, District Judge. The admissions of the bankrupt in the answer in chancery, are unquestionably evidence against him; and if, as seems to be tacitly conceded, they establish the truth of the objections, no discharge can now be granted. But the preferences imputed to the bankrupt having been given before the passage of the act, are only a qualified bar to a discharge, which may be removed by the assent of a majority in interest of those of his creditors who have not been preferred. No period is fixed by the act within which such assent must be obtained; but from the nature of the case there must be some reasonable limit to this period. It was suggested by one of the counsel for the objecting creditors, that the bankrupt ought to be required to come prepared with the assent on the day to show cause. There is nothing in the terms of the act demanding so great strictness, and I am of opinion that such a construction would be unreasonable. The bankrupt ought to be allowed sufficient time after the decision against him on the objections, to ascertain the disposition of his creditors, and obtain the assent of such of them as are willing to give it. The length of time actually necessary for this purpose in any particular case, would of course depend on the circumstances of the case; and the absence or remote residence of creditors might require a considerable period. The act being unfortunately silent on the subject, it would seem from the necessity of the case to rest altogether in the discretion of the courts. They might prescribe a period in each case with reference to the circumstances pertaining to it. But this would be inconvenient; and it would therefore, I think, be better to fix a period applicable to all cases; and for the reasons already stated, this ought to be of considerable length. It was suggested, also, that no discharge ought to be granted on the assent of creditors, without previous notice to the objecting creditors. This seems to be reasonable, in order to afford them an opportunity to contest the existence and amounts of the debts claimed by the assenting creditors. It will therefore be necessary to frame

additional rules to regulate the practice in this respect, and I shall accordingly direct my attention to the subject for that purpose.

Case No. 464.

ANONYMOUS.

[3 N. Y. Leg. Obs. (1845,) 155.]

District Court, N. D. New York.

BANKRUPTCY—DISCHARGE AND CERTIFICATE—JURY TRIAL—RIGHT TO BEGIN.

On trial by jury to determine the right of a bankrupt to a discharge and certificate, the opposing creditor has the affirmative of the issue, and has consequently the right to begin.

At the close of an argument, on a motion for a new trial by jury to determine the right of a bankrupt to a discharge, Mr. Myers stated to the court, that considerable doubt and some diversity of opinion and practice prevailed among the commissioners before whom trials of this nature had from time to time been ordered, upon the question, whether it was the right of the objecting creditor, or of the bankrupt, to begin; and he suggested that, as there were yet many trials to be had, an expression of the opinion of the court on this point, would be useful in relieving the commissioners from embarrassment, and in producing uniformity in the practice.

CONKLING, District Judge, said he had never entertained any doubt on the point, but had uniformly been of opinion that the opposing creditor was to be considered as holding the affirmative of the issue, and ought to begin. The granting of a discharge was a matter of course, unless objections were affirmatively interposed and affirmatively sustained by evidence. In such a proceeding, the objector was the actor, and the bankrupt stood on the defensive.

Case No. 465.

ANONYMOUS.

[4 N. Y. Leg. Obs. (1846,) 98.]

District Court, S. D. New York.

ALIEN—NATURALIZATION—RESIDENCE.

1. To entitle an alien to be naturalized, [Under Act April 14, 1802, (2 Stat. 153, c. 28,)] it is not enough that he should have been within the jurisdiction of the United States for more than five years; the act of Congress contemplates a territorial residence.

2. Where, therefore, an alien deserted from a ship of war and enlisted on board an American frigate in 1814, war then existing between the two nations, and continued in the United States navy throughout the war and for several years subsequently, and had since that time followed the seas constantly, sometimes in the merchant, and at other times in the United States service, but had had no residence within any part of the United States, other than by such employment on board American vessels. *Held*, that he had not been

a resident, within the meaning of the act of congress, and was not entitled to be naturalized.

[In the matter of the application of an alien for a certificate of naturalization. Denied.]

BETTS, District Judge. Application is made by an alien to be naturalized upon these facts: The applicant deserted from a British ship of war, and enlisted on board an American frigate in 1814, war then existing between the two nations. He continued in the United States navy through the war and several years subsequently, and since that time has followed the seas constantly, sometimes in the merchant, and at other times in the United States service. He has had no residence within any part of the United States, other than by such employment on board American vessels. In 1832 he filed his declaration of intention to become naturalized. The point for decision, applying these facts to the law, is whether such residence has been shown as is required by the act of congress. When the applicant came within the jurisdiction of the United States in 1814, the laws in force made it necessary he should prove to the court a residence within the United States five years at least, and within the state where his application is made one year at least, in order to obtain his naturalization. Act April 11, 1802, § 1, art. 3, [Act April 14, 1802; 2 Stat. 153.]

It is plain these provisions demand more than that the applicant should be within the jurisdiction of the United States, and look to a territorial residence. The policy of the naturalization laws is to amalgamate immigrants with the resident population. This is ascertained, not only from our legislative and political history, but is distinctly indicated upon the face of every enactment on the subject. The act of March 26, 1790, [1 Stat. 103,] the first one on the subject passed under the federal constitution, required a residence of at least two years within the limits, and under the jurisdiction of the United States; and that the jurisdiction referred to is territorial, and inter fines, is made manifest by the addition that the alien is to make his application to a court in some one state wherein he has resided for the term of one year at least. At that day there were many military posts and stations still occupied by the British forces, which could not, until surrender or conquest be regarded as under our actual jurisdiction, and it might be questioned whether the Indian country in possession of the natives, but within the boundaries of the United States, might not be claimed as a place of residence, where a right to naturalization might be acquired, although not under the dominion of the laws of the United States. To mark, then, definitely, the policy upon which the privilege rests, that the foreigner should be intermingled and incorporated

with citizens resident upon the soil of the United States, congress enacted that in addition to his coming within the limits of the country, the alien should place himself also under its laws and authority.

The act of January 29, 1792, (2 Stat. 446,) does not include the condition of jurisdiction required in the subsequent act of 1802, and that condition is only afterwards enjoined in relation to certain classes of residents. Acts March 22, 1816, [3 Stat. 258,] and May 26, 1828, [Act May 24, 1828; 4 Stat. 310.]

This applicant most clearly could not, under the laws then in force, have obtained a certificate of naturalization, if he had taken the earliest measures for it, after abandoning his country, without having first acquired a residence within some state or territory of the United States. An employment in the naval marine would not be a residence within any state, nor would sailing in merchant vessels gain an inhabitancy within this state, according to the local law of that period, or as it now prevails. Rev. Laws N. Y. April 8, 1813; 1 Rev. St. N. Y. p. 621, § 29. [See note at end of case.]

The laws of the United States were essentially modified with respect to the particular of residence by the act of March 3rd, 1813, the 12th section enacting, "that no person who shall arrive in the United States, from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not, for the continued term of five years next preceding his admission as aforesaid, have resided within the United States without being at any time during the said five years out of the territory of the United States." 4 Stat. 514. The act commenced operation with the determination of the last war, (Feb. 1815,) but the facts agreed in this case, show that the applicant did not come within the territory of the United States until after that period. His being on board a public vessel would not constitute a residence, which would afterwards go on, because, as has been already indicated, under the act of 1802, the residence must have its commencement within the territory of the country. Probably after a domicile is acquired within the country, it might, under the act of 1802, be regarded as continuing so as to satisfy at least four of the five years required, although the applicant should be during that period engaged in the merchant or naval service, but the beginning must necessarily be his coming within the country, with intent to render this his only abode and home. There was, accordingly, no arrival of the applicant within the United States according to the intent of the act of 1813, until after that had gone into operation, and then in its terms it inhibits the grant of naturalization, when the applicant has been during

any part of the five years out of the territory of the United States. This applicant had been, almost without intermission, out of the territory of the United States, following the seas as his sole occupation, and having no fixed home within this country. The act of March 3rd, 1813, whilst it declares a great principle in excluding foreigners from our national and merchant marine, and in bestowing the employment upon our citizens, must still be regarded as growing out of the relations notoriously existing at the time between the United States and Great Britain on that subject. The aggressions and outrages committed on board American vessels in searching for and impressing seamen, led to the declaration of war in 1812, and the remonstrances and recriminations which had been the chief theme in the diplomacy of the two governments for years antecedent to the war, were unquestionably intended to be afterwards avoided by the enforcement of the policy indicated by this statute. This enactment might probably be proffered by the United States, as a basis of negotiation with the English government, but although no concession of the controverted subjects was made by treaty on the part of Great Britain, yet this particular section has been allowed to stand as a solemn assurance that the privileges of naturalization, under our laws, would hereafter be restricted according to its provisions.

It is now, therefore, a part of the naturalization laws, applicable to all others as well as seafaring men, who have emigrated to the United States since 1815, and must supply the rule of decision in the case now submitted to the court. The application must be, therefore, denied.

[NOTE. The provisions of 1 Rev. St. N. Y. (1st Ed. 1829,) p. 621, § 29, are as follows: "Every person of full age, who shall be a resident and inhabitant of any town for one year, and the members of his family who shall not have gained a separate settlement shall be deemed settled in such town." Here follow provisions for minors gaining a settlement. This section is a part of chapter 20, tit. 1, "Of the Relief and Support of Indigent Persons."]

Case No. 466.

ANONYMOUS.

[1 Pac. Law. Rep. 173.]

District Court, D. California. May 6, 1871.

INVOLUNTARY BANKRUPTCY—FRAUD—SECRETION OF GOODS.

[1. The seller of certain goods, hearing of the probable insolvency of the purchaser, made an examination of the latter's stock, and found that a part of it had been secreted. The seller then induced the buyer to give up goods enough to satisfy the debt for which a receipt in full was given. The greater part of the goods so taken had been obtained from another seller. *Held*, that the transaction was a fraud upon the bankruptcy act, and that the assignee subsequently appointed could recover from the seller the value of the goods so seized.]

[2. The secretion of the goods by the purchaser to prevent their being taken on attachment amounted to an act of bankruptcy.]

In bankruptcy.

HOFFMAN, District Judge. A purchased goods for business purposes of B. and also of C. B., hearing of the probable inability of A. to pay, sent an agent to demand payment, which was done, and who saw the stock of goods was much reduced, whereupon he instituted search, and found some eight hundred dollars worth of goods secreted, chiefly the goods bought of C. Thereupon he induced A. to give him sufficient of the goods to satisfy his debt to B. Subsequently, on petition of C., A. was adjudged a bankrupt. A. contends that he did not consent to B. taking the goods, but it appears that he did receive a receipt in full of B. The goods left with A. were of little value and insufficient to meet the demands of C. and others. Held:—

1. In surrendering his property, the bankrupt intended what was the inevitable result. This is made more clear from the fact of his failure to apply for a month thereafter for a division of his property among his creditors.

2. The assignee of the bankrupt now sues B. to recover the value of such goods to the estate as were seized by B., and judgment in favor of the assignee must be entered.

3. That the defendant B. obtained a preference, and has procured a payment in full of his whole demand against the bankrupt, is indisputable.

4. It is urged that it is not shown that A. was insolvent at the time of the transfer. Whether or not the total value of his stock of goods had been converted into money may be doubtful. But he was unable to pay his indebtedness as it accrued, which it is said is the test of insolvency, under the bankrupt act. He had committed an act of bankruptcy by secreting his goods, to prevent their being taken on attachment. This the defendant well knew, and the knowledge of that fact induced him to adopt summary means resorted to by him to obtain a payment of his debt. The bankrupt declined to pay the debt when demanded, and suffered his business to be broken up and the greater part of his stock in trade to be carried away. "He has since been adjudged a bankrupt, and it is to be presumed that no assets sufficient to satisfy his other indebtedness have come into the hands of the assignee; for, otherwise, this suit, which has been instituted for the benefit of the other creditors, would not have been commenced." "Under these circumstances, I cannot but consider the fact of insolvency as clearly established, and it is equally clear that the creditor had reasonable cause to believe the debtor to be insolvent, and that the transaction whereby he sought to obtain a preference necessarily operated a fraud on the bankrupt act."

Case No. 467.

ANONYMOUS.

[1 Pa. Law J. 323; 1 Pa. Law J. R. 121.]
Circuit Court, E. D. Pennsylvania. Nov. 10, 1842.

VOLUNTARY BANKRUPTCY—GENERAL ASSIGNMENT —VALIDITY.

A general assignment without preferences is valid, under the bankrupt law; and this, though the assignor have filed a petition to be decreed a bankrupt, provided, that a decree of bankruptcy have not yet passed.
[Cited in *Sullivan v. Hieskill*, Case No. 13,594.]

In bankruptcy. *Breneman's Case*, [Case No. 1,830,] having decided that a general assignment with preferences is an act of bankruptcy, and void under bankrupt law, the question was raised, in several subsequent cases, whether a general assignment without preferences is likewise void. It was admitted by those who maintained the validity of such assignments, that under the English decisions they were void; but it was asserted that these decisions had given dissatisfaction both in England and here; and that our courts being free to decide the question on principle, should not regard those decisions. It was a doctrine which had not proved satisfactory even at home. *Eden* spoke of it, as a doctrine "difficult to understand." Page 28. As one whose reasons, "are by no means satisfactory." *Id.* Lord *Eldon* had more than once expressed his disapprobation of the doctrine. [Ex parte *Bourne*,] 16 Ves. 148; [Dutton v. *Morrison*,] 17 Ves. 198. It got foot from a N. P. decision of Lord *Mansfield*, (Co. Bankr. Law, 100,) whose great name controlled subsequent judges against their own judgment. On principle, it was not easy to understand the doctrine. Such an assignment is good at common law, by the statutes of *Eliz.*, and it is not declared by the bankrupt act to be void. Nor was such an assignment against the policy of the act. The policy of the act is, that creditors shall be paid alike; and the act has no further policy. Now, a general assignment, without preferences, did exactly this thing. It might not do it in the manner and through the same forms as the bankrupt law would do it; but the machinery of the act was no part of its policy. The court had no right to extend the policy of the bankrupt act, beyond the point that the bankrupt act had, itself, defined.¹ Since the decision in *Bennett's Case*, [Case No. 1,309,] confirmed in *Ex parte Dudley*, [Id. 4,114,] it was argued that if a debtor had no power to make a general assignment, then the effect of the bankrupt law was to assist in giving preferences. For as a voluntary petitioner in bankruptcy is bound to set forth in his petition "an accurate inventory of his property, &c. and the location and situation of each and every parcel and portion thereof."

¹ See *Shouse's Case*, [Case No. 12,815.]

the effect was to indicate to a pressing creditor, the manner in which he is to satisfy his execution.

On the other side, it was said that the question had been settled in England by a succession of her most able judges, including Lord Hardwicke, De Grey, and Mansfield. that there was nothing in the English acts, essentially to distinguish them on this point from ours; that the reasoning of the court in *Breneman's Case*, [supra,] led to the doctrine of the English courts, and that that doctrine had been judicially affirmed in this country. By Judge Concklin, in the western district of New York. See [Barton v. Tower, Case No. 1,085.] It was urged likewise, that though an assignment of the sort in question, did, to a certain extent, do what a decree of bankruptcy would do, yet that those assignments being regulated entirely by state laws, the property of the debtor, and the rights of the creditor, would be subjected to a control quite collateral to this court, and which might endanger both, and be at variance with the spirit of the bankrupt law. In Pennsylvania, to this day, the assignee was selected by the debtor, and until lately (14th April, 1828) gave no security for the performance of his duty. The federal legislature had provided for the whole subject of insolvent debtors; and it was not wise to allow other jurisdictions to interfere with what had been provided for by congress. The question was adjourned into the circuit court in the following form: "First—Is an assignment of all a debtor's property made since the passage of the bankrupt law, for the equal benefit of all his creditors, void as against the assignee under the bankrupt law, so that the latter may recover the property. Second—Can a petitioner for the benefit of the bankrupt law make a voluntary assignment of all his property for the equal benefit of his creditors, after filing his petition and before decree?"

BALDWIN, Circuit Justice. Neither of these assignments is an act of bankruptcy as defined in the first section of the bankrupt act. There can be no pretence of their being fraudulent upon creditors, or a fraud on the policy of that act, inasmuch as the debtor voluntarily does the very thing, which it is the policy of the law to enforce—an equal distribution among all his creditors, of all his property, real and personal, without preference. The second section provides, "That all future payments, securities, conveyances, or transfers of property, or agreements made or given by any bankrupt in contemplation of bankruptcy, and for the purpose of giving any creditor, endorser, surety, or other person any preference or priority over the general creditors of such bankrupt, and all other payments, securities, conveyances, or transfers of property, or agreements made or given by such bankrupt, in contemplation of bankruptcy, to any

person or persons whatever, not being a bona fide creditor or purchaser for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act; and the assignee under the bankruptcy shall be entitled to claim, sue for, recover, and receive the same as part of the assets of the bankruptcy; and the person making such unlawful preferences and payments, shall receive no discharge under the provisions of this act: provided, That all dealings and transactions by and with any bankrupt, bona fide made and entered into more than two months before the petition filed against him, or by him, shall not be invalidated or affected by this act: provided, That the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act. And in case it shall be made to appear to the court, in the course of the proceedings in bankruptcy, that the bankrupt, his application being voluntary, has, subsequent to the first day of January last or at any other time in contemplation of the passage of a bankrupt law, by assignment or otherwise, given or secured any preference to one creditor over another, he shall not receive a discharge unless the same be assented to by a majority in interest of those of his creditors who have not been so preferred." A careful analysis of this section is necessary to its proper understanding in all its parts and their bearing on each other. Its first provision is "that all future payments," &c., made "by any bankrupt in contemplation of bankruptcy, and for the purpose of giving any person any preference over his general creditors." The second is "and all other payments," &c., "made in contemplation of bankruptcy, to any person not being a bona fide creditor, or purchaser for a valuable consideration without notice, shall be deemed utterly void and a fraud upon this act, and the assignee shall be entitled," &c. Two classes of cases are contemplated: both are put on the same footing, the first is a payment, &c., made after the passage of the act, which must have two ingredients. 1. It must be made "in contemplation of bankruptcy," &c. 2. For the purpose of giving a "preference over general creditors." If either is wanting, the case is not within this provision. The second is, "all other payments," &c., made at any time, "in contemplation of bankruptcy," to any person "not a bona fide creditor," without notice: here are likewise two ingredients necessary to bring a case within this class, the contemplation of bankruptcy, and a payment &c., to a person not a bona fide creditor, &c., or who has notice. This part of the law is silent as to the subject of notice, but the intention is apparent by referring to the first ingredient, "made in contemplation of bankruptcy," as the subject of notice. This means without notice of the intention or de-

sign of the bankrupt having a contemplation of bankruptcy. This is the more apparent from the language of the second proviso, where the subject of the notice is thus defined: "No notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act." Thus referred, the subject of the notice is perfectly appropriate to the respective provisions of this section. Should a question arise on the meaning of the words "all future payments," &c.—that is to say—whether this means from the passage of the act, or, the time when it takes effect, an answer is at hand. Laws speak from the time of their enactment, unless there be some prescribed limitation to control their effect. If a rule of conduct is prescribed, as it operates by mere force of the law, no other time than the passage of the law, can be taken as intended. Laws may be retrospective likewise, as is illustrated in the section under consideration. The expression, "all future payments," refers to those made after the 19th August, 1841, as clearly as if that day had been inserted; and there being nothing in any other part of the law, by which its operation in this respect is controlled, the law operates from that day.

The next clause is retrospective, providing that any assignment made after the 1st January, 1841, giving a preference to one creditor over another shall prevent a discharge, unless there be obtained the assent of a majority in interest of the non preferred creditors. These clauses manifest the intention of the legislature. The first annuls the prohibited payments, &c., made after August; the second does not invalidate the preference given after January, 1841, but imposes a condition on the bankrupt as a prerequisite to his discharge. These are the definite periods from which the respective provisions take effect on the act done by the bankrupt. There is also a third clause, which must be taken in connection with the others,—“and all other payments,” &c. which are indefinite as to time, operating alike on the prohibited acts, done before or after the passage of the law. So read, the whole section is harmonized. To so read it as to refer future payments, to any time other than the 19th August, would make it impossible to find out the meaning of “all other payments” in their reference to the time when the provision takes effect on the act done. The law clearly contemplates a difference in point of time, between the commission of the acts which are the ingredients of the two distinct classes of cases which are declared to be frauds upon it. If they are referred to the same time, the two classes of cases become confounded into one, which will be incapable of definition without judicial legislation. For instance, if all future payments, and all other payments, are referred to the 1st February, 1842, there is no clue by which to separate the two

classes; the law must refer to that day in both clauses and make them read, all payments made after the 1st February, 1842, leaving the words all other payments wholly inoperative. Such a construction would be inadmissible for the reasons given in the case *Ex parte Irwine*, [Case No. 7,086,] and on general principles. This construction, or rather plain reading of the second section, is not inconsistent with the seventeenth section, which declares, “that this act shall take effect from and after the 1st February next.” This means that proceedings under the act may then commence and be carried on under and according to its provisions regulating the forms and modes of action to its close: that was the period at which the jurisdiction of the district court arose and might be exercised. But the fixing a time at which the power of that court came into existence; at which there could be judicial action on the various provisions of the law, presenting rules for the judgment of the court; or merely delineating a course for its proceedings, is wholly distinct from fixing a time at which certain defined acts of the debtor should be deemed frauds upon the law, and which the court should be bound to adjudge void. Judicial action under the law could not begin till the appointed time; but when it begins, the law has prescribed definite rules by which to judge of the validity of antecedent acts bearing on the policy of the law. It cannot be supposed that no provision was intended to be made for those acts of the debtor, done between the passage of the act and the time when proceedings might begin under it, which would contravene the whole object of the law, and defeat an equal, or any distribution of the debtor's property among his general creditors, by permitting preferences made in contemplation of bankruptcy, or assignments so made, to others than bona fide creditors without notice. Such an intention would be as inconsistent with the general policy of the whole law, as repugnant to the definite provisions of the second section. On the contrary, the intent of the law as expressed in plain language, the provisions to prevent frauds upon it, are too manifest to admit of a doubt. These considerations suffice to dispose of the first question presented. An assignment made after the passage of the bankrupt act, is within the second section, if made in contemplation of bankruptcy, and for the purpose of giving any preference over the general creditors: it is void as a fraud upon the law; so if the assignee is not a bona fide creditor, or purchaser without notice. But an assignment for the equal benefit of all creditors, is not within the first clause as to all future payments,—a preference being an indispensable ingredient to make it void; and if the assignees fill the character of bona fide creditors or purchasers for valuable consideration without notice, a like ingredient is wanting

to constitute a case of fraud upon the law within the second clause, as to all other payments, &c. It follows that such an assignment as stated in the first question being valid independently of the bankrupt act, and not invalidated by any of the provisions of the act, the assignee under that act cannot recover the property assigned.

The second question adjourned to this court, relates to a voluntary assignment, of all the debtor's property, for the equal benefit of all his creditors, after filing his petition. The foregoing remarks will apply, to this case, unless the law give some effect to the filing of the petition on the property of the debtor, before he is declared a bankrupt, by which he is prohibited from making any valid disposition of it, after the filing the petition and before a decree of bankruptcy, —in other words, unless the decree relates to the filing the petition, so as to act on an assignment otherwise valid. In *Ex parte Dudley*. [Case No. 4,114.] this court expressed itself fully on the effect of a decree on liens created after the filing the petition, and before the decree. In the reasons for the opinion then delivered, there will be found the grounds of the decision that the decree had no effect by relation, on antecedent judgments, executions, and levies on the property of a bankrupt; the same course of reasoning and the reference to authority in that case, will apply to an assignment such as stated in this question, and we think with greater force on the language of the third section taken in connection with the first.

By the first section it is provided, "That all persons whatsoever," &c. "who shall by petition," &c. "apply to the proper court," &c. "for the benefit of this act, and therein declare themselves to be unable to meet their debts and engagements, shall be deemed bankrupts within the provisions of this act, and may be so declared accordingly by a decree of such court." This is the definition of a voluntary bankrupt. The following of an involuntary one: "All persons being merchants," &c. "shall be liable to become bankrupts," &c. "and may upon the petition of one or more creditors," &c. "be so declared in the following cases, to wit," &c. These definitions must be carried into the third section, to explain the true meaning of its provisions, which are, "That all the property and rights of property, of every name and nature, and whether real, personal or mixed, of every bankrupt, except as is hereinafter provided, who shall by a decree of the proper court be declared to be a bankrupt within this act, shall, by mere operation of law, ipso facto, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment, or other conveyance whatsoever; and the same shall be vested, by force of the same decree, in such assignee as from time to time shall be appointed by the proper court for this

purpose; which power of appointment and removal such court may exercise at its discretion, toties quoties; and the assignee so appointed shall be vested with all the rights, titles, powers, and authorities to sell, manage, and dispose of the same, and to sue for and defend the same, subject to the order and direction of such court, as fully, to all intents and purposes, as the same were vested in, or might be exercised by, such bankrupt before or at the time of his bankruptcy declared as aforesaid; and all suits in law or in equity then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to their final conclusion, in the same way and with the same effect, as they might have been by such bankrupt."

That the term bankrupt is used in a double sense in the first clause of the first section, is evident. A petitioner for the benefit of the act is deemed to be a bankrupt within its purview, from the time of filing his petition, and may be declared so by a decree:— in the second clause, a merchant is liable to become a bankrupt on the petition of a creditor, and may be so declared accordingly in the cases specified; thus discriminating between the person who is decreed a bankrupt in the one case, or liable to become bankrupt in the other, and those who are actually declared so by a decree. Having drawn this distinction in the first section, it cannot be supposed that it was lost sight of in the third, nor that in prescribing the time and the acts by which the property of the bankrupt should pass to the assignees, congress intended to use the term bankrupt, as denoting one who was not declared so, but was merely deemed so, or liable to become so. Such supposition is contrary not only to settled rules of interpreting law, but to the plain language of this section—"All the property and right of property," &c. of every bankrupt "who shall by a decree of the proper court be declared a bankrupt within this act, shall by mere operation of law, ipso facto from the time of such decree be deemed to be divested," &c.: not all the property of every person who is deemed to be, or liable to become a bankrupt, but of every one who is so decreed to be. It is only the decreed bankrupt whose property passes from him to the assignee by the decree: it is the property which is owned by him at that time, not what had been divested by legal process, or a previous valid sale or assignment, by which rights of property had become vested in others. The decree operates only on his property and rights of property. If this clause of the law stood alone, it would not admit of the construction, that the expression, a person who was deemed, or liable to become a bankrupt, meant the same thing as a bankrupt who shall by a decree of the proper court, be declared to be a bankrupt: That potential, was actual, adjudged, bankruptcy; and if this clause could be so tor-

tured; if it were the only one in this section which bore on this subject, it would be in direct collision with the two following; "and the same (all property and rights of property) shall be vested by force of the same decree, in such assignee," &c. be "and the assignee so appointed," &c. "shall be vested with all the rights," &c. "and to sue for and defend the same," &c. "as fully to all intents and purposes, as the same were vested in, or might be exercised by such bankrupt, before or at the time of his bankruptcy declared as aforesaid." This clause points directly to the declared, and not the deemed or potential bankruptcy. It gives the assignee the same, and no other right or power, than existed in the debtor up to the decree. If the bankrupt had no power over his property after his petition was filed, or a merchant, &c. after an act of bankruptcy, this language is senseless; and congress must be deemed incapable of expressing their intention in intelligible terms, and not to have understood what they have said, in prescribing a rule of property. Had it been intended that any other act than the decrees should directly or by retrospection operate from the filing of the petition, or the act of bankruptcy, it was most easy to have said so, as in the tenth section of the act of 1800, 1 Story's Laws, 736, but this law has deliberately pointed to the decree as the only operative act, and by necessary implication from plain language declared, that it did not affect what was done before or at the time of the judicial declaration of bankruptcy. The property of the debtor passed from him to the assignee by the judgment of the court, and not the acts of the bankrupt previously, or by making the judgment so operate by relation.

The next clause is to the same effect—"and all facts in law or in equity then pending, in which such bankrupt is a party, may be prosecuted, and defended by such assignee to their final conclusion, in the same way and with the same effect, as they might have been by such bankrupt." Suits then pending, means, at and before the decree: Such bankrupt, means one so declared by a decree. Now if the decree operates by relation to the petition, on property which the bankrupt then owned, but of which he was divested by operation of law or his own act, it must have the same relation to suits then depending, and if the court may place in the hands of a receiver the property of a bankrupt before a decree, they may likewise appoint a prochein ami to prosecute and a guardian to defend all suits to which the bankrupt was a party at the time of filing the petition, or the act of bankruptcy. When it thus appears that congress has in each of these clauses, so expressly declared the decree to be the act which divests the bankrupt of all his property and rights of property—vested the same in the assignee precisely as it was in the debtor before and at the time of rendering the decree—and transferred to the

assignee the management of all suits depending at that time, it seems impossible to give, by mere construction, the same effect to the filing the petition, or an act of bankruptcy, without the assumption by the court, of legislative power. A general view of the whole section, equally precludes all relation of the effect of the decree, to any antecedent act of either a petitioner for the benefit of the act, or a merchant, &c. who may be brought within it on the petition of a creditor.

It cannot be denied, that all the provisions of this section apply equally to cases of voluntary and involuntary bankruptcies, in respect to the operation of the decree, and to the term bankrupt throughout, while the first section discriminates between a petitioner for the benefit of the act; declaring that he shall be deemed a bankrupt, and the merchant, &c. who shall be liable to become a bankrupt, but is nowhere declared to be deemed or considered as one, in any part of the law, before a decree. Now if the term bankrupt refers to the petition in the one case, and the act of bankruptcy in the other, it includes the merchant who was not so at the time, but in the very words of the law was only liable to become a bankrupt, and could become one only by a decree; thus giving the same meaning to these two different phrases "shall be deemed bankrupt," and "shall be liable to become bankrupt," and making the third section declare a merchant to be by relation an actual bankrupt, when, by the first section he could not be declared one, unless he was brought within one of the defined cases. In our view of this whole section, it refers only to the bankrupt who is declared so by a decree; to his "bankruptcy declared as aforesaid," and to "every bankrupt alike," and to "such bankrupt," and such only as on their own, or the petition of a creditor, had been judicially determined to be such.

When an attempt is made to engraft the doctrine of relation on the provisions of this section, it is unsupported by any one title in the whole law, to justify it. As a matter of construction, it is a gratuitous assumption of an intention of the legislature, as repugnant to their words as to the general design of all the parts which constitute the system of bankruptcy which they have established. If the principles and rules by which statutes are expounded, will justify the insertion of a retrospective effect of a decree to any prior act, it may as well be applied to the passage of a bankrupt act, as a petition voluntarily filed under it, or an act committed which brings it to bear on a person against his will. The relation to an act of bankruptcy, was an express provision of the bankrupt act of 1800, and was from the first, a part of the English system of bankruptcy; but this furnishes no good reason for our adopting, by mere judicial power, a principle for which there is no colour in the act of 1841, and which was embodied in the act of 1800, only

by the force of a legislative enactment, in language too plain for doubt, or even for argument. The reasons which induced the legislature to ingraft the doctrine of relation on a system of involuntary bankruptcy, can have no operation on the system of the present act, which introduces a new and anomalous feature, that of voluntary bankruptcy in which the debtor is the actor. In the former, the debtor was forced into the operation of the law: in the latter he comes voluntarily, at such time as he pleases; and as held by the learned judge of the first circuit, and by this court, can withdraw his petition at any time before a decree. If then the district court should assume the power of placing the property of a petitioner into the hands of a receiver, and appoint a person to conduct the suits to which he is a party, a withdrawal of the petition would restore his property, and give him the management of his suits; a consequence which would be unavoidable, thereby leaving the court nothing on which it could exercise any power, and enabling the petitioner to defeat what had been ordered, while there was a case for judicial action. It cannot be imagined that such was the intention of the legislature, or that it could have been their opinion, that the law would admit of such a construction, as to make a rule of property dependent on an act of a debtor which he could revoke and renew at his option. In denying the doctrine of relation, we run counter to no provision of the law. In adopting it, we should introduce a feature at war with its whole scope and policy, as well as repugnant to its plain language. It is therefore the opinion of the court that an assignment such as is stated in the second question is valid under the bankrupt act. The first question must consequently be answered in the negative, and the second in the affirmative.

Case No. 467a.

ANONYMOUS.

[1 Pet. Adm. 247, note.]¹

District Court, D. Pennsylvania. Jan., 1807.

SHIPPING—MATE BECOMING MASTER—LIABILITY ON CONTRACTS BY PREDECESSOR.

[A mate who, by the death of the master of a ship, becomes master for the rest of the voyage, is not responsible upon a contract for seamen's wages made by his predecessor in that office, and is a competent witness in a suit by such seamen against the owners.]

[See *Atkyns v. Burrows*, Case No. 618.]

[In admiralty. Libel for seamen's wages.]

In a late case, in the district court, a question was made as to the responsibility of a mate, who, by the death of a captain, became master, by succeeding to that berth on a voyage. One, under these circumstances, was offered as a witness, on the part of the

owner, in a suit, by a mariner, against the ship and owner. It was said he was not answerable to the seamen for any wages; a liability for which, only attached by contract made with the late master; he was, therefore, disinterested in any event. On the other side it was contended, that by operation of law, the liability grew out of service, and not positive contract. If it did not reach farther than to the late master's death, it was operative for all wages accrued since that event.

BY THE COURT. I will not determine this point, so as to preclude further investigation, if it shall arise in a question directly. I will not refuse to admit the witness, if it is pressed. But there is other testimony, perhaps sufficient. I incline strongly to the opinion of the counsel for the owner. The necessary, but casual successor to the late master, is only accountable for his own transactions. Bills of lading signed by his predecessor, do not bind him, though he may be responsible for the goods, if on board, in their condition at the time he succeeds to the command. He must sue in the admiralty as mate; and his wages, as such only, are recoverable here. [*The Favourite*,] 2 Rob. Adm. Cas. 196, (Philadelphia Ed.) [2 C. Rob. Adm. 232.] His claim for services, as temporary master, either demanded as additional wages, or as a quantum meruit, must be agitated elsewhere.

Other testimony was produced, a compromise took place, and the point subsided.

Case No. 468.

ANONYMOUS.

[Pet. C. C. 457.]¹

Circuit Court, D. Pennsylvania. Oct. Term, 1817.

ALIENS—NATURALIZATION—REGISTRATION—PROOF—ACT APRIL 14, 1802.

1. Under the act of April 14th, 1802, [2 Stat. 154.] the registry of aliens required by the second section of the law, must have been made five years before the application for naturalization.

2. The applicant must also prove the period of his residence in the United States, and also, the other matters required by the provisions of the section.

3. Parol evidence of the arrival of an applicant for naturalization, five years prior to the application, is insufficient.

Upon a motion to admit an application for naturalization, the court decided, that under the act of April 14th, 1802, [2 Stat. 154.] the registry required by the second section must have been made five years antecedent to the application. Because, as the term of the arrival of the alien is not required to be set forth in the report and certificate, and yet it is declared to be evidence of that fact, it can only be so by referring to the date of

¹[Originally published as a note to *Atkyns v. Burrows*, Case No. 618.]

¹[Reported by Richard Peters, Jr., Esq.]

the report itself. Besides this, the party must exhibit common law proof of the length of his residence in the United States, as also of the other matters mentioned in the third condition of the first section. The applicant offered to prove, by parol evidence, that he arrived in the United States more than five years ago, but the court thought this insufficient.

Case No. 469.

ANONYMOUS.

[2 Pittsb. Leg. J., Dec. 2, 1854, No. 33.]

Circuit Court, —.

QUALIFICATIONS OF JURORS.

In a criminal case now on trial in the United States circuit court Chief Justice Taney has decided the following to be the proper qualifications for a juror to try the issue: "If the juror has formed an opinion that the prisoners are guilty, and entertains that opinion now without waiting to hear the testimony, then he is incompetent. But if from reading the newspapers or hearing reports, he has impressions on his mind unfavorable to the prisoners, but has no opinion or prejudice which will prevent him from doing impartial justice when he hears the testimony, then he is competent."

[Note. Nowhere reported; opinion not now accessible.]

Case No. 470.

ANONYMOUS.

[12 Pittsb. Leg. J. 220.]

District Court, D. New York. Jan. 8, 1865.

FORFEITURE—INDECENT PICTURE.

[The importation of articles of merchandise incased in boxes embellished with pictures and fancy drawings "too indelicate for family use," and of an indecent character, tending to the corruption of the public morals, come within the prohibition of the statute ordering the forfeiture of indecent and obscene articles.]

[Proceedings by United States against Amar Young, Bros. & Co. for the condemnation of certain articles of merchandise enclosed in boxes embellished with prints and pictures of an indecent and obscene character. Verdict of condemnation.]

Ethan Allen, Asst. U. S. Dist. Atty., for the government.

Webster & Craig, for claimants.

An important issue was tried January 8th 1865 before his honor, Judge Betts, in the United States district court, involving the right of merchants to import merchandise containing articles of an indecent character, which resulted in the forfeiture of the merchandise brought before the court. Messrs. Amar Young, Bros. & Co., of Philadelphia, imported from Liverpool in January last quantity of linen handkerchiefs and linen shirt fronts, valued at \$10,000, which were contained in one hundred and sixty-five boxes, one dozen handkerchiefs in each box. Of these boxes about twelve were found to be embellished with pictures and fancy draw-

ings, much too common in our shop windows, and known as "Susanna at the Bath," "Diana and her Nymphs," &c. &c. These goods were seized at the custom-house and brought into court for condemnation. It appeared from the evidence introduced for the defense that boxes, or cartoons, similar to those in question were imported and sold at this port by the first class mercantile firms as freely as were the linen handkerchiefs which they contained, which were usually of the best quality of linen goods imported. The very merchants who confessed so readily to buying and to selling these "fancy boxes," as they are styled, admitted that they were "rather indelicate" for family use, but as the "fancy prints" helped the sale, they considered themselves fully justified in dealing in them as they had for years. Mr. Ethan Allen, for the government, urged upon the jury that these articles were indecent, because they were, in the language of some of the witnesses, "too indelicate for family use;" that if they ought not to go into the family they ought not to be permitted to enter the community, which was happily an aggregation of families; that these things were none the less indecent, because they had been for a long time freely imported, and by the best and most immaculate of our mercantile firms. Neither time, nor the exalted character of the devotee, could purify debauchery, nor make indecency respectable. If the importation of such articles had become so common, that men of probity and high social position openly advocated the traffic, this fact of itself was an argument why the salacious, lewd current, which was setting towards our shores from Europe, and increasing in volume, should be stopped forthwith and forever.

The court charged, that if the jury found that the articles in question were indecent, so as to corrupt public morals, they were bound to condemn them; but if they found that the pictures were only of a coarse or vulgar nature, but insignificant in themselves and harmless, however reprehensible it might be to deal in them, still in this view they were not within the meaning of the statute that ordered the forfeiture of indecent and obscene articles. The jury were out about half an hour, when they returned a verdict for the government.

Case No. 471.

ANONYMOUS.

[15 Pittsb. Leg. J. 81; 1 N. B. R. 215; Bankr. Reg. Supp. 46; 3 N. B. R. (Quarto,) 15.]

District Court, N. D. New York. July 23, 1867.

PETITIONS ARE NOT ALLOWED TO BE FILED WHERE THE WRITING IS ILLEGIBLE.

In bankruptcy.

HALL, District Judge, has refused to allow a petition to be filed on account of the

illegible manner in which it was written. The names of the petitioner and his attorney are suppressed for obvious reasons. The judge said:—The clerk is directed not to file the foregoing petition, schedule and inventory, or any other so illegible. Looking to the petition alone, without some knowledge or information other than that to be derived from the marks intended for letters, no one can certainly determine the name of petitioner, or of the town or county of his residence, or the name of his attorneys; and the names and residences of many of the creditors are so illegibly written that, from the schedules themselves, no register could, without further knowledge or information, determine with anything like reasonable certainty, the name or address to be inserted in the warrant directing the notices to such creditors to be served by mail. In addition to these defects, a considerable proportion of the words really intended by the scrawls which disfigured the schedule and inventory, can be guessed at but not read. The 14th of the general orders promulgated by the justices of the supreme court of the United States requires that "all petitions and schedules filed therewith shall be printed or written plainly and without abbreviation or interlineation, except when such abbreviation or interlineation may be for the purpose of reference; and the utmost liberality that the district court can exercise, under such order, will fall far short of excusing the numerous and obvious defects in these papers. I think the register might properly have refused his certificate.

Case No. 472.

ANONYMOUS.

IN THE CASE OF THE CLERK'S FEES.

[Taney, 453.]

Circuit Court, D. Maryland. April Term, 1841.

CLERK OF COURT—FEES—HOW DETERMINED.

1. The third section of the act of congress of 28th February, 1799, among other things, declares that "in case a clerk of a court of the United States perform any duty for which the laws of the state make no provision, the court in which such service shall be performed, shall make a reasonable compensation therefor." *Held*, that in order to determine what is a reasonable compensation, the court must look to what the law allows in similar cases.

[Cited in *Jerman v. Stewart*, 12 Fed. 275.]

2. That whatever the legislature allows to the officer in any case, it must be supposed, they considered a reasonable compensation, and meant a compensation at the same rate, when they referred it to the court to make a reasonable allowance.

3. That acting upon this principle, the fees allowed in the case of a seizure of goods in a river or creek, for a breach of the revenue laws, would seem to furnish the true rule of compensation to the clerk, in the case of a seizure upon land, for a similar breach of the revenue laws.

4. That as in cases of seizure within the admiralty jurisdiction, the clerk is, by the act of 18th April, 1814, allowed one-half of one per cent. commission on the money deposited in court, the same allowance may be deemed reasonable, in cases of seizure made upon land, where the property seized has been condemned as forfeited and sold, and the proceeds brought into court.

Quere? Whether the act of 1814 is confined to admiralty cases, or extends to others.

TANEY, Circuit Justice. In this case, a seizure has been made, on land, of goods to a large amount, for a breach of the revenue laws, and the goods seized have been condemned as forfeited and sold, and the proceeds brought into court to be distributed, after the payment of costs, according to law. A question has arisen as to a portion of the costs charged by the clerk; he claims one-half of one per cent., upon the amount of money deposited in court. If the seizure had been made upon water, within the jurisdiction of the admiralty court, the clerk would undoubtedly be entitled to the commission he claims. The act of congress of 1st March, 1793, (1 Stat. 332,) gave him one and a quarter per cent. on all money deposited in court, in admiralty and maritime cases; the act of 23th February, 1799, § 3, (1 Stat. 625, confirms the provision made in the act of 1793; and the act of 18th April, 1814, (3 Stat. 133,) reduces the commission allowed by the above-mentioned laws to one-half of one per cent.; so that, if this were a seizure within the limits of the admiralty jurisdiction, there could be no question as to the proper fee to be allowed. Some doubt, however, has been entertained as to the construction of the act of 1814, in relation to cases not within the admiralty jurisdiction; and it is suggested, that its only purpose was to lessen the fees before allowed in admiralty and maritime cases, and not to give compensation where none had before been provided. But from the rule upon that subject adopted by this court, in December, 1826, it appears, that a contrary opinion was, at that time, entertained; and it was held, that the statute not only lessened the fees in this respect, in admiralty and maritime cases, but also gave the commission thereby allowed in such cases, that is, one-half of one per centum, in all cases where money was deposited in court, whether they were of admiralty jurisdiction or not. It is not, however, necessary, in determining the present question, to decide upon the construction of the act of 1814; the point before us can be satisfactorily disposed of, under the third section of the act of 1799, giving either of the constructions above mentioned to the act of 1814.

The third section of the act of 1799, among other things, declares that in case the clerk performs any duty for which the laws of the state make no provision, the court in which such service may be performed, shall make a reasonable compensation therefor. Now, there can be no seizures in the state courts, in cases like this, and consequently, no

¹Reported by James Mason Campbell, Esq.]

money paid into court upon such a proceeding; the state law, therefore, cannot furnish the rate of compensation, according to the section of the act of 1799, above mentioned, but this court is required to make a reasonable compensation. In order to determine what is a reasonable compensation, we must look to what the law allows in similar cases; for, whatever the legislature allows to the officer in any case, we are bound to suppose they consider a reasonable compensation, and mean a compensation, at the same rate, when they refer it to the court to make a reasonable allowance. Acting upon this principle, the fees allowed in the case of a seizure in a river or creek, for a similar breach of the revenue laws, would seem to furnish the true rule of compensation. The proceedings are in all respects alike; the object is the same, and the same tribunal exercises jurisdiction. There can be no good reason for making a different rate of fees, or allowing a different commission to the clerk, merely because the goods are seized on land, instead of the water; when the proceeding is the same in every respect. And as it is admitted, on all hands, that the clerk is entitled to one-half of one per cent. upon money deposited, in cases of admiralty and maritime jurisdiction, the same may be deemed reasonable in the case before us. In this view of the matter, it is immaterial whether the act of 1814 is confined to admiralty cases, or extends to others. Upon either construction, the clerk is entitled to the fees he now claims.

Case No. 473.

ANONYMOUS.

[1 U. S. Law Int. 121.]

District Court, E. D. Pennsylvania. 1829.

SEAMEN—IMPRISONMENT IN FOREIGN JAIL—CONSULAR CERTIFICATE.

[1. A master is not generally justified in imprisoning seamen in foreign jails as a mere matter of discipline, unless there is danger in keeping the offender aboard, or he has committed some great crime; and during such illegal imprisonment a seaman cannot be charged with his board nor with his wages given to another hand.]

[2. The fact that a master, in inflicting such illegal imprisonment, acted on the advice of the consul, goes to show the absence of malice, but cannot justify the illegal act, nor deprive the injured parties of their legal remedies.]

In admiralty.

HOPKINSON, District Judge, said the practice of imprisoning disobedient and refractory seamen in foreign gaols is one of doubtful legality. It is certainly to be justified only by a strong case of necessity; it is not among the ordinary means of discipline put into the hands of the master. I am inclined to think there should be danger in keeping the offender on board, or some great crime committed, when this extreme

measure is resorted to; it must be used as one of safety rather than one of discipline, and never applied as a punishment for past misconduct. The powers given by law to the master to preserve the discipline of his ship and compel obedience to his authority, are so strong and full, that they can seldom fail of their effect; they should be clearly insufficient before we should allow the exercise of a power which may so easily be made an instrument of cruelty and oppression; and may be so terrible in its consequences. A confinement in an unwholesome jail, in a hot and pestilential climate, may be followed by death or some disabling disease. In this case the libellants were taken from the prison when the vessel sailed on her return, and although one of them was able to do duty, the other was prevented by sickness for the whole voyage. I would rather altogether deny a power, which can be so seldom necessary, than trust it in hands in which it is so likely to be abused, and so difficult to be regulated. The master may, without the aid of foreign police officers, and dungeons, which he cannot control, even if kindly disposed in the treatment of his men, take measures of great strength to enforce the discipline of his ship. He may there confine a refractory sailor; he may stop his provisions; he may inflict reasonable personal correction, according to the enormity of the offence and the obstinacy of the offender; and, if he be incorrigibly disobedient and mutinous, he may discharge him; and withal he incurs a forfeiture of his wages. A firm and judicious exercise of these powers can hardly fail of reducing the most perverse to obedience. Without deciding the general question, whether the master of a vessel may, in any case, imprison a seaman in the jail of a foreign port, under the control and discipline of foreign police and its officers, for the mere maintenance of his own authority, I will examine the circumstances of the case under the principles mentioned. The judge decided that the circumstances of this case did not warrant the imprisonment of the men; and proceeded:

If the imprisonment in this case was unauthorized, the men cannot be charged with the expenses attending it—especially with their boarding which the master was bound to provide; nor is it just to forfeit their wages, or what is the same thing, charge them with the pay given to another hand. They have been punished for their misconduct by their imprisonment, and it would be to double the punishment, if these penalties were inflicted.

I will take this occasion to notice an error which I fear, has frequently, as in this case, misled our masters of vessels. They seem to believe that they may do anything, provided they can obtain the consent of the consul to it; which consuls are apt to give on very little consideration. When the mas-

ter, on his return, is called upon to answer for his conduct, he thinks it is enough to produce a consular certificate approving his proceeding, or to say he consulted the consul and acted on his advice. This is altogether a mistake. It is certainly a very prudent precaution to consult the consul in any difficulty; and if the case were fully and fairly stated to the consul, and his advice faithfully pursued, it would afford a strong protection on the question of malicious or wrongful intention, but it can give no justification or legal sanction to an illegal act, nor deprive those who have been injured by it of their legal rights and remedies.

Case No. 474.

ANONYMOUS.

[1 Wall. Jr. 107.]¹

Circuit Court, E. D. Pennsylvania. Oct. Sessions, 1843.

BANKRUPTCY—OPINION OF COUNSEL—VOLUNTARY SETTLEMENT ON ILLEGITIMATE CHILD—RIGHTS OF CREDITORS.

1. The opinion of counsel not in practice, and given in a case other than that before the court, may, in the court's discretion, be quoted at the bar; not as authority, in a technical sense, but as calculated to assist the court in its researches and judgment.

2. A voluntary settlement in favour of an illegitimate child by a father in trade, and indebted, if clearly solvent at the time, is good against subsequent creditors; the settlement having been made without a fraudulent intent.

In equity. J. S. M. being the father of an illegitimate child by a former connexion, and now about to marry another woman, settled, in March 1833, of his own suggestion, \$3000, personal estate, in trust for the child; himself retaining no interest in the property, which was transferred to the trustee and the possession of it surrendered. His whole estate, in round numbers, and beyond that settled, was \$13000: his debts \$1700: they were simple contract debts not specially secured. His marriage took place about a month afterwards. He was in trade at the time of the settlement; about half of his estate being thus invested. He continued essentially in this relation of debts, property and business up to January 1836; rather improving his concerns than otherwise; his debts frequently shifting, and all the persons who were creditors at the time of the settlement having been paid within nine months from the date of it. In that month he entered into a partnership, and by the advice of his partner, engaged in new and extensive speculations which proved disastrous. The concern having failed in July 1838, this suit was brought by a creditor whose debt arose November 10th 1837, to set aside the settlement as fraudulent against him.

The validity of the settlement was accordingly the point in issue. In the course of the argument, the defendant's counsel, having cited judicial authorities, offered to read a printed case and opinion upon it by Mr. Binney, of the Philadelphia bar, retired from practice. He said that it appeared to be an opinion drawn with more than usual care. This was opposed on the other side as irregular, but no authorities were cited against it. His honour, remarking that such citation was not very common, desired to take till the following day to consider of it; when he gave an opinion as follows:

THE COURT. It is clear that opinions of counsel cannot be considered as of authority in any strict sense of the word: but in this day when the limits of technical precedent have been a good deal broken down, they may be used by the court, at its discretion, to assist its researches and judgment. Lord Holt. Lord Kenyon and Chief Justice Marshall, all of them men of strict minds, have severally referred to the statements of counsel made arguendo. *Fisher v. Wigg*, 1 Ld. Raym. 622, 631; *Sadgrove v. Kirby*, 6 Term R. 483, 486; *Sexton v. Wheaton*, 8 Wheat. [21 U. S.] 229, 243. Lord Talbot in 1734, referring to a case decided by Lord Macclesfield, mentions it as a circumstance of weight that "Mr. Vernon had always grumbled at the determination of that case, and never forgave it to Lord Macclesfield." *Jones v. Marsh*, Cas. t. Talb. 64. Subsequently, as appears from the Reports of Sir John Comyns, an opinion of Mr. Vernon was read before the barons of the exchequer, and appears to have been heard respectfully; since the reporter notes that the decree was "agreeable to this opinion." *St. Amand v. Countess of Jersey*, 1 Comyns, 255, 256. In 1790 Lord Kenyon quoted an opinion of Mr. Fazakerley and D. Ryder, and spoke of it as containing as much good law as if it had the authority of all the judges in England. *Alpass v. Watkins*, 8 Term R. 516, 519. The work called "Cases and Opinions" was cited more lately, both before Sir T. Plumer and Sir Lancelot Shadwell, vice chancellors, (*Simpson v. Gutteridge*, 1 Madd. 609, 616, or *Amer. Ed. 1829*, pp. 327, 330; *May v. Roper*, 4 Sim. 360, 362;) in the last instance by Sir Edward Sugden: and in another case, before V. C. Sir John Leach, a detached opinion of Serjeant Hill was quoted at the bar, and is given at large by the reporter, (*Forth v. Duke of Norfolk*, 4 Madd. 503, 504, or *Amer. Ed. 1829*, pp. 266, 268.) In all these instances, however, with the exception of that in Comyns, (an exception which might be excused only in favour of so great an equity lawyer as Mr. Vernon,) the opinion was given on a case other than that before the court, nor were the counsel in practice. I think that if opinions of this sort are cit-

¹[Reported by John William Wallace, Esq.]

ed, it should be under these limitations: and, of course, the reception of them at all is matter of discretion for the court. It must be intended that the court is as well instructed in the law as the majority of gentlemen at the bar. You may read the opinion; but give a copy of it to the other side.*

In the argument of the principal subject, it was said, against the settlement: that sustaining it would be without any foundation in precedent. The settlement is voluntary: it is made by a person in debt: the debts are wholly unsecured either by the settlement itself, or by any lien independent of it: the settler was in trade: his bounty is in favour of a bastard child: he himself has failed, and the party opposing it is a creditor. No case has gone so far as to support such a settlement. In *Holloway v. Millard*, 1 Madd. 414, or *Amer. Ed. 1829*, p. 225, though a mother's settlement was upheld in favour of her natural child, there was no debt, nor was the settler in trade. In *Battersbee v. Farrington*, 1 Swanst. 106, the settler was not in debt, and the beneficiaries of the trust were a wife and children. *Sexton v. Wheaton*, 8 Wheat. [21 U. S.] 229, was without debt, and in favour of a wife. And though in *Stephens v. Olive*, 2 Brown, Ch. 90, there were debts, yet it is made an important fact that they were secured by mortgage; and the settlement was in favour of a wife. Even in the case of *C. F. R.*, on which counsel's opinion is quoted, (if such citation is to be answered,) existing debts were all secured, and the settler was neither in trade nor contemplating it. An examination of the cases subsequent to those here cited will prove, that although voluntary settlements have, at times, been sustained, they have never been settlements so surrounded with bad circumstances as this is. If the specific debts which existed at the date of this settlement, were yet unpaid, there is no doubt that the settlement could be set aside. *Reade v. Livingston*, 3 Johns. Ch. 481, 494. The result ought not to be altered because the debts have shifted. There has been nothing beyond shifting. Payment there has been none. Creditors may have changed, but indebtedness has remained: and it carries along with it the original taint. Suppose that the existing creditors were the same persons as were creditors at the date of the settlement; holding mere renewals of their original debts;—renewals by successive notes, perhaps. Could not such creditors set aside this settlement? The character of the beneficiary of this trust is an argument. The consideration arises *ex turpi causa*. It is uncleanly. To sustain it is to encourage licentiousness and, indeed, to "render adultery respectable." Throw upon every part of such vice not only the stain of disgrace, but also the sting of disability, and you do much to prevent it. The less

that is done to elevate illegitimate children to the rank of those born in wedlock, the better certainly for the cause of morals. Something was also argued from the settler's having been in trade; and reliance was had upon the remarks on this point of Judge Duncan in *Thompson v. Dougherty*, 12 Serg. & R. 448, 457, and of other judges in different cases; not of sufficient moment to be recorded.

BALDWIN, Circuit Justice. I was inclined, on first view, to connect this settlement with the marriage; but though we may perceive in the proximity of the two, a motive for the settlement, there is not enough in the case to prove that the transaction was in consideration of marriage. It must, therefore, be considered as a voluntary settlement; and if sustained must be sustained on the principle that it was made under circumstances which do not impair its validity when so considered. And, in the first place, I take it to be now settled, that the fact of a conveyance being voluntary is not, of itself, enough to impair its validity. *Stephens v. Olive*, 2 Brown, Ch. 90; *Battersbee v. Farrington*, 1 Swanst. 106; *Sexton v. Wheaton*, [supra.] Points less settled in this country are those which arise from (1) the party's having been somewhat indebted at the time; (2) his having been in trade, and (3) from the beneficiary of the trust being a bastard child.

Let these matters be examined. The whole doctrine on the subject of voluntary settlements rests, I take it, on this principle: that a man being the absolute owner of what is his own, may do with it what he pleases, provided he does not injure the existing or expected rights of others. And hence with regard to debts created subsequently to the settlement, the matter must generally resolve itself into a question of fraudulent intent: This fact or that fact is accordingly unimportant except in so far as it bears upon this question of design. The common law being a system built up as cases arise which it is to settle, its principles are developed in so close connexion with facts, that we are apt to mistake for essential that which is but accident. Thus, advancing a step beyond first principles, cases say that a settlement by one indebted is good provided there be provision in it, or otherwise, for existing debts. (*Stephens v. Olive*, 2 Brown, Ch. 90, 92; *George v. Milbanke*, 9 Ves. 194;) others rely on the fact that the settler was not in trade, (*Holloway v. Millard*, 1 Madd. 419, or *Amer. Ed. 1829*, p. 228;) others that the whole of the estate was or was not settled; others that debts were or were not contracted immediately after the settlement, (*Walker v. Burrows*, 1 Atk. 93;) and others upon facts of different sorts which I need not particularize. But in no case at all fully reported, (no case at least that I have been able to find,) are these facts relied on as facts, or otherwise

*[See note at end of case.]

than as shewing the intuitus. In this point of view they are indeed often significant:—as, for example, if a man settling his estate, provide effectually for all existing creditors; the presumption of fraud on those creditors, which, without such provision, would be violent, is repelled. As, on the other hand, if, having embarked all his estate in the risks of commerce, he privately withdraw it, and yet trade as he did before, and fail; or, if he put the whole of his estate, by settlement, into the keeping of others, and so “subject himself to his cradle;” or, if, immediately after a settlement, he contract large debts with persons whom he knows to be ignorant of what he has done, and who may have been dealing and deceived by a belief of his means: in these, and in many cases which might be put, a natural or even a violent presumption of fraud arises. It is however but a presumption, and as such, liable to be overcome by facts which control and break it down.

(His honour then examined the facts of the case, as already presented, and ended in a conclusion that actual fraud could not be presumed from them.) On the contrary, the motive of the settlement seems to have been a good one. The party was father to a bastard child. In this he had undoubtedly been guilty of an act both sinful and shameful. He was about to form a new and “honourable” connexion; but his former course of living had fastened upon him obligations easy to be perceived, and permanent both on his feelings and providing care; obligations which were all the more coercive over him because they would be rejected by every one besides. What then was more decent, or more according to the suggestions of an enlightened conscience or a refined mind, than to make some arrangement by which this offspring of a strumpet’s bed should not become a charge upon her whom he was about to make the wife of his bosom? There may, however, yet be some rule or principle of law which, superiour to the settler’s intent, subverts his act. Thus, it is urged that the party was in debt at the time, and that the taint of this indebtedness was not destroyed by specific securities as in *Stephens v. Olive*, [supra.] But if you are unembarrassed by the debt, considered as an evidence of fraud, (and as such we have already considered and disposed of it,) its effect, I think, is destroyed. Mr. M. was clearly solvent in the spring of 1833: that is enough. His debts, it is true, were not secured by specific pledge; but certainly they were secured; of which the best evidence is, that they have all, long ago, been paid.

In reply to this it is argued, that although creditors have changed, indebtedness has remained; an argument which, in connexion with the facts of the present case, is rather specious than solid. Suppose, that just before the settlement, and with a view to it, Mr. M. had run off \$1700 of his property,

and with the proceeds paid those debts which he then owed, or that he had transferred the property itself in satisfaction of those debts: it will be admitted that, on this score of indebtedness, the settlement would be free from objection. Yet he would only have credited one account by debiting another; discharging debts, but reducing assets in exactly the same amount. He might have gone into debt again, in the same hour in which he made the settlement; purchasing or taking back the same property, perhaps; and, may be, from the same person to whom he had transferred it, and for the same price, and the identical moneys. A matter so purely formal as this would be, a mere transposition of items in account, cannot be important in itself; nor important at all, except as evidence of fraud; a point of view in which we are not, here, considering it. Solvency, it must therefore be, which is of the essence of the inquiry, and so are the authorities. *Lush v. Wilkinson*, 5 Ves. 384, 387; *Jacks v. Tunno*, 3 Desaus. 1, 5; *Salmon v. Bennett*, 1 Conn. 525, 548; *Sexton v. Wheaton*, [supra;] *Hopkirk v. Randolph*, [Case No. 6,698;] *Van Wyck v. Seward*, 6 Paige, 62, 68; and see, also, *Huston v. Cantril*, 11 Leigh, 136, 159.

The argument derived from publick morals, savours too much of severity. Would it not force us to avoid the contracts of these unfortunate persons? to place them under every disability? and to reduce them at once to the state of the ancient excommunicate? All their senses have but human conditions; and it is enough to leave upon them that stain of their birth, which neither their own innocence, nor a life of virtue, nor the compassion of society, nor any earthly law hath power to take away. Indeed, it would be quite as much against publick policy, in one way, to relieve a man against acts done according to his duty, as, in another way, it can be against that policy to sustain them. And a conscientious chancellor,³ in overruling the hard decree of one of his predecessors,⁴ said properly enough, that it is both reason and justice that a father provide for an innocent child, whom he has occasioned to be brought into the world in this shameful manner. *Marchioness of Annandale v. Harris*, 2 P. Wms. 432, 433. This sentiment is confirmed by other judges: “God forbid,” said Chancellor Desaussure, “that I should lend the sanction of the court to any thing which would shake or loosen those great moral ties which bind society together; but we must not permit our feelings and apprehensions to mislead our judgment. Although it is morally as well as legally improper to have illegitimate children, the law not only permits, but enjoins it on the father to maintain the illegitimate child: the immorality is in the act, not in the provision.” *Harten v.*

³ Sir Peter King.

⁴ Lord Cowper, *Fursaker v. Robinson*, Prec. Ch. 475.

Gibson, 4 Desaus. 139, 142. And see Williamson v. Codrington, 1 Ves. Sr. 511, 514; Holway v. Millard, 1 Madd. 414, 419, or Amer. Ed. 1829, pp. 225, 227; Knye v. Moore, 1 Sim. & S. 61, 64; Bunn v. Winthrop, 1 Johns. Ch. 329, 338; also, Pratt v. Flamer, 5 Har. & J. 10, 20; and 4 Kent, Comm. pp. 216, 217.

Finally, as to the settler's being in trade. Why shall this fact, as of any essential and inherent malignity, destroy the settlement? As proving a liahleness to failure, and thence as indicating intent or inferring fraud, the force of such a fact is sometimes considerable: but the question of fraudulent intent has been disposed of. No doubt at all, these settlements are made to guard against failure;—failure, not as certain, nor as expected, nor even as probable; but yet as within the chances of human life. And, such being the fact, there seems to be no good reason why such arrangements, if allowable to those who do not require them, should be disallowed if made by persons who, from the vicissitudes of their profession, peculiarly need them. No settlement has been upturned purely because the person making it was in trade: and there are cases which have been sustained where the settler was either in trade or contemplated it. *Sexton v. Wheaton*, [supra;] *Battersbee v. Farrington*, 1 Swanst. 106, 110; *Jacks v. Tunno*, 3 Desaus. 1. Arguments are occasionally found against these settlements altogether, (*Atherly's Treatise*, pp. 230, 237;) and it is sometimes said that they are at variance with our republican manners and institutions. But I doubt whether these arguments have been well considered, or whether they would be confirmed by practical observation. If made in rightful subordination to the claims of others, at a proper time, with due reference to the amount of property unsettled, and, generally, under circumstances otherwise allowable, I confess myself unable to perceive how such settlements shall war against either our social interests or our republican manners. We have, it is true, no titled aristocracy, "and property does not, as in the land of our forefathers, accumulate in large masses, and descend undivided through a long line of expectant proprietors." But are we not endowed, like the people of other lands, with an appreciation of domestick stability and repose? with feelings of attachment to the order and comfort of families? And what is there inconsistent with the national duties of the merchant, if, in view of the vicissitudes of his profession, and in sight of the prolific materials for their activity and influence in the game of hazard every where playing in modern commerce, he shall, prior to engaging in these risks, make some provision by which they whom he has made helpless dependants upon him, shall not be brought into inevitable subjection to his disasters? some provision by which the peace, comfort, and habits, and settled pursuits of others shall not be all torn up, as by a whirlwind, from their

base? The court would justify no career of ambitious splendour, nor contend for security to luxurious enjoyments or to vulgar magnificence. Far from it: and these, indeed, belong much less to settled sources of income than to the uncertain, more varying, less valued returns of adventuring enterprize. Family settlements, such as I have spoken of, have had a place in every nation advanced at all beyond primitive civilization; and cases in our highest court and in different states of the Union, have already placed their lawfulness, with us, beyond further question. The settlement, we think, having been made without a fraudulent intent, and by a person solvent at the time, is good against subsequent creditors, though it was made in favour of a bastard child and by a person in trade.

NOTE, [from original report.] The case and opinion referred to above are as follows:

On the 18th April, 1834, C. F. R. made a conveyance of all his real estate, to certain trustees, with power to let and demise the same, and to receive the rents, issues, profits and incomes thereof, and with the same to pay, in the first place, the taxes, ground rents, and all reasonable costs and charges, &c.; and further, from time to time, to pay over the surplus income, to him, the said C. F. R. on his own receipt, and in their discretion to pay and apply the same towards his maintenance and support, for and during the term of his natural life; but in such a way or manner, that the same should not be answerable for, or in any manner liable to the debts and engagements of the said C. F. R. contracted after the date of the execution of the said deed, nor be liable to any charges, incumbrance, assignment, or anticipation of him, the said C. F. R. and that from and after his decease, the trustees should hold all the trust estate in trust, to and for the only use and behoof of six certain natural children of the said C. F. R. And it was provided further, by the deed, that it might be lawful for the trustees, to sell all the trust estate, at public or private sale, or the whole or any part thereof on ground rent, and to pay out of the proceeds thereof, all and singular the debts owing and due by the said C. F. R. at the date of the execution of the deed; and to invest the surplus in good real security: with certain other provisos, &c. The deed was recorded in the usual way, April 21st, 1834. C. F. R. died Oct. 3d, 1836. After his decease, claims were made, and judgments obtained against his estate, and in July, 1837, a bill in equity was filed in the common pleas, &c. At the time of the deed of trust, the grantor was considerably indebted, and his assignees sold a considerable part of the assigned estate in 1834, 5, 6, and paid all the debts which were known, certainly, to be within the trust. The property sold, brought more than \$30,000, and the debts paid exceeded \$23,000. The balance was invested in different ways, and will be applied to any remaining debts, provided for by the trust. The debts of the grantor not paid, amount, the doubtful together with the debts not to be disputed, to a sum of \$17,000 and upwards. They were contracted principally in the years 1835 and 1836, and very few of them, none to a considerable amount, in the year 1834. His debts were generally of small amount, contracted in the heedless way which was his practice. He was never in trade.

Is the deed fraudulent and void as to subsequent creditors? The bill, which set forth the deed, relied principally on the fact of debts at the time and afterwards, and of the children be-

ing illegitimate. It averred that C. F. R. left sufficient real and personal estate to pay the judgment which was the subject of the bill; that the real estate had been transferred in the way before stated; and that the personal estate had been removed and transferred without consideration, or concealed, and that by reason of such concealment, and such fraudulent transfer, the complainant was prevented from having execution of his judgment.

Opinion.

I have examined the deed referred to in the annexed case, and have considered the question submitted to me. The consideration of the deed 18th April 1834, was certainly not a valuable one. The deed was of that description which the law terms voluntary; and the question is, was it also fraudulent and void. So far as the object was to provide for natural children, the consideration was a moral one, because it was according to the grantor's duty; and although, in many respects, this class of children is not regarded by courts of law and equity with as much favour as children born in wedlock, I am not aware that any authoritative decision has attributed a greater degree of strength to a voluntary settlement for the protection of the latter than to a like settlement for the protection of the former. A voluntary settlement in favour of an illegitimate child has been sustained against subsequent creditors, the settler not being indebted at the time. *Holloway v. Millard*, 1 Madd. 414, Amer. Ed. Phil. 1829, p. 225. So a voluntary provision for natural children, has been enforced against the father's assets; he having defeated the settlement by a sale to a purchaser for a valuable consideration. *Williamson v. Codrington*, 1 Ves. Sr. 511. Atherly, in his treatise on Marriage Settlements, argues with great force against the existence of any distinction between a voluntary settlement in favour of a child and one in favour of a stranger. *Ath. Mar. Sett.* 223, I think it free from doubt that the circumstance of Mr. R——'s deed being in favour of his natural children, is not a circumstance which injures it. It is of equal validity as if it had been made under like circumstances in favour of lawful children. In either case the settlement would be a voluntary settlement, liable to all the objections to which such settlements are subject, and not more or less subject to them, the one than the other. I take it to be clearly settled at the present day, that a volunteer deed in favour of natural children, may be good against subsequent creditors if the grantor was not indebted at the time: that is to say, it is not in such a case fraudulent and void against subsequent creditors, by mere presumption of law, from its being voluntary; as is the case with such settlements if the grantor is indebted at the time. There must be, to make them void, some other evidence of fraud besides the mere fact of their being voluntary and there being subsequent debts. This is the doctrine to be collected from the modern cases. *Battersbee v. Farrington*, 1 Swanst. 106; *Sexton v. Wharton*, 8 Wheat. [21 U. S.] 229; *Hinde v. Longworth*, 11 Wheat. [24 U. S.] 199; *Reade v. Livingston*, 3 Johns. Ch. 481; *Thompson v. Dougherty*, 12 Serg. & R. 418. I regard it also as settled, that if the grantor is indebted at the time, but his debts are already secured or provided for by the settlement, then the presumption of fraud from the party's being indebted at the time, is repelled by these facts; and, unless there is other proof of fraudulent intention in regard to subsequent creditors, the deed is good against them. *Reade v. Livingston*, 3 Johns. Ch. 481; *Stephens v. Olive*, 2 Brown, Ch. 90; *Lush v. Wilkinson*, 5 Ves. 384. In *George v. Milbanke*, 9 Ves. 194, Lord Eldon says, the modern doctrine is, that a provision in a voluntary settlement, for existing debts, will support it against all future creditors. I understand this to mean, not that in such a

case, no circumstance of intentional fraud upon subsequent creditors will weigh against the settlement, but that the presumption of fraud from being indebted at the time, is effectually repelled by the provision, and therefore that the settlement is as valid as if he had not been indebted at the time. In such a case, the question whether the deed be fraudulent against subsequent creditors depends upon other circumstances shewing a fraudulent intention at the time.

The circumstances shewing fraudulent intention whereby a voluntary deed by one who is not indebted at the time or has made provision for existing debts is nevertheless void against subsequent creditors, are stated to be of the following kind:—as the continuance of the grantor in possession; an unusual degree of secrecy in making the settlement; the reservation of a general power of revocation; and the like. It has been said in *Fonblanque*, 270, note a, that if a voluntary settlement includes the whole or the greater part of the grantor's property, this is a circumstance of fraud which will overthrow it; because the grantor must have foreseen that future creditors would suffer by it; and *Judge Duncan*, in *Thompson v. Dougherty*, [supra.] seems to have entertained this opinion. But I can find no other authority for this opinion; and if in the last case, his honour thought that Lord Northington's language in *Partridge v. Gopp*, Amb. 599, was an authority for it, it was, I apprehend, a clear mistake; for *Partridge v. Gopp* was a case of existing debts at the time of the advance to the children, and the language of the chancellor is to be applied to such a case. If the quantity of the grantor's property not conveyed is insufficient to pay all subsequent debts, it may in like manner be argued, that he must have foreseen that future creditors would suffer by it: and what is this but to say, that a voluntary conveyance is not good where enough is not reserved to pay all subsequent debts? or, in other words, that no such conveyance is good against such creditors? The circumstance which makes the amount of property conveyed material, would seem to be, the clear and certain intention to contract debts afterwards, and to leave them unprotected. This comes under another head to which I will advert; but in the absence of any such foregone purpose to contract debts, I am unable to perceive any objection against a conveyance of all the grantor's property which does not equally hold against the conveyance of any part of it. Among the circumstances inferring a fraud intended upon subsequent creditors, Lord Hardwicke, in *Walker v. Burrows*, 1 Atk. 94, has also stated, the becoming indebted immediately after the settlement. There certainly may be cases in which debts immediately following a settlement, might speak very strongly as to the intention with which it was made: but debts of small amount, debts of weakness and heedlessness, rather than of design, might immediately follow and yet infer no such previous intention. It remains, I think, to be considered by our courts, how far the universal recording of conveyances of land under our law, ought to affect this question. It is true, that recorded or not, a deed of conveyance may disappoint a creditor; but if in fact recorded, it may perhaps be thought in no slight degree to repel the presumption of intended fraud upon subsequent creditors. I cannot find that Lord Hardwicke's dictum has been acted upon, unless in the case of persons in trade, intending to go on contracting debts in trade, as in *Thompson v. Dougherty*. The circumstance is not perhaps very material in the present case.

To apply these principles to the deed of Mr. R——. Mr. R—— was indebted at the execution of the deed, and perhaps largely so. Had there been no provision for these debts, the deed would have been by force of the statute, and upon general principles of law, fraudulent

and void against creditors subsequent as well as antecedent; for a voluntary deed, fraudulent and void against existing creditors, is so against subsequent creditors. But the deed does make a provision for all existing debts. It gives the trustees a power to sell, and declares the trust as to the proceeds of sale, for the satisfaction of all these debts in the first instance. It was therefore not fraudulent and void against existing creditors, and consequently if it is void against subsequent creditors, it is not so by necessary presumption of law, but in consequence of other circumstances. It is true, that previous to the power of sale in the deed, there is a power given to the trustees to let and demise the property and to pay over the nett rents to the grantor during his life, or to apply them for his maintenance in such a way that they should not be answerable for his debts subsequently contracted; and no express trust is declared as to these rents to apply them to the payment of his existing debts. But it is clear that there is no trust to apply them in defeat of existing debts, but only of subsequent debts; and taking the whole deed together, I am of opinion, that the duty of the trustees is to see to the satisfaction of existing debts in the first instance. By the acceptance of the trust, the grantees became trustees for these creditors, and were bound to exercise the power of sale for their satisfaction. The power of sale rides over the trust for the application of these rents. What they had power to do for these creditors it was their duty to do, and to do it immediately if this was necessary. I therefore regard the true interpretation of the deed to be, that the trust as to the rents is subject to the power for the benefit of the creditors; and that a payment of the rents to the grantor, if it impaired the security of existing debts, would have been a breach of the trust to sell: for the power was a trust, and of paramount obligation according to the clear intention of the deed. I am therefore of opinion that the deed makes a clear provision for the satisfaction of all existing debts; and the case shews that the trustees have sold parts of the estate, and have paid all debts that were known to be of this description. The presumption of fraud from the existence of these debts, is therefore repelled, and consequently, according to the cases I have cited, the deed is good against subsequent creditors unless there are circumstances shewing an actual intention in the grantor to defraud such creditors. Upon examining the papers, and the bill that has been filed in the common pleas, I perceive no evidence or allegation of such circumstances. The bill relies on the fact of debts at the time and afterwards. But the debts at the time were provided for and if subsequent debts are enough per se, no voluntary settlement can be good against subsequent creditors. It dwells also upon the circumstance that the principal objects of the trust were illegitimate children; but this, the cases adverted to shew, is not unlawful, but as good as if the objects were lawful children. By setting forth the whole deed, the bill necessarily sets forth the trust to the grantor for life, though it does not specifically notice it as a badge of fraud. The question in regard to such a trust is of great moment. If it is void then a man cannot protect himself against his own weakness. He may grant to his family, to a stranger, to any volunteer whatever, but he cannot grant for his own maintenance, so as to exclude his subsequent creditors, nor vest in his trustees a power to supply him in their discretion, so as to make his maintenance certain. I am not aware of any decision to sustain such an objection. The power of the owner of an estate so to settle it as to tie his own hands as to the time, manner and circumstances of his own disposition of it, is not to be denied since the case of *Bath v. Montague*, 3 Ch. Cas. 107-108. Lord Holt argued that there might be very good reasons for even a wise man to put such re-

straints upon himself to guard against rash and precipitate wills, settlements or gifts, to prevent inconveniences that might arise from an infirmity on his part, and that no court of equity, any more than of law, could relieve him from the restraints so deliberately imposed upon himself. The same is equally true as to voluntary settlements, providing for the certain maintenance of the grantor. They may be fraudulent against subsequent creditors for other causes: but are they so, because, instead of declaring an immediate trust for children, they declare a trust for the grantor himself during his life? I confess I do not perceive why they should be so, nor why, if the estate may go to a volunteer or stranger, so as to elude a subsequent creditor, it may not also go to the settler himself in such a way as to prevent creditors reaching it. Such a trust may, in connection with others, tend to raise a presumption of fraud; but by itself, I do not think it has ever been so held. The point yet remains to be settled. In like manner, the bill, by setting forth the whole deed, shews that it conveyed all the grantor's real estate; but it does not point it out as a specific objection. On the contrary, it alleges that which is adverse to the objection and might be fatal to it, namely, that the grantor had personal property also, which he left at his decease, but which had been removed or transferred without consideration, or concealed:—matters not charged nor chargeable upon the deed of April 1834, or the trustees. This objection, if made, ought, I think, to be over-ruled. As regards the grantor's becoming indebted immediately after the deed, and thus shewing a fraudulent intent, the case states the contrary. The great mass of subsequent debts does not shew fraud intended by the conveyance, so much as it shews a continuance of the weakness against which, as possible, though not as intended, he wished to guard his children and also himself. He was never in trade. He did not mean to go into trade. They were in general, debts of folly, committed upon a sudden temptation; not the result of previous purpose or design. There was no concealment. The deed was executed on the 18th of April, and recorded in Philadelphia on the 21st of the same month; and it contains no power of revocation, nor is there any evidence or allegation that the grantor continued in possession or in the exercise of any control or management of the property. My opinion upon the whole is, that the deed may be sustained against the subsequent creditors; not being fraudulent and void against them, though voluntary.

HOR. BINNEY.

Philadelphia, Oct. 10. 1838.

Case No. 475.

ANONYMOUS.

[1 Wash. C. C. 84.]

Circuit Court, D. Pennsylvania. April Term, 1804.

STATUTES—EFFECT OF REPEAL—CRIMINAL LAW—PERJURY—ACT DEC. 19, 1803.

1. Indictment for perjury under the bankrupt law of the United States.

2. When a bill of sale is made fraudulently and colourably to the bankrupt, if he swears that the property mentioned in it belongs to him, it is perjury. But, if he swears to such ownership from mistake, resulting from a misconstruction of a paper, it would not be perjury.

[Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States.]

3. If an offence be created by law, and before prosecution, the law be repealed, the offence cannot be punished, unless there is a reservation of jurisdiction over the offence, in the repealing law.

[Cited in *U. S. v. Finlay*, Case No. 15,099; *Tinker v. Van Dyke*, Id. 14,058; *U. S. v. Barr*, Id. 14,527; *U. S. v. Van Vliet*, 22 Fed. 643.]

[See note at end of case.]

4. Under the act of 19th December, 1803, [2 Stat. 248,] repealing the bankrupt law, [2 Stat. 19,] there is no reservation for such purposes; and it would only be for perjury committed after the repeal of the law, in cases, which, by authority of the repealing act, may be completed, that an indictment could be sustained.

5. Perjury committed in proceedings under the bankrupt law, cannot be prosecuted under the general criminal law of the United States, the 18th section of which applies to perjuries committed in judicial proceedings, whether orally or by deposition.

6. For a perjury under the bankrupt laws, an indictment will not be supported at common law; because, there must not only be a false oath, but it must be taken in some judicial proceedings, in a matter material to the issue.

[7. Cited in *Henfield's Case*, Case No. 6,360, to the point that there can be no indictment for perjury at common law in the courts of the United States.]

At law. The defendant was indicted for perjury committed before the commissioners of bankrupts, where, being asked, "at what time did you own the brig Abigail, and when did you cease to own her," answered, on oath, "I cannot tell exactly the time; I believe it was at the latter end of 1799 that I first owned her; I ceased to own her, I rather think, in the year 1800." Whereas in truth and in fact, the said defendant never did own the said brig at any time during the year 1799, or before or after. The first count laid the offence against the bankrupt law, and the second against the general criminal law of the United States. On not guilty pleaded, Mr. Rawle for the defendant stated, that he should endeavour to satisfy the court there was no law to support the indictment; and submitted whether this should be done before the jury were sworn, or after, and before a verdict were rendered; or in arrest of judgment, should the verdict be against the defendant.

The court thought it most proper to proceed in the ordinary way, leaving both law and fact to the jury, under the charge of the court; or to a motion in arrest of judgment, should the jury find the defendant guilty.

Byrd Wilson, the secretary to the commissioners, proved, that the question, as stated in the indictment, was asked the defendant, and that he answered it on oath as there stated; that the question was put, and the oath administered, in the presence of the commissioners and by their direction, on the 20th September, 1803. The question and answer were committed to writing by the witness, and was not signed by the defendant. Phineas Daniel proved, that he wished to purchase the brig; and, being an alien, he,

with a view to give her the character and privileges of a vessel owned by a citizen, got the defendant to let the bill of sale be made to him; but that he, Daniel, paid for her, and to give colour to the cover, obtained a power of attorney from the defendant to manage the vessel, and also one charter party to Bristol for one voyage, and afterwards another for ten years. Both this witness and Williams, a partner of defendant, proved that the defendant never claimed or exercised any acts of ownership over the vessel, or made any demand for freights, profits, &c. In fact, the testimony on this point was complete.

There were witnesses examined to discredit Daniel, who said very hard things of his general character and credit, and some contradictions appeared in his testimony. But his evidence respecting the property in the vessel, was strongly corroborated, by Williams, Robert Whittle, and A. Brown; the power of attorney, charter parties, and the accounts kept by defendant.

Mr. Dallas, the district attorney, contended, that the defendant was indictable under the bankrupt law, although it was partially repealed before the prosecution, because the proviso saved from the operation of the repealing clause, all cases where commissions had previously issued; and that unless perjuries committed under such commission could be prosecuted and punished, it would affect the execution of the commission. To prove that the intention of the legislature is to prevail, cited *Bac. Abr.* 390; [*King v. Harris*,] 2 *Leach*, 800. He referred to many other repealing laws in the code of the United States, where savings had been made as to offences previously committed. 3 *Laws U. S.* 163; 6 *Laws U. S.* 80, 58, 3, 61; 4 *Laws U. S.* 456; 5 *Laws U. S.* 126; 3 *Laws U. S.* 88; 4 *Laws U. S.* 446. Second. That if this case be not within the proviso, still the repeal does not prevent the prosecution afterwards. The doctrine applies only to cases of treason and felony. 2 *Hawk. [P. C.]* 57; 1 *Hawk. [P. C.]* 306; 1 *Hale, [P. C.]* 291, 525; 2 *Hale, [P. C.]* 190. Third. Defendant, if not indictable under the bankrupt law, may be under the general criminal law; for in this case, the false oath was taken in a deposition taken under the authority of the United States, as expressed in the — section of that law. Fourth. If not indictable under either of those laws, he may be convicted at common law, though indicted contra formam statuti, (1 *Hale, [P. C.]* 525,) if the court should think the common law obligatory in the courts of the United States. He contended, under the first head, that the execution of the commission would not be completed as long as any thing might remain to be done, and this might happen in a variety of cases, even after certificate granted, as if an estate should afterwards vest in remainder, or descend to the bankrupt, &c.,

&c. Under the third head, that the general criminal law was not repealed by the bankrupt law, as to perjury; because not inconsistent with it, cited 1 Hale, [P. C.] 705; [Rex v. Wardroper,] 4 Burrows, 2026; [King v. Bass,] 1 Leach, 252; 1 Hawk. [P. C.] 306; [King v. Woodcock,] 1 Leach, 501.

Mr. Dickerson and Mr. Rawle, after arguing the matter of fact to the jury, addressed the court and jury on the law. They contended, first, that the false swearing must be material to the issue. 4 Bl. Comm. 136; 1 Hawk. [P. C.] 331; [Sharp's Case,] Cro. Car. 352; [Lane's Case,] Cro. Eliz. 148. It must be given with deliberation. [Rex v. Dummer,] 1 Salk. 374. So, too, if he swears under a false impression respecting the construction of a paper, or of his title, it is not perjury. [Rex v. Crespigny,] 1 Esp. 281. Now, in this case, the interrogatory and answer only applied to the time of his owning and parting with the vessel, which was entirely immaterial. The answer was made here immediately; the question was put without the defendant's taking time, and as the legal title was, by the bill of sale, in defendant, he might have naturally supposed that it made him the owner, particularly as the notes given for the vessel, were either signed or endorsed by defendant. As to evidence, there must, to convict in perjury, be one credible witness, and strong evidence besides, sufficient in the minds of the jury to establish the guilt. [Queen v. Muscot,] 10 Mod. 195. Daniel, the only positive witness, is not to be credited. Where a statute creates a new offence, and fixes the punishment, the prosecution must be against that statute. [Irex v. Dixon,] 10 Mod. 335; [Castle's Case,] Cro. Jac. 644; [Rex v. Sparks,] 3 Mod. 79; [Anon.,] 2 Ld. Raym. 991; [Rex v. Wright,] 1 Burrows, 543; [Rex v. Wardroper,] 4 Burrows, 2026; [Rex v. Jackson,] Cowp. 297; [King v. Bass,] 1 Leach, 252. The punishment being different under the bankrupt law from what it is under the general criminal law, and not cumulative, the defendant cannot be indicted under the latter—disqualification, under the general law, is to be part of the punishment. In other cases, it is not part of the sentence. [Rex v. Greepe,] 2 Salk. 513. Many parts of the laws of the United States referred to, showing the punishment of perjury in certain cases. 4 Laws U. S. 427, 102; 3 Laws U. S. 337; 2 Laws U. S. 21, 157, 193; 6 Laws U. S. 27.

The repeal of a law creating an offence, whether it be felony or misdemeanor, sweeps away all prosecutions against it, without a saving for the purpose. [Miller's Case,] 1 W. Bl. 451; 1 Hale, [P. C.] 309, 291. Instances where such savings have been introduced, 4 Laws U. S. 446, 523, 541, 202. So similar saving in the statute 6 Edw. VI. c. 12. As to the common law, Mr. Dickerson denied its validity in the United States

courts, but his colleague, Mr. Rawle, admitted it.

[Before WASHINGTON, Circuit Justice, and PETERS, District Judge.]

WASHINGTON, Circuit Justice, charged the jury. As it is the opinion of the court, that the law is in favour of the defendant, I shall spare the jury and myself the trouble of going through the evidence. If, in the opinion of the jury, it is insufficient to establish the fact against the defendant, I would not wish to disturb that opinion; if it has a different operation, I shall not press it against him. But I must notice one of the observations made by Mr. Dickerson, lest those who heard it might suppose it had received the countenance of this court; and it is this, that the defendant, having a bill of sale for the brig, might, under the circumstances of the case, have taken an oath that he was owner of her, without committing perjury. It is true, that where a mistake is shown to be the result of a misconstruction of a paper, it is not perjury; but no such misconstruction could take place in a case like this. The oath must be considered in reference to the subject and occasion of it. It was taken for the purpose of disclosing the property and effects belonging to the bankrupt. The defendant, if Daniel's evidence is believed, was a mere nominal owner, made so with his own consent, and with a view, understood by him, to cover Daniel's property under his name. In no sense of the word could he suppose that he owned, or had a property in the vessel. Such a doctrine would defeat the important provisions of our navigation law, if a citizen might cover the property of aliens, and yet safely swear that he was the owner.

Every offence for which a man is indicted, must be laid against some law, and it must be shown to come within it. Such law may be the general unwritten or common law, or the statute law. The offence must not only come within the terms of such law, but the law itself must, at the time, be subsisting. It is a clear rule, that if a statute create an offence, and is then repealed, no prosecution can be instituted for any offence committed against the statute, previous to its repeal. The end of punishment is not only to correct the offender, but to deter others from committing like offences. But, if the legislature has ceased to consider the act in the light of an offence, those purposes are no longer to be answered, and punishment is then unnecessary. Perjury is said to be *malum in se*. False oaths of all kinds are prohibited by the divine law; but civil institutions punish them only in certain cases, and upon reasons of policy. A false oath taken before the commissioners of bankruptcy, was declared to be perjury, and subjected the offender to punishment; but, the moment the law was repealed, it

remained a false oath, but ceased to be an offence punishable by municipal law. There are many offences that are mala in se, which are not prohibited by human laws; and, therefore, if in any case they should, by such laws, be deemed criminal and made punishable, the repeal of those laws places the acts committed under them, upon the same ground as they were before the laws passed.

As to civil rights, the rule is, that rights acquired under, or barred by an existing law, are not defeated by the repeal of the law. In short, the cases which were cited at the bar, and the language which the legislature of the United States has used in the cases cited, when it has intended to except out of the operation of the repealing law, prosecution for offences committed before the repeal, are conclusive to show that the above doctrine is not to be shaken.

The next question is, to what extent was the bankrupt law repealed by the act of the 19th of December, 1803? [2 Stat. 248.] Until we come to the proviso, it is a general and absolute repeal. Had it stopped here, what would have been the consequence? That all commissions then proceeded in, to various points of their execution, must have been arrested, and infinite mischief have been produced. A proviso is always intended to limit the generality of the enacting clause, or to save or except certain cases out of its operation. If the proviso be ambiguous, its explanation may best be obtained by understanding the scope of the enacting clause, and discovering the mischief to be remedied. Now, here the mischief would have been what I have stated, and the proviso applies precisely to, and remedies it. It declares, that "the repeal shall in no wise affect the execution of any commission of bankruptcy, which may have been issued prior to the passing of this act, but every such commission shall be proceeded in, and fully executed, as if this act had not been passed." The commissions then are still to go until finally executed. But what has the punishment of a perjury previously committed, to do with the progress of such a commission to its final execution? I have no doubt, though it is not now necessary to decide the point, that even in the defendant's commission, though he has obtained a certificate, yet if it be not to be considered as finally executed; and in all other commissions not so executed, should perjury be committed after the repeal, it may be punished; because if otherwise, it would affect the final execution. The difference is this: in the construction which I give to the proviso, I give it a prospective operation; that contended for by the attorney, gives it a retrospective operation, a construction not favoured in civil, much less in criminal cases. In the cases of future perjury, the not punishing them would affect the execution of the commission, but not so as to perjuries previously committed.

Upon the whole, if the legislature intended to except from the operation of the repealing clause all cases where commissions had previously issued, it was easy to have expressed such intention generally, and not confine the proviso to the execution of commissions; and in every instance where they did intend to leave open to prosecution, offences committed before the repeal, they have declared it in plain unambiguous terms.

If, then, the indictment cannot be supported upon the first count against the bankrupt law, can it be sustained upon the second, as against the general criminal law of the United States? If the case could be brought clearly within the 18th section of this law, no doubt that the indictment might be supported. But this section plainly refers to perjuries committed in judicial proceedings, whether orally, or by deposition. The words relied upon by the attorney cannot, I think, be construed to extend the crime of perjury to all cases of depositions taken under the authority of the United States, because that would be to make the same false oath perjury, and punishable if put into the form of a deposition, which would be dispunishable if given orally. This would be a great absurdity; but, if it be construed to extend to depositions taken in judicial proceedings, then the consequence will be, that false oaths taken in judicial proceedings, whether orally or by deposition, when taken under the authority of the United States, are declared to be perjury. Besides, if the construction contended for be correct, the many laws declaring what should be perjury in particular cases, would have been unnecessary. And what is conclusive upon this point is, that, admitting the construction, the defendant has not committed this perjury in any deposition; for the answer taken down by the secretary in this case, though committed by him to writing, cannot be called a deposition. But if the defendant can be indicted under the general law now, he might have been before the repeal of the bankrupt law—if so, he might upon conviction have been punished with fine, imprisonment, and pillory; although under the bankrupt law, the punishment was confined to imprisonment only, which proves either that false oaths, taken in judicial proceedings, are not made punishable by the law in question; or if they were, that the law quoad oaths, taken before commissioners of bankruptcy, was repealed by that law; for otherwise the legislative declaration of what should be the punishment in such a case, would be defeated by the prior law, and the act of the public officer in preferring to indict under it. A bankrupt, though deprived of every thing, and therefore excused from paying a fine under the bankrupt law, might be fined to the amount of 800 dollars under the general law. This cannot be contended for. If then the defendant could not have been indicted under the general law, had the bankrupt law been still in force, to say that

he can be so indicted after the repeal, would be to place him in a worse situation by the repeal than he was before it, whereas the effect of the repeal was to excuse, or rather to render him dispensable for this offence

If he cannot be indicted under either of those laws, can the common law be pressed into the service? I think not; and for the same reasons I have assigned why he cannot be indicted under the general criminal law. First. Because the common law description of perjury is, a false oath taken in some judicial proceeding in a matter material to the issue, and the punishment is fine and imprisonment. In this case the offence does not answer the description, and the punishment is different.

The jury found the defendant not guilty.

[NOTE. Rev. St. U. S. § 13, (Act Feb. 25, 1871,) provides that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall expressly so provide." In U. S. v. Ulrici, Case No. 16,594, this section was held to apply to indictments for criminal offenses.]

Case No. 476.

ANONYMOUS.

[2 Wash. C. C. 270.]¹

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

COSTS—PAYMENT BEFORE DISCONTINUANCE OF SUIT.

The cause had been at issue for three terms, and the defendant asked leave to file a new plea, the effect of which would be to oblige the plaintiff to suffer a nonsuit. The defendant, before the suit was brought, refused to show his lease to the plaintiff, when, by so doing, he would have prevented the institution of the suit. The court refused to permit the defendant to enter the plea, but upon his paying the whole costs of the suit.

At law. This was a rule obtained by the defendant, after two or three terms that the cause has been at issue, for liberty to amend his plea of covenants performed, which it is admitted, if allowed, will compel the plaintiff to discontinue the action. The plea is certainly a fair one, it being stated, that the defendant is a sub-tenant, and has paid the rent demanded, to his immediate lessor. But still, the defendant asks a favour, and one which the court, in its discretion, and upon the circumstances of the case, may grant upon equitable terms. Now, it appears that the defendant, by refusing to show his lease to the plaintiff when asked to do so, misled him into bringing a suit, which, if he had known that the defendant was only a sub-tenant, he would not have brought, but, by his present plea,

¹[Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States.]

he had admitted the lease as laid. He now asks to withdraw his admission, and to plead what must inevitably force the plaintiff out of court. Upon no principle can he be allowed to amend, without paying the costs which have accrued since he put in his plea. But since he has occasioned the bringing of the suit by his refusal to show his deed, we do not think he ought to be indulged in his present application, so as to throw the other costs on the plaintiff. The proposition of the plaintiff, to discontinue without paying costs, seems perfectly fair.

Case No. 477.

ANONYMOUS.

[3 West. Law J. (1845,) 144.]

Circuit Court, D. New York.

PATENT LAW—PURCHASER OF ARTICLES KNOWN TO BE MANUFACTURED IN VIOLATION OF A PATENT NOT LIABLE TO INJUNCTION.

In the U. S. circuit court, at New York, a motion was made for an injunction by a patentee, to restrain the defendant from selling cotton wadding, made with a machine, which the plaintiff alleges was an infringement on his patent. The court held that the purchaser on his own account of an article, the product of patented machinery, though purchased with the full knowledge that it was manufactured in violation of the patent, could not be enjoined, nor held liable in any other way.

[Contra, see Haselden v. Ogden, Case No. 6,190.]

[Note. Nowhere fully reported; opinion not now accessible.]

Case No. 478.

ANOWEURTH v. BURLINGIN.

[6 West. Law J. (1848,) 431.]

Circuit Court, D. Illinois.

TAX TITLES IN ILLINOIS—"CLAIM AND COLOR OF TITLE MADE IN GOOD FAITH."

[At law. Action of ejectment by Anoweurth against Burlingin to recover 160 acres of land in Adams county, Ill.] The plaintiff showed good title derived from the United States, and possession by the defendant, and rested his case. The defendant relied upon seven years' possession, the payment of taxes during that time, and a connected title from the auditor of the state on a sale in 1829 for taxes, under the act of 1827; the auditor's deed dated in 1831. Such was his title. The defendant maintains that he is protected by the limitation laws of 1835. If not by that, then he is by the law of 1833-9, "to quiet possession and confirm titles to land." [Judgment for plaintiff.]

Williams & Lawrence, for plaintiff.
Browning & Bushnell, for defendant.

THE COURT decided as to the act of 1835, that possession without title would not avail; that the supreme court of Illinois, in 1837, in the case of Garret v. Higgins, [Garret v.

Wiggius, 1 Scam. 335.] had decided, that the auditor's deed, unaccompanied with proof of the performance of the essential requisites of the law, conveyed no title. Therefore, the defendant is not protected by that law. Also that the law of 1838-39 was unconstitutional and void, because it purports to convey to one man the land of another. The court farther decided, that the auditor's deed, unaccompanied as in the case at the bar by proof that he had performed all the requisites of law authorizing him to sell the land for taxes, conveys no title. Therefore, the defendant is not protected by "claim and color of title made in good faith" in the meaning of the law. The court defined the "claim and color of title made in good faith" under this law, to be such a title as in law would pass the estate prima facie, if a better title be not shown. That it is a question of law, and not depending upon the opinion of the occupant, otherwise the defence would depend upon the capacity of the man to judge; in which case it would protect one and not avail another, who might be more intelligent.

[NOTE. The points determined in this case were originally published in the St. Louis (Mo.) New Era, and reprinted in 6 West. Law J. (1848,) 431. See Arrōwsmith v. Burlingim, Case No. 503.]

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 ANSHUTZ v. CAMPBELL. See Case No. 17-796.
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Case No. 479.
The ANTARCTIC.

[1 Spr. 206; 15 Law Rep. 573.]

District Court, D. Massachusetts. Dec., 1852.

MARITIME LIENS — MATERIALS FOR CONSTRUCTION — MASSACHUSETTS ACT OF 1848 — CREDIT — PAYMENT APPLIED TO THE DEBT SECURED BY LIEN.

1. Under the Massachusetts statute of 1848, (chapter 290, § 1,) the lien upon a new vessel for materials furnished is only for those actually used in her construction.

[Cited in The James H. Prentice, 36 Fed. 781.]

2. Where, in the purchase of materials to be used in the construction or repair of a vessel, a credit is given, which, it is known by the parties, will expire before the completion and sailing of the vessel, the lien is not thereby extinguished.

3. When there are two debts, one secured by a lien and the other not so secured; and a general payment is made by the debtor, without any appropriation thereof at the time it is made, either by the debtor, or by the creditor with the actual or presumed assent of the debtor, the law will appropriate it to the extinguishment of the debt secured by the lien.

[Cited in The A. R. Dunlap, Case No. 513; The J. F. Spencer, Id. 7,316; The Lady Franklin, Id. 7,984; Schuelenburg v. Martin, 2 Fed. 749.]

[Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

In admiralty. Libel in rem, by Gurdon Waterman [against the ship Antarctic] to recover a balance of \$1048 claimed to be due on account of materials furnished for the ship Antarctic, by virtue of the lien given by the statute of Massachusetts of 1848, c. 290, § 1, which provides that "whenever a debt is contracted for labor performed, or materials used in the construction or repair, &c., of any vessel within this commonwealth, such debt shall be a lien," &c. It appeared in evidence that the libellant, in pursuance of a contract with Cannon & Lewis, the ship-builders, delivered a quantity of lumber valued at \$1148, at their ship-yard, while the Antarctic was building. The evidence, as to what portion of this identical lumber was actually used in the ship, was conflicting. The lumber was originally purchased upon a credit of four months. On the 1st of January, 1852, the builders made to the libellant a cash payment of \$100, and gave their promissory negotiable note, payable at the Marine Bank, in New Bedford, without interest, for \$400 more. The note was dated Jan. 6th, 1852, and was payable in four months. The Antarctic was libelled April 28th, and sailed in May following. The points taken by the respective counsel, and the facts in the case, sufficiently appear in the opinion of the court.

T. G. Coffin, for libellant.

R. C. Pitman and J. C. Stone, for respondents.

SPRAGUE, District Judge. The first question is, whether the libellant has any lien. It is contended by the claimant, that in order to create a lien, the materials should have been originally furnished for this specific ship, and I have been referred to the case of The Callisto, [Case No. 2,316.] But the language of the Maine statute, under which, that decision was made, is different from the Massachusetts statute. The former requires the materials to be furnished for, or on account of, the ship; the latter, that they should be used in the ship. In this case, the ship was in the process of building; the lumber was delivered to the builders, at their yard, and was suitable for this ship, and so far as it was actually used in her construction, the presumption is, that it was purchased for that purpose. It is said, that the construction of the statute contended for, will give a general and indefinite lien, following the property through any number of intermediate hands. But where the circumstances plainly show a personal credit, and negative the idea of any other, the lien will not exist. When a man sells to a mere lumber dealer, he certainly trusts to individual credit; and generally, when he sells to one not a builder, he has no lien. The debt is to be created for materials to be used in the ship. I

think, in this case, there is a prima facie lien. On the other hand, it is contended by the libellant, that there is a lien for the whole amount, whether used or not, if it were apparently furnished for the ship. But I cannot say, that if it were furnished for the ship, it would create a lien, unless used. That is the language of the statute, and is equitable. The merchant, contracting with, or purchasing of, the builders, may know what amount of materials has gone into the ship, and may guard himself to that extent; but he cannot know what amount the builders may have purchased. The equity of the law is, that the materials and labor put into the vessel, shall be held as security to those who furnished them. The *Kearsarge*, [Case No. 7,634;] *The Kiersage*, [Id. 7,762;] 1 Pars. Mar. Law. 493-496.

The second question is, whether such a credit as was given by the original contract, excludes the idea of a lien. When the original credit was given, it was known by the parties that it would expire before the completion or sailing of the vessel, and I think there is nothing in it inconsistent with the existence of the lien. Such a credit only suspends the remedy, until it expires.

[The more important question is as to the application and effect of the note which was given. This note was not due when process was commenced, and the credit given by it at least suspended the remedy, if it did not displace the lien. As to this amount, then, the suit was clearly premature. But the claimants contend that the note was absolute payment pro tanto. By the law of Massachusetts and Maine, a negotiable promissory note is prima facie payment. It is otherwise in most of the other states. The case of *The Chusan*, Case No. 2,717, was decided according to the local law of New York. In the present case, the law of Massachusetts must govern the contract. There is nothing in the case to repel the presumption of payment.]² By the evidence it is shown, that the note for \$400 was an absolute payment pro tanto, and it remains to consider how this amount, and the \$100 paid in cash, shall be appropriated. The libellant contends, that, if it appears that for a portion of the lumber purchased he has no lien, then this payment shall be applied to discharge the portion of the debt not thus secured; while the claimant contends that the payment shall be applied to the extinguishment of the lien. This leads us to consider the doctrine of the appropriation of payments. The books abound with very conflicting opinions on this subject. The language of different cases is not capable of being reconciled. But I think we shall find the dicta more contradictory than the decisions. The disposition to generalize has led to much of the difficulty. Thus, the

strongest case cited for the libellant, *Upham v. Lefavour*, 11 Metc. [Mass.] 174, contains the general proposition, that the creditor may appropriate a payment to discharge a portion of the debt that has no security; but the circumstances of that case were very peculiar, and required no such dictum to support the decision. (The judge here entered upon a critical examination of the facts in that case, and the grounds upon which the decision might properly be placed.) The authorities agree that, in the first instance, the debtor may appropriate; that, failing to do so, the creditor may appropriate at the time; but, beyond this point, the decisions are not uniform. It is held, in some of the cases, that the creditor has the right of appropriation, even up to the last moment, and may change a prior application made by him. But I think the true rule is otherwise, and is that which is substantially laid down in the cases. *Gass v. Stinson*, [Case No. 5,262;] *Pattison v. Hull*, 9 Cow. 773; *Warren v. Warren*, 6 Law Rep. 501. All the authorities agree in one point, that the debtor, when he pays, has a right to say to what debt the payment shall be appropriated; and this for the obvious reason, that the debtor might withhold the payment, and if the creditor receives it, he must take it on the terms offered by the debtor. Now, it is said, that the debtor failing to exercise the right, it passes to the creditor. Why so? What equity is there in giving this right to the creditor, at any subsequent period? If the creditor appropriates it at the moment, and with the knowledge of the debtor, and he is silent, there is a presumed assent to the application. Otherwise the law ought to appropriate. But on what principles? The Roman law adopted the rule of appropriation, sanctioned in the case of *Gass v. Stinson*, [supra,] and the other cases above cited, viz., that the application was to be made as the defendant would have made it, if he had expressed his choice at the time. Thus, where there are two debts, one secured by a penalty and the other not, or one bearing interest and the other not, the payment, in both cases, is to be applied to discharge the former, according to the presumed intent of the debtor. I am satisfied, that the law applies the same principle, in case of a debt in part secured by a lien; that the debtor would naturally intend to relieve his property from incumbrance. He had the original right of appropriation, but it not having been made by either party, the law comes in and makes it, as it presumes the debtor would have done. The case cited of *Harker v. Conrad*, 12 Serg. & R. 301, fully sustains this view, and the present case is stronger in favor of the claimant. The case in Pennsylvania, was one of lien and a general payment, and the court held that the builder was bound in conscience, to have relieved the property sold by him, from in-

²[From 15 Law Rep. 578.]

cumbrance; and, therefore, he must be presumed to have intended so to do. But from the circumstances of that case, it is doubtful whether it was his pecuniary interest to do so. The presumption was certainly a charitable one. But, in the present case, both the obligation and interest of the builders required them to deliver the ship to the claimant free of all incumbrances, for he had made advances to the builders equal to the value of the vessel. It is therefore to be presumed, that they would have so appropriated the payments as to effect this object. I shall therefore appropriate the \$500, toward satisfaction of the part secured by the lien.

The last question to be considered is, what was the amount of materials used in this ship, for which a lien existed? The amount is left somewhat indeterminate, but on the whole I must take the builders' testimony as most satisfactory, and shall fix the amount at \$700. From this the \$500 is to be deducted, and a decree will be entered for the balance, \$200, and costs.

Case No. 480.

The ANTELOPE.

[1 Ben. 343.]

District Court, S. D. New York. Aug., 1867.

SETTING ASIDE DEFAULT—WAIVER—CANCELLING STIPULATIONS—PRACTICE.

1. Where a libel was dismissed by default in 1860, and the claimant, without notice to the libellant, entered an order, in 1861, cancelling the stipulation for costs and the bond under the act given on the discharge of the vessel, but thereafter agreed to open the default, and the cause was, in 1864, noticed for hearing by both parties, but when it was called for hearing, in March, 1864, the claimant's proctor stated that it had been dismissed, and thereupon the libellant's proctor moved to set aside the decree and the order of cancellation, which motion was adjourned by consent till the present time: *Held*, that the claimant was regular in entering the order of cancellation without notice to the libellant, the libel having been dismissed by default.

2. That the claimant had, by his acts, waived the decree dismissing the libel and the order of cancellation.

3. That the court had power to vacate that decree and order, so as to hold the stipulators still liable on their stipulations.

In admiralty. This was a motion to set aside a decree entered in October, 1860, dismissing the libel in this case, and an order entered in January, 1861, cancelling the bond given on the discharge of the vessel, and to set the cause down for trial. The libel was filed in October, 1855, to recover for spars furnished to the vessel on the order of her owner while she was being built by him, and used in building her, of the value of \$415. A claim and a stipulation for costs and a bond under the act of congress,

in double the amount claimed, were filed, and the vessel was discharged from custody. The claimant filed an answer, and, in March, 1859, the cause being on the calendar, was called in its order, and, the libellant not appearing, a decree was made dismissing the libel, with costs. This disposition of the case was made, it was said on the motion, because of the decision made by the supreme court at the December term, 1857, in the case of *People's Ferry Co. v. Beers*, 20 How. [61 U. S.] 393, and of the rule adopted by the supreme court at the December term, 1858, as the result of the case of *Maguire v. Card*, 21 How. [62 U. S.] 251, and because it was thought that, under the principle of that rule, taking away from district courts the right of proceeding in rem against a domestic vessel for supplies or repairs in virtue of a lien given therefor by state laws, no recovery could be had in this suit. But, notwithstanding this decree, the case was noticed and put upon the calendar by the claimant for the October term, 1860, and, on the 5th of October, 1860, the libel was again dismissed with costs, the libellant not appearing, and a decree to that effect was entered. On the 26th of January, 1861, an order was entered, on motion of the claimant, reciting that the libel had been dismissed by default, and that more than ten days had elapsed since the decree, and no subsequent proceedings had been taken on the part of the libellant, and ordering that the stipulations executed on the part of the claimant be cancelled. This order was entered as an order of course and without notice to the libellant. No notice or copy of the decree dismissing the libel, and no notice or copy of the order of January 26th, 1861, was served on the libellant's proctors. The clerk's costs were taxed January 26th, 1861, and the taxed bill was filed the same day, but the taxation was without previous notice to the libellant, so far as appeared. The bill of costs was served on the libellant's proctor, and he, immediately on receiving it, requested the claimant's proctor to open the default and withdraw the bill of costs, and was told, in reply, that he might consider the bill of costs withdrawn and the default opened. In February, 1864, the libellant's proctor informed the claimant's proctor that the cause would be noticed for the March term, 1864, and each party served a notice of trial on the other party in the suit, for the March term, 1864. The originals of these notices were produced to the court, that is, the one served by the claimant's proctor on the libellant's proctor, and a copy of the one served by the libellant's proctor on the claimant's proctor, the latter having upon it an admission of service by the claimant's proctor, dated February 16th, 1864. The cause being on the calendar for the March term, 1864, was called for trial, when the claimant's proctor stated to the court that the libel had been

¹[Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

dismissed by default. The case then stood over, and this motion was noticed for the 29th of March, 1864, and had been postponed by consent from that time until now.

A. F. Smith, for libellant.
W. R. Beebe, for claimant.

BLATCHFORD, District Judge. It is claimed on the part of the libellant, that, under the decision of the supreme court in the case of *The St. Lawrence*, 1 Black, [66 U. S.] 522, this court has jurisdiction of this case, and that the libellant ought to have an opportunity to try the case on its merits.

It is urged that it was irregular to enter the order of January, 1861, as an order of course, and without notice of a motion for leave to enter it; but I am of opinion that the proceedings on the part of the claimant were regular. After he took the decree in October, 1860, dismissing the libel by default for want of the appearance of the libellant when the case was called for trial, it was regular for him to enter without notice an order of course cancelling the stipulations executed on the part of the claimant. Such an order followed of course the dismissal of a libel, and it did not require any special fiat of the court or the judge, or any signature of the judge to the order, or any notice, to authorize its entry. Under rule 145 of this court in admiralty, where proceedings on a decree are not stayed by an appeal, and the decree is not satisfied in ten days after notice to the proctor of the party against whom it is rendered, an order that the sureties of such party cause the engagement of their stipulation to be performed, or show cause why execution should not issue, is an order of course. In view of this practice and of the fact that, where a libel is dismissed, the whole foundation and support of the stipulations is gone, and they fall with the libel as a matter of course, there is no reason why an order cancelling the stipulations should not be an order of course.

But I think that the claimant, by his conduct, followed up by his noticing the cause for trial for the March term, 1864, waived the decree of October, 1860, dismissing the libel, and the order of January, 1861. The only question as to which I have had any hesitation has been, whether the claimant could thus practically assent to the reinstatement of the cause, so as to affect the sureties in the stipulations, and hold them to their liability after the dismissal of the libel, and whether the court could now vacate the decree and the order, so as to hold the sureties still liable on their stipulations. Unless that can be done, the remedy to the

libellant is practically worthless. The point, however, is settled by the decision of the supreme court in the case of *The Palmyra*, 12 Wheat. [25 U. S.] 1. In that case, the supreme court dismissed an appeal, and afterwards ordered the case to be reinstated. It was contended that the court had no authority to reinstate the case after such a dismissal, because it might operate to the prejudice of the stipulators or sureties to whom the vessel was delivered upon stipulation in the court below. The court, Mr. Justice Story delivering its opinion, overruled the objection and said: "Whenever a stipulation is taken, in an admiralty suit, for the property subjected to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators liable to the exercise of all those authorities on the part of the court which it could properly exercise if the thing itself were still in its custody. This is the known course of the admiralty. It is quite a different question whether the court will, in particular cases, exercise its authority where sureties on the stipulation may be affected injuriously. That is a subject addressed to its sound discretion." "Every court must be presumed to exercise those powers belonging to it, which are necessary for the promotion of public justice, and we do not doubt this court possesses the power to reinstate any cause dismissed by mistake. The reinstatement of the cause was founded, in the opinion of this court, upon the plain principles of justice and according to the known practice of other judicial tribunals in like cases." This court has, therefore, clearly the power to reinstate this case. It was dismissed on the idea that the supreme court had decided that this court had no jurisdiction of such a case. The libellant now claims that the supreme court has decided otherwise. He is entitled to try the case and to maintain the jurisdiction of this court if he can, and he cannot try the case unless it be reinstated. The mistake made by the libellant in allowing the case to be dismissed by default, was indeed a mistake of law, and the case would have been in a different position if the claimant had not waived as he did the decree and the order, and, but for such waiver, the court might have been constrained to deny any relief to the libellant. Nor is it shown that the sureties will be affected any more injuriously than sureties in any case who may be compelled to respond for their principal. The court acts on the matter as if the vessel were still in its custody. The result is that the case is a proper one for granting to the libellant the relief asked for.

Motion granted.

Case No. 481.

The ANTELOPE.

[1 Ben. 521.]¹

District Court, E. D. New York. Oct., 1867.

ADMIRALTY PRACTICE—BONDING A VESSEL WORTH LESS THAN SEVERAL CLAIMS AGAINST HER — MARRIED WOMEN REJECTED AS SURETIES.

1. Where several libels were filed against a vessel to recover claims, which amounted to more than the appraised value of the vessel, *Held*, that she might be discharged, on the claimants giving a stipulation, in the full value of the vessel, the same to stand in court, for the benefit of all the libellants before the court.

2. That a married woman, though she justified in the required amount, would not be accepted as surety.

In admiralty. The ship Antelope was held under process in two cases, and both cases came before the court upon a motion made on behalf of the claimants, for the release of the vessel upon bail. It appeared that, on the 31st day of August, 1867, one George W. Curtis filed his libel against the vessel to enforce a lien, amounting to \$827.22, for supplies furnished the vessel in this port between the 19th day of June and the 30th of August last. The vessel was, at that time, in the custody of the sheriff, under process issuing out of a state court, and the execution of the process of this court was, accordingly, delayed until the custody of the sheriff terminated by a sale and delivery to the persons now before the court as claimants, when the vessel was duly seized by the marshal, under the process issued in the action of Curtis, and also under process issued in a subsequent action instituted against the same vessel by the libellant, Franklin F. Randolph, to recover the sum of \$23,000, claimed to be due by reason of a breach of a charter party, which occurred in this port at about the same time. The total value of the vessel, as ascertained by an appraisal, to which no objection was taken, was \$18,000, a sum insufficient to discharge in full the claims made against her in the two actions above mentioned. The claimants, having perfected their appearance, now moved for the release of the vessel, upon the filing of a stipulation in the full value of the vessel, the same to stand in court in place of the vessel for the benefit of all the libellants before the court, and conditioned to abide by and perform the decrees of the court in such actions, and pay the sums awarded therein, not exceeding in all the appraised value of the vessel.

Beebe, Dean & Donohue, for Curtis.

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Scudder & Carter, for Randolph.
Emerson & Goodrich, for claimants.

BENEDICT, District Judge. Inasmuch as the value of this vessel is conceded to be less than the amount claimed in these actions, it is manifest that the claimant will, by stipulating to pay the decree in each case to the extent of the value of the vessel, render himself liable to pay into court, upon his stipulations in the two cases, more than the value of the property which he will receive upon the release. Unless, then, some form of stipulation can be taken which will render the claimant liable for no more than the value of the property which he receives from the marshal, the vessel must remain in custody. According to the view taken by the libellants, the necessary effect of admiralty proceedings against a vessel, under circumstances like the present, is to compel the shipowner either to permit his vessel to be taken from him and sold before any liability on her part has been ascertained, or to allow her to remain tied to the wharf in custody of the marshal until the final termination of the litigation in this or the appellate court, or to pay a demand which he disputes. But the flexible proceedings of the admiralty cannot be supposed to be inadequate to such a state of facts, and the court powerless to prevent such an effect of its process. To relieve a ship owner from such a dilemma, by a stipulation in the form here proposed, is as clearly within the general powers of a court of admiralty as the power to release upon a stipulation in the ordinary form. It is a power necessary to the proper exercise of the extraordinary jurisdiction over a ship and her owners, which belongs to this court, and the same reason which impels the court to take the ordinary stipulation is applicable in favor of the stipulation in the form proposed. A court of admiralty will always release a ship, and enable her to proceed to earn freight, when the rights of parties having claims upon her can be properly protected by a stipulation taken in place of the vessel. The stipulation here offered will fully secure to the libellants all the rights which they now have. Their proceedings look to a sale of the vessel, in satisfaction of the claims set forth. If the vessel were to be sold upon final decrees, or as perishable, only her value would be paid into the registry, no matter how many claims were outstanding against her, and the liens of each libellant would be then transferred to the fund in court, leaving the vessel free from all liens. Under the stipulation proposed, the same sum will be paid in, and with this difference in favor of the libellants, that, by the terms of the stipulation offered, the amount so paid in will be applicable to the payment of the claims of the present libellants before the court; whereas,

in case of a sale, the proceeds might be subjected to subsequent and additional claims. While the stipulation proposed will thus secure to the libellants the payment of their demands, it will cause no inconvenience in the prosecution of the suits. The proceeding is, in effect, a consolidation of the two causes for the purpose of bonding, to avoid the loss and expense which must otherwise be sustained; and the causes could properly be formally consolidated for this purpose, and might well remain consolidated, if either libellant desires to contest the validity or amount of the demand made by the other, to be dissevered whenever it shall be needful for the sake of convenience or in furtherance of justice. *The Wm. Hutt*, 1 Lush. 25. In all cases of many libels against a vessel, where the proceeds in court are insufficient to pay all, the causes are, in effect, consolidated: that is, no one is heard without notice to all, and the rights and priorities of all are disposed of at one and the same time, each libel being generally considered as an answer to all other libels, when the question is simply one of priority. *The Magoun*, [Case No. 5,163.] It is not seen why the same practice cannot as well be pursued where, instead of proceeds, there is a stipulation for the benefit of all. See *The Rodney*, [id. 11,993.] As to the objection founded upon the eleventh rule of the supreme court, it seems sufficient to say that that rule is not intended to apply to a case of several libels against a vessel which is insufficient to pay all; and no rule of the supreme court applying to the case, it must be governed by "the principles, rules and usages which belong to courts of admiralty, as contradistinguished from courts of common law." *The Delaware*, [Case No. 3,762.] Moreover if the eleventh rule were to be deemed applicable to a case like this, the power which the rule confers upon the court to fix the amount of the stipulation, without regard to the value of the vessel, would include the power to limit the liability of the stipulation as proposed here. The motion of the claimants will, therefore, be granted, and the vessel will be released upon the claimants filing a stipulation to the effect above indicated. The form of the stipulation may be settled before the court, if necessary, and it must contain a provision for interest. In this court, all persons desiring to recover property upon stipulations are required to include in their stipulations a provision for interest on the value of the property, from the time of its receipt.

The claimants presented, as surety on the bond directed to be given as above, a married woman, who justified in the required amount. The libellants objected to taking a bond thus executed, and, on referring the matter to the judge, the surety was rejected, and the claimants were ordered to furnish other surety.

Case No. 482.

The ANTELOPE.

[2 Ben. 405.]

District Court, S. D. New York. May, 1868.

MARITIME LIENS—BUILDING VESSEL—RIGHTS UNDER STATE LAW.

1. When articles are furnished towards the building of a vessel, no lien for their value is given by the general maritime law.

2. Where a vessel was built at Newburgh, New York, in 1855, and articles were furnished by the libellant there for such building, and the vessel left Newburgh and went to New York city, and the libellant then filed his libel, in 1855, to recover the value of the articles: *Held*, That he had no lien under the lien law then in force in the state, because he had not filed specifications of his lien within twelve days after the vessel left the port of Newburgh, as was required by such lien law. That he had no lien otherwise, and the libel must be dismissed.

[In admiralty. Libel in rem by David J. Taff against the brig Antelope for materials furnished during the building of the vessel. Libel dismissed, with costs.]

A. F. Smith, for libellant.
C. Donohue, for claimant.

BLATCHFORD, District Judge. This is a libel, which avers, that, sometime in September, 1855, there being then a brig or vessel, since called the Antelope, building at Newburgh, in the state of New York, her owner or owners, or his or their agent employed in building the same, applied to the libellant, David J. Taff, to furnish a set of spars and a foreyard for the vessel; that the libellant, on such order, furnished to the brig one set of spars and a foreyard; that the value of the set of spars was \$385, and the value of the foreyard \$30; that the articles were duly delivered, and were used in building the vessel; that the value thereof was, by the maritime law and the law of the state of New York, a lien on the vessel; that the articles have not been paid for; that the vessel is at the city of New York; that she left Newburgh, where she was built, for the city of New York, about seven days prior to October 4th 1855; and that she has remained at New York ever since, and has never been without the state of New York. The libel was filed October 4th, 1855.

The answer sets up, as a defence, that the spars alleged to have been furnished to the brig were furnished to one Marvell, and not to the vessel, and that, if any lien ever existed, it was lost by the departure of the vessel from the port where she lay at the time of the alleged furnishing of the spars.

This defence is made out, as respects the loss of any lien which the libellant ever had. He had no lien by the general maritime law, for the articles furnished by him towards building the vessel, which this court can

¹[Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

enforce in admiralty. *People's Ferry Co. v. Beers*, 20 How. [61 U. S.] 393; *Roach v. Chapman*, 22 How. [63 U. S.] 129. Therefore, any lien which he had was one given by the law of New York. By that law, (2 Rev. St. 493, § 1, as amended by chapter 110 of the Laws of 1855, passed March 29, 1855,) whenever a debt amounting to fifty dollars or upwards is contracted by the master, owner, or his agent, builder, or consignee, of any ship or vessel within the state, on account of any materials or articles furnished in this state, for or towards the building, fitting, furnishing, or equipping such ship or vessel, such debt is made a lien upon such ship or vessel, her tackle, apparel, and furniture, and is preferred to all other liens thereon except mariners' wages. It is further provided (section 2, as amended by the same act of 1855) that, in all cases, the lien shall cease immediately after the vessel shall have left the port at which she was when the debt was contracted, unless the person having the lien shall, within ten days after such departure, cause to be drawn up specifications of his lien, the correctness of which shall be verified by oath and filed in the county clerk's office of the county in which the lien shall be created. In this case, the libel and the testimony show that the vessel was built at Newburgh, that she was at Newburgh when the debt was contracted, that the articles furnished by the libellant were furnished to her at Newburgh, and were used in building her at Newburgh, and that she had left Newburgh, and had arrived at New York. The lien, therefore, if any there was, ceased immediately after the vessel left Newburgh, unless the libellant filed the specifications prescribed within ten days after the departure of the vessel from Newburgh. The libel avers no such filing. It is for the libellant to aver and prove such filing. No evidence of any such filing was given. The answer takes the objection clearly, and the libel must be dismissed, with costs.

Case No. 483.

The ANTELOPE.

[Blatchf. Prize Cas. 370.]¹

District Court, S. D. New York. June, 1863.

PRIZE—VIOLATION OF BLOCKADE—FALSE PAPERS.

Vessel and cargo condemned for having false papers as to their destination, and for an attempt to violate the blockade.

In admiralty.

BETTS, District Judge. This vessel and cargo were captured, March 31, 1863, by the United States steamer *Memphis*, as prize, and were sent into this port for adjudication. They were here libeled, April 23, 1863. De-

¹[Reported by Samuel Blatchford, Esq.]

fault for the non-intervention of any claimant or defence having been regularly taken in court, the preparatory proofs and the vessel's papers were submitted to the court, on the part of the libellants, with a demand for judgment against the vessel and cargo.

No papers relating to the vessel and cargo or the voyage were found on board of her, except the clearance of the vessel at the port of London for Nassau, N. P. January 15, 1863, and letters of introduction of the master of the vessel, William Brain, from a Mr. Martin, assuming to be the owner of the schooner, and recommending the vessel and the cargo of salt on board of her to a Mr. Hart, of Nassau, for advice and directions as to the business of the voyage. The mate of the vessel, in his examination in preparatorio, says that the master and the crew of the vessel belonged to England, and shipped from London to Nassau, but that he understood that the voyage was not to be to Nassau, but to some other port on the continent of North America; that her cargo was all salt; that London was her last clearing place; that she was captured near Fort Sumter, going into Charleston harbor; that he and the master knew that that port was then under blockade; that, when first pursued, the *Antelope* was endeavoring to enter Charleston; and that she tried to escape by getting into Bull's bay. The master, William Brain, confirms the evidence of the mate, and says that the vessel was captured trying to run the blockade of Charleston; that he knew of the war and of the blockade of Charleston, and presumes that the owner of the vessel did also, when he sailed; and that he was bound to run the blockade at Charleston, and steered for that purpose.

All the evidence is concurrent and conclusive that the nominal clearance of the vessel from London to Nassau was simulated and false, and that the voyage from London was set on foot and pursued with a design to violate the blockade of Charleston. A decree is pronounced for the condemnation and forfeiture of the vessel and cargo, because of false papers, and an attempt to run the blockade of Charleston, in her destination and procedure.

Case No. 484.

The ANTELOPE.

MONTGOMERY v. TYSON.

[1 Lowell, 130.]¹

District Court, D. Massachusetts. Feb., 1867.

SEAMEN—WAGES—WRITTEN CONTRACT—WHALING VOYAGE—SALVAGE—SEAMEN AS SALVORS.

1. Seamen in the whaling service have a lien on the oil for their wages.

[Cited in *The Ontario*, Case No. 10,543.]

¹[Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

2. Seamen can be salvors only when their connection with the ship has been entirely broken up.

[See *The Olive Branch*, Case No. 10,490; *Phillips v. McCall*, Id. 11,104.]

3. Daily wages which had been promised the crew for services in the nature of salvage were allowed, the owners not objecting.

4. Where, in the original articles for a whaling voyage, the time of its continuance, though agreed on, was accidentally omitted to be written out, the defect can be supplied by oral evidence.

[Cited in *Frates v. Howland*, Case No. 5,066.]

5. Salvage paid by the master in good faith, and in the exercise of reasonable prudence, is a charge upon the oil in which the crew must share.

In admiralty.

F. W. Sawyer and E. H. Pierce, for libellants.

T. K. Lothrop and W. W. Crapo, for claimants.

LOWELL, District Judge. These two cases, which were tried together, were both promoted by the crew of the whaling bark *Antelope*; one for wages and salvage, brought against the oil which was saved and sent home from the wreck of the vessel, and the other against the master and owners for damages for alleged short supplies and other breaches of the contract or the duty of the respondents. The vessel, which was lost on the rocks of Nianteleck harbor, in Cumberland inlet, on the night of the fifth of October last, had had a long and unsuccessful voyage, and had passed two winters in the ice. The amount of oil and bone taken was not sufficient to give either to owners or crew any thing like a fair return upon their respective outlays of time, labor, and money. These circumstances are not the most propitious for the harmonious settlement of any joint enterprise.

Taking first the libel that was first filed. It is clear that the libellants are entitled to the lays provided for in the articles. They contend for more, and say that the articles are void as not complying with the statutes, in this, that the voyage is not stated in them. It appears, that in the original paper the time to which the voyage was limited is not mentioned; but it is proved that the usage on this Greenland fishery, is, to stipulate for a term not exceeding thirty months; and that it was so understood in this case; and that the copy of the articles certified by the collector, which was taken in the ship, was so written out. How this discrepancy occurred is not shown, and there is no reason to suspect any fraud on the part of any one. Under these circumstances the omission may be made good by oral evidence. *Wickham v. Blight*, [Case No. 17,611;] *The Harvey*, 2 Hagg. Adm. 79. So far as statutes are concerned, there is none, I think, which regulates the shipping of men on whaling voyages, or requires the contract to be in writing; I mean the original shipment in the

home port. *Curt. Merch. Seam.* 60; *Taber v. U. S.*, [Case No. 13,722;] *The Atlantic*, [Id. 620.] So that no question arises under the law making void shipments of seamen contrary to law.

Salvage the crew cannot have in whaling voyages more than in others, except in the few excepted cases, of which this is not one. *The Holder Borden*, [Id. 6,600.] In one case like this, Judge Betts allowed the men a per diem compensation for work and labor. *Reed v. Hussey*, [Id. 11,646.] In the present case it is admitted that they are entitled to such a compensation, under a promise of the master, the binding force of which is not disputed by the owners, though perhaps they might have set up that it was without consideration. When the wreck occurred, the crew, knowing that their interest in the catchings amounted to little or nothing beyond the advances and slops they had received, showed a disposition to refuse duty, and six of them actually deserted for a time; and the master promised the men they should have days' wages if they would work faithfully in saving the property. They did work for some eleven days, and I shall allow them for that time the highest rate mentioned by the master. They will receive fifty-five dollars each, excepting the six men above mentioned; and they, forty-five dollars each.

Some doubt was expressed at the argument whether the seamen can proceed against the oil in the hands of the owners. It has long since been settled that the property in the oil is wholly in the owners of the vessel; and that the lays of the crew are only a mode of arriving at their wages. Many important consequences have followed from this doctrine; one of which is, that the sailors, not being partners nor part-owners, may sue at law for their wages, and are not obliged to go into equity for a settlement of accounts. The crew always have a lien on the freight for their wages; and one usual mode of enforcing liens on freight, in the English practice, is by a warrant against the cargo, to detain it until the freight is paid into the registry. *The Ringdove*, Swab. 312. Where the owners of the vessel own the cargo, they would be liable for a reasonable freight in all controversies and adjustments in which that question became important; and no doubt the right might be enforced in any proper case against the cargo itself. In whaling voyages, it may almost be said that the cargo, to the extent of the owners' shares, represents freight exclusively, having been earned in a long cruise by the use of the vessel and her outfits. The doubt arises out of the terms of the articles, by which the owners have the right to sell the oil and bone. This agreement must undoubtedly confer upon them the right to give a good title, clear of all liens; and they might probably sell the oil and bone before its arrival home. But, until a sale is made, I am of opinion that the seamen have a lien upon the oil,

Judge Sprague appears to have understood the matter in this way in his remarks in *Hussey v. Fields*, [Case No. 6,947;] and such a libel was brought in *Two Hundred and Ninety Barrels of Oil*, [Id. 14,294.] If the question were between shipper and ship-owner, the master's lien for freight would be lost by any agreement in the charter-party or bill of lading inconsistent with his retaining the cargo for the freight. But the master's lien for freight has been decided by the supreme court of the United States to depend entirely on possession; that of the seaman for wages has no relation whatever to possession, which he never has, either of ship or freight.

On the part of the crew, it is urged that the large payment which was made to the steamer *Wolf*, for assistance in saving the oil and transporting it and the crew to St. Johns, Newfoundland, ought not to be allowed as a charge against the gross proceeds, or what otherwise might have been the proceeds of the voyage. There can be no doubt that the services of the *Wolf* were salvage services, whether her crew took more or less part in getting the oil from the wreck, because it appears that there were no conveniences for storing or caring for the oil on the bleak shores of the country where the *Antelope* was lost; and no regular or reasonably certain means of getting it home; and in a few days or weeks all intercourse with the wreck would be shut out for months by the ice; and under these circumstances something more than mere freight would be allowed for the work actually performed by the steamer. The contract was made by the master of the *Antelope*, in good faith and for the best terms he could obtain, and he has actually paid the price. If there were any appearance of fraud, or of any underhand advantage accruing either to the master or owners, I should not hesitate to disregard the contract; for I shall adhere, until otherwise instructed by a superior court, to the doctrine laid down by Judge Sprague, in *Jay v. Allen*, [Case No. 7,235,] that the master is the agent of the owners, and that for his embezzlement or misfeasance in respect to the oil, they must be responsible to the crew. I am aware that some doubt was expressed upon this point by Mr. Justice Woodbury, in the same case, reported as *Joy v. Allen*, [Id. 7,552;] but it seems, on a careful examination of the judgment, that the decision did not turn upon this point; and there is reason to believe that Judge Sprague did not consider the point as definitely settled against his opinion.

The same doctrine is invoked by the crew in another way. They endeavor to show that the vessel was purposely cast away by the master; and aver that if this be proved the owners must bear all the expenses consequent upon his act. In the first libel the allegation is in the modified form, that the libellants aver and believe that the disaster was unnecessary and might have been avoid-

ed. The evidence fails to sustain this grave charge. It is shown that the vessel was but partially insured, and the cargo not at all; and that every possible present or prospective interest of the master as well as the owners was against the loss of the vessel, and no just cause of suspicion either of wilful or grossly negligent conduct is shown. On the contrary, the testimony confirms the statement of the libel, that there was a great and sudden increase of wind about two o'clock at night. There is some evidence on both sides that the watch were either inattentive or incapable; but there is none that the master is responsible for this. The attempt of the libellants to charge the master with so grave a crime upon the flimsy grounds brought forward in its support, tends to throw great doubt upon their own fairness as witnesses, and leads me to scrutinize their evidence with much care in other matters.

That the crew contribute to salvage in whaling and fishing voyages might be established by reasoning, were it not already decided. The contract of the owners to receive and transport the oil contains an implied exception of perils of the seas; and it is only on what escapes such perils that the lays can be reckoned, and they therefore contribute. *Reed v. Hussey*, [Case No. 11,646;] *Utpadel v. Fears*, [Id. 16,808;] *The Holder Borden*, [Id. 6,600.] The libellants will recover, in this case, their extra wages, and their lays, if any.

The judge then considered the second case, which turned only on points of evidence, and decided it for the claimants; giving costs to neither party. Decrees accordingly.

ANTELOPE, The, (WAITE v.) See Case No. 17,045.

ANTHES, (UNITED NICKEL CO. v.) See Case No. 14,406.

ANTHONY, Ex parte. See Case No. 5,070.

Case No. 485.

Ex parte ANTHONY.

[1 Cranch, C. C. 295.]¹

Circuit Court, District of Columbia. March, 1806.

SLAVERY—RUNAWAY SLAVES—AUTHORITY OF JUSTICE OF THE PEACE TO COMMIT.

A justice of the peace in Alexandria cannot commit a person as a runaway, unless according to the form of the act of assembly of Virginia, of 26th December, 1792, p. 246.

Habens corpus. On return it appeared that the prisoner was committed by a warrant under the hand of Mr. Justice Faw, in these words: "Alexandria County, ss. You are hereby required to receive into your custody negro Anthony, who was brought be-

¹[Reported by Hon. William Cranch, Chief Judge.]

fore me by Joseph Simpson, as a runaway, said to be a slave, the property of Mr. Richard West, of Prince George's county, Maryland, and him safely keep until he be thence discharged according to law. Given under my hand, this 19th day of April, 1806. A. Faw. Capt. James Campbell, Jailer."

The prisoner was discharged, on consideration of the Acts of Assembly, of December 26, 1792, p. 246; December 10, 1793, pp. 315, 316; and January 21, 1801, p. 412.

Case No. 486.

ANTHONY v. AETNA INS. CO.

[1 Abb. (U. S.) 343; 2 Chi. Leg. News, 34.]
Circuit Court, E. D. Michigan. June Term, 1869.

INSURANCE — WHAT ARE "PERILS OF THE SEAS."

1. Under a policy of marine insurance against "perils of the lakes, seas, rivers, &c.;" also against "all other perils and misfortunes, &c.;" also against "the usual risk of ligherage at O." the assured shipped cattle to O. At that port, as the vessel was prevented by a bar from landing, the cattle were put on board a lighter to be landed. They were tied by ropes to a chain running through the lighter, fore and aft. This was the usual mode of landing cattle at that port. While the lighter was proceeding in, the cattle became frightened, broke a part of the chain loose, rushed overboard and were drowned. *Held*, 1. That this loss was within the insurance of "perils of the seas, &c."

2. That even if it were not covered by that provision, it was embraced within the general assurance against "other perils and misfortunes," and that against "the usual risk of ligherage at O."

At law. Motion for a new trial.

This action was brought by Francis W. Anthony against the Aetna Insurance Company, to recover upon a policy of insurance issued by the defendants upon live stock shipped on board a propeller plying upon Lake Superior. The facts out of which the controversy arose are detailed in the opinion of the court. Upon the former trial, which took place before Judge Wilkins, the court directed the jury to render a verdict for the defendants, upon the ground that the loss which the plaintiff had sustained was not covered by the policy. The plaintiff now moved for a new trial, contending that this ruling was erroneous.

Moore & Griffin, for the motion.
Pond & Brown, opposed.

WITHEY, District Judge. On May 1, 1865, an open, season policy was issued by defendants to plaintiff, insuring the plaintiff's property from ports and places to ports and places, including the voyage in which was this risk. The adventure was to begin from the loading, and continue until the property should "arrive and be safely land-

[Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

ed at the port of destination." The risks covered by the policy are, "perils of the lakes, seas, rivers, canals, railroads, fires, jettisons, and all other perils and misfortunes that have or shall come to the hurt, detriment or damage of the said property, or any part thereof;" also, "the usual risk of ligherage at Ontonagon." Under this insurance the plaintiff shipped on board the propeller Pewabic, from Bayfield to Ontonagon, on Lake Superior, forty or more beef cattle. The vessel arrived off the latter port in July, 1865, but was prevented by a bar in the harbor from landing. The animals were taken from the propeller on to a lighter to be landed, and were fastened upon the lighter in this way: A chain of five-eighth inch iron—called an anchor chain—ran fore and aft through the middle of the lighter, fastened at the ends to timber heads eight or ten feet from each end of the lighter. To this chain the cattle were tied by ropes, heads in, on opposite sides of the chain. When the lighter had proceeded from a quarter to a third of the distance in, the cattle, from some cause not explained, became frightened, breaking the chain into three pieces, and twenty-seven of the cattle, tied to one of these pieces, went over into the lake and were drowned by the weight of the chain carrying their heads under water. The lighter was tugged in and out, and was in good condition. The cattle were fastened on the lighter in the customary way of lightering at that place. Such was the case made by the plaintiff at the trial, and the question presented, which we are called upon to decide, is whether the loss was occasioned by a "peril of the lakes," or "other peril or misfortune," within the meaning and intent of the policy.

The general doctrine is, that the insurer undertakes, in a marine risk, only to indemnify against extraordinary perils of the sea, and not against those ordinary ones to which every ship must inevitably be exposed. Every loss which arises from tempests, or by rocks, winds or waves, strictly and naturally comes under the idea of a loss occasioned by perils of the sea. But if this be the extent of the phrase, "perils of the sea," we should be obliged to conclude that it covered only accidents of an extraordinary nature, and produced only by natural causes peculiar to that element. Such, however, is clearly not the rule for construing the phrase, "perils of the sea," in reference to marine insurance. Mr. Parsons, in his work on Marine Insurance, (volume 1, p. 544.) says: "The phrase, 'perils of the seas' covers all losses or damage which arise from the extraordinary action of the wind and sea, and from inevitable accidents directly connected with navigation, excepting those provided for in other parts of the policy, as captures and the like." Mr. Justice Story, in the case of *The Reeside*, [Case No. 11,657.] remarks, that "the phrase 'danger of the

seas,' whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element; or whether understood in its more extended sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence." The supreme court of the United States, in *Garrison v. Memphis Ins. Co.*, 19 How. [60 U. S.] 312, 314, seems to give the more extended sense to the term, "perils of the sea," as suggested by Judge Story. That court says, these words "have been extended to comprehend losses arising from some irresistible force or overwhelming power, which no ordinary skill could anticipate or evade." It has often been said, and correctly, that what are ordinary and what are extraordinary perils, is a question of much difficulty. The difficulty has been illustrated by many cases: Thus, in *Magnus v. Buttemer*, 9 Eng. Law & Eq. 461, a vessel moored in a tide harbor, and took ground when the tide fell. In consequence of this she was hogged and strained all over. It was held the underwriters were not liable. In *Potter v. Suffolk Ins. Co.*, [Case No. 11,339,] the circumstances were very similar to the last case, and Mr. Justice Story held, "that unless there was inherent weakness in the vessel, such damage could only be occasioned by an unusual and extraordinary accident in grounding, upon the ebbing of the tide, which would be a peril of the sea." In *Hunter v. Potts*, 4 Camp. 203, Lord Ellenborough held that a leak occasioned by rats was not a peril of the sea, not being a loss of an extraordinary nature. But in *Garrigues v. Cox*, 1 Bin. 592, a leak occasioned by rats was held to be a peril within the policy. And Mr. Parsons, in his *Marine Insurance*, (volume 1, p. 546, note,) after citing a number of cases, concludes his review by saying: "On the authority of the recent cases in this country, we should consider the insurers liable in such a case, even if the rats remained on board through the negligence of the master, on the ground that the damage by water was the proximate cause of the loss." We might refer to many other cases on the subject, but we think they will not tend very much to elucidate the question involved in the case at bar; inasmuch as every case depends so much on its own particular facts and circumstances.

My own views are strongly in the direction of holding this case to be a loss within the term "perils of the sea," in accordance with the more comprehensive sense of those words and their more reasonable signification—in brief, because the cattle were drowned, which is peculiar to the element on which they were being transported; be-

cause they were drowned by an accident that could not have been guarded against by ordinary exertions or prudence, considering the fact that it was the usual mode of lightering at that place, which fact must be presumed to have been known to the insurer; because, too, it could not reasonably have been foreseen that there was inherent weakness in the chain; and because, in the absence of explanation by the insurer, it is to be presumed the fright of the animals was caused by something connected with navigation, whether from the exhaust of steam, the working of machinery of the tug, the ringing of a bell, or otherwise. It was a peril of navigation, which could not well have been foreseen or guarded against by the carrier. But we are not compelled to rest our decision on the ground strictly of a loss by a "peril of the sea," and the court does not wish to be understood as so deciding. I have simply indicated the tendency of my own mind after an examination of the question, because that particular point was much dwelt upon by the arguments of the learned counsel. We are entirely clear, after a careful examination of the authorities, that the loss was a risk within the general terms of the policy, "all other perils and misfortunes," and the specific provision, "the usual risk of lighterage at Ontonagon." While it is laid down by the authorities, that these general words, "all other perils," cover only perils of the like kind to those specifically enumerated, we think they are material and operative words, and are not in the policy to have no effect assigned to them in its construction. Hildyard on Marine Insurance, (page 348,) says, these words have "the effect of providing for any doubts which might arise as to cases which come nearly, but not precisely, under the specific causes of loss. In *Cullen v. Butler*, 5 Maule & S. 465, Lord Ellenborough says: "They are entitled to be considered as material and operative words, and to have due effect assigned to them in the construction of this instrument; and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes."

The animals did not die from disease or any inherent defect in them, but from an accident on water, in course of the voyage, and was something peculiar to that element. Had the accident of breaking the fastening occurred in a land transportation, no such result could have taken place. The cattle were drowned by their heads being drawn under water by the weight of the piece of chain to which they were tied. It was five-eighths inch iron, and had the chain been perfect would undoubtedly have resisted any strain the whole number of the animals on board could have produced, and yet the accident was fortuitous. It was the custom to use this chain for fastening cattle light-

ered from vessels; it was believed to be sufficiently strong, and, as we have already remarked, it could not have been foreseen, in all reasonable probability, that there was inherent weakness in this anchor chain. The insurer must be presumed to have known the usual mode and appliances of lighterage at the place, and to have had it in contemplation when taking the risk.

If, now, we regard it doubtful whether the loss was strictly within the indemnity against "perils of the sea," still we think it should be regarded as caused by perils of like kind, and therefore covered by the general words of the policy. No case has been found where the facts were like those in the one at bar; but on principle, *Devaux v. l'Anson*, 7 Scott, 507, is regarded as sustaining the conclusions to which we have arrived. In that case, the effect of the general words of the policy, "all other perils and misfortunes," were very fully considered, and the cases which had been decided referred to. The declaration averred that the "ship was broken, damaged and destroyed, and rendered wholly incapable of pursuing the said voyage, by certain perils which the said assurers as aforesaid, by the said policy did take upon themselves, to wit: by the accidental breaking and giving way of the tackle and supports whereby the said ship was supported, in being moved from a certain dock; in consequence of which breaking and giving way, the said ship struck violently against the sand and was bilged, broken, destroyed, damaged, and rendered incapable of pursuing the said voyage as aforesaid." The defendants traversed the allegation that the ship was "broken, damaged, and destroyed, and rendered incapable of pursuing the said voyage, by any perils which the said assurers, by said policy, did take upon themselves." Lord Chief Justice Tindal said, "the point remaining to be considered is, whether the loss was occasioned by any of the perils insured against by the policy. It is to be observed that the words in the policy are very large; the policy not only enumerates 'perils of the sea,' but 'all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage' of the subject matter of the insurance." After referring to several cases, the learned judge says, "the loss occasioned by the endeavor to get the vessel afloat from the dock in which she had just been repaired, was a loss within the policy." Here the supports broke and caused the damage, like the case at bar. Again, the other clause in the contract, "the usual risk of lighterage at Ontonagon," was clearly not necessary to indemnify the assured against "perils of the sea," nor perils of the like kind, for the risk begins with loading the freight, and continues until safely landed. Assuming, then, what is claimed by defendants, the accident which happened not to be a loss by "perils of the sea," nor "other perils and misfortunes," we should,

in order to give due effect to the clause, "usual risk of lighterage," in view of the other stipulations of the policy being held not to cover the loss, say that it is covered by the risk of lighterage. In the view we have taken of "all other perils and misfortunes," there is no occasion to inquire into the effect of the lighterage clause; but if we were to hold differently in reference to the other specific and general clauses of the policy, it would be difficult to see how the lighterage clause could be regarded as operative words in the contract, unless held to cover their loss. For the reasons given, the motion must prevail, and a new trial be awarded. Order accordingly.

NOTE, [from original report.] This decision was reviewed by the *London Law Times* upon the erroneous view that the jury had found, upon the facts, that the case was not one within the terms of the policy; was not a loss by perils of the seas. In truth, Judge Wilkins, before whom the cause was tried, upon hearing the facts, which were stipulated in writing, directed the jury to render a verdict for the defendant.

ANTHONY, (BARTON v.) See Case No. 1,084.

Case No. 487.

ANTHONY v. CARROLL.

[2 Ban. & A. 195; 9 O. G. 199; 23 Pittsb. Leg. J. 123.]

Circuit Court, D. Massachusetts. Dec., 1875.

PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—STATE STATUTE OF LIMITATIONS.

1. State statutes of limitation cannot be pleaded in bar, in a suit for the infringement of a patent.

[Cited in *May v. Logan Co.*, 30 Fed. 257.]

[See *Sayles v. Dubuque & S. C. R. Co.*, Case No. 12,417.]

2. Whether a court of equity will entertain a suit for the benefit of an assignee of a right of action for a tort, *quaere*.

[In equity. Bill by R. C. Anthony and the American Wood-Paper Company against John Carroll for an accounting for the alleged infringement of patent No. 17,387. Heard on demurrer to the bill. Demurrer overruled.]

Francis C. Nye and L. C. Ashley, for complainant.

Browne & Holmes, for defendant.

SHEPLEY, Circuit Judge. This bill in equity, filed July 27, 1874, alleges the grant of letters patent of the United States to Marie Amedee Charles Mellier for a new and useful improvement in making paper-pulp; the assignment by Mellier to one Buchanan, June 19, 1857, of all Mellier's right and title to the invention secured by the letters patent; the assignment by Buchanan

¹[Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

to Buffam, trustee of the American Wood-Paper Company, October 14, 1863, and the assignment by Buffam to that company June 16, 1865, of his legal estate in the patent. The infringement by the defendant, and consequent profit to defendant and damage to the American Wood-Paper Company, is alleged from October 14, 1863, to August 19, 1867. The bill alleges an assignment, August 19, 1867, from that company to Gardner Harland of "all their claims against the said defendant for the said damages and profits for the said infringement during the said period," and an assignment by Harland to R. C. Anthony, one of complainants, October 4, 1873, of all said claims. The bill is brought by R. C. Anthony, a citizen of New York, and the American Wood-Paper Company, a corporation created by the legislature of the state of Rhode Island and located at Providence in said state, against the defendant, a citizen of Massachusetts, for a discovery and account of profits, and for damages and other relief.

The defendant has demurred generally to this bill, and in support of his demurrer relies upon the bar of the statute of limitations of the commonwealth of Massachusetts, and also upon the character of the claim alleged in the bill. The limitation in cases of tort in this commonwealth is six years. Gen. St. Mass. c. 155, § 1. As a general rule, the laws of the state in which a national court sits must be the rules of decision in such court. The thirty-fourth section of the judiciary act provided that "the laws of the several states, except when the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as the rules of decision in trials at common law in the courts of the United States in cases where they apply." It is too well settled to require the citation of authorities, that, in ordinary actions at common law, the statutes of limitation of the state where the suit is brought may be pleaded in bar under this provision of the judiciary act. Whenever the cause of action is one cognizable by a court of common law, a court of equity, in accordance with the general rules of equity jurisprudence, follows the law in relation to the limitations of actions. The question presented is whether this rule applies to actions, the subject-matter of which is under the exclusive control of the national legislature and judiciary.

Mr. Justice Swayne held, in the case of *Collins v. Peebles*, [Case No. 3,017,] that the state statutes could not limit the time within which actions for the infringement of letters patent might be brought in the courts of the United States; that congress having failed to legislate upon this subject, there was no limit to the time for bringing such actions; and Mr. Justice Grier is reported, in a note to the above case, to have so decided in the case of Par-

ker v. Halleck, [Id. 10,735.] To the same effect is the decision in *Read v. Miller*, [Id. 11,610.] In the case of *Parker v. Hawk*, [Id. 10,737,] the learned judge of the southern district of Ohio decided that the limitation act of Ohio applied to an action on the case in the circuit court of the United States for an infringement of a patent. It is stated, in a note to that, that the decision was affirmed by Mr. Justice McLean. *Parker v. Hawk*, [supra,] was decided on the authority of *M'Cluny v. Silliman*, 3 Pet. [23 U. S.] 270. But *M'Cluny v. Silliman* is by no means decisive of the question. That was an action on the case against the defendant as register of a land office in Ohio for non-feasance, in refusing at the request of the plaintiff to enter his application for the purchase of certain government lands, as required by an act of congress. Such an action against an officer for non-feasance could have been prosecuted in the state as well as in the federal courts. The cause of action was one over which the national and state courts had concurrent jurisdiction. Such a case clearly falls within the provisions of section thirty-four of the judiciary act. It is one of the cases where the laws of the state apply. But how can it be contended that the laws of the states apply to an action for the infringement of a patent, when the right of action is exclusively under the constitution and laws of the United States, when the form of the remedy is prescribed by the acts of congress, and when the circuit courts of the United States are clothed by statute with exclusive jurisdiction over the whole subject-matter?

Should the legislature of a state pass an act in express terms limiting the time for bringing an action in the federal courts for infringement of patent rights, there can be no reasonable doubt that such a statute would be unconstitutional and void. The policy of the government to provide a uniform system of rights and remedies throughout the United States upon the whole subject-matter of patents for new and useful inventions and discoveries, by placing it under the control of congress and the federal courts, would be frustrated, if such state legislation could directly or indirectly limit, restrict, or take away the remedy. For these reasons, I think no state statute of limitation can be pleaded in bar of this action. It is contended, in support of the demurrer, that a court of equity will not entertain a suit for the benefit of an assignee of a right of action for a tort. The question whether a court of equity would entertain this bill, if brought only in the name of an assignee of a right of action for a tort, does not necessarily arise in this case, as this bill is brought by the assignor, who is also the owner of the patent, and who, under the rules of equity pleading, joins with him the assignee, he being beneficially interested therein. The better opinion seems to be

that, if the claim be for an injury to one's estate or property, and not to a mere solatium for an injury done to the person or feelings of the assignor, the claim may be assigned. *People v. Tioga*, 19 Wend. 73; *McKee v. Judd*, 2 Kern. [12 N. Y.] 622; *Milnor v. Metz*, 16 Pet. [41 U. S.] 221. The demurrer of the defendants is not sustained.

[NOTE. For other cases involving the same patent, see note to *American Wood-Paper Co. v. Fiber Disintegrating Co.*, Case No. 320.]

ANTHONY, (GORDON v.) See Case No. 5-605.

Case No. 488.

ANTHONY v. JASPER COUNTY.

[4 Dill. 136; 3 Cent. Law J. 321.]

Circuit Court, W. D. Missouri. 1876.

REGISTRATION BOND ACT—FRAUDULENT ANTE-DATING—INNOCENT HOLDER.

A statute of Missouri (Laws 1872, p. 56) provided that "before any bond hereafter issued by any county shall obtain validity or be negotiated," it must be first registered by the state auditor, who shall certify thereon that all conditions precedent, required by law, and by the contract under which the bonds were ordered to be issued, have been complied with. Subsequent to the passage of this statute, certain bonds were issued by the county court of Jasper county to a railway company, the said company not having fully complied with the conditions upon which the issue of the bonds had been authorized by a vote of the people. In order to evade the statute, the bonds were antedated to a date prior to the passage of the act: *Held*, that they were void, even in the hands of an innocent holder, and that the county was not estopped to set up this defense. Argument.—Where a statute declares absolutely and without exception that a contract or bond or note is void, it is void into whosoever hands it comes.

[See note at end of case.]

The court made the following special finding of facts, viz.:

1. This action is brought for the collection of interest coupons, originally attached to bonds of the following tenor:

"United States of America, state of Missouri. No. 1. Jasper County Bond. \$500. Interest, ten per cent. per annum. Know all men by these presents: That the county of Jasper and state of Missouri acknowledges itself indebted and firmly bound to the Memphis, Carthage, and Northwestern Railroad Company, or bearer, in the sum of five hundred dollars, which sum said county of Jasper, for and on account of Marion township, for value received, hereby promises to pay said company, or bearer, at the National Park Bank, in the city of New York, and state of New York, twenty years after date, with interest thereon from the date hereof at the rate of ten per cent. per annum, pay-

able semi-annually, on the first days of January and July of each year, on the presentation and delivery at said National Park Bank, in said city of New York, state of New York, of the coupons of interest hereto attached. This bond is issued pursuant to an order of the county court of said county of Jasper, made by authority of an act of the general assembly of the state of Missouri, entitled 'An act to facilitate the construction of railroads in the state of Missouri,' and approved on the 23d of March, A. D. 1868, and authorized by a vote of more than two-thirds of the voters of said township. In testimony whereof, the said county of Jasper has executed this bond by the presiding justice of the county court of said county, under the order of said court, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same, and affixing thereto the seal of said court. This done at the office of the clerk of said court, this 28th day of March, A. D. 1872. [Seal.] R. S. Merwin, Presiding Justice of the County Court of Jasper county, Missouri. A. E. Gregory, Clerk of the County Court of Jasper county, Missouri.

"Carthage, Jasper County, — 1872. The county of Jasper promises to pay the sum of twenty-five dollars on the 1st of July, 1873, being interest on bond No. 1, for \$500, payable at the National Park Bank, in the city and state of New York. A. E. Gregory, Clerk of the County Court of Jasper county, Missouri."

2. That at the regular term of the county court of Jasper county, Missouri, held on the 10th day of February, 1872, the following, among other proceedings, was had, to-wit: "Whereas, more than twenty-five persons, tax-payers and residents of the municipal township of Marion, in the county of Jasper, in the state of Missouri, have petitioned this court, setting forth their desire as a township to subscribe to the capital stock of the Memphis, Carthage, and Northwestern Railroad Company, proposing to build a railroad into and through said township; that the amount they desire to subscribe is seventy-five thousand dollars, upon the following named terms and conditions, viz.: First. That the railroad of said company be continued and extended through said township of Marion, from the depot at Carthage, westward to some point on the Missouri River, Fort Scott, and Gulf Railroad, in the state of Kansas, within nine months from the 1st day of March, one thousand eight hundred and seventy-two, and that the work of grading and constructing be commenced within twenty days after the date of making the subscription, and be pushed vigorously until completed. Second. That the machine and repairing shops of the said company be permanently located and forever maintained within three-quarters of a mile of the public square in Carthage;

¹[Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

and said shops, with their equipments, when completed, shall cost not less than three hundred thousand dollars; that the construction of said shops shall begin within sixty days after the cars are running to the depot at Carthage, and be completed within one year. Third. That such subscription shall be paid by issuing and delivering of the bonds of said township to the said railroad company; said bonds to be of the denomination of five hundred dollars each, to bear date on the day and year when said railroad company shall become entitled to receive the same under the stipulations herein contained. Aforesaid bonds to bear ten per centum interest per annum from the date they are delivered, the interest payable semi-annually, and represented by the coupons to be attached, the principal payable twenty years after date, and both the principal and interest payable at the National Park Bank, in the city of New York, in the state of New York. 'Said railroad shall be equal to the standard construction of railroads in the state of Missouri, and of the same gauge as the Atlantic and Pacific Railroad.' The aforesaid bonds shall be issued and be placed in escrow, and bear interest as aforesaid from the date of the delivery of said bonds to the aforesaid railroad company. Fourth. That when the cars are running regularly on said railroad, for the transportation of freight and passengers, from the town of Pierce City, in Lawrence county, Missouri, into and through Marion township to the depot at Carthage, and thence westward to a point on the Missouri River, Fort Scott, and Gulf Railroad, within the time specified in the first specification herein, to-wit: nine months from the 1st day of March, one thousand eight hundred and seventy-two, and making regular connection with the Atlantic and Pacific Railroad at Pierce City, in the county of Lawrence, in the state of Missouri, and the Missouri River, Fort Scott, and Gulf Railroad, in the state of Kansas, fifty thousand dollars of the said bonds, and when at least fifty thousand dollars shall have been first expended and paid out towards the construction of said machine and repair shops, and work begun in good faith for their erection, then twenty-five thousand dollars more of said bonds shall be delivered to said company."

3. That at a special term of the county court of Jasper county, Missouri, held on the 28th day of March, 1872, the following, among other proceedings, was had, to-wit: "In the matter of a subscription to the capital stock of the Memphis, Carthage, and Northwestern Railroad Company, in behalf of Marion township: Whereas, it appearing from the returns of an election, held in pursuance of an order of this court, on Tuesday, the 5th day of March, A. D. 1872, that more than two-thirds of the qualified voters of the municipal township of Marion, in Jasper county, Missouri, voting at said

election, are in favor of subscribing to the capital stock of the Memphis, Carthage, and Northwestern Railroad Company seventy-five thousand dollars, upon the terms and conditions as set forth in the petition heretofore presented, and the order of this court, made on the 10th day of February, A. D. 1872, for said election, and that more than two-thirds of the voters of said township voted in favor of such subscription being made; now, therefore, it is ordered by the court that the sum of seventy-five thousand dollars be, and is hereby, subscribed to the capital stock of said railroad company in behalf of said Marion township, according to the terms and conditions of said order of election, and that the bonds to be issued in payment of such subscription be signed by the presiding justice of this court, and attested by the clerk of this court, with the seal of this court affixed."

4. That at an adjourned term of the county court of Jasper county, Missouri, held on the 4th day of June, A. D. 1872, the following, among other proceedings, was had, to-wit: "Ordered by the court, that fifty thousand dollars of Marion township bonds, voted to the Memphis, Carthage, and Northwestern Railroad Company, be issued, and that the clerk of this court have the same registered according to law, and that when so registered the same shall be deposited in escrow in some responsible banking house in the city of St. Louis."

5. That an act of the general assembly of the state of Missouri, entitled "An act to provide for the registration of bonds issued by counties, cities, and incorporated towns, and to limit the issue thereof," approved March 30, 1872, enacted inter alia:

"Section 4. Before any bond hereafter issued by any county, city, or incorporated town, for any purpose whatever, shall obtain validity or be negotiated, the same shall be presented to the state auditor, who shall register the same in a book or books provided for that purpose, in the same manner as the state bonds are now registered, and who shall certify by endorsement on such bond that all the conditions of the laws have been complied with in its issue, if that be the case, and also that the conditions of the contract under which they were ordered to be issued have also been complied with; and the evidence of that fact shall be filed and preserved by the auditor. But such certificate shall be prima facie evidence only of the facts therein stated, and shall not preclude or prohibit any person from showing or proving the contrary, in any suit or proceeding to test or determine the validity of such bonds, or the power of any county court, city or town council, or board of trustees, or other authority, to issue such bonds; and the remedy by injunction shall also be at the instance of any tax-payer of the respective county, city, or incorporated town, to pre-

vent the registration of any bonds alleged to be illegally issued or founded on any provisions of this act."

6. That John Purcell was the presiding justice of the county court of Jasper county on the 28th day of March, 1872, and continued to hold said office until the — day of September, 1872, when he resigned; and that R. S. Merwin was a member of the said county court in March, 1872, and until the 21st day of October, 1872, when he became, and thereafter was, presiding justice of said court; and these facts appear by the records of said court.

7. That the bonds in controversy were sealed with the seal of the county court of Jasper county, affixed by the clerk and signed by the clerk, and at the same time said bonds were signed by the said R. S. Merwin, which was after he became presiding justice of said county court, in October, 1872. Merwin delivered the said bonds in October, 1872, to the Union Savings Association, of St. Louis, for the use of one Edward Burgess, a contractor for the building of the railroad named in the bonds, having first removed the first two coupons; and the said bonds were purchased by one William C. Wilson from said Burgess at the rate of fifty-five cents on the dollar, which was then the market value of said bonds, and the same were paid for in November, 1872, by the said Wilson giving his check to Burgess for the amount (\$27,500) on said savings association, which check was paid. Neither the other justice of the county court, nor the county court, consented to the said delivery of the said bonds by Merwin to or for the use of Burgess. The said railroad for which the bonds issued was finished through Marion township, but the said railroad company has never complied with the condition of the vote requiring its railroad to be continued and extended through said township of Marion, from the depot at Carthage, westward, to some point on the Missouri River, Fort Scott, and Gulf Railroad, in the state of Kansas, and there still remains about nine miles of such railroad to be constructed in Kansas.

8. That said bonds, when signed, sealed, and delivered as aforesaid, were antedated so as to bear date the 28th day of March, 1872, and they were never presented to the state auditor, and he never registered the same, nor made any certificate thereon, under the provisions of said statute, approved March 30, 1872, and said bonds, as held by the plaintiff, contain no certificate of registration endorsed or written thereon.

9. That the plaintiff is a bona fide purchaser of said bonds and coupons for value, without actual notice of any matter of fact impairing the regularity and validity of said bonds, and without actual notice that the said bonds had been antedated so as to bear date prior to the 30th day of March, 1872.

Joseph Shippen, for plaintiff.

E. J. Montague, for county.

Before DILLON, Circuit Judge, and KREKEL, District Judge.

DILLON, Circuit Judge. The well-known history of the issue of municipal bonds in this state, as it appears by the many cases in this court, shows that conditions imposed by law requiring a popular vote, or conditions in the proposition submitted to the voters, intended to prevent fraud, and to secure the actual building and completion of the roads, have been often evaded, and the bonds issued without compliance therewith. Such bonds, when negotiated for value, the courts have held to be binding. To prevent such improper or improvident issue of bonds in the future, the legislature passed the act of March 30, 1872, (Laws 1872, p. 56.)

The fourth section of that act provides that "before any bond hereafter issued by any county * * * shall obtain validity or be negotiated," it must be first registered by the state auditor, who shall certify thereon that all conditions precedent, required by law, and by the contract under which the bonds were ordered to be issued, have been complied with.

In this case the bonds were signed, sealed, and issued in the manner above appearing, after this statute went into effect, and were antedated to a date prior to the passage of that enactment. In point of fact, the conditions on which the bonds had been voted had not been fully complied with; and hence they could not have been, and were not, certified by the auditor as registered bonds. The bonds have found their way into the hands of an innocent holder for value, who did not know that the bonds bore a false date.

If the bonds bore date after the act of March 30, 1872, and had not been registered, it is plain, we think, that they would have no "validity," and hence could not support an action in the hands of any person. Pars. Bills & N. 218, 276, 279. But they are antedated, and the question is whether they have validity in the hands of the innocent purchaser. Upon the best consideration we have been able to give, our conclusion is that the bonds cannot be enforced. The case comes within the doctrine, which is well settled, that where a statute declares absolutely and without exception that a contract or bond or note is void, it is void into whosoever hands it may come. This statute declares that no unregistered bond shall be valid or be negotiated. Bonds must first be registered. Without registration they "obtain no validity." Such is the statute. A declaration that bonds shall have no validity is equivalent to declaring them to be void.

Is the county estopped to set up this defence? We think not. The case is to be distinguished from those decided by the

supreme court of the United States, in which it is held that the frauds of the officers cannot be visited upon the innocent bondholder, and falls within the case of Bayley v. Taber, 5 Mass. 286. In that case it was held, where a statute enacted that promissory notes of a certain description, "made or issued" after a specified day, should be "utterly void, and no action should be sustained thereon," that it was competent to the makers of such notes, when sued upon notes bearing date before the day fixed by the statute, to prove that they were, in fact, made and issued after such day.

The principle of that case is the same as in the case at bar, and if that is a sound principle when applied to the individual maker of prohibited paper, it should apply with at least equal force in favor of public bodies, where one or two officers, without the consent of the others, may, as in this case, combine to evade the law, the other officers being innocent of wrongful participation.

The principle involved is one of great consequence. For illustration: Loose and general powers have been heretofore given in this state to municipalities and counties to issue such bonds. This power has been taken away by the new constitution. Can the protective provisions of that instrument be evaded and rendered useless by the mere fraudulent act of the officers of the county in antedating the bonds. If so, the power to defraud is endowed with a fearful vitality, which survives the prohibition of the constitution, and threatens to become immortal.

Judgment for the defendant.

[NOTE. On appeal to the supreme court, the decree of the circuit court was affirmed. In speaking for the court, Mr. Chief Justice Waite said: "When the bonds now in question were put out, the law required that, to be valid, they must be certified to by the auditor of the state. In other words, that officer was to certify them, before their execution was complete, so as to bind the public for payment. * * * Antedating, under such circumstances, partakes of the character of a forgery, and is always open to inquiry, no matter who relies on it. The question is one of the authority of him who attempts to bind another. * * * It matters not that when the bonds were voted the registration law was not in force. Before they were issued, it had gone into effect. It did not change in any way the contract with the railroad company. * * * All the legislature attempted to do was to provide what should be a good bond, when issued. There was nothing changed, but the form of the execution." *Anthony v. County of Jasper*, 101 U. S. 693. Also see *Douglass v. Pike Co.*, Id. 677.]

ANTHONY, (UNITED STATES v.) See Cases Nos. 14,459 and 14,460.

ANTHONY KELLY, (The SCOTTISH BRIDE v.) See Case No. 12,551.

ANTHONY MANGIN, The, (UNITED STATES v.) See Case No. 14,461.

ANTHRACITE, The, (HERN v.) See Case No. 6,412.

ANTHRACITE INS. CO., (GERMOND v.) See Case No. 5,365.

Case No. 489.

The ANTILLES.

[8 Ben. 9.]

District Court, E. D. New York. Jan., 1875.
SMUGGLING — GOODS NOT ENTERED ON THE MANIFEST.

In order to sustain a libel against a vessel for the recovery of the penalty imposed by the 24th section of the act of March 2d, 1799, (1 Stat. 646,) for the importation of goods not entered on the manifest, it must be shown that the vessel belonged in whole or in part to a citizen or inhabitant of the United States. The value of the goods omitted must also be shown.

[See, also, *U. S. v. Twenty-Six Diamond Rings*, Case No. 16,572.]

In admiralty.

A. W. Tenney, Dist. Atty., for United States.

Beebe, Wilcox & Hobbs, for claimant.

BENEDICT, District Judge. This is a proceeding in rem on the part of the United States to enforce against the bark *Antilles* a penalty incurred by a violation on the part of her master of the 24th section of the act of March 2, 1799, (1 Stat. 646,) which provides that if any goods, wares and merchandise shall be imported or brought into the United States, in any ship or vessel belonging in whole or in part to a citizen or citizens, inhabitant or inhabitants, of the United States, from any foreign port or place, without having a manifest containing a full description of the cargo, in such case the master or other person having charge of such ship shall forfeit and pay a sum of money equal to the value of such goods omitted from the manifest.

The allegations of the libel are all denied by the answer. An examination of the evidence introduced on the part of the government to sustain the libel, shows at least two fatal defects of proof, namely, that there is no evidence to show that the vessel belonged in whole or in part to a citizen or citizens, inhabitant or inhabitants, of the United States; and, further, that there is no evidence as to the value of the goods claimed to have been shown to have been omitted from the manifest. In the absence of any evidence upon these material facts, no decree can be rendered against the vessel.

The libel is accordingly dismissed.

[Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

Case No. 490.

In re ANTISDEL.

[18 N. B. R. 289.]

District Court, D. Michigan. April 29, 1878.

BANKRUPTCY—DISCHARGE—PROPER BOOKS OF ACCOUNT—CONCEALMENT OF PROPERTY—RES JUDICATA.

[1. On objections to the discharge of a bankrupt, it appeared that his books of account were kept in the ordinary form of books of country merchants, and that, although there might be errors in posting, a trial balance could be made with no extraordinary effort, and a competent accountant could gain a correct idea of the bankrupt's business. *Held*, that the requirement as to keeping proper books was fully met.]

[Cited in *Re Vernia*, 5 Fed. 725; *Re Frey*, 9 Fed. 384; *Re Graves*, 24 Fed. 554.]

[2. It appeared that certain erasures in such books arose from errors in the original entries, which were corrected by erasing the figures and substituting the correct ones therefor, and there was no suggestion of fraudulent intent. *Held*, that a discharge would not be refused because of such erasures.]

[Cited in *Re Frey*, 9 Fed. 382.]

[3. A member of a firm in embarrassed circumstances conveyed to his wife a large amount of property, real and personal, constituting all his individual property, at a time when a withdrawal from his assets of this amount of property was likely to embarrass him seriously in meeting his obligations. He continued embarrassed, and became bankrupt. *Held*, that such conveyance could not be upheld on the ground that it was made in consideration of a loan made to him by his wife 20 years before, and which had been barred by the statute of limitations for 14 years, and the omission from his schedules of the property conveyed was a concealment thereof, for which his discharge might be refused.]

[4. A creditor of a bankrupt, having recovered a judgment against him in a state court, filed a creditor's bill against the bankrupt and wife to have a conveyance by him to his wife set aside as made in fraud of creditors. The bill was dismissed upon the merits, and on appeal to the supreme court the decree was affirmed. *Held*, that the creditor was estopped to oppose the bankrupt's discharge, as the matter must be regarded as *res judicata*.]

[5. Creditors who have been duly notified of a bankrupt's application for discharge, and make no opposition, are regarded as consenting to the discharge; and the court will only consider whether the bankrupt has committed an act which would bar a discharge, upon specifications regularly filed in opposition thereto, upon which an issue can be joined, and the bankrupt be heard in his defense, and will not of its own motion refuse a discharge, though it may appear that such an act was committed by the bankrupt.]

[Cited in *Re Read*, 5 Fed. 722.]

[In bankruptcy. Application by James S. Antisdel a bankrupt, for discharge. On specifications filed by the Union National Bank, a creditor of the bankrupt, setting forth objections to his discharge, as follows: (1) That the bankrupt had willfully and intentionally concealed his title to certain real estate and personal property which belonged to him, by having the same conveyed to his wife at a time when he was insolvent, and knew himself to be so, and when he expected and contemplated proceedings in bankruptcy;

(2) that the bankrupt, being a country merchant, did not keep proper books of account.]

John Atkinson, for bankrupt.

Alfred Russell, for objecting creditor.

BROWN, District Judge. Substantially three objections are made to the bankrupt's books of account. 1. That they did not exhibit the condition of his business, that no trial balance could be made from them, and that Antisdel's individual account was unintelligible. 2. That there were unexplained mutilations and erasures. 3. That he had omitted to credit two or three small amounts, and had made false entries of advances to his wife.

With regard to the first objection, I fully concur in the opinion of Judge Longyear in the case of *In re Archenbrow*, [Case No. 505,] that the books of account of a merchant, whatever be their form and number, must be so kept as to give the creditors an intelligible idea of the business, and enable a competent accountant to ascertain the debtor's financial condition. If that be done, the form in which they are kept is of no importance; but if it be not done, then it is immaterial whether the omission was fraudulent or otherwise. The evidence of the experts upon the subject is somewhat conflicting—one testifying that a trial balance could not be made, and three that it could be. The books consist of a ledger, a cash-book, a journal or day-book, and are kept in the form in which the books of country merchants are ordinarily kept. While there may be errors in posting, which would prevent a balance being obtained, upon the first trial, I am satisfied that such balance could be obtained with no extraordinary effort, and that from an examination of these books a competent accountant could gain a correct idea of the bankrupt's business.

To sustain the second objection, I think it should be made to appear that the mutilations or erasures were fraudulent, and that the ruling in the case of *In re Archenbrow*, [supra,] above cited, extends no further than to the form and nature of the books. In *re Beatty*, [Case No. 1,196;] *In re Pierson*, [Id. 11,153;] *In re Burgess*, [Id. 2,153.] There are undoubtedly numerous erasures through these books, but all of them seem to have arisen from errors in the original entries, subsequently corrected by erasing the figures, and writing the corrected ones over them. There is not the slightest evidence of a fraudulent intent.

The third objection, that certain credits to which his customers were entitled were omitted and certain false entries made, is wholly unsupported by the testimony.

In support of the first specification, it was proven that on the 6th of August, 1873, the bankrupt conveyed directly to his wife, for the nominal consideration of two thousand dollars, about twenty acres of land in Union City; that on 7th of February, 1872, he con-

veyed to one Decker several lots in the same village, which were afterwards and on the 23d of July, 1873, conveyed by Decker to the bankrupt's wife, for the nominal consideration of three hundred dollars, the bankrupt at the same time discharging a mortgage of two hundred and seventy-five dollars, which he had taken from Decker upon the sale to him. He subsequently made another conveyance to his wife of land in Sherwood, and on 1st of January, 1875, gave her a bill of sale of certain lumber and stone, originally designed for a house to be erected upon the same land. It appeared that in 1869 the bankrupt went into partnership with one Leonard, buying a half-interest in the business for ten thousand dollars, without taking an inventory, or knowing the financial condition of the firm, except as he had obtained certain impressions with regard to the business from his having been assessor of taxes the year before. He supposed the firm was worth twenty thousand dollars, but never knew the amount of the indebtedness until the administrator of his deceased partner took an inventory in the season of 1874, Leonard having died 5th of August, 1874. Leonard had attended to the financial part of the business, and sometimes the bills "seemed to crowd them," as he expressed it. In 1873, when Antisdel conveyed his land in Union City to his wife, he owed the Union City National Bank, the objecting creditor, two thousand dollars. He then knew the firm was in debt from fifteen thousand dollars to eighteen thousand dollars. He had no recollection whether they had run behind or not the first or second years, though he remembers that once or twice Leonard made the remark that they were behind, and had not made anything—had even lost. It appears, however, that the merchandise account exceeded the sales without counting any profits, and at the end of the first year showed a loss of about one thousand dollars. At the end of the second year the inventory showed a loss of two thousand dollars of stock, with all the profits. His partner then, being persuaded from the accounts that the profits of the year should be some six or seven thousand dollars more than paying for the goods, decided to dissolve the firm, to which Antisdel at first consented, but afterwards proposed to withdraw from taking an active part in the business, and put a clerk in his place. The next year showed a margin of one thousand six hundred dollars in the profits, and from thence to the day that Leonard was taken sick and left the store the business was in better condition. After March, 1874, the management of the store was in the hands of Antisdel until a settlement was made in September, when the administrator found that the purchases exceeded the sales some six thousand dollars. When the inventory was taken shortly after Leonard's death, the assets footed up about twenty-two thousand

dollars, and liabilities about eighteen thousand dollars. The bankrupt continued in business until March, 1875, when he sold out to one Watkins, the inventory at this time being about six thousand dollars. The debt of two thousand dollars to the Union City National Bank was contracted before the conveyances were made by the bankrupt to his wife. The property stood in Antisdel's name at the time the loan was made to the firm of which he was a member, August 27, 1872, and the fact of his possessing this property was undoubtedly some inducement for making the loan. It was then believed to be worth between four and five thousand dollars. Allen, cashier of the bank, remonstrated with Antisdel when he learned of the transfers through the newspapers, when Antisdel remarked he ought to let his wife have the farm. Antisdel afterwards said Allen had abused him, and probably that would be the last claim that would be paid. One Bostwick testified his wife had a mortgage on the firm property, and the payments were due semi-annually; that after Leonard's death payments were not made on the mortgage, and when Bostwick applied to Antisdel for payment, he said he could not pay it, that there was no company money to pay it with, and he didn't calculate to pay it with his own money. With regard to the personal property, one Scott testified that Antisdel took him to look at the lumber piled on the land in or near Union City, and asked him to buy it. He said he didn't want him to take the lumber and keep it, but he wanted him to take it; he wanted it for building purposes, and wanted him to give a note for it, and he would take it back and give up the note; they had got the lumber out for building a house and wanted to keep it for that purpose. That the firm of Leonard & Antisdel had got to pay their debts, and he did not propose that his private property should go to pay them. Scott recommended him to convey it to his wife. Antisdel doubted whether she could hold it from his creditors, but Scott thought she could if he owed her anything, and about a week after this he learned that Antisdel had given his wife a bill of sale for the lumber and stone. In defence it was shown that Mrs. Antisdel in 1850 let her husband have eight hundred dollars inherited from her father's estate, and in 1853 four hundred dollars from her grandfather's estate, but she took no security, and no memorandum of the loan was made by either party. It appears, however, that Antisdel had promised to make good these loans to his wife, though before 1866 he had owned two farms in his own name without securing the loan to her. In 1866 he bought twenty-five acres in Union City, with the understanding that it should be conveyed to his wife, and the deeds made in her name, but by an accident this was not done, and it was not until August 6, 1873, that he conveyed this property to his wife. No expla-

nation was given for the delay. In 1873 it was calculated that the one thousand two hundred dollars originally loaned amounted to about three thousand dollars, and these three conveyances were said to have been made in payment of this amount. The personal property consisted of building material intended for the house, which was upon the lot in 1873 when the conveyance of the land was made, and she agreed to take it at four hundred dollars, though the bill of sale was not made until January 1, 1875. Under Scott's testimony, however, I regard it as extremely improbable that any such agreement was made. Both parties testified that when these conveyances were made Antisdel believed himself entirely solvent, and had always met his paper at maturity. There is further testimony tending to show that his credit was good up to about the time of his bankruptcy, and there is no direct testimony that he was actually insolvent at the time they were made. He seems, however, to have been doing a losing business, had been pressed by his creditors, and if he were a man of ordinary business sagacity could hardly fail to have been aware that he had made a bad bargain in buying into the business, and that the partnership property would in the end be wholly insufficient to pay his liabilities.

The second subdivision of section 5110 requires the court to refuse a discharge, "if the bankrupt has concealed any part of his estate or effects." This specification is satisfied by proof that the bankrupt has concealed his title to real estate, by leaving out of his schedules property that has been conveyed by him in fraud of his creditors. In *re Hussman*, [Case No. 6051;] In *re Rathbone*, [Id. 11,583, Id. 11,581;] In *re Hill*, [Id. 6,483;] In *re Goodridge*, [Id. 5,547.] The facts in this case seem to me to fall within the ruling of the supreme court in *Humes v. Scruggs*, 94 U. S. 22, and to establish a case of a conveyance made with intent to hinder, delay, and defraud creditors. The court in his case seems to me to establish a most salutary principle in holding that "if the money that a married woman might have had secured to her own use is allowed to go into the business of her husband, and to be mixed with his property, and is applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in his business, and is thus used for a series of years, there being no specification when the same is purchased that such real estate shall be the property of the wife, the same becomes the property of the husband for the purpose of paying his debts; he cannot retain it until bankruptcy occurs and then convey it to his wife; such conveyance is in fraud of the just claims of the creditors of the husband." See, also, *Phipps v. Sedgwick*, 95 U. S. 3. Putting the facts in this case in the most favorable light for the bankrupt, it appears that he received this money of his wife without

giving her security, or any written evidence of the loan; that he held it in his possession for upwards of twenty years, having in the meantime purchased land which he might have conveyed to his wife in satisfaction of the debt, but which he held in his own name, and thereby acquired credit at the bank; that the loan was made, partly at least, upon the faith of this security, and that he made the conveyance to his wife at a time when he was heavily indebted, and when a withdrawal of this amount of property from his assets was likely to embarrass him seriously in meeting his obligations. Although it does not appear that he had failed to meet his paper at that time, he continued embarrassed, and finally was compelled to wind up his business in a court of bankruptcy. This is regarded as sufficient evidence of insolvency as to existing creditors, whose debts remain unpaid. *Bump, Fraud. Conv.* 294. To hold that a member of a firm in embarrassed circumstances may convey all his individual property to his wife in payment of a debt barred by the statute of limitations for fourteen years is a premium upon fraud I am unwilling to offer. If such a transfer be sustainable at all, I think it should be made within a reasonable time, at least within the six years fixed by the statute. But it appears by the record in this case that Charles T. Allen, cashier of the Union City National Bank, the opposing creditor, in June, 1875, recovered a judgment in the circuit court for the county of Branch against the bankrupt for the debt which was proved by the bank in this court; that he afterwards filed a creditor's bill against Antisdel and his wife, praying that these conveyances be set aside and declared to have been made in fraud of creditors; that the case went to a regular hearing upon pleadings and proofs, and his bill was dismissed, and upon appeal to the supreme court, the decree of the circuit court in that regard was affirmed. It is insisted that the objecting creditor is estopped by this decree to claim here that this conveyance was made in fraud of creditors.

Three replies are made to this defence:

1. That the proceedings are not identical. A similar question arose in *Re Hussman*, [Case No. 6,951,] in which the opposing creditors pleaded a decree of a state court setting aside a similar conveyance as fraudulent in bar of a discharge, and the learned judge held it to be a case of *res adjudicata*. The question litigated in the state court was practically the same, and I see no reason why its judgment does not operate as an estoppel. See *Downer v. Rowell*, 25 Vt. 336. The cases of *Jones v. Milbank*, 6 Lans. 73, and *Bradley v. Hunter*, 50 Ala. 265, evidently have no application.

2. That the parties are not identical. But it appears distinctly by the testimony in this case, that Allen was cashier of the Union City National Bank, that the foundation of his suit was the debt proved by the bank in

this case, and that it was brought by Allen in his own name as trustee for the bank. Under these circumstances it is quite clear there is an estoppel as between the defendant and the person for whose use the suit is brought. *Freem. Judgm.* § 173; *Hodson v. McConnel*, 12 Ill. 170; *Peterson v. Lothrop*, 34 Pa. St. 223; *Calhoun v. Dunning*, 4 Dall. [4 U. S.] 120; *Rogers v. Haines*, 3 Greenl. 362; *Boynton v. Willard*, 10 Pick. 166.

3. That admitting the question is *res adjudicata* as between the opposing creditor and the bankrupt, it is insisted that the court is bound of its own motion to refuse a discharge, wherever it can see that the bankrupt has committed an act which if properly pleaded would bar a discharge. I know of but one case which tends to support this proposition, *viz.*: In *Re Wilkinson*, [Case No. 17,667,] in which the court, upon inspecting the record of the bankrupt's examination by the assignee, discovered that he had lost a large sum of money in gambling, and refused a discharge, although creditors interposed no objection. The circumstances of this case were such as to appeal strongly to the discretion of the court. The question does not seem to have been argued, and the matter apparently did not receive any very careful consideration. The other cases cited by counsel lend no support at all to this proposition. In *Re Houghton*, [Id. 6,730,] the only point considered was, whether the court could permit opposition to be made after the return day of the order to show cause, where a creditor, who ought to have considered himself the representative of all the creditors, had filed specifications of opposition, and then withdrew them. In the case of *In re Palmer*, [Id. 10,678,] the bankrupt obtained the consent of a sufficient number to entitle him to his discharge, but desiring to obtain also the consent of another creditor, "to strengthen his application," he gave him a note for \$40 with security, and in consideration thereof the creditor signed his consent; another creditor opposed the discharge because of this transaction, and the learned chief justice held that, although there was a sufficient number and amount without this, he was still precluded from obtaining his discharge. It is true that he remarks in the course of his opinion that "the courts are as much bound by the provisions of the act as the bankrupt himself, and if it appears in the regular course of the proceedings that an applicant for a discharge has failed in any particular to perform his duties as a bankrupt, the application must be refused." This language, however, must be considered in connection with the facts of the case, which were far from sustaining the position that the court is bound of its own motion to refuse a discharge. The better opinion seems to be, that creditors who have been duly notified, and make no opposition, are regarded as consenting to a discharge; and that the court will only consider whether the bank-

rupt has committed an act which would bar a discharge, upon specifications regularly filed in opposition thereto. *Creditors v. Williams*, [Case No. 3,379;] In *re Sullivan*, [In *re Sutherland*, Case No. 13,640;] In *re Schuyler*, [Id. 12,494;] In *re Rosenfeld*, [Id. 12,057.] The books are full of cases holding that the specifications must not be vague and general, but distinct, precise and specific, and so framed as to advise the bankrupt what facts he must be prepared to meet and resist. In *re Rathbone*, [Id. 11,590;] In *re Hill*, [Id. 6,482;] In *re Hansen*, [Id. 6,030;] In *re Waggoner*, [Id. 17,037.] But of what use all this particularity in framing an issue, if the court may disregard the issue thus framed, and refuse a discharge *mero motu* if it appears the bankrupt has committed any other act not covered by the specifications? Suppose there be a trial by jury upon the specifications; that upon such trial it should appear that the bankrupt had not committed the act alleged, or that a creditor was estopped to take advantage of it; but, that he had committed some other act which would bar his discharge; would the court be bound to refuse a discharge, notwithstanding the verdict of the jury that the specifications were not sustained. It seems to me that the statement of this proposition is its own answer. When the bankrupt has taken the required oath, I think a discharge should only be refused when some creditor has filed specifications of his opposition thereto upon which an issue can be joined, and the bankrupt be heard in his defence. I do not feel authorized in this case to refuse a discharge, but will direct it to be withheld for a few days to permit other creditors to intervene in case they should desire to do so. The point upon which these specifications are overruled is a technical one, and it may be that the court would permit other creditors who have awaited the result of this proceeding to intervene and take up these specifications in their own behalf.

ANTISDEL, (HAWES v.) See Case No. 6,234.]

Case No. 491.

The ANTOINETTA C.

[5 *Reu.* 564; 15 *Int. Rev. Rec.* 115.]

District Court, S. D. New York. March, 1872.

DAMAGE TO CARGO—PERIL OF THE SEA.

Casks of bleaching powders were stowed in the hold of a vessel, against the skin, without dunnage. Water, which came in through the deck and water-ways, reached the casks and wet their contents, which rotted the wood of the casks. The casks were stove by reason of this, and the bleaching powders were mixed with the water, and this water reached some bundles of bags and injured them. The bags

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were being carried under a bill of lading which excepted the dangers of the seas: *Held*, that the injury to the bags was not caused by the dangers excepted, and that the ship was liable for the damage.

[Cited in *The H. G. Johnson*, 48 Fed. 697.]
[See note at end of case.]

In admiralty.

Townsend Scudder, for libellants.
James D. Keymert, for claimant.

BLATCHFORD, District Judge. This libel is filed to recover for the damage caused to sundry bales of empty grain bags, while being transported under a bill of lading, by the bark *Antoinetta C.*, from Liverpool to New York. The libel alleges that the goods were damaged by contact with sea water and with certain bleaching powders on board of the bark, and that the damage was not caused by the perils of the seas, or by any of the perils excepted in the bill of lading. The answer alleges that the damage was caused by the accidents and perils of the seas.

The bill of lading acknowledges the receipt of the bales of empty bags in good order, and contracts for their delivery in like good order, the dangers and accidents of the seas and navigation excepted. That the bales of bags came out of the vessel in a more or less damaged condition, is shown. The injury arose from the destruction of the fibre of the bags, by their having been wet by water in which bleaching powder, or soda ash was dissolved. The burden of proof is on the claimant to show that this was a peril of the sea. There was on board both bleaching powder and soda ash, in casks. Some of the casks of bleaching powder were stowed against the skin of the ship, without any dunnage. The bleaching powder became wet, the water penetrating through the wood of the casks. The effect was to rot the wood, and break it, and discharge some of the powder, which mixed with the water and became dissolved in it, and reached the bags, and saturated and burned them. The water which wet the bleaching powder leaked through the deck and water-ways. If the bleaching powder had remained dry, there would according to the evidence, have been no such result as there was. I cannot regard it as a peril of the sea, to stow casks of bleaching powder in such relation to bales of grain bags, that the casks, being against the skin of the ship, may become wet, and the bleaching powder become wet, and destroy the wood of the casks, so that, by the rolling of the vessel, the casks will be stove and discharge their contents so as to reach and injure the bales of bags. The loss is not shown to be one which could not be guarded against by the ordinary exertion of skill and prudence on the part of the ship owner. *The Reeside*, Case No. 11,657; *Bearse v. Ropes*, Id. 1,192.

There must be a decree for the libellants,

with costs, with a reference to a commissioner to ascertain the damages.

[NOTE. As to the point that a carrier is bound to observe reasonable care in loading and stowing chemicals or bleaching powders, see *The St. Patrick*, 7 Fed. 125; *The Kate Irving*, 5 Fed. 630; *The Pharos*, 9 Fed. 912.]

Case No. 492.

The ANTONA.

[Blatchf. Prize Cas. 572.]

District Court, S. D. New York. Dec. 23, 1863.

PRIZE—ATTEMPT TO VIOLATE BLOCKADE.

Vessel and cargo condemned for an attempt to violate the blockade.

In admiralty.

BETTS, District Judge. The steamer *Antona* and cargo were captured off Cape San Blas, Florida, by the United States war vessel *Kittatinny*, January 6, 1863, as prize of war. The vessel and cargo having been appropriated by the government at the appraised valuation of \$76,353.09, a libel was filed for the condemnation thereof, May 25, 1863, and the warrant and monition were thereupon made returnable in court June 26th thereafter, and, being served by publication and returned in court by the marshal, on motion of the United States attorney, in open court, the default of all persons interested in the said vessel or cargo, in not appearing to the said monition, was ordered and taken. By the joint consent in writing, of the United States attorney and the counsel for the captors, executed July 2, 1863, and on application of the proctors for the claimants, the default was vacated by order of the court, and, on the 3rd of September thereafter, a claim and answer, by consent of the United States attorney, was filed on behalf of J. and T. Johnson, merchants of Liverpool, England, owners of the vessel and cargo, by Edwin Gerard, their agent. The answer and claim denies in general, all the allegations made in the libel, and the jurisdiction of the court over the cause. It admits the taking of the vessel and cargo for the use of the United States, but charges that the same were unlawfully taken, without the intervention of any prize tribunal, and were unlawfully converted by the captors in the port of New Orleans; and it denies that the prize property was ever duly appraised by a board of naval survey or otherwise, or was brought within the jurisdiction of this court. The test oath made by the agent, solely, asserts no fact in relation to the ownership of the vessel or cargo, or the acts of the captors in its seizure or disposal, as within his personal knowledge.

The case was brought to hearing at the present term, upon the proofs in preparatory and the ship's papers and the argument of the United States attorney, no brief or

[Reported by Samuel Blatchford, Esq.]

argument on the part of the claimants having been furnished to the court, nor any application for further proofs made by the claimants.

The certificate of British registry, dated Glasgow, April 24, 1860, states that David Sloan and others, of the county of Lanark, were the owners of the Antona, and an indorsement on the same registry shows that George Wigg, of Liverpool, was on the 16th of October, 1862, the owner of 64 shares of the vessel. The shipping agreement with the crew, dated Liverpool, October 31, 1862, is for a voyage from that port to Havana and Nassau, N. P., and back to a port of final discharge in the United Kingdom. There is a charter party, dated October 23, 1862, from George Wigg, owner of the vessel, (George Grindle, master,) to John and Thomas Johnson of Liverpool, for a voyage to Nassau and Havana, with liberty to touch at intermediary ports for coals, &c. No mention is made in the shipping papers, of the destination of the vessel to Matamoros. There is a clearance of the ship from Liverpool, November 1, 1862. The bills of lading of the cargo are all drawn to order, in blank, for the delivery of the cargo at Nassau, and no designation is made on them, or contained in any papers of the vessel respecting the cargo, that it comprehends any other than lawful merchandise and ordinary supplies for the ship's company, or that it is deliverable elsewhere than at Nassau. The prize commissioners, on the 14th of September, 1863, reported to the court a sworn inventory of the lading of the prize, as consisting, in gross, of 618½ chests of tea, 1 case of needles, 1 case of sample shoes, 40 cases of boots and shoes, 541 cases of brandy, 1 case and 2 barrels of sample crockery, 1 case of army buttons, 1 case of calf skins, 4 barrels of salt provisions, 4 cases of clothing, 1 cask of files, 1 case of assorted brushes, 3 coils of hemp, 2 gentleman's coats, 29 casks of wine, 36 iron cans (patent) of caustic soda, 29 crates of crockery, and 5 cases of drugs.

The facts testified to by the ship's company, on the depositions in preparatorio, on the 12th, 14th and 15th of May, 1863, in their clear bearing and results, prove that the voyage undertaken by the Antona was set on foot and conducted with the design to run the blockade of the port of Mobile, and furnish her cargo to the use of the enemy within the rebellious states.

The master deposes that the capture of the prize was made January 6, 1863, at 11 P. M. in latitude about 23° 50' north, and longitude 86° 11' west; that the vessel was taken to the blockading squadron off Mobile, thirty-six or forty hours after her capture; that she was bound to Matamoros; that, when captured, she was on her way back to Havana, in consequence of having had to throw coal overboard to lighten her, because of having had heavy weather; that

the voyage began at Liverpool, and was to have ended at Nassau; that from Havana the vessel went, on the 31st of December, towards Matamoros; that he had been at anchor before the capture, waiting for daylight to see the land, having been driven back northward in the heavy weather; that he wished to ascertain about his chronometer before returning to Havana; that, from the loss of coal, he would not have been able to complete the voyage to Matamoros; that he had just raised his anchor when the capturing vessel came in sight; that he believes that the cargo was consigned to order, on his arrival at Matamoros; that he expected these instructions from his agents at Nassau; that he should have waited for those instructions before disposing of his cargo; that he took a Gulf pilot on board to give him information, as he (the master) was unacquainted with the Gulf navigation; that he does not know the name of that pilot, or that his name was entered in the log-book; that when he raised his anchor he steered from the vessel which came in sight, and observed that she followed him 13 or 14 hours; that the Antona altered her course during the chase about 2½ points; that she had always been on the course of her destination on the ship's papers until he determined to return to Havana, in consequence of having been exposed to severe weather; and that the destination of the vessel at the time of her capture was Matamoros.

The testimony of Grindle, the master, has been stated more fully, to give the claimants the largest benefit they can derive from the statements and exculpation of the commanding officer under whose charge and directions the vessel and cargo were when captured. Only three other witnesses were examined—Horace Pontet, rated as boy on board the vessel, on the 12th of May, 1863, and William Cumming, first mate, and John Patterson, carpenter, both on the 15th of May, 1863.

The boy states no facts of any moment, not appearing to know anything other than outside occurrences common to a trading voyage from a port in England to another in the Gulf of Mexico.

The testimony of the mate and the carpenter is directly in conflict with that of Grindle, the master, and, if credited, proves beyond doubt that the design and effort of the master, after reaching Havana, were to run the vessel and cargo into the blockaded port of Mobile, and, also, that such was the purpose of his voyage from its inception. The facts stated by Cumming and Patterson are in essential accordance, where they speak of things known to both of them, and they only differ on matters having a material bearing upon the guilt or innocence of the enterprise, where they relate particulars as being within their separate individual knowledge. For instance, Patterson, the

carpenter, asserts it as within his knowledge that the vessel was in part laden with powder; and the mate is more positive and exact as to the movements of the vessel and soundings of her course taken along the shore to guide her progress into Mobile. Both of the witnesses are very clear and positive in their asseverations that the Antona went from Havana with the design to run directly into Mobile, and never was bound for Matamoras, or contemplated going to Nassau. They assert that the master took on board a man who was understood to be a resident of Mobile, as a Gulf pilot; that they were paid each a considerable sum of money at Havana, by the master, to keep silence as to the purpose and destination of the vessel; and that it was understood by the ship's company on board that she was to go where she had no right to go. Cumming, the mate, says that when he inquired of the master after leaving Havana, where the vessel was going to, his reply was that it was none of his business; that he had never heard that she was bound to Matamoras; that, when captured, was wide off the course given upon her papers and was going up along the coast towards Mobile; that her course was altered, by order of the master, 12 or 14 points on the appearance of the capturing vessel, and that she was chased. Patterson says that it was the common report on board, after leaving Havana, that the vessel was to run the blockade. Cumming says that the Antona made all sail to avoid being taken by the capturing vessel, and that 31 shotted guns were fired at her before she came to.

The log-book shows that the course of the Antona, after she left Havana, until she anchored close in on the Florida coast in 5 fathoms of water, on the 5th of January, was, generally, northwest or northwest by west.

From all the facts in proof it is clear, in my opinion, that, when arrested, the vessel was actively engaged in the endeavor to enter the port of Mobile, in violation of the blockade known by her master to be then maintained there. A decree of condemnation and forfeiture must be entered.

Case No. 493.

ANTONE v. HICKS.

[2 Lowell, 383.]¹

District Court, D. Massachusetts. Dec. 1874.
SEAMEN—WAGES—SEPARATION FROM SHIP WITHOUT FAULT.

1. A seaman in the whaling service, who, having become separated from his ship by no fault of his own, fails to rejoin her from causes which he cannot control, is entitled to wages to the time of separation, and the expenses of return to his country, as if the ship had left him behind for sickness.

¹[Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

2. Where the master sold the effects of such a seaman by auction, and there was no evidence of negligence or bad faith on his part, the owner of the ship was held liable only for the amount realized by the sale.

[See *Five Seamen v. The Fair American*, Case No. 4,846; *Vencock v. McCall*, Id. 10,904; *Nevett v. Clarke*, Id. 10,138.]

In admiralty. The libellant was shipped at New Bedford in July, 1869, on board the defendant's ship *Mermaid*, for a whaling voyage not exceeding four years in length. In February, 1870, when the vessel was cruising off South Australia, the fourth mate's boat, with six men, was separated from the ship, and, after being out for two days with a very insufficient supply of food, they made the land at a point where there were no inhabitants. Three of the men walked overland to George's Bay, where the ship was expected to be found, and joined her. This took them about a week, and they were on the sick list after their arrival. The fourth mate and the remaining two men, of whom the libellant was one, went in the boat to Vasse, the nearest port, which was about two hundred and fifty miles from George's Bay by water, and was the only port they could make with the wind they had. The master's next cruise took him within about one hundred miles of Vasse, and he would have gone in there for the boat and the men, but that the wind was ahead and blowing hard, and he thought it would take too much time to wait for a change of wind. The libel set up that the master neglected his duty in not calling for the libellant at Vasse. The answer averred that the libellant deserted the ship.

C. T. Bonney, for libellant.

O. W. Clifford, for respondent.

LOWELL, District Judge. A case tried upon depositions, taken four years after the events occurred upon which the dispute arises, is not in the most satisfactory position for clearing up doubtful constructions of conduct. I think the preponderance of the evidence is, that the fourth mate, and the two men with him, not only did not desert the ship, but were not understood to have deserted her. The master knew where they were before he was told, which is pretty good evidence that they were in the right place. He knew they would be there when he called for them, and intended to call. He says he received a letter from the consul at Vasse, promising to detain the boat until he came. But the letter is not produced; and there is not the least reason to believe that the men had any intention of leaving Vasse or removing the boat. They remained there for several weeks after the ship had left them behind. The master does not testify that he entered the mate and men as deserters on his log-book, or reported them as such to the nearest consul, or to the

authorities at home; all which he was bound to do, if he believed the truth to be so. Neither the log-book nor the copy of the articles that was on board the ship is produced. I do not know when he considers them to have deserted. Certainly not when they determined to stay by the valuable whaleboat and gear, rather than to take the chances of a week's journey overland in an unknown country. What were they to do? They could not stay in the uninhabited spot, where they first landed, without starving to death. Three of them tried the overland journey, and three sought the nearest and only available port. The former were the more fortunate; but I do not know that their course was more reasonable at the time it was undertaken.

It is clear to a reasonable intent that the ship deserted the men, and not the men the ship. Then the question remains whether this was such a breach of duty or contract on the part of the master as will entitle the libellant to damages. I am disposed to believe that the master decided this matter according to his best judgment. He had no interest to leave the boat or the men behind him; and I may well assume that his decision was in accordance with the interests he was bound to consult. In this I follow the same rule that I have applied to the conduct of the fourth mate, when he determined to make sail to Vasse, instead of leaving his whaleboat upon the beach, and going overland to George's Bay. It was not a case in which humanity required that the men should be rescued at all hazards. They were in a country where they could take care of themselves, and had some opportunities to obtain employment and a passage home, though such opportunities do not appear to have been very frequent. At all events, they did not apply for relief to the consul, or the person who acted as such. What are the rights of the parties in such a state of things? By the articles an officer or man who is prevented by sickness or death from performing the whole voyage is to have his lay in the proportion which the time he served bears to the whole length of the voyage. This has often been held to be a reasonable stipulation. The same rule was adopted by Judge Sprague, where a minor justifiably but voluntarily left a whaling-ship in a foreign port. *Lovrein v. Thompson*, [Case No. 8,557.] Where two seamen, on occasion of a collision, induced by sudden and reasonable fear, jumped on board the colliding vessel, and the master of their ship was unable to lie by for them, it was held that they had earned wages to the time of their separation from the vessel. *Hanson v. Rowell*, [Case No. 6,043.] In that case the judge said, that if the master had left them on board the foreign ship, without sufficient excuse, they should have had wages for the whole voyage.

This case does not seem to be precisely

covered by either of these decisions. The men, in my opinion, failed to rejoin the ship, not only justifiably, but by a sort of compulsion. I do not find in the evidence, what I understand to be argued, that a vessel sailed from Vasse to George's Bay while the men were waiting at the former place, and that by not taking passage in her they neglected a known opportunity to rejoin the *Mermaid*. If the fact is so, it is not proved. As the case stands, the question was, whether the three men should undertake the voyage to George's Bay in their whale-boat, or wait for the ship to pick them up; and both parties acted on the supposition that the ship would call at Vasse, as she might easily do under ordinary circumstances. Notwithstanding these differences, the case is very like many in which the sickness of a seaman requires him to be left behind without any fault of his own, and he cannot rejoin the ship, though, if the master could wait a day or two, he might resume duty. In such a case the owners are bound to pay the expenses of the seaman's return to his own country. *Brunent v. Taber*, [Id. 2,054.] This return of seamen is a policy very deeply ingrained in our commercial law, and is fairly applicable to a case of this kind. In this case, however, there is the circumstance that the fourth mate found himself in possession of a boat and its equipments, which the master values at \$230. After he had been left at Vasse, he sold these things for some price not known to the libellant, and out of the money he appears to have paid the board of himself and the other men. This, perhaps, ought to be considered an equivalent for the passage money, in the absence of evidence of what the expenses were or the passage money would have been.

Then comes the question of the libellant's clothes. The master sold them by auction to the other men, according to a usage which has, I suppose, been of long standing in these voyages, in cases of death or desertion. By the shipping act, passed after the time of these transactions, a master is authorized to sell, in this mode, any clothes or effects of a seaman dying during the voyage. Act June 7, 1872, § 43, (17 Stat. 271.) Following out the analogy of an involuntary breaking up of the service, the master would seem to have adopted a justifiable course in disposing of the libellant's effects by auction. The amount realized seems small; and if there were reasons to suppose that any error could be shown in the account, or any negligence in keeping the goods, I should be disposed to permit an inquiry upon these matters. As the evidence stands, I find myself authorized to decree only the sum received, with interest, which in all is thirty-three dollars. I understand it to be admitted that the libellant had been paid more than his lay would be for the eight months of his service. Decree for the libellant for \$33 and costs.

Case No. 494.**ANTRIM v. KELLY.**

[4 N. B. R. 587, (Quarto, 189.)]

District Court, E. D. Missouri.

BANKRUPTCY—FRAUDULENT CONVEYANCE—INDEBTEDNESS OF GRANTOR.

[A voluntary settlement upon his wife and children, made by a member of a firm financially embarrassed, may be set aside as fraudulent, although the debts of the firm existing at the time were subsequently paid in due course of business, where they were met by contracting other obligations, which resulted in bankruptcy.]

[Cited in Spaulding v. McGovern, Case No. 13,218.]

[In equity. Suit by the assignee in bankruptcy of the firm of Antrim, Sweet & Co., against Kelly, as trustee, and the wife and children of the bankrupt, Antrim, to set aside as fraudulent a conveyance made by Antrim to Kelly in trust for the wife and children of Antrim.]

It appeared that the firm of Antrim, Sweet & Co. had procured an extension of a part of their commercial paper for 60 or 90 days; that thereafter on May 15, 1867, Antrim, who owned real estate valued at \$60,000, part of which was incumbered to the amount of \$18,000 by deeds of trust made to raise money for the firm, conveyed part thereof valued at \$20,000 to Kelly in trust for his wife and children. The firm met their suspended paper at maturity and all other debts until July 28, 1868, when they filed their petition in bankruptcy. The assignee brought suit to set aside the settlement, which the defendants alleged was executed when Antrim was solvent, and in fulfillment of a promise made when he purchased the property and before he went into business. Under the Missouri statutes a voluntary conveyance duly recorded, unless made with intent to defraud creditors, is valid as against subsequent purchasers and creditors.

THE COURT held that, since the obligations of the firm were met by assuming other obligations which resulted in bankruptcy, the conveyance should be set aside as a fraud on subsequent creditors, as it took away a large proportion of assets which should be applied to creditor's claims.

Case No. 495.**ANTRIM'S CASE.**

[20 Leg. Int. 300; 5 Phila. 278; 11 Pittsb. Leg. J. 49.]

District Court, E. D. Pennsylvania. Sept. 9, 1863.

WAR—MILITARY DUTY—EXEMPTION—FINAL DECISION BY BOARD—CONCLUSIVENESS—ACT OF MARCH 3, 1863

1. A statute which, in relation to summary proceedings before a military commission, en-

¹[Reprinted from 20 Leg. Int. 300, by permission.]

acts that its decision shall be final, does not necessarily make the decision conclusive as to the right which was in question.

2. The provisions of the 14th section of the act of congress of March 3, 1863, c. 75, [12 Stat. 733.] requiring the presentation, by drafted persons, of all claims of exemption to the board of enrolment, and making the board's decision final, do not, in the case of an exempt whose claim of exemption has been duly presented to the board and disallowed, preclude the subsequent consideration, under a writ of habeas corpus, of the question of his right of exemption.

3. Quere: Whether the question will be considered under such a writ at the instance of a party, who, having had proper notice and opportunity, has not presented his claim of exemption to the board, or has failed to comply with its reasonable regulations, of which he has had proper notice, or of a party who, after a rejection of such claim, and full subsequent time and opportunity to obtain an unobstructed judicial investigation of the question of alleged right, neglects to apply for the writ until after he has been mustered into military service.

On habeas corpus.

CADWALADER, District Judge. The provost marshal of the proper district returns to the habeas corpus that the petitioner was duly drafted and notified; appeared before the board of enrolment asking exemption as the only son of a widow dependent on his labor for support, [see 2 Stat. 731, § 2;] was duly heard upon his allegation and evidence, and that his claim of exemption was finally disallowed; that he subsequently appeared and reported himself for duty; received his uniform; asked and obtained leave of absence for a time not quite expired when the return was made; and, though not in the respondent's actual custody, was still under his control.

No question as to the effect of the occurrences posterior to the disallowance of the claim of exemption is properly raised by this return. These occurrences are not so stated in it that a traverse of them is necessary. Whether proof of them will ultimately be receivable against the petitioner, if proofs on his part of his alleged right shall have been admitted in the first instance, may be a question to arise hereafter. In the meantime, the question of the sufficiency of such a statement of these occurrences in a return is different. As acts of mere submission to military authority, where obedience would have been compellable, they can add nothing to the effect otherwise attributable to the decision of the board. His temporary acquiescence in it was no waiver of right. But, if the occurrences are mentioned for the purpose of showing that, notwithstanding his previous claim of exemption, he afterwards waived any right of exemption that he may have had, so as voluntarily to become a soldier under the draft, the voluntary waiver should have been directly averred. In a return, a statement of occurrences merely tending, more or less, to

prove such a fact, is not of equivalent effect. Sometimes, indeed, a fact consists of a series of connected, or mutually dependent, occurrences. They may then be stated in detail. But such a specification of the details of a fact is different from a mere specification of evidence, tending to prove it. The proposition or fact relied on, whether stated in detail or in that general form which is ordinarily more proper, should be set forth substantively so that the statement, if true, shall absolutely suffice in law. The occurrences mentioned in this latter part of the return, under the most favorable view of it, may or may not, independently of those previously stated, suffice to establish a waiver of right. This part of the return, therefore, does not require a traverse. The objections to it might not apply to returns properly framed in order to meet cases of drafted men who, after proper notice, have omitted to appear before the board and claim exemption, or of those appearing and claiming it, but omitting to comply with proper regulations of the board, of which sufficient information has been given. To cases of drafted men who, after the board's disallowance of their claims of exemption, have had fair time and opportunity to obtain elsewhere the judicial investigation of their alleged rights of exemption, and have not availed themselves of such opportunity, returns might perhaps be so adapted as to prevent unnecessary judicial interference with consummated military organizations embracing such parties.

The question upon the return is whether the military board's disallowance of the claim of exemption must be traversed; in other words, whether this board's decision that there was no right of exemption precludes inquiry here as to the existence of the right. This question depends upon the effect of the fourteenth section of the act of 3d March, 1863, c. 75, which enacts "that all persons drafted and claiming exemption from military duty on account of disability or any other cause, shall present their claims to be exempted to the board, whose decision shall be final." [Section 14, 12 Stat. 733.] Cognizance of the application for exemption, if taken, must be judicial, however special the jurisdiction or summary the proceeding. The point in question is whether the decision is or is not conclusive elsewhere as to the right of exemption. This depends on the effect of the word final. It certainly imports that the decision of the board shall not undergo executive or other revision. The decision is, relatively to military jurisdiction, conclusive as well as final. Therefore a decision of the board in favor of the claim of exemption, is necessarily conclusive as to the right of exemption. The question will be whether the effect of the words should be extended so as to make a decision against the claim equally conclusive against the right. The consideration of this

question will involve the inquiry whether an enactment that the decision of such a tribunal shall be thus conclusive, would be constitutional.

The act of 3d March, 1863, has provided for the organization of an exclusively national military force by enrolment, draft, and, where necessary, impressment; that is to say, compulsion to serve. The words of this act, which might otherwise be of doubtful import, must be interpreted so that usurpation of power, beyond the legislative authority conferred by the constitution, may not be unnecessarily imputed to congress. The case has been commendably argued on this point, upon the words of the constitution and of the statute, without any such references to congressional debates, or to debates of those who drafted the constitution, or of those who proposed or discussed its early amendment, as, of late, have, perhaps, been too frequent. Such references to extrinsic matter, it is true, are not always improper. They are sometimes of legal assistance in explaining the meaning of words which are to be interpreted. This meaning may depend upon some relation of the words to occurrences of which historical memorials are preserved in the reports of cotemporaneous discussions. Where, moreover, the meaning of a word is doubtful, or has undergone change since the date of its use, the language of such discussions may sometimes serve, in some degree, the purpose of a glossary. Such cases are, however, not exceptions from, but, on the contrary, exemplify the rule that the intention is ascertainable from the words only. Under this rule, the proper inquiry is, not what may, from extrinsic sources, appear to have been intended by the men whose words are in question, but what was the legal meaning and application of the words when used. The rule applies where a single person has been the lawgiver, and with greater force of reason where a numerous assembly has made a law; and is applicable especially to the constitution of the United States and the amendments. This constitution was, when finished by its framers, as Ch. J. Marshall said, "a mere proposal without obligation or pretension to it." [M'Culloch v. State of Maryland,] 4 Wheat. [17 U. S.] 404. We read in the subsequent proposal by the first congress, of amendments that the conventions of a number of the states had, in adopting the constitution, expressed a desire for "declaratory and restrictive" additions, (1 Stat. 97); and Ch. J. Marshall has reminded us that almost every convention had recommended such amendments. [Barron v. Mayor, etc., of Baltimore,] 7 Pet. [32 U. S.] 250. The omission to specify which amendments were declaratory and which restrictive enabled persons who differed most widely in opinion as to the effect of the original constitution to concur in adopting ten of the series of

amendments proposed. Otherwise they would not have been adopted. The hope of reconciling the differences of opinion was in future judicial decision upon the constitution and amendments without any consideration of extrinsic matters. The powers conferred by the constitution upon congress to raise and support armies, and make rules for their government, are distinct from the powers which are conferred in it as to the militia of the respective states. Until the act in question, the national armies had been raised by voluntary enlistment. The system of enrolment and draft had long been matured as to the militia of the states. But, until the summer of 1862, the utmost penalty for not serving when drafted from such militia for the service of the United States had been pecuniary, with a limited imprisonment for non-payment. The act of congress of 17th July, 1862, [12 Stat. 597,] authorized impressment into the military service of the United States of those persons drafted from the militia under that act, who, when ordered to attend at the place of muster, disobeyed. The specific power of impressment had not been previously conferred. But, under the former system, though the fine for not serving had, when received, been considered an equivalent for service, the payment had nevertheless been enforced, or the penalty of imprisonment inflicted by courts-martial, when the money was not otherwise collected. The constitutionality of this former jurisdiction of courts-martial may be considered established. *Houston v. Moore*, 5 Wheat. [18 U. S.] 1. It would not have been constitutional if disobedience to attend at a place of muster had not been a military offence. Congress, unless it had the power of absolutely subjecting a drafted person to military rule from the time of the draft, could not have thus made his disobedience before he was mustered into service a military offence. The act of congress of 1795, [1 Stat. 424, § 4,] which fixed the time of arrival at the place of rendezvous as the period of the commencement of the military service, might, constitutionally, in the opinion of the supreme court, have made the time of draft the period. [*Houston v. Moore*,] 5 Wheat. [18 U. S.] 17. The constitutionality of the act of 17th July, 1862, when the question was considered here in March last, in *M'Call's Case*, [Case No. 8,669,] appeared, therefore, to be established by authority. If the question had been thought an open one, the same view of the effect of the constitution would have been taken.

The act of 3d March, 1863, has adopted a like system, on an extended scale, for the purpose of raising national armies independently of the militia of the states. Under the former laws which have been mentioned, a question such as that now under consideration could not arise. The question under those laws could only have been that of a

military court's exercise of jurisdiction over a person who, having been lawfully drafted, already owed military service. There could not have been any dispute that the primary question whether he had been lawfully drafted or was liable to serve, was open to decision by the ordinary tribunals under a writ of habeas corpus. Here, however, the question is whether a military commission can so decide the original question of liability to serve, as absolutely to deprive all other tribunals of cognizance of it.

The enactments of the law in question are not so arranged that its provisions for the preparatory enrolment, and those for the draft, are always separated. They must, however, be kept distinct when they are considered with reference to the constitution. The most unlimited system of mere enrolment could not be constitutionally objectionable; but a system of drafting might be arbitrary and latitudinarian to such an extent as to encroach upon constitutional rights. That the framers of the constitution had inherited the parent nation's jealousy of the power to raise and support armies, appears from the prohibition to appropriate money to that use for a longer term than two years. The constitutional authority to enact the law which is under consideration was derived exclusively from this power to raise armies. It cannot be enlarged under the authority which the constitution also confers to make all laws necessary and proper for carrying the powers delegated, this one included, into execution. This incidental authority cannot extend beyond the limits of the principal power. A government previously republican, whose armies are, upon executive requisition, to be raised under a system of draft and impressment, administered without any restriction as to persons liable to serve, and without any limitation of the time of service, may, at the will of the chief executive magistrate, become an established military government. The constitution guaranties to every state a republican form of government. The supreme court have said that a military government, permanently established in a state, would not be republican, and that "it would be the duty of congress to overthrow it." [*Luther v. Borden*,] 7 How. [48 U. S.] 45. Congress, of course, could not establish such a government for the whole country.

The general provisions of the act are not unconstitutional. Those who are liable to do military duty under it are, in the first instance, described as all able-bodied male citizens, and persons of foreign birth who have duly declared their intentions to become citizens, between the ages of twenty and forty-five years, except persons rejected as physically or mentally unfit, and those exempted under seven other enumerated heads; the first including designated magistrates and other principal officers of the United States, and the others including re-

spectively the private persons, whose rights of exemption are specified. One of them is the only son liable to military duty of a widow dependent upon his labor for support. No persons not thus excepted are to be exempt; but no person convicted of any felony can be enrolled or permitted to serve. The preparatory enrolment is biennial, to be made in the present year, and hereafter in each alternate year, and to embrace those only whose ages will be, on the first of July in every year in which it is made, between twenty and forty-five years. They are to be enrolled in two separate classes, the first comprising all between the ages of twenty and thirty-five years, and all who are above the age of thirty-five and unmarried; the second class comprising all other persons liable to do military duty; and those in the second class are not, in any district, to be called into service until those of the first class shall have been called. All persons thus enrolled are subject for two years after the first of July succeeding the enrolment, to be called into military service, and to continue in it during the present rebellion, not, however, exceeding the term of three years. The president is authorized, whenever it may be necessary to call them out for such service, to assign to every enrolment district its quota of men to be furnished. In doing so, he is to take into consideration the number of volunteers and militia furnished by and from the respective states, and the period of their service since the commencement of the rebellion, and is to equalize the respective quotas by allowing for the numbers thus already furnished, and the time of their service. Upon such requisition of the president a draft is to be made, under his direction, of the required number, and fifty per cent. in addition. A roll of the names thus drawn, upon which they are to stand in the order in which drafted, is then to be made. The persons drafted are to be notified within ten days thereafter, and required to report at the rendezvous for duty. Provision is made for the acceptance of substitutes, and for the receipt of such commutation money as exempts those paying it, and enables the secretary of war to procure substitutes for them. Provision is also made for the hearing and decision of claims of exemption; and it is enacted "that as soon as the required number of able-bodied men liable to do military duty shall be obtained from the list of those drafted, the remainder shall be discharged."

This review of the principal enactments of the law suffices to indicate its general purposes. The organization of armies under it is to cease on the termination of the civil war for whose exigencies it provides; and the term of service of those drafted under it cannot exceed three years, though the war should continue longer. Such limitations of the time would have prevented the

compulsory requirement of military service from being unconstitutional, though it had included every able-bodied male inhabitant. The administrative regulations of the law will next be considered.

The commission appointed for every enrolment district to execute the provisions of the act is designated in one section of it as the enrolling board, and in other sections as the board of enrolment. Biennial primary rolls, made by subordinate officers in the respective districts and sub-districts, having been reported to the board, are biennially consolidated into one list for each district. Of this list a copy is transmitted to the provost marshal general. The designation of the commission as the board of enrolment is referable not merely to these two stages of that preparatory enrolment, but also to the subsequent roll of the persons who have been drafted. This roll of drafted persons the board is required to make. The word enrolment, when used without any qualification, is, however, ordinarily understood as applicable only to the preparatory enrolment which must precede any draft.

The provisions of the 14th section, requiring the presentation of all claims of exemption to the board, and making its decision final, have been quoted. They do not apply to such a case of a person improperly drafted as depends neither upon a question of disability, nor upon one of exemption for any other specified cause. This opinion was acted upon in the Cases of Stingle and of Robinson. Stingle was drafted as enrolled in the first class. He alleged that he belonged to the second, which is composed of persons not exempt, but not as yet liable to be called into service. Robinson was a person liable to enrolment in the first class. But on the enrolment from which he was drafted, his name and occupation were entered incorrectly. The decisions of the respective boards of enrolment had been that these parties were liable to serve. Both cases were very fully argued, as the present case has also been. Stingle has been allowed to adduce proofs in support of his allegation that he was improperly enrolled in the first class. Robinson has been discharged from military restraint. The same decision was made in Tilghman's Case, where a resident of one sub-district, when sojourning in another, had been enrolled and drafted in the latter. These decisions do not affect the present question otherwise than as they may circumscribe it within ascertained limits.

Executive instructions and regulations have been greatly multiplied under authorities conferred by this act, and under assumed authorities which it has not conferred. These executive mandates, where authorized, have doubtless promoted various useful purposes, including that of securing a desirable uniformity throughout the United States, in

the course and modes of proceeding under the act. The sixth section requires "the provost marshal general, with the approval of the secretary of war, to make rules and regulations for the government of his subordinates," and perform other specified acts; among them, "to furnish proper blanks and instructions for enrolling and drafting." Under these two heads of enrolling and drafting, including their administrative incidents, executive instructions conformable to the purposes of the act, and to the provisions of the sixth section, are not less binding than if they had been contained in the act. But some of the executive instructions have, without any warrant in the act, assumed to regulate the exercise of the board of enrolment's duties as to applications for exemption under the fourteenth section. The exercise of this jurisdiction should be independent of regulation or other interference or supervision by any executive department of the government. Instructions of the latter kind, therefore, can have no imperative effect. This remark applies to the instructions which assume to regulate the practical course of proceeding of the board; and applies with greater force to those which assume to furnish rules for its decision upon questions of exemption. Some or all of these instructions which apply merely to the course of proceeding may, nevertheless, have been reasonably and properly adopted by the respective boards of enrolment as their own rule of their procedure; and, through such adoption may, after proper notice to parties appearing to claim exemption, have become regulations observable by such parties.

This independence of executive supervision or interference is neither less nor greater than that of an ordinary court-martial after its organization, and before its finding or sentence. Such independence does not prevent the board of enrolment, even when administering its jurisdiction, under the fourteenth section, from being a mere military commission. Its president is the provost marshal of the district, whose rank, pay and emoluments are those of a captain of cavalry, and who may, under the act, be an officer of this rank specially detailed. That such an officer may be thus detailed as a member, is conclusive as to the military character of the commission. The other members are the surgeon, who is also required by the act to inspect the drafted men at the rendezvous, and report on their physical condition; and a third person who, in another act of congress, passed on the same day (chapter 79, § 5) is called a "citizen at large." Under the latter act, the compensation of these two members of the board is that of an assistant surgeon of the army. Under a subsequent executive regulation, all the members of the board receive their dues through the pay department of the army. The powers conferred on the board

would have been exercisable with precisely the same legal effect as if congress had conferred them upon any officer of the army who might be from time to time specially detailed as a sole commissioner.

The requirement in the fourteenth section that all claims of exemption should be made before such local military commission is reasonable and convenient. Non-compliance with such a salutary provision, and with reasonable regulations made by such commissioners for carrying it into execution, might perhaps preclude such an inquiry as the petitioner now asks. But he has fulfilled the statutory condition; and the question recurs whether the additional enactment in the fourteenth section that the decision of the military commission shall be final has precluded inquiry here as to his right which was in question before the board.

To the board's independence of supervision, which resembles that of ordinary courts-martial, this enactment adds an independence of such executive revision as the proceedings of courts-martial and of other military commissions ordinarily undergo. Their findings and sentences do not ordinarily take effect, even provisionally, till after such revision. The exigency of a legal application for the word final is fulfilled when it is understood as meaning not subject to such executive revision. This makes it conclusive so far as military jurisdiction can properly extend. But even the word conclusive, if it had been superadded in the act, would, perhaps, not have made a decision against the claim conclusive against the right. [Clarke v. Patterson,] 6 Bin. 128. See [Mussina v. Hertzog,] 5 Bin. 387; [Wilson v. Young,] 9 Pa. St. 102. Upon the word final the question is more simple. There is no doubt that a decision may, relatively to the proceeding in which it was made, be final, and yet not conclusive elsewhere as to the right which was in question. See [Weston v. City Council of Charleston,] 2 Pet. [27 U. S.] 463; [Galbraith v. Black,] 4 Serg. & R. 211, 212. This remark is applicable especially to such summary proceedings under a special jurisdiction as are those of this board.

The meaning of the word "final" in this enactment must, of course, be thus qualified, if its effect would otherwise be unconstitutional. The argument that it would have been constitutional is that it would have been so if no exemption from military service had been specified in the act; that the exemptions specified were therefore not of right; that an army might constitutionally have been raised, not by draft or lot, but by selection; that a power of absolute selection might therefore have been directly conferred upon commissioners or a commissioner; and that the exemption in question, being consequently of mere grace, can be claimed only in the mode and under the conditions imposed. This argument, if an-

alyzed, will appear not to meet the constitutional difficulty.

The privilege of exemption is not the less of right because it has been legislatively conferred, or because it might have been altogether withheld. The mere form of the legislative enactment through which the immunity was obtained is, in this respect, immaterial. The right is conferred in the law by way of exception from a general enactment. This form of legislation, whatever opinion the lawgivers may possibly have entertained, cannot affect the substantive character of the right, and therefore cannot affect the question of constitutional power. As to privileges or immunities enjoyed through legislation, powers of government must be administered constitutionally, and their execution must be regulated in due subservience to judicial authority, exercisable through the proper organs. No power, otherwise unconstitutional, can, as qualifying rights, privileges or immunities, legislatively conferred or vested, acquire validity through any legislative annexation, express or implied, of a condition to their enjoyment. Such a condition as would abrogate, or abridge, the effect of a constitutional provision as to the judicial power cannot be implied from any phraseology of the act in question.

If armies may constitutionally be raised by selection, as distinguished from lot, the proposition is immaterial, because, under such a system, the power of selection would be executive, and not like that in question, which is judicial. If such a power should ever be conferred by congress, its definite character, the prescribed methods of its exercise, the official character of those exercising it, and the method of their appointment, might become subjects of judicial consideration. Congress cannot constitutionally delegate its own powers; but may confer executive and judicial powers upon those respectively who are, according to the constitution, qualified for their exercise. Those qualified, except a single class, must be such officers as are nominated to the senate, and appointed with its consent. Those of the excepted class are designated as inferior officers. Their capacities must necessarily be tested and limited in every case, with special relation to authorities which are, according to the distribution of the powers of government, superior. In the distribution of the judicial power, congress may establish inferior courts. But judges of such courts are not in the class of those inferior officers who can be appointed or designated without reference to the senate. Therefore, independent judicial powers could not be vested by congress in such a commission as the board of enrolment unless it is regarded as a tribunal simply military. Thus regarded, it can have no jurisdiction except over persons who are already under military rule. Whether a person is or is not under such

rule is a question which a military tribunal may often have occasion to consider, and, so far as may concern its own proceedings, to decide. The tribunal may or may not be so organized that its decision of such a question is, relatively to military jurisdiction, final. But an act of congress making such a decision as to the status of a citizen final, in such a sense as to preclude altogether judicial cognizance elsewhere of the question, would not be constitutional. Such a law, if thus executed, would confer a judicial power not warranted by the constitution. Congress cannot give to such a mere military commission, or to a simple court-martial, any jurisdiction over a person who is neither in military service, nor locally amenable to the military police of a territorial space properly occupied for military purposes. Nor can congress confer upon such a special tribunal the power of conclusive adjudication, whether a case is within its own jurisdiction.

An argument in support of the return has been that, as to persons drafted under this act, the fourteenth section may, at a time like this, of rebellion, take effect constitutionally by suspending the privilege of the writ of habeas corpus. If this had been the intention of congress, it might have been simply, and would doubtless have been directly, expressed. An intention to frustrate a right by indirectly suspending a remedy, is not imputable to congress. Moreover, such legislation would not well comport with another act passed on the same day, authorizing, during the rebellion, the suspension of this privilege by the president, but requiring a sworn return of a detention in custody under his authority. The question of right is dependent more, perhaps, upon the amendments to the constitution than upon that provision of the original instrument which restricts the power to suspend this privilege. If the point were attended with any difficulty, the amendments might, in this respect, require full consideration. But I do not think it necessary. The return does not require a traverse.

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 APEGUES, Ex parte. See Case No. 10,907.
 APLINGTON, (BARRETT v.) See Case No. 1,045.
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Case No. 496.

APOLLINARIS BRUNNEN v. SOMBORN.

[14 Blatchf. 380.]

Circuit Court, S. D. New York. Jan. 16, 1878.

TRADE-MARKS—ARBITRARY WORDS—INFRINGEMENT.

The use, on labels and bottles, of the word Apollinis, in connection with the representation of a bow and arrow or anchor, was restrained, by preliminary injunction, on account of the similarity between them and the word Apollinaris and the representation of an anchor.

[Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

as before used by the plaintiff, as being calculated and designed to induce the supposition, by users and dealers, that the waters of the defendant, so marked, were the waters of the plaintiff; but the plaintiff was ordered to give a bond to pay all damages to the defendant, if it should be finally determined that the plaintiff is not entitled to the injunction.

[Cited in *Glen Cove Manuf'g Co. v. Ludeling*, 22 Fed. 826.]

[See *McLean v. Fleming*, 96 U. S. 245; *Carbolic Soap Co. v. Thompson*, 25 Fed. 625; *Hostetter v. Vowinkle*, Case No. 6,714.]

In equity.

Rowland Cox, for plaintiff.

Edward T. Bartlett, for defendants.

WHEELER, District Judge. Upon the hearing of the motion of the orator for a preliminary injunction in this cause, it is considered, that the use, by the defendants, on their labels and bottles, of the word "Apollinis," in connection with the representation of a bow and arrow, or anchor, as used by them, on account of the similarity between them and the word "Apollinaris" and the representation of an anchor, as before used by the orator, is calculated to lead those using and dealing in such waters, to suppose that the waters of the defendants, so marked, are the waters of the orator; and, as there is no other reason apparent, that the use of these symbols was adopted for that purpose. Wherefore, it is ordered, that, upon the filing a bond to the defendants, in such penal sum as shall be fixed by the clerk, as a master of this court, with good surety approved by him, conditioned for the payment of all damages to the defendants, in case it shall finally be determined, in this cause, that the orator is not entitled to this injunction, a writ of injunction do issue, to restrain the defendants from the further use of the word "Apollinis," and such representation of an anchor, or bow and arrow, in connection with the sale of their waters, until further order in the premises.

APPEAL OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the appellants.]

APPEL, (UNITED STATES v.) See Case No. 14,462.

Case No. 497.

APPERSON et al. v. CITY OF MEMPHIS et al.

[2 Flip. 363.]¹

Circuit Court, W. D. Tennessee. March 31, 1879.

POWER OF THE FEDERAL COURT — LOCAL LAW — MANDAMUS — STATE COURT — CONSTRUCTION OF "MAY" AND "SHALL" — LAWS IMPOSING TAXES TO BE UNIFORM — SET-OFF.

1. This court has power to so control its process as not to violate the local law, and to prevent injustice to the tax-payer.

¹ [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

2. The state court can make no order or decree which shall interfere directly or indirectly with a mandamus issued from this court. This court not only has the power to pass upon all questions connected incidentally with the collection of the tax, (in question) but it is its duty to exercise that power in such a way as that no property justly subject to its burden shall escape liability, and that those who have honestly paid their obligations shall, as far as possible, be protected.

[See *U. S. v. City of Memphis*, 97 U. S. 284.]

3. The word "may" is not to be construed in all cases as "shall." The ordinary meaning of the language used in legislative acts must be presumed to be intended, unless it would manifestly defeat the object of the provisions.

[See *Thompson v. Roe*, 22 How. (63 U. S.) 434.]

4. While laws imposing taxes are required to be uniform, it is no objection to a tax that there is a want of uniformity in its application.

5. The general law is well settled that no set-off is admissible against demands for taxes, as they are not in the nature of contracts between party and party, but are the positive acts of the government through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent individually is not required. The fact that persons complaining were not parties to a suit out of which orders grew upon them to pay taxes, affords no ground to set such orders aside as to them.

[See *U. S. v. Pacific Railroad*, Case No. 15,983.]

6. It would seem that where the judgment on which a mandamus is founded has been reversed, the mandamus would fall also.

In equity. Demurrer to bill, which prayed for an injunction against the collection of a tax.

Statement of Bill.

Complainants [Edward M. Apperson and others] are citizens of Shelby county, Tennessee, and property owners and tax-payers of the city of Memphis. Defendant Brown is a citizen of Iowa, and Rawlings and Shaper are tax collectors of the city of Memphis. By an act of the legislature passed November 24, 1866, the city of Memphis was empowered to lay Nicolson and stone pavement, etc., and to charge the entire cost of such improvements on the abutting property. By virtue of this act and in pursuance thereof, the city, by ordinance, provided for paving certain streets with Nicolson pavement and certain alleys with stone. Contracts were made by the city with certain firms to lay such pavements, and part of the work was done, when defendant Brown became the assignee of such contracts, and completed the work. In pursuance of the system adopted, bills were made out as the work progressed, against the owners of property abutting upon said improvements for the entire cost of the pavement to the center of the street in front of such lots, and payment thereof demanded of the owners. Under threats of suit complainants severally paid to Brown the entire cost of making said improvement in front of their several pieces of property, for which payment Brown gave

receipts in full, as against them, for their part of such improvements. Most of the citizens whose property was on these paved streets, resisted this mode of collection and assessment, and refused to pay. Numerous bills were filed against such by Brown, which were resisted in the courts, and in 1872 the supreme court of Tennessee declared that the act of the legislature of November 24, 1866, pretending to authorize the city to make the assessment by frontage to pay the cost of the pavement, was unconstitutional and void. After this decision, Brown, by a suit in this court against the city of Memphis, on the thirteenth of March, 1872, recovered judgment against the city for \$488,993 for said work, from which judgment the city took an appeal to the supreme court of the United States, but being unable to give a supersedeas bond, the judgment stood in force pending the appeal. Upon the hearing of the appeal in the supreme court, the decree of this court was reversed in part and the cause remanded to this court, in which, on the fifteenth of March, 1875, a new decree was rendered in the sum of \$292,133.47.

By an act of the legislature passed on the 18th day of March, 1873, it was enacted that "where an incorporated town or city has, by virtue of presumed authority to levy special assessments for specific purposes, levied and collected taxes or special assessments, the right to make which special assessment was afterward declared void by the supreme court of the state, said town or city shall have power to levy a tax, in addition to all other taxes allowed by law to be levied, sufficient to cover the entire cost of the improvement, with interest thereon, for which said special assessments were illegally made. And in the levying of such additional tax authority is hereby given to such town or city to allow as valid payments on such additional tax any sum or sums, with interest, paid by persons in satisfaction, or in part satisfaction, of said special assessments illegally levied and collected as aforesaid." After the passage of this act, on the 24th of June, 1873, a writ of mandamus was granted against the city, commanding it to levy a tax to pay Brown's then existing judgment of \$488,993, the city having taken an appeal without a supersedeas. This was the first mandamus, and was predicated upon the aforesaid act of 1873. In pursuance of this act, the general council of the city of Memphis passed an ordinance to provide for the issuance of certificates of indebtedness to all persons who had paid assessments, which certificates provided upon their face that they should be receivable in payment of any tax levied to cover the entire cost of the Nicolson pavement. In pursuance of this mandamus of June 24, 1873, the city of Memphis levied a tax of seventy cents on each one hundred dollars worth of taxable property to pay Brown's said judgment. For 1874, without mandamus, the city levied a tax of thirty

cents, for the same judgment, voluntarily, upon all the taxable property of the city, including the property of these complainants, and sought to collect the same in money. On the 22d of March, 1875, the act of March 18, 1873, was repealed, and upon the same day Brown filed in this court a petition for an alternative mandamus against the city, claiming a balance of \$292,133.47, found to be due him by the decree of March 15, 1875, and praying that the city be required to levy a tax each year, for '75, '76 and '77, sufficient, after allowing for errors, delinquencies, insolvencies and defaults, to realize \$125,000 each year. The answer of the city was filed, and on the 28th of June, 1875, a peremptory mandamus was issued. On the 9th of February, 1876, the city filed a return to the peremptory writ, presenting sundry excuses for not promptly obeying such writ, and submitting certain legal questions to the court for its decision, for its own guidance in levying a tax. Among other questions were the following: First. Whether those lots upon which the frontage tax had been paid were exempt? Second. Whether the ninth and tenth wards, which had been taken into the city after the contracts with Brown's assignors, were exempt? Third. Whether the capital of merchants should be included in the levy as subject to such tax? On March 2, 1876, upon due consideration of the matter set forth in said return of February 9, and the affidavit of Brown filed upon March 1st, the court adjudged the ninth and tenth wards and the property upon which the assessments had been paid, exempt, but held the merchants' capital liable, and ordered an alias writ, commanding a levy of an additional tax, sufficient, excluding the exempted property, to pay the residue of Brown's judgment. From these orders appeals were taken to the supreme court of the United States, where such orders were afterward affirmed and are still in force.

The bill of complainants now filed, sets forth that they are the owners of lots in front of which pavements were laid and the cost thereof paid to Brown and for such sums, thus collected, Brown gave receipts in full satisfaction of the cost of the pavement in front of the lots designated. It claims that, independently of the judgment of March 2, 1876, in the mandamus proceedings, Brown is estopped from demanding additional tax on said property. The frontage tax was necessarily larger than the pro rata share of the particular property would be in a general tax, because, by the frontage tax, the whole cost of the pavement was imposed on a small portion of the property in the city, while a general tax would cover the whole; hence, in any contingency, those who paid the frontage tax have paid more than their just share of the entire cost of the pavement. The bill further claims that the act of March 24, 1873, was the only authority granted by the legislature to the city to levy

a tax for the payment of the cost of the pavement, and that under this act the power granted was to levy a tax sufficient to cover the entire cost of the pavement, with interest thereon, and coupled with this power, was also the authority and duty to allow, as valid payments on such additional tax, any sums with interest, paid by persons in satisfaction of such special assessments illegally levied and collected. To the mandamus proceedings none of these complainants were parties, and hence are not estopped by the judgment to deny the liability of their property. It is charged that in pursuance of the act of 1873, the city took steps, by ordinance, to issue certificates, and to protect those who had paid frontage tax from further taxation; but in spite of this the collectors are claiming to collect again this tax from the complainants, and they are instigated thereto by the demands and threats of Brown. For 1876, the city, in conformity to the judgment of this court of March 2, considered the ninth and tenth wards, and the property which had paid the frontage tax assessment, as exempt; but as it was impracticable in making the tax books, to exclude this property, which was taxable for other purposes, the mandamus tax was put upon all the property without distinction, but the rate was fixed so high, that the amount to be realized in money would cover the amount demanded by the mandamus, after allowing those who had paid the frontage assessment to pay the tax on that particular property in Brown's receipts or paying certificates. Still the tax collectors are pressing the collection in money against the exempted property. The bill further sets forth that the city is insolvent; that the tax collectors, if not insolvent, have property of little value, and wholly inadequate to answer complainants' demands. That, by the laws of Tennessee, taxes are a lien upon property, and constitute a cloud upon complainants' lots, and unless restrained, such officer will proceed to sell the property for payment of taxes; that the attempt to collect such taxes, and especially the actings and doings of Brown, are a fraud upon the complainants and upon the court; that some of the complainants hold the receipts of Brown for the payment of the front foot assessments, and some of the scrip of the city, issued in exchange for his receipts. Complainants have tendered and offered to surrender a sufficient amount of such receipts and scrip to cover their respective taxes, and desire to enjoin the collection of all such taxes in money. Complainants pray that the city and its officers be enjoined from collecting from said complainants any part of the mandamus taxes on their property, described in the exhibits to the bill, and that the right of complainants to satisfy and discharge the mandamus tax, levied or to be levied, on any of their lands in the city, by the payment of said receipts or scrip to the amount of the money originally paid by each

of them on frontage assessments, be declared and established.

To this bill Brown interposes a demurrer for want of equity upon the ground: First. That the front foot assessments paid by the complainants were voluntary payments, and the only remedy the complainants have for a recovery of the amount so paid is against the city. Second. That the act of March 18, 1873, under which the complainants claim the right to pay in Brown's receipts or scrip issued in exchange therefor, was repealed before the taxes complainants are seeking to enjoin were levied or ordered by the court to be levied. Third. That the decree of the state court in favor of Bethel and others, enjoining the collection of the taxes levied under the mandate of this court, was void for want of jurisdiction in the state court to pronounce the same, and cannot be relied upon as a ground of relief here. Fourth. That the constitution of Tennessee requires that all property shall be taxed, and that taxation shall be equal and uniform, and the fact that the tax is required to be levied, requires that it be levied upon and collected from the property of the complainants as well as others. Fifth. That the judgment of March, 1875, decided that all the questions made by the appeal adversely to the complainants, and this court cannot now make a decree inconsistent therewith. Sixth. That the taxes complainants here seek to be relieved from were not levied under the order of March 2, 1876, but under the judgment of March 30, 1875, and no right to relief from such taxes can be based on the order of March 26, 1876. Seventh. That the complainants have by law no right to set off claims due them by the city, against the taxes levied by the city under the mandate of this court. Eighth. If the complainants have any equity at all, such equity extends no further than to the particular piece of property owned by any complainant, on which the assessment by the front foot was in fact paid, and such equity is in no sense personal or restrictive of the personal obligation of the person who made the payment, and the bill does not show whether or not all the property on which the taxes sought to be enjoined have been levied is property on which the frontage assessments have been paid. Next, the bill shows that some of the property on which the taxes are sought to be enjoined was never assessed for the cost of the pavement.

Meriwether and Myers & Sneed, for complainants.

Wm. M. Randolph, for defendant Brown.

BROWN, District Judge. No doubt is entertained of the power of this court to control the execution of its process in such a manner that no local law be violated and no injustice be done to any particular taxpayer. Clearly no power exists in a state

court to make any order or decree which shall interfere directly or indirectly with this mandamus, and unless the power is vested with us the tax-payer will be remediless. This was the view taken by the supreme court of Tennessee in *Lea v. City of Memphis*, [9 Baxt. 103,] by the supreme court of the United States, in *City of Memphis v. Brown*, [97 U. S. 300, affirming Case No. 9,415;] and also by Judge Emmons, in *Brooks v. City of Memphis*, [Case No. 1,954,] where the question of the taxability of merchants' capital for these assessments was fully considered. Not only has this court the power to pass upon all questions connected incidentally with the collection of this tax, but it is our duty to exercise that power in such a way that no property justly subject to its burden shall escape that liability, and that those who have honestly paid their obligations shall, as far as possible, be protected. Acting upon this theory, the order of March 2, 1876, was made, exempting the property upon which the assessment had been paid, and no reason is now perceived why that order should not apply to all writs of mandamus issued from this court for the collection of this tax, whether such writs were issued before or since the making of such. The payment of these assessments having been voluntary, perhaps it would be difficult to justify this order upon technical principles of law without trenching upon another maxim—that all taxation must be uniform. But without touching upon this question, the order was upheld by the supreme court upon the ground that it was exactly the order which Brown had asked for, and that he could not be heard to complain of it. The case certainly presented the strongest possible equities for the exemption of the property in question. But we are now asked to go further (and that is the main question in the case) and exempt not only the property upon which the front foot tax was paid, but all other property of the owner to the amount of Brown's receipts or the city scrip still in his hands, so far as there is a balance still remaining unapplied to the payment of the frontage assessment upon his paved lot. It is argued that the only authority to impose this tax is derived from the act of March 18, 1873, and that by this act, the city was required to allow as valid payments, any sums so paid in satisfaction of special assessments. It will be observed that this act did not in terms exempt such property from assessments, for that might have laid the tax open to the charge of want of uniformity. But it sought to bring about the same result by permitting Brown's receipts to be taken in payment. The act evidently contemplated that a tax should be laid sufficient to cover the entire cost of the improvement, including the amounts already paid by way of special assessments; in which case, the allowance of these

amounts, so paid, would still leave enough to pay Brown the balance due him. Indeed, the certificates of indebtedness issued under the provisions of the ordinance of June 29, 1873, passed in accordance with the above act, provided upon their face that they should be receivable only in payment of any tax that might be levied by the city of Memphis to cover the entire cost of laying the said pavements. This course, however, was not pursued. A tax was laid sufficient simply to pay Brown the residue of his claim. Of course, he was entitled to payment in cash, and, if his receipts or city scrip were taken in liquidation of the amounts, he would realize little or nothing upon his rights. It is true, that where the course contemplated by the act was pursued, permission was given to allow the special assessments as payments, but I do not understand that the legislature absolutely required this to be done, or that the general council intended it to be done, unless a tax was laid sufficient to cover the entire cost of the improvement. It is not true that in all cases the word "may" must be construed as "shall." The principle adduced from the modern cases is that that exposition ought to be adopted in this case as in other cases, which carries into effect the true intent and object of the legislature in the enactment; the ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions. *Sedg. St. Lav.*, p. 439; *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. [26 U. S.] 46, 64; *Mason v. Fearson*, 9 How. [50 U. S.] 248, 250. In this case, if the course marked out by the statute had been pursued, and a tax had been laid to cover the entire cost of the improvement, I should have found little difficulty in holding that the city was bound to credit the special assessments; but, where such construction would defeat the object of the writ, a different rule should be applied. This seems to have been the view adopted by Judge Trigg, in his opinion of August 23, 1877, enjoining the defendants Rawlings and Shaper from collecting anything but money in payment of this tax. While laws imposing taxation are required to be uniform, it is no objection to a tax that there is a want of uniformity in its application. For instance, a tax of twenty-five dollars is imposed upon all retail dealers in liquors. The tax is uniform, but it bears ten times heavier upon one who only does a business of a thousand dollars a year, than upon one whose sales amount to ten thousand dollars. "It is only where statutes are passed which impose taxation on false and unjust principles, or operate to produce gross inequality, so that they cannot be deemed in any sense proportionate in their effect on those who are to bear the public charges." *Cooley, Tax'n*, 127. In the imposition of taxes upon real estate great inequalities fre-

quently occur in the assessment and valuation, beyond the reach of the legislature or courts. If the collection of these mandamus taxes could be so arranged that every tax-payer holding Brown's receipts or city scrip, could use them in payment, all would receive a like benefit; but, as has already been shown, this is now impracticable, owing to the fact that the tax was laid only sufficient to cover the balance due him upon his contracts. But to permit one to avail himself of this privilege, and to deny it to another, is to produce inequality rather than uniformity. To illustrate: A owns two lots; in front of one the pavement was laid and the assessment paid. In paying this assessment A paid one thousand dollars more than he would have paid on this lot had a general tax been laid over the whole city; he now asks that the tax now laid upon his second lot may be paid with city scrip to the amount of the thousand dollars overpaid upon the first. Upon the other hand, B owns but one lot, upon which he has paid an assessment greater by one thousand dollars than he would have paid if a general tax had been laid, but having no other property, he can only look for his thousand dollars overpaid, to the responsibility of the city. The general tax-payers, then, are called upon to make up the thousand dollars held by A in scrip, and not that held by B, simply because A happens to own another lot. I think the liability of the general tax-payers should not depend upon an accident of this kind, but that all parties holding city scrip of this issue should be placed on an equality and required to look to the city for payment. Leaving out of view the act of 1873, there seems to me no reason for holding that complainants are entitled to set off assessments illegally but voluntarily paid. The general law is well settled that no set-off is admissible against demands for taxes, as they are not in the nature of contracts between party and party, and are the positive acts of the government through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent individually is not required. *M'Cracken v. Elder*, 34 Pa. St. 239; *Peirce v. City of Boston*, 3 Metc. [Mass.] 520; *Cooley, Tax'n*, pp. 13, 14. In *Fremont v. County of Mariposa*, 11 Cal. 361, it was held directly that equity will not relieve from a tax on the ground that an illegal tax was collected of the complainant in former years. The fact that complainants were not parties to the original suit or to the proceedings which culminated in the orders of March, 1875 and 1876, does not confer upon them the right to object to these orders or set them at naught. *State Railroad Tax Cases*, 92 U. S. 575. I see no authority for collecting taxes levied for 1873-4. The judgment upon which the mandamus for their collection was based was afterwards reversed by

the supreme court of the United States, and a new judgment taken in 1875 for the balance remaining due to Brown. The mandamus was in the nature of an execution and when the judgment was reversed and held for naught, it would seem the mandamus must fall with it. But as this point was not made by defendant Brown in his brief, I am quite willing to reconsider it if I have overlooked any material fact in this connection. I think the complainants are entitled to an injunction against the collection of the tax for 1873 and 1874, and also against the collection of any tax for this pavement upon property in front of which the pavement was laid and the assessment paid, but as to all other property the demurrer is held good. Counsel will prepare the proper order and submit it to me for signature.

NOTE, [from original report.] The decision of Judge Emmons (referred to) in *Brooks v. City of Memphis* [Case No. 1,954] laid down several important propositions, among others these:

"When a contract has been made with a municipal corporation, and the work performed by the contractors, who relied upon a certain mode of taxation, which the supreme court declared unconstitutional, and the legislature afterwards pass a law to take the place of the invalid law, under which a judgment is had and a mandamus applied for, when this latter law is repealed; the court will disregard the repeal and apply the same rule as though it was in full force when the contract was made.

"The legislature has no power to repeal the only adequate remedy to enforce an existing judgment, unless some other reasonable mode of enforcement is provided. And this is so by virtue of the provision in the state constitution, which declares that 'no retrospective law, or law impairing the obligation of contracts should be passed.' And although there may be a statutory limitation upon a corporation's general power of taxation, yet, where there has been an express grant of power to such corporation to contract a debt, a power of taxation for its payment will be implied.

"The federal courts will sometimes delay judgment to await decisions in state courts, but where there is a mandamus to enforce the payment of a final judgment in a case where a tax to be collected had been levied according to the common usage of the state, and no objections have been raised to the lawfulness of the tax in other cases, or as to the taxes levied for other purpose—such a course will not be followed."

APPLEBACK, (POSTMASTER GENERAL v.) See Case No. 11,305.

APPLEBY, (HOPNER v.) See Case No. 6,699.

APPLER, (TRAVERS v.) See Case No. 14,148.

Case No. 497a.

APPLETON v. CHAMBERS.

[3 App. Com'r Pat. 384.]

Circuit Court. District of Columbia. Sept. 21, 1860.

PATENTS FOR INVENTIONS—INTERFERENCE—PRIORITY—CAVEAT—LACHES—WITNESSES.

[1. On appeal from the commissioner of patents in an interference case, the appellant must

rely upon the strength of his own case, not the weakness of his adversary's.]

[2. One who filed a caveat in 1855, and used constant effort to perfect his invention until his application for a patent, in 1859, is a prior inventor, with respect to another person, who conceived the idea after the filing of the caveat.]

[3. Upon the question of priority of invention in an interference case, one of the alleged inventors is not a competent witness in his own behalf, nor is another person who is to have an interest in the patent if issued.]

Appeal [of Appleton] from the decision of the commissioner of patents refusing to grant letters patent to them for an improvement in paper-folding machines, and awarding priority of invention to said Cyrus Chambers, Jr. [Affirmed.]

MORSELL, Circuit Judge. The appellant, in stating his claim in his specification, states very minutely all the various parts of it under eleven heads or divisions. This occupies great length, and instead of rectifying it, I must refer to it, and state the points or principles involved. As they are stated by himself, they are: First, propelling rollers to advance paper in a paper-folding machine, in combination with wires to support the paper while being advanced. Second, deflectors which are curved pieces of metal that turn the sheets as they pass through the folding rollers.

The commissioner's decision dated March 29, 1860, adopts the examiner's report dated the 16th of the same month. It says: "Chambers' application was made on the 10th of November, 1859, North's on the 22d of the same month. Chambers cites his invention as certain new and useful improvements in machinery for cutting and folding paper; and claims the combination of circular or revolving cutters with folding rollers for the purpose of cutting paper, as it is being folded; also sliding or moving the paper on or between bars or their equivalents by means of revolving wheels or rollers whose surfaces come in contact with the paper, &c. The claim is divided into four sections. North declares his invention to be certain new and useful improvements in machinery for folding paper and divides his into eleven sections. These sections embrace all that Chambers has claimed, excepting the cutters, which are however included in the devices, though they do not appear to be claimed. The interference was declared on the 5th of December, 1859. Chambers has produced but two witnesses, Robt. L. Armstrong and Cornelius Mullans, but has produced a caveat filed on the 30th of November, 1855, on which he chiefly relies to prove priority of invention. North has produced seven witnesses, two of whom are charged with being interested in the issue, one being himself, the other William Matthews. The caveat of Cyrus Chambers with additional papers filed on the 30th of November, 1855, establishes his priority of

claim to the bars and rollers, but not to the cutters. The office cannot ignore the existence of Myers and Dukehart's paper-folding machine rejected on the 28th of June, 1853, where the rotary cutter is shown and described. Therefore it is respectfully suggested that a patent be issued to Chambers for his device to dispense with the tapes constituting the third and fourth sections of his claim when he shall have cancelled the two first sections of the same. I further suggest that a patent be granted to John North on his removing all sections of his claim interfering with the prior claims of Cyrus Chambers which have been clearly proved as above set forth. The commissioner says: "The foregoing report is confirmed and patent allowed to Cyrus Chambers, Jr., upon the third and fourth sections of his claim, when he shall have cancelled the two first sections thereof. A patent is also allowed to John North upon the cancellation of all sections of his claim which interfere with the prior claims of Cyrus Chambers, Jr."

From which decision the appellant, having prayed an appeal, filed his reasons of appeal. First on the ground that the said Chambers has never, up to the time of the hearing of the interference before the commissioner, made a working machine or a drawing or a model of one, has never applied his idea or suggestion to practice, and consequently has never made the invention, and that his acts are therefore no bar to the grant of a patent to North. And secondly, that even if his application for a patent be held to describe a working machine, he has never exercised diligence in applying his idea to practice, and in fact abandoned his idea until after he saw North's working machine, and that consequently he, the said Chambers, is not to be deemed the first inventor,—but on the contrary, North, who invented, independently used diligence and first practically embodied the idea in a working machine, is really the first original inventor, and this appellant further objects to the honorable commissioner's decision for the reason that he, as far as this appellant can discover, refuses to grant to him a patent for the deflectors specified in his application, the equivalents for which are described in the application of Chambers. and without assigning any reason therefor, and without deciding, as appears from the evidence, that they are public property, and belong neither to North or Chambers, which ought to have been his decision, as the testimony does not show that Chambers ever invented them, as it shows they were in use more than two years prior to Chambers' application, with his knowledge, even if he was an inventor, and as it shows that North, although an inventor, invented subsequent to the public use of said deflectors in Philadelphia, &c. Further, in conclusion, he says that "even supposing Chambers to have

been an inventor subsequent to the Philadelphia use, and that such use was without his knowledge, nevertheless such public use deprives both him and North of their rights to a patent for a subsequent invention." According to the foregoing state of proceedings, the original papers and documents with the evidence, the commissioner's decision, and the reasons of appeal, were laid before me by the commissioner of patents in pursuance of previous due notice of the time and place of hearing, at which time the respective parties appeared by their counsel, filed their arguments in writing and submitted the case.

The issue to be tried and decided between these parties is priority of invention, and evidence has been taken by each of them with that view. Chambers dates his invention as early as November, 1855; North's claim appears to be of a more recent date in the year 1858. Chambers' application was filed 10th November, 1859. North on the 22nd of the same month. Ordinarily the appellant holding the affirmative of the issue, and according to the practice of the office, before an interference is declared, the inventions being ascertained to be identically the same, the simple question then, which in its character is rather collateral than on the merits, (for both may be independent inventors,) to be tried, has been which of the two was the first, and original discoverer of that invention, and the evidence shaped accordingly. But instead of substantively relying on the strength of his own title, his principal ground seems to be the weakness of his adversary's, and accordingly, his reason of appeal involving as he supposes the two points of objection before stated, he proceeds in his argument to take a resume of the testimony, from which he supposes it nowhere appears that Chambers has ever constructed a practical or operating folding machine containing propelling rollers and wires, and that he has never built such a machine. Second, nor that Chambers built the model sent to the office until after he had requested to see, and had seen and examined, North's machine. Third, that it appears from the testimony of Worthen, an engineer of reputation and experience, and from that of Matthews, a book-binder, and from that of McLeod, a book-binder, that Chambers' model, as described in his application, is not a model of a practical machine for folding paper, and that a machine constructed after that model would be entirely inoperative. It appears also from the testimony of English, a working book-binder, that propelling rollers on the underside of the paper only will not work, &c.; he saw the experiment tried, &c. Fourth, it appears that Chambers filed a caveat, or rather an additional paper making a part of a caveat, by a letter dated November 28, 1855, &c., substantially admitting that an idea or suggestion has been

conceived by Chambers that he is going to experiment, in order to put the idea in practical shape; the language, in mentioning the wires and rollers, is not that paper can be propelled by rollers, but it may be slipped, &c. There is no hint how the paper is to be got out of the machine, no description of any upper rollers to press up the paper, no description on the addition, &c. He concludes therefore that the caveat is proof of an idea, but no proof of an invention, which is an idea reduced to practice. Fifth, that North is an independent inventor. Sixth, that the witnesses prove North conceived the idea, experimented on it, altered one working machine so as to introduce his invention into it, and had another working machine built, and that both those machines were in use up to the time when the testimony was taken, and that he wasted no time in making these successive steps. To support the positions taken in this branch of his argument he has referred to various judicial decisions, before noticing which it may be proper to state that having considered the objection to the competency of the two witnesses, North and Matthews, I am satisfied the objection must be sustained and their testimony be ruled out of the case.

In the case of Dietz v. Wade [Case No. 3,903,] on appeal from the commissioner of patents, similar grounds were taken, and the same authorities (except the cases before Judge Sprague and Judge Clifford) were cited and relied on, and after a very full and thorough consideration given them, my conclusion was that the principles decided by them did not sustain the positions contended for on this point by the appellees, and so I think in this case, for I consider the decisions of Judge Sprague and Judge Clifford not materially different from the others cited. With respect to the description, although it cannot be so satisfactorily seen in the model, yet the specification, drawings and other papers connected therewith do seem to me to describe it sufficiently to enable any one skilled in the art to make and use the invention. In the interpretation a liberal construction should be given. As to the opinion of the experts, I am very much disposed to think as Judge Story says he did. He says "that in the course of thirty years' experience he had never known them to agree in opinion as to whether any machine was really an invention or not." I have seen enough with my own eyes to satisfy me they were mistaken.

As to the objection on the ground of laches and abandonment, the decision on the Case of Dietz [supra] also establishes the right of the inventor to an allowance of a reasonable time, to be judged of according to the circumstances of the case, in which to perfect his invention, without impairing his claim to priority. The facts in the case from the earliest time of the discovery prove

constant and unremitting endeavors to prepare it for his application for a patent. His early and repeated caveats, &c., and his experimental advances to attain the desired object, show that he was not unreasonably sleeping on his rights and awoke only by the filing of an application by another inventor, for he was the first of the two in this cause; nor do I observe any other use than is permitted for necessary experiments; no public use took place before January, 1858, less than two years before filing his application.

I think, from the fullest and best consideration I have been enabled to give to the case, that the decision of the commissioner is correct, and ought to be affirmed, and the same is accordingly hereby affirmed.

APPLETON, (DWIGHT v.) See Case No. 4, 215.

APPLETON, (GRATTAN v.) See Case No. 5,707.

APPLETON, (HEINE v.) See Case No. 6, 324.

Case No. 498.

APPLETON v. SMITH.

[1 Dill. 202.]¹

Circuit Court, D. Arkansas. 1870.

PRACTICE OF SUPREME JUSTICE ON THE CIRCUIT.

1. The justice of the supreme court sitting alone in the circuit court, will not review and set aside an order or judgment made by the district judge, when the latter was alone holding a term of the circuit court; and Mr. Justice Miller added that he had "prescribed it as a rule of conduct for himself, that the presence of the district judge, and his consent to a review of his decision, would not vary the course to be pursued.

[Cited in Reynolds v. Iron Silver Min. Co., 33 Fed. 355; U. S. v. Biebusch, 1 Fed. 214.]

2. Accordingly, Mr. Justice Miller, holding the circuit court alone, overruled a motion to quash an attachment levied on goods, solely because a motion involving the same legal proposition was overruled at the preceding term, by the district judge, who then held the court.

[Cited in Reynolds v. Iron Silver Min. Co., 33 Fed. 355.]

This was an action at law commenced by attachment. A motion was made before Mr. Justice MILLER, holding the term, to vacate and dissolve an attachment levied on the goods of the defendant.

Watkins & Rose, for the motion.
Garland & Nash, opposed.

MILLER, Circuit Justice. This motion is made upon the ground that the writ was wrongfully issued. Upon looking into the record of the case, I find that the same motion, based upon the same legal proposition,

¹ [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

was made at the last term of the court, and was overruled by the district judge, who at that time held the court.

I have repeatedly decided in this circuit, since I was first assigned to it, that I would not sit in review of the judgments and orders of the court, made by the district judges in my absence.

Where, as in the present case, the motion is made on the same grounds, and with no new state of pleadings or facts, it is nothing more than an appeal from one judge of the same court to another, and though it is my province in the supreme court, to hear and determine such appeals, I have in this court no such prerogative. The district judge would have the same right to review my judgments and orders here as I would have in regard to his. [It would be in the highest degree indelicate for one judge of the same court thus to review and set aside the action of his associate in his absence, and might lead to unseemly struggles to obtain a hearing before one judge in preference to the other.]

I have also held, and have prescribed it for myself as a rule of conduct, that the presence of the district judge, and his consent to a review of his decision, will not vary the course to be pursued.

If it were understood that in such case the order of the court would be reconsidered, the desire of the district judge to have the responsibility shared by another, and his natural reluctance to refuse his assent to a rehearing, would always enable pertinacious counsel to get his consent.

For these reasons I decline to consider this motion. Counsel for the motion thereupon withdrew it.

Motion withdrawn.

APPLETON, (STEVENS v.) See Case No. 13,394.

APPLETON, (UNITED STATES v.) See Case No. 14,463.

APPLICATION OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the applicants.]

Case No. 499.

In re APPOLD.

[25 Leg. Int. 180; 1 N. B. R. 621, (Quarto, 178); 7 Amer. Law. Reg. (U. S.) 624; 6 Phila. 469; 1 Amer. Law T. Rep. Bankr. 83.]

District Court, E. D. Pennsylvania. May 11, 1868.

BANKRUPT LAW—CONSTITUTIONALITY—UNIFORM OPERATION—POWERS OF ASSIGNEE—RENT.

1. So far as conformity in the procedure under executions out of the federal courts, and

¹ [Reprinted from 25 Leg. Int. 18, by permission.]

out of the courts of the respective states, had been attained under the act of congress of 12th May, 1828, and the rules of practice in the federal courts, which, under the authority conferred by that act, had, from time to time, been adopted before the present bankrupt law was passed—the constitutional requirement that the system of bankruptcy should be uniform throughout the United States has been fulfilled if the bankrupt law operates uniformly upon whatever would have been liable to execution if no such law had been passed, though the subjects of its operation may not be in all respects the same in every one of the states.

2. Quære, whether under the present bankrupt law of the United States, goods of the estate in the hands of the assignee are distrainable for rent?

3. If they are not, it is because they are not less in legal custody than goods taken in execution; and under the equity of any laws of the respective states which, like the English statute 8 Anne c. 14, entitle a landlord to payment of rent accrued, not exceeding one year's, out of the proceeds of goods sold under an execution, the landlord, who is prevented from distraining may demand such an amount of rent from the assignee in bankruptcy.

[Cited in Re Trim, Case No. 14,174; Re Hufnagle, Id. 6,837.]

4. Such a rule of decision is not inconsistent with apparently contrary decisions under the English system of bankruptcy.

[Cited in Re Trim, Case No. 14,174.]

5. Though rent, as such, may not accrue during the proceedings in bankruptcy, an equal charge for storage may, for a certain period, under certain circumstances, be incurred by the assignee.

In bankruptcy. On 1st May, 1868, Register Slaymaker certified the following questions, agreed to by the assignee of the bankrupt [Benjamin F. Appold] and the attorney of the bankrupt's landlord: The room, in which the bankrupt had conducted his business of a grocer, was leased to him at \$62.50 per quarter. On January 24, 1868, the day appointed by the assignee for the sale of the goods of the estate on the premises, a bailiff of the landlord appeared, and by virtue of a warrant from him, distrained the goods for \$125, due for two quarters rent. The bailiff did not sell the property, but it was agreed by and between the principal and the assignee, that the latter should make the sale and that the proceeds "in his hands should remain subject to the claim of the landlord just as the goods then were." The assignee made the sale and received the proceeds. In his account, as audited before the register, immediately following the statement of the balance for distribution, was a memorandum, that this balance was subject to such rights as the landlord of the bankrupt might have obtained by virtue of the levy made by his bailiff, and of the agreement made as above by the assignee. The questions presented were, 1st. Is the landlord entitled to take out of the balance in the hands of the assignee the sum of \$125 due to him by the bankrupt for rent? and 2d. Has the register authority to direct or sanction the payment of this sum to the land-

lord by the assignee out of the balance in his hands as shown by the account.

CADWALADER, District Judge. Under the present system of bankruptcy in the United States the estate in the hands of the assignee is more determinately in legal custody than under the English system. There is, therefore, I think, reason to doubt the applicability of the English decisions that a landlord's right to distrain continues after an assignment under the bankruptcy of his tenant. [See note at end of case.] But if these authorities are inapplicable, it does not follow that the so-called lien of a landlord for rent should be wholly disallowed. The proceedings in bankruptcy may then have the effect of a statutory execution so that the case of the bankrupt's landlord may be within the equity of any laws of the respective states which entitle a landlord to payment out of the proceeds of goods taken in execution. The Pennsylvania statute, following the English act of 8 Anne, c. 14, entitles him thus to receive an amount not exceeding a year's rent. Blackstone's opinion, (2 Comm. 487,) that the landlord was thus entitled to the benefit of the analogy of the statute of 8 Anne where he omitted to distrain, has been overruled in England only because the goods late of the bankrupt on the demised premises are distrainable in England notwithstanding the assignment in bankruptcy. Otherwise the case would be within the equity of the statute. This conclusion may be reached without any necessity for considering the rent as a lien properly so called. Under the Maryland insolvent law it has been decided that the property of an applicant for the benefit of that act is in the custody of the law and cannot be distrained, and also that, without a previous distress, the landlord has no recourse against the estate. The latter part of this decision depends upon the local statute law. The statute 8 Anne, it is true, is in force in that state; but certain state laws are cited as controlling the decision there. [Buckey v. Snouffer,] 10 Md. 156.

Where the landlord makes a demand upon the assignee before the removal of the goods for an amount not exceeding a year's rent, it should, I think, if unpaid, be admitted as entitled to priority of payment whether the right of distraining exists or not. Where more than a year's rent is demanded, the question of the existence of the right of distraining will arise. At present I intimate no opinion upon this point. The claim is allowed under the alternative view of the law which I have explained. In cases in which assignees in good faith keep the stock in trade of a bankrupt in his former place of business for the purpose of either economical storage or advantageous disposal, if there is no improper delay, the hire of the landlord's premises may often be fairly valued by the standard of the former rent. In

such cases I have not hesitated to allow him an amount equal to accruing rent. The cost of storage elsewhere would equitably be considered a lien.

The first question of the register is therefore answered affirmatively. The landlord's claim is allowed, but without any costs of a distress.

Upon the second question I am of opinion that the register, if the assignee had paid the amount, would have been warranted in allowing him credit for it in the audit of the account under the 27th section of the act of congress, at the second meeting of creditors. The allowance, as any other one, would then of course have been subject to exception. But I am of opinion that a prospective payment could not have been regularly sanctioned by the register unless there had been a special reference of the question to him by the court. Even then his allowance would have been subject to exception. In all cases however he may refer any such question incidentally to the court, as he has done in this instance. I understand that the questions here certified have arisen at a second meeting of creditors. The sum of \$125 will be deducted by the register from the nett amount in the hands of the assignee after all proper charges have been allowed. The register's own account will be settled with the assignee, and the excess or deficiency of the deposit of \$50 accounted for between them. The nett amount will be reported for a dividend, after which the distribution of it will be reported according to form No. 32, appended to the general order of the supreme court. The remarks in the last paragraph are made in answer to inquiries by the register in a letter to the clerk.

Recurring to the main point in question it may be added that the bankrupt law of 1867, does not, in general, vest in the assignee any more beneficial interest in the debtor's estate than his execution creditors could, under the laws of the respective states already in force have obtained under adversary proceedings. General conformity of procedure in this respect in the federal courts, and in those of the several states, had been previously attained through the act of congress of 19 May, 1828, (4 Stat. 281,) and the rules and practice of the federal courts adopted from time to time, under the authority conferred by this act. The system of bankruptcy is, in a relative sense, uniform throughout the United States when it operates uniformly upon whatever would thus have been available to the recourse of execution creditors if the bankrupt law had not been enacted. My views to this effect have been explained in a former opinion. The assignee in bankruptcy will, in the present case, obtain what would have been obtainable for the benefit of an execution creditor under the law of Pennsylvania. That less or more may perhaps be obtainable in another state does not prevent the operation of the bank-

rupt law from being, in a constitutional sense, uniform.

NOTE, [from original report.] In a case of involuntary bankruptcy there certainly can be no distress while the estate is in custody of the marshal as messenger; and the assignee succeeds to this custody. In the case of the estate of Samuel C. Brown, [unreported,] an involuntary bankrupt, (21 October, 1867,) this court was of opinion that rent might be paid by the assignees on the same footing as under an execution, and that an equal amount as accruing storage might be paid in addition so long as the assignee should necessarily occupy the premises. In a previous case of the estate of Jeremiah M. Gale, also an involuntary bankrupt, the landlord of the bankrupt commenced summary proceedings before an alderman to recover possession of the demised premises under the Pennsylvania statute of 25th March, 1825. Upon the petition of the assignee showing that his dispossession would be injurious to the interests of the creditors, he was, on the 19th August, 1867, authorized by this court [unreported] to pay the rent, or if not in funds, to give security under the Pennsylvania statute. In this case it was desirable that the lease, fixtures and good will should be sold with the late stock in trade of the bankrupt. In case of Schell, Berger & Co., voluntary bankrupts, a provisional receiver had been appointed after the adjudication of bankruptcy and before the first meeting of creditors. He was afterwards elected assignee. But before he thus became assignee, an order upon him as receiver to pay rent was made, on 16th March, 1868, [unreported,] upon the landlord's petition, showing that funds were in hand which ought to be thus applied. The receiver certified that in his belief the landlord's claim was correct.

[No opinions can be found in the unreported cases cited in this note.]

APPOMATTOX R. CO., (POWHATTAN STEAMBOAT CO. v.) See Case No. 11, 363.

Case No. 500.

The AQUILA.

District Court, S. D. Florida. April 11, 1871.

SALVAGE—AMOUNT OF AWARD.

[Cited in Buckley v. The William M. Jones, Case No. 2,095, and in Baker v. The Slobodna, 35 Fed. 543, as having awarded the salvors of a portion of the cargo of sugar of the Spanish bark Aquila 27 per cent. on the sugar saved dry, 42 per cent. on that wet and damaged, and 50 per cent. on the materials.]

[Note. Nowhere reported; opinion not now accessible. 10 Adm. Rec. 26, only contains the decree.]

Case No. 501.

The ARABELLA.

[2 Gall. 368.]¹

Circuit Court, D. Massachusetts. May Term, 1815.

PRIZE—CAPTURED PROPERTY LYING IN NEUTRAL PORT—REMOVAL OF GOODS—MASTER AND SHIP'S PAPERS—EVIDENCE—CONDEMNATION.

1. The prize courts of a belligerent may take jurisdiction of property captured by its cruisers,

¹[Reported by John Gallison, Esq.]

while such property is lying in a foreign neutral port.

[Cited in *Hopner v. Appleby*, Case No. 6,699; *Jecker v. Montgomery*, 13 How. (54 U. S.) 516.]

2. It is the duty of captors to bring in the master of the captured ship, and the ship's papers. An omission to do this must be fully and satisfactorily explained to the Court, otherwise it will withhold condemnation.

See *The Bothnea and Janstoft*, [Case No. 1-686.]

3. The removal of prize goods is an irregularity, but is indulged under certain circumstances.

[Cited in *The Ella Warley*, Case No. 4,371.]

4. How far the want of regular evidence may be supplied by the affidavits or written declarations of the captured.

[Cited in *Waring v. Clarke*, 5 How. (46 U. S.) 477.]

5. Of the mode of sale and distribution, in case of condemnation, of prize goods lying in a foreign neutral port.

In admiralty. The British ships *Arabella* and *Madeira* were captured, in June, 1814, by the private armed brig *Rambler*, Edes commander; and thirty boxes of medicines, sixteen bales of piece goods, five boxes of opium, and seventy-five casks of *Madeira* wine, parcel of their cargoes, were removed on board of the *Rambler*, carried into the port of Canton, in China, and there landed. On the 7th day of April, 1815, a prize allegation was filed in the district court against the same goods and merchandise, praying condemnation thereof as enemy's property, while lying in the neutral port of Canton. The usual monition having been returned, at the hearing of the cause, certified copies of the affidavits of the master and mate of the *Arabella*, sworn to before the American consul at Canton, were produced, in which there was a most explicit avowal, that the whole property was British. Certified copies of the written declarations of the master and mate of the *Madeira*, drawn up and signed at sea after the capture, were also produced, in which were contained similar avowals. No ship's papers, or documentary evidence of property, had been lodged in the registry, and the only other evidence in the cause was a copy of the protest of the prize master of the *Arabella*, stating the circumstances of her subsequent recapture by the British. No claim having been interposed in the district court, a pro forma decree was rendered, from which the captors appealed to this court.

A. Townsend, for the captors, now moved the court, upon the evidence above stated, to proceed to condemnation. The court having taken time for advisement, the following opinion was delivered by

STORY, Circuit Justice. The first question which presents itself, is, whether the court has jurisdiction to proceed to the adjudication of prize property, lying in a for-

ein neutral port. This question has been discussed with much ability and learning in the admiralty courts of Great Britain, and has there been finally settled in the affirmative, not so much upon the supposed correctness of the principle, as the general usage of nations. It was there admitted, that condemnation of prize property, lying in the ports of an ally in the war, was strictly justifiable; but it was thought, that a different rule might apply to neutral ports. *The Henrick and Maria*, 4 C. Rob. Adm. 43; *The Christopher*, 2 C. Rob. Adm. 207; *The Victoria*, 1 Edw. Adm. 97; *The Comet*, 5 C. Rob. Adm. 285. In the courts of the United States, the question has received a solemn decision, and it has been held, that upon principle a condemnation of a prize, lying in a neutral port, is valid, and may be rightfully decreed by the prize jurisdiction. *Hudson v. Guestier*, 4 Cranch, [8 U. S.] 293, 6 Cranch, [10 U. S.] 281. And the correctness of this decision is evidently presupposed in several provisions of the prize act. Act June 26, 1812, c 107, § 6, [2 Stat. 761.] If, therefore, I felt any lurking doubts on the subject, I should feel myself bound by authority. But I am free to declare that, after much reflection, I am entirely satisfied, that the doctrine is founded in national law.

The next consideration is, whether the court ought now to proceed to adjudication, in the absence of the regular testimony and documentary evidence, required in prize causes. The court always demands from the captors a compliance with the requisitions of the prize statute and the public instructions; and watches, with great jealousy, every deviation from them. Whenever such deviations occur, the court requires the most satisfactory proof, that they were unavoidable, or at least justified by very cogent and pressing reasons. It is an ancient and fundamental rule of prize proceedings, enforced by the president's instructions, that the master of the captured ship should be brought in and examined upon the standing interrogatories, and that the ship's papers should accompany the property brought before the court. I do not say that the rule is inflexible, for cases may and do occur, in which the omission has not been allowed to work any injurious consequences. But the omission must be accounted for in a satisfactory manner, or the court will withhold its sentence even in very clear cases. *The Anna*, 5 C. Rob. Adm. 373, and note, page 385f. The transaction, indeed, in the present case, having taken place in a remote part of the world, the absence of the regular testimony of the enemy's masters may be easily accounted for; and, under such circumstances, I should have no difficulty in admitting their affidavits, taken before some proper authority in the neutral country. Such a proceeding is by no means unusual. *The Peacock*, 4 C. Rob. Adm. 185, 191. But here

even such original affidavits are not produced. Copies only are offered of the affidavits and certificates of the enemy's masters and mates, and no reason is assigned for the non-production of the originals. In respect to the certificates of the master and mate of the *Madeira*, there is this further objection, that they gave them while they were at sea, as prisoners, on board of the capturing ship. Nor is there any reason assigned, why their testimony was not afterwards taken, as was done in the case of the *Arabella*. Certainly, the certificates of hostile persons, while prisoners of war on board of an enemy's ship, are liable to some suspicion, for they may have been procured by duress or by fraud. I do not mean to suggest any doubt of the purity of the transaction in the present case. On the contrary, I have many reasons to presume it to have been entirely fair. But the court would surrender all its discretion, if it could permit captors to act with such irregularity, and not require a plenary explanation of the manner, in which it happened, and of the circumstances which may excuse it. It would hold out temptations to gross misconduct in captors, and subject the prize tribunals to unjust accusations of connivance in breaches of national law. Our duty also, in respect to the interests of neutrals, requires us to act with caution, and to afford no just pretext for dissatisfaction in administering the maritime rights of war.

There is another irregularity, which indeed has become so general in practice, and has so far obtained the silent acquiescence of public opinion, that it seems almost to have been thought to have ripened into a right, I allude to the removal of the goods from prizes on board of the capturing ship. This is in direct contravention of the express provisions of the prize act, which require, that before bulk is broken, or the prize property is otherwise disposed of or converted, it shall be brought in and proceeded against before some competent tribunal. This provision was undoubtedly designed more immediately for the security of neutrals; but it is also a useful restraint, even as to enemy's property, inasmuch as it has a tendency to prevent embezzlements and frauds, and to aid the regular operation of the revenue laws. In relation, however, to neutrals, it is of the highest importance; as their property, especially on board of enemy's ships, would otherwise be liable to every species of hazard, and often to irretrievable ruin. Courts of prize are therefore bound to hold the captors to very strict scrutiny, whenever cases of removal of goods occur, and to take every precaution to guard against the abuses growing out of the practice. I do not say that a removal is in no case to be allowed, unless of necessity, though perhaps the prize act might, at first view, seem to warrant that rigorous construction. In point of practice, however, even in the British courts,

where a similar statutable direction exists, a more indulgent rule has been adopted. Where property has been captured on a remote station, or under circumstances calling for a removal, sale or other conversion, or even a delivery on bail, on the ground of some great inconvenience, the act has been held valid upon the proper explanations being made, and condemnation has been pronounced in favor of the captors. The *Peacock*, 4 C. Rob. Adm. 185, 191; The *L'Eole*, 6 C. Rob. Adm. 220, 224; *La Dame Cecile*, 6 C. Rob. Adm. 257, 260; The *Falcon*, 6 C. Rob. Adm. 194, 200.

In respect to our own country, considering the character of the war, in which we have been engaged; the great naval force of the enemy; and the consequent difficulty of bringing prizes into our ports; it has not been thought unreasonable to hold, that a removal of prize goods into the capturing ship, if not strictly justifiable, is at least excusable. I trust it is no want of proper decorum to assert, that this conduct seems to have received the favorable consideration even of the government itself. It has been deemed consistent with the national policy, to interpose no obstacles to such proceedings; and to leave the courts of law to make the most liberal interpretations in such cases, in favor of the captors. Under these circumstances, a uniform practice has prevailed in all the courts of the United States, to proceed to adjudication of prize property without any other regard to the fact of its transshipment, than as it called for a most exact examination of the proprietary interest. Still, however, after every indulgence, the transshipment is deemed an irregularity, and at the peril of the captors, who become ultimately responsible to the court for all its consequences.

I have thought it proper to state thus much, in order to vindicate the court from the imputation of lending its aid to great irregularities without reasonable cause. In every case, what shall be the effect of any irregularity must depend upon the sound discretion of the court, acting upon an enlarged and liberal policy. Cases may occur of such gross misconduct, that it might be proper to apply the penalty of a forfeiture of the right of the captors to the United States. I profess not to see in the present case any circumstances, which may not entitle the parties to the most benign indulgence of the court. What I shall at present do is, to suspend judgment, and to require of the captors affidavits of the facts, which shall explain the irregularities, to which I have alluded.

NOTE, [from original report.] On a subsequent day of the term, the affidavit of the commander of The *Rambler*, stating the circumstances, having been produced, condemnation was decreed. A sale was ordered to be made under the direction of the court. It was stated, that any mode of sale, that might be agreed upon by the captors, would be sanctioned by the court. And that, up-

on receipt of an account of sales, it might be filed in court, and distribution would be decreed accordingly.

Case No. 502.

ARAPAHOE COUNTY v. KANSAS PACIFIC RY. CO. et al.

[4 Dill. 277; 5 Cent. Law J. 102; 9 Chi. Leg. News, 369; 4 Law & Eq. Rep. 181.]

Circuit Court, D. Colorado. 1877.

REMOVAL OF CAUSES—CITIZENSHIP—ACT OF MARCH 3, 1875—"CONTROVERSY"—SUIT.

1. The plaintiff, a citizen of Colorado, brought a stockholder's bill in a state court, in Colorado, making the defendants thereto the railroad company (also a citizen of Colorado), in which the plaintiff was a stockholder, viz.: the Denver Pacific Railway Company, and also the directors thereof, including two directors, citizens of Colorado, against whom, however, no charges were made, and no relief asked; also making a defendant another railroad company, viz.: the Kansas Pacific Railway Company (a citizen of Kansas), and certain individuals, all citizens of other states than Colorado. The object of the bill was to secure an accounting in favor of the Denver Pacific Company against the Kansas Pacific Company, and to secure a decree in personam against the non-resident directors of the Denver Pacific Company. The Kansas Pacific Company, and the individual defendants connected with that company, without being joined with the other defendants, applied to remove the suit to the circuit court of the United States, under the act of March 3, 1875: *Held*, that the suit was removable.

2. The right of removal cannot be defeated by the joinder as defendants of citizens of the same state with the plaintiff, if no relief is prayed against them, and they are made defendants without any right or reason or just cause.

[Approved in *Walden v. Skinner*, 101 U. S. 589. Cited in *Donahoe v. Mariposa Land & Min. Co.*, Case No. 3,989; *Pond v. Sibley*, 7 Fed. 135; *M'Henry v. New York, P. & O. R. Co.*, 25 Fed. 69; *May v. St. John*, 38 Fed. 771; *Dow v. Bradstreet Co.*, 46 Fed. 827. Distinguished in *Mills v. Central R. Co.*, 20 Fed. 451; *Belding v. Gaines*, 37 Fed. 820.]

3. In a stockholder's bill of the kind before the court, the company in which the plaintiffs are stockholders is a necessary party defendant, but the interests of the stockholders and the company are identical, and they represent one side of the controversy, and the company against whom the accounting and relief are sought represents the other.

[Cited in *Barry v. Missouri, K. & T. Ry. Co.*, 27 Fed. 2.]

4. The removal act of March 3, 1875, provides that the suit—the whole suit, and not a part of the suit—shall be removed; and under that act, if the requisite conditions exist, any one of the plaintiffs or defendants may remove the suit and carry the other parties with them.

5. Act March 3, 1875, (18 Stat. 470.) does not repeal all acts on the same subject, but only such as are in conflict; so that Act March 2, 1867, (14 Stat. 558, c. 196.) concerning local prejudice as a cause for removal, remains in force.]

[Cited in *Dennis v. County of Alachua*, Case No. 3,791.]

In equity. This suit was brought in the district court of Arapahoe county, by the

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complainants, against the Kansas Pacific Railway Company, the Denver Pacific Railway and Telegraph Company, Sayre, Moffat, Carr, Perry, Meier, Edgerton, Greeley, Dodge, Gould, and Dillon. The defendants, the Denver Pacific Railway Company, Sayre, and Moffat, are and were, with the complainants, citizens of the state of Colorado; the defendants, Dodge, a citizen of Iowa, and Gould and Dillon, citizens of New York. The three last named were not served with process, nor have they entered an appearance in the suit. The Kansas Pacific Railway Company, a citizen of Kansas, Carr, Perry, Meier, Greeley, and Edgerton, citizens of Missouri, united in a petition, accompanied by a sufficient bond, to the district court of Arapahoe county, for the removal of the suit into the circuit court of the United States for the district of Colorado. The judge of the state court indorsed his approval of the sufficiency of the bond, but declined to make an order for the removal of the cause. Nevertheless, the petitioners, in accordance with the conditions of their bond, filed, on the first day of the term of the circuit court of the United States, a certified copy of the pleadings and proceedings in the suit had in the state court, with the clerk of the circuit court, who docketed the cause as one properly removed; whereupon the complainants appeared and moved the circuit court to remand the cause to the state court, on the ground that the cause had been improperly removed from the state court. The attention of the court was not directed to the fact that the state court had declined to make an order for the removal of the suit. The issues tendered by the bill are fully stated in the opinion of the court.

Wm. B. Mills, John I. Redick, and Charles R. Redick, for plaintiff.

Alfred Sayre, John P. Usher, and A. H. Holmes, for defendants.

MILLER, Circuit Justice. The case of the board of county commissioners of Arapahoe county against the Denver Pacific Railway and Telegraph Company, and the Kansas Pacific Railway Company, and various individuals mentioned, presents a question of the jurisdiction of this court arising under the act of [March 3] 1875, [18 Stat. 470.] and especially that branch of it which concerns the removal of cases from state to federal courts. The construction of this statute, in various respects, has been very largely the subject matter of my consideration and action on the circuit during this spring and summer.

It was very aptly remarked here, in the course of the argument on the motion to remand this case to the state court, that the act was intended and was understood to have been passed for the purpose of developing substantially all the judicial powers which the constitution conferred upon the government of the United States. The con-

stitution, while it declares to what the judicial power of the government shall extend, created no court except the supreme court of the United States; and it declared in no manner where that jurisdiction should be vested, except that the supreme court of the United States should have a certain class, which was as to the original jurisdiction very limited, and as to appellate jurisdiction was to be regulated in such manner as congress might determine. It was therefore necessary, for the exercise of all jurisdiction, except that which was directly conferred upon the supreme court of the United States, that some action of congress should create courts in which that jurisdiction should be vested. Congress has created these courts, and it has from time to time made various declarations of what their jurisdiction shall be. The original act of [September 24,] 1789, [1 Stat. 79, § 12,] (called the judiciary act, for the reason that it did attempt and was intended to create courts and invest them with so much of this jurisdiction as in the wisdom of congress ought to be exercised at that time), did not fill the measure of the judicial power of the federal government. The main body of this as to original jurisdiction was vested in the district courts and circuit courts. That of the district courts was confined in a large measure to criminal jurisdiction of the federal power, with an exclusive jurisdiction in admiralty cases. To this has since been added exclusive jurisdiction in bankruptcy. The circuit court, however, was the main depository of the power as regards the original jurisdiction of the federal courts. But all of the power which congress might have conferred on these courts, either separate or united, was not developed. They specified a limited class of cases, and for the purposes of this suit I may say that the main source of the jurisdiction of the circuit court of the United States was originally contests between citizens of different states, as it is to-day. Congress provided two modes by which jurisdiction might be exercised in the circuit courts of the United States; one by a suit brought there, and in which it was necessary in the declaration, or petition, or bill by which the suit was instituted, to describe the citizenship of the parties, so that the court could recognize that it had jurisdiction of the case. In the construction of that statute the supreme court of the United States decided, in the case of *Coleman v. Virginia*, 6 Wheat. [19 U. S.] 264, and has always adhered to this to the present time, that, in bringing suit by original process in the circuit court of the United States, all the parties plaintiff and defendant must have the required citizenship — to be more explicit, that all of the parties plaintiff must be citizens of a state or states different from all and each of the parties defendant, and that if either of the parties plaintiff and either of the parties defendant were citizens of the same state the juris-

isdiction failed. That has been the uniform construction of the act of congress upon the subject.

There was another mode by which the circuit courts acquired jurisdiction of cases, which has been called the original jurisdiction, because it does not fall within the ground of appellate jurisdiction, and this is by removal of cases brought in the state courts of which the state courts had concurrent jurisdiction with the courts of the United States. If a suit was brought in a state court, which, in the arrangement of parties as plaintiffs and defendants, might with equal jurisdiction have been brought in the circuit court of the United States, the act of 1789 provided for a removal of that suit to the circuit court of the United States, upon the application of the party who was not a citizen of the state where the suit was brought. The terms and time and manner of removal were limited. That act remained unrepealed and without substantial modification for a great many years. But about the time of the late civil war in this country it became the policy of congress to enable parties, citizens of different states, for reasons readily imagined, to remove a class of cases not included in the original act, and to remove them at times and under circumstances which could not be done under that act; and from that date to 1875 the statute has been undergoing continual modification and changes. The final act is the one under which the removal is sought in this case from the state court of Arapahoe county, Colorado, into this court.

The suit in this case is brought, as the parties concede, and as the petition shows, by the commissioners of the county of Arapahoe, who are citizens of the state of Colorado, against the Denver Pacific Railway and Telegraph Company, which is also a citizen of Colorado, and against two gentlemen, Mr. Sayre and Mr. Moffat, who are citizens of Colorado, and against seven or eight other persons, who are citizens of other states than Colorado. The case has been removed to this court upon a petition setting forth substantially these facts, and it is now asked to be remanded because the requisite essentials, as prescribed by the act of congress conferring jurisdiction upon this court, are not found in this case. The objection is that the Denver Pacific Railway and Telegraph Company, Sayre and Moffat, are citizens of the same state with the complainants in this action. This objection, as before stated, has always been considered decisive against the jurisdiction of this court; [that unless the parties on each side, each and all of them, have the required citizenship, this court is without jurisdiction.] Where the complainant and defendant are both citizens of the same state, this court has no jurisdiction. It is further alleged,

¹[From 5 Cent. Law J. 103.]

in support of the objection to the jurisdiction of this court in this case, that the Denver Pacific Railway Company, and Sayre and Moffat, each of them, are necessary adverse parties to the complainants in this suit. The objection, if well taken, will require the suit to be remanded.

The reply is that the Denver Pacific Company, and Sayre and Moffat, are nominal parties, against whom no relief is sought, and against whom no decree can be rendered; that the bill is clear and specific on that point; consequently the right which belongs to the other parties to remove the case is not and cannot be defeated by the joinder in the petition of other defendants, citizens of the same state with the complainants, against whom no relief is prayed. As regards Sayre and Moffat, the case seems very clear. A careful reading of the bill shows that no relief can be had against them. No case is made in the bill against them, nor does it appear that any was intended to be made. They are carefully distinguished from the other trustees against whom the relief is asked. No relief is asked against the corporation of which they are directors, nor is the relief asked against all the directors of the road. Not only so, but the complainants are very careful to show in their bill that there is no cause of action, or anything asked against these two directors. The charges are against the majority of the board of trustees of the Denver Pacific Railway Company; the decree asked is a decree in personam against the majority of the trustees, and not against the whole board. It is perfectly clear that no possible decree can be had, nor any charge of misconduct or maladministration be sustained, against Sayre and Moffat, as nothing is alleged against them. They are, therefore, entirely immaterial parties, and may be regarded as out of the case.

The supreme court has decided that where there are merely formal parties, without the requisite citizenship, that does not oust the jurisdiction. But in this case they are hardly formal parties, and it is hard to see why they were put into the bill at all; for it charges that they protested against the wrong while it was being done.

It would be a very dangerous doctrine, one utterly destructive of the rights which a man has to go into the federal courts on account of his citizenship, if the plaintiff in the case, in instituting his suit, can, without any right or reason or just cause, and with the express declaration that he asks no relief from them, join persons who have not the requisite citizenship, and thereby destroy the rights of the parties in federal courts.

We must, therefore, be astute not to permit devices to become successful which are used for the very purpose of destroying that right. In this case there is no question but that these two gentlemen—Sayre

and Moffat—are in no sense in the way of the removal of the case, though they be citizens of the same state as the complainant.

The case then rests upon the question of whether the fact that the Denver Pacific Railway Company is a party defendant, and is a citizen of the same state of the party plaintiff, ousts the jurisdiction of this court or defeats the right of removal of the other parties who are citizens of other states. That question does not rest upon the same principle as the case of Messrs. Sayre and Moffat. The Denver Pacific Railway Company is a necessary party to this suit; it is one without which the suit cannot proceed. The main object of this suit, aside from obtaining a temporary injunction, and the appointment of a receiver, is to obtain an accounting with the Kansas Pacific Railway Company and other defendants, on an allegation that a majority of the trustees of the Denver Pacific Railway Company have been committing frauds, and thus depriving that company of the funds belonging to it. The relief sought is an accounting, and the relief asked is a decree in favor of the Denver Pacific Railway Company for the amount found due upon that accounting. The Denver Pacific Railway Company is a necessary party to that accounting. A party cannot be required to go to all the trouble of accounting and having a decree, when that accounting and decree will not be a valid defence against the principal party having the right to call such party to account. If the suit was merely between the county commissioners and these trustees, the decree would not protect the trustees, whether they were decreed to pay over moneys, or whether they were discharged or acquitted. It would be no protection against the Denver Pacific Railway Company in another suit upon the same cause of action. This shows very clearly that the Denver Pacific Railway Company is not a mere nominal party, but is an indispensable party. But, as already stated, the main relief sought in this case will be, if the suit is successful, a decree in favor of the Denver Pacific Railway Company for the amount found due from the other defendants in this case. That is an important and significant feature of the transaction. In an action at law a suit could not be maintained in which the board of commissioners of Arapahoe county should be plaintiffs, and the Denver Pacific Railway Company and these petitioners defendants, in which a judgment should be asked for one hundred thousand dollars in favor of the Denver Pacific Company against itself and its co-defendants. The court would say, you cannot make two defendants litigate before a jury and get a verdict as between themselves, while the party who brought the suit looks on as having no interest in the transactions. But the flexibility of the mode of proceedings in a court of chancery is such that,

for the attainment of justice, you may, in some instances, where the party is not before the court, make him a defendant, when he will not be a plaintiff. You cannot compel him to hazard the results of a defeat, though his presence in the court may be necessary for the rights of somebody else, and his rights be with the plaintiff in the case. In suits at common law he would be there as plaintiff, if there at all. By the rules and practice in equity the court allows him to be defendant in the case; but the mere fact that he is placed as defendant instead of plaintiff in a suit in chancery, never changes his relation to the controversy in the case, and it is very clear that the interest of the Denver Pacific Railway Company is the interest of the plaintiffs; that their interest is identical—that the board of county commissioners are using the name of the Denver Pacific Company to carry on this suit solely for the benefit of that company. The Denver Pacific Company, being in the control of the defendants, refused to bring this suit, and the complainants, stockholders of that company, were of necessity compelled to make it defendant, that it might be brought before the court; but when before the court, the company is entitled to recover against the other defendants. The complainants recognize this themselves, for in their prayer for relief they say expressly what they pray for is a decree in favor of the Denver Pacific Railway Company against the Kansas Pacific Railway Company and the other defendants. Now, the controversy in this case is one in which the commissioners of Arapahoe county and the Denver Pacific Railway Company are on one side, citizens of the state of Colorado, against all the other defendants. And all the other defendants are citizens of other states, except Sayre and Moffat, and the controversy, in the language of the constitution and of the statutes, is one between citizens of the state of Colorado and citizens of other states, and therefore within the meaning of the constitution of the United States, and within the meaning of the statute under which this removal is sought. The statute says, in the second section, "that any suit of a civil nature, at law or equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state, claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, either party may remove said suit into the circuit court of the United States for the proper district; and when, in any suit mentioned in this section,

there shall be a controversy which is wholly between citizens of different states, and which can fully be determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit to the circuit court of the United States for the proper district."

The best judgment I am able to give is that this is a controversy between citizens of the state of Colorado on one side, and citizens of other states on the other side, and is properly subject to removal.

Another objection, and the last one taken in the argument, was, that all of the parties defendant, who are citizens of other states, have not united in asking this removal, and that it requires the union of all these parties in the request that it should be done. The decisions of the courts were that, under the former statutes, it did require all the defendants, or the parties who were classed on the same side as regards citizenship, to unite in the petition for removal, or the suit could not be removed. But the act of 1875 intended to make a different rule upon the subject, and, in my judgment, it was the purpose and intent of the last clause of that act to enable one man, where all the parties on his side of the controversy had such citizenship as to authorize a removal, to have the case removed, and with it to carry all other parties. The language of the statute on that subject is very clear: "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states"—which is so in this case—"and which can be fully determined as between them, then either one or more of the plaintiffs or defendants"—not all of them—"actually interested in such controversy may remove said suit." The argument is, that where less than the whole number on the same side made application, it could be removed as to them only, if they had a separate or special interest which could be determined between them and the plaintiffs. But it is the suit that is intended to be removed under this clause, and congress provided that one plaintiff or one defendant could remove the suit. I have decided that the act of [March 2] 1867, [14 Stat. 558, c. 196.] concerning prejudice, remains in full force. The reason is, that the act of 1875 does not repeal all acts on the same subject, but only such as are in conflict. It is very guarded. It is not in conflict with the provisions of this act that one of the defendants may, under the act of 1866, remove the cause as to himself. They are supplementary rights. To say that, where the case can be removed as a whole, it should be removed, but where, from its essential nature, it cannot be removed as a whole, and a part can be removed, that part shall be removed, is not in conflict; so that the two statutes stand together, and are not in conflict, just as I held under the act of

1867. In all cases of removal under the act of 1875, application must be made at the first term, or before the term at which the suit could be tried or heard. No such provision is made in the act of 1867, or in that of [July 27,] 1866, [14 Stat. 306.]

I am, therefore, of the opinion that the fair construction of the act, taken in connection with the general policy of the statute to give very nearly all the jurisdiction which the constitution of the United States intended to belong to the federal judicial power, requires that this case shall remain where it is; and the motion to remand it is denied. Motion denied.

ARBOR. The ANN. See Cases Nos. 407 and 408.

ARBUNCLE, (BOWNE v.) See Case No. 1, 742.

ARBUNKLE, (BROWN v.) See Case No. 1, 990.

ARBUSTOL, The, (JUSTI PON v.) See Case No. 7,589.

ARCHBOLD, (GERMAN SAV. BANK v.) See Case No. 5,364.

ARCHEMBROUN, In re. See Cases Nos. 503, 504, and 505.

ARCHENBRAUN, In re. See Cases Nos. 503, 504, and 505.

Case No. 503.

In re ARCHENBROWN.

[8 N. B. R. (1876,) 429.]

District Court, E. D. Michigan.

BANKRUPTCY—PROOF OF DEBTS—EXPENSES OF ATTACHING CREDITORS.

[A claim by creditors of a bankrupt for the expenses of an attachment, begun by them against him before the commencement of bankruptcy proceedings, should not be allowed against the bankrupt estate. Gardner v. Cook, Case No. 5,226, followed.]

In bankruptcy.

By the register: Foreman & Friedlander presented for allowance an account. The following are the items:

Services of Dickenson & Dickenson, investigating said bankrupt's condition.....	\$10
County fee paid clerk of Wayne county said case in attachment.....	2
Clerk's fees in said-suit, attorney's services in suit of attachment.....	20

The allowance of this account being contested by the assignee, the register certifies the case to the district court, with the following opinion:

I do not think that the account ought to be allowed; because: 1st. It is not and does not claim to be an account for which the bankrupt is liable; and if it were, it could only be proved after the form prescribed by section twenty-two. 2d. It does not claim to be an account for disbursements incurred by a petitioning creditor in procuring the adjudication of bankruptcy. Such accounts have usually been allowed, because they are

seen to have been incurred in the interest of all the creditors by taking proceedings which will bring the estate of the bankrupt within the power of this court, where an equitable distribution may be assured, according to the principles and policy of the bankrupt act. Nothing appears from the petition to show that the expenses here incurred were not solely for the benefit of the attaching creditors; and their proceedings, if they had not been interrupted by the proceedings in bankruptcy, would have resulted in the payment in full of the parties who make this application, at the expense of all other creditors. A result so hostile to the policy of the bankrupt act ought not, in my judgment, to be countenanced by the allowance of the claim here presented.

Hovey K. Clarke, Register.

LONGYEAR, District Judge. I think Judge Knowles' opinion in Gardner v. Cook, [Case No. 5,226,] in the reasoning and conclusions of which I entirely concur, and the cases there cited, are conclusive of the correctness of the foregoing decision of the register. I, therefore, hereby approve the same.

Case No. 504.

In re ARCHENBROWN.

[11 N. B. R. (1875,) 149; 7 Chi. Leg. News, 99.]

District Court, E. D. Michigan.

BANKRUPTCY — SUFFICIENCY OF NOTICE — IDEM SONANS—RIGHTS OF CREDITORS—JURISDICTION.

[1. A notice in bankruptcy addressed to "Levey, New York," is insufficient as notice to Lawrence J. Levey, residing in New York.]

[2. Though a creditor has had no notice of, and has not proved his debt nor received any dividend in, bankruptcy proceedings, he cannot proceed by action at law against the bankrupt, pending an application for his discharge, under Act 1867, §§ 33, 34, which provide that a discharge shall release the bankrupt from all claims which "might have been proved against his estate in bankruptcy," except such as were created by fraud or in a fiduciary character. His remedy is to oppose a discharge.]

[Cited in Lamb v. Brown, Case No. 8,011.]

[3. The court obtains full jurisdiction of the proceeding by petition, adjudication, and warrant, and not by notice to the creditors.]

[In bankruptcy. Archenbrowne was adjudicated a bankrupt on creditor's petition on November 6, 1872; and his estate was subsequently collected and distributed. Lawrence J. Levey, a creditor, sued the bankrupt, at law, for the collection of a debt; and the bankrupt petitioned, under section 21, to enjoin the prosecution of the suit until the determination of the question, then pending, of the bankrupt's discharge. An order for the creditor to show cause having been made and served, he appeared, and for cause showed that the bankrupt did not include his name in the list of creditors furnished to the marshal; that he received no

notice of the bankruptcy proceedings; that he was not informed of such proceedings till long after; that his debt was not proved therein; and that he had received no dividends. Petition granted.]

Mr. Dewey, and Chipman & Dewey, for petitioner.

Mr. Burt, and Burt & Clark, for Levey.

LONGYEAR, District Judge. On an inspection of the list of creditors furnished by the bankrupt to the marshal, I find that the name of Lawrence J. Levey does not appear therein; and there is no proof on file that any notice was sent to or served upon him, or that his name and address was furnished to the marshal in any manner whatever. The attention of the court was called, however, to the following appearing upon said list, viz.: "Levey, New York, 400;" and it is claimed, that this was meant for Lawrence J. Levey, the respondent, and the court is asked so to construe it. It appears by the records that the notices were sent by mail, addressed as indicated by the list of creditors. It certainly needs no argument to show that a notice addressed to "Levey, New York," without any other description or designation, cannot be presumed to have reached Lawrence J. Levey, notwithstanding that he resides and did business in New York. The two names are not idem sonans, and cannot, by any stretch of construction, be held to be the same in any respect whatsoever. The case is therefore one in which the name of the creditor sought to be restrained from prosecuting his suit at law to await the determination of this court upon the bankrupt's application for a discharge was entirely omitted, and who had no notice of and has not proved his debt or received any dividends in the bankruptcy proceedings. If a discharge, under the provisions of the act, may be a bar under such circumstances in any case, the proceedings at law must be stayed (in the absence of any objection that the application for a discharge has not been made and prosecuted with reasonable diligence), and the creditor must come into this court and oppose the granting of the discharge in the mode pointed out by the act, if he would avoid such bar, otherwise he ought not to be delayed in the prosecution of his suit.

By section 34 of the act of 1867 it is provided "that a discharge duly granted under this act shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy. * * * Always provided, that any creditor or creditors of said bankrupt whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of

said discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same." The "exceptions aforesaid" are those mentioned in the first clause of section 33, viz.: Debts created by fraud or embezzlement, by defalcation as a public officer, or while acting in any fiduciary character. The present case does not come within the exceptions; and, being a debt which "might have been proved" against the bankrupt estate in bankruptcy, it clearly comes within the category of "debts, claims, liabilities, and demands," as to which a discharge is declared by section 34 to be a release.

But it was contended that the court has no jurisdiction of a debt, etc., of a creditor whose name was omitted from the schedule, and who received no notice of the bankruptcy proceedings, nor voluntarily submitted himself to the jurisdiction of the court by proving his debt and receiving dividends in the bankruptcy proceedings. This position, at first impression, seems very reasonable, and there have been some decisions in its support. *Anon.*, [Case No. 457;] *Barnes v. Moore*, 2 N. B. R. 573; *In re Hall*, [Case No. 5,922;] *Perkins v. Gay*, 3 N. B. R. 772. But unfortunately, perhaps, for the position contended for, jurisdiction is not made by the act to depend upon the correctness of the schedule of creditors, or that the creditors actually received notice of the proceedings. Provision is made for a schedule of creditors, and also for notice to creditors personally, or by mail and by publication; but jurisdiction, either of the proceedings or to grant a discharge, is not made to depend upon the correctness of the schedule or the actual reception of such notice by the creditors. The court obtains full and complete jurisdiction for all purposes whatsoever by the petition, whether voluntary or involuntary, adjudication, and warrant. Provision is made, however, by section 29, for defeating the granting of a discharge, and by section 34 for the annulling of the same when once granted, on the grounds here alleged, under certain restrictions and limitations; and creditors like Mr. Levey, who have been omitted from the schedule, must avail themselves of the provisions of those sections, if they would avoid their debts being barred by the granting of a discharge. So long as they do not do so the presumption is that their debts will be released by a discharge if granted, and they must be restrained in the prosecution of suits upon such debts until the question of the granting of a discharge shall have been determined in the bankruptcy court. *Hill v. Robins*, 22 Mich. 475, 478; *Symonds v. Barnes*, [59 Me. 191;] *Payne v. Able*, 4 N. B. R. 220; *Corey v. Ripley*, [57 Me. 69.] Prayer of petition granted.

Case No. 505.

In re ARCHENBROWN.

[12 N. B. R. (1875), 17; 7 Chi. Leg. News, 231.]

District Court, E. D. Michigan.

BANKRUPTCY—DISCHARGE—"PROPER BOOKS OF ACCOUNT"—EVIDENCE.

[1. A merchant tailor, for several months before his bankruptcy, kept no account of his business done for cash, and his previous accounts consisted of a running memorandum of work done, without showing whether for cash or credit, nor whether cash received or cash paid out was on account or otherwise. Part of his accounts with customers were marked "settled," without showing how, and he discontinued his account with his creditors for more than a year before his bankruptcy. *Held*, that his discharge must be refused for failing to keep "proper books of account."]

[Cited in *Re Antisdel*, Case No. 490; *Re Blumenthal*, Id. 1,575; *Re Vernia*, 5 Fed. 725; *Re Graves*, 24 Fed. 554; *Re Frey*, 9 Fed. 384.]

[2. The fact that a bankrupt did not keep "proper books of account," without reference to his intent or harmless results to creditors, will prevent his discharge.]

[Cited in *Re Graves*, 24 Fed. 554.]

[In bankruptcy. Petition by William Archenbrowne for a discharge. Refused. For prior opinions, see *In re Archenbrowne*, Case No. 503, and *In re Archenbrowne*, Id. 504.]

Mr. Burt, for opposing creditor.

Mr. Dewey, for bankrupt.

LONGYEAR, District Judge. The first specification is for omitting the opposing creditor's name from the schedule of creditors, and not for willfully swearing falsely to the schedule. In this it is fatally defective, but even if it had been properly framed, it was clearly not sustained by proofs. For both reasons, therefore, it is overruled without further comment. The second and only other specification is for not keeping proper books of account, the bankrupt having been a merchant or tradesman. The object of the requirement of the act (section 29) that merchants and tradesmen shall have kept proper books of account in order to be entitled to a discharge in case of bankruptcy, is that the debtor himself, or his creditors, might at any time ascertain his financial condition from an examination of his books; and in case of bankruptcy to insure the entire appropriation of the debtor's property, not exempt, to the payment of his debts, and to enable the assignee to accomplish that end, and to assist him in the administration of the estate. The test as to whether the books which were kept, when, as in this case, some books were kept, were "proper" books of account, within the meaning of the act, is, whether a competent accountant could, from the books themselves, ascertain the debtor's financial condition. If that can be done, then the form in which they were kept is of no importance. In *re Hammond*, [Case No. 5,999]; *In re Bellis*, [Id.

1,275;] *In re Solomon*, [Id. 13,167;] *In re Gay*, [Id. 5,279;] *In re Schumpert*, [Id. 12,491;] *In re Garrison*, [Id. 5,254;] *In re Bartenbach*, [Id. 1,068.]

Archenbrowne was a merchant tailor, and did work and sold goods both on credit and for cash. So far as the books kept by him of work done and goods sold on credit, I do not see as there is any just cause of complaint, although the accounts were kept in a loose and rather informal manner. For several months before his bankruptcy he kept no account of his business done for cash, and the account he kept previously is very unsatisfactory and quite unintelligible. It seems to have been a sort of running memorandum of work done, without any distinction as to whether it was for cash or on credit, and the item of cash received and cash paid out is often without any indication as to whether it was on account or how otherwise; and his accounts with his customers where a balance appears against them upon his books are very often marked "settled," without saying how, whether by note, cash, or barter. For a time he seems to have kept an account with his creditors—those of whom he purchased stock, but even this seems to have been discontinued for more than a year before his bankruptcy. Without going further into details, it must suffice to say that his books do not come anywhere near to what would be the lowest degree of the list above laid down. I am satisfied from the proofs that Archenbrowne had no intent, in his failure to keep proper books of account, to defraud his creditors. Neither does it appear that any fraud upon or loss to creditors has resulted from it; but these elements do not enter into the calculation. The fact that he did not keep proper books of accounts is made by the act a cause for refusing to discharge, without any reference to the intent or the result. I am therefore constrained, however reluctantly, to refuse his petition for a discharge. In addition to the cases already cited, see *In re Littlefield*, [Case No. 8,398;] *In re White*, [Id. 17,532;] *In re Newman*, [Id. 10,175;] *In re Burgess*, [Id. 2,153.] Discharge refused.

Case No. 506.

In re ARCHER.

[9 Ben. 427; 24 Int. Rev. Rec. 110.]

District Court, S. D. New York. April, 1878.

INCOME TAX.

1. It is not within the purview of sections 3172 to 3182 of the Revised Statutes that unpaid income-taxes are now to be assessed and collected through the machinery provided by those sections, or that the examinations which are solely a part of such machinery should now take place.

¹ [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

2. Where a person made sworn returns of his income each year from 1866 to 1872, and paid income-taxes accordingly, the commissioner of internal revenue could not, in 1878, under section 3182, make a new or corrected list in respect to the income-taxes of such person for those years, because the fifteen months named in that section had elapsed.

R. M. Sherman, Asst. Dist. Atty., for the United States.

Dudley Field, for Mr. Archer.

BLATCHFORD, Circuit Judge. The order to show cause is an order to show cause why an attachment should not issue, as for a contempt, "as provided by section 3175 of the Revised Statutes of the United States." That section applies only to persons summoned under sections 3173 and 3174. The proceedings which resulted in the order to show cause are, on the face of the papers, based specifically on those three sections only. The summons was one "to produce all books of account containing entries of your business transactions, and relating to the trade or business of yourself, from January 1st, 1866, to January 1st, 1872, which you may have in your possession, custody or care, and to give evidence, according to your knowledge, respecting the liability of yourself as an income-tax payer, to an excise duty or tax under the internal revenue laws of the United States."

The three sections above cited are part of a scheme looking solely to the assessment and collection of taxes through the machinery of assessment and collection by the warrant of the collector. This appears from the tenor of the three sections themselves, and of section 3172, and of the sections which follow section 3175. Whether the case be one of neglect to render a return, or of the rendering of a false return, section 3176 shows that the object of the examination of books and the taking of testimony under section 3173 is to enable the collector or deputy collector to make a correct list or return, and to enable the commissioner of internal revenue to assess the tax on objects liable to tax. I do not think it is within the purview of the sections referred to, even including section 3182, that unpaid income-taxes are now to be assessed and collected through the machinery provided by those sections, or that the examinations which are solely a part of such machinery should now take place. Moreover, in the present case, Mr. Archer made sworn returns of his income each year during the period named in the summons, and paid income-taxes accordingly. Therefore, under section 3182, the commissioner of internal revenue could not now make a new or corrected list in respect to the income-taxes of Mr. Archer for the years named in the summons, because the fifteen months named in section 3182 have elapsed.

I do not think there is anything in section 3163 as to the power of supervisors,

in connection with the provision of the act of August 15, 1876, (19 Stat. 152,) which varies the view above taken of the sections on which this proceeding is based, or which can uphold it.

The application for the attachment is denied.

Case No. 507.

The ARCHER.

[9 Ben. 455.]¹

District Court, S. D. New York. April, 1878.

CARGO AND FREIGHT—BONDING—SECURITY— CHANGE OF CLAIM.

1. A vessel, cargo, and freight being attached on a libel on a bottomry bond, the owner of the cargo moved for leave to bond in its value less the freight on paying the freight into court, and the libellant, opposing, moved for a sale of the cargo: *Held*, That, as it appeared likely that the proceeds of the sale of the vessel alone would be sufficient to meet the demand of the libellant, if proved, the sale of the cargo would not be ordered; but the cargo must be bonded in its full value and not less freight.

2. It is no reason for refusing to a libellant any part of the customary security, that he seems to have much more than enough security.

3. A claimant of a vessel, filed a claim in which he averred that he was a mortgagee in possession. The libellant denied his right to appear and claim, and on a reference it was determined that the claimant was a mortgagee in possession. Thereafter he applied for leave to withdraw that claim and file a new one averring that he was the owner of the vessel. The libellant objected. *Held*, That the motion would be granted, no other party having been affected by the proceedings or suffering prejudice.

[4. Cited in *The Two Marys*, 10 Fed. 925, to the point that a common law lien is enforceable under the general power of a court of admiralty.]

[In admiralty. For a subsequent hearing in this case on motion to take out of registry the proceeds of sale of the vessel upon giving the customary bond, see *The Archer*, Case No. 508.]

Theodore F. Meyer and R. D. Benedict, for libellant.

W. W. Goodrich, for claimant of vessel.

Butler, Stillman & Hubbard, for claimant of cargo.

CHOATE, District Judge. This is a libel on a bottomry bond against vessel, cargo, and freight. The vessel, cargo, and freight having been attached, and claimants having appeared for vessel and freight and also for cargo, the claimant of the cargo now moves to be allowed, on paying the freight into court, to bond the cargo for its value in this port, less the freight. The claimant of the vessel consents; the libellant objects. The ground of the motion is that the extreme interest of the owner of the cargo

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in the cargo, on which the libellant can have obtained security by the bottomry bond, is the value of the cargo in this port, less the freight; that the master cannot have hypothecated what was not at risk; that when the bond was given it covered only the value of the cargo as it was in the foreign port where the bottomry bond was given; that the amount of the freight has been added to that value, and that if the owner of the cargo pays the freight and is made liable also for the full value of the cargo, he will have to pay freight twice, while all that he has at risk is the cargo, which he may, if he will, abandon, without paying freight.

But I am referred to no statute, rule, or decision which authorizes the bonding of property in the custody of the court for less than its actual value, and it seems to me that all equities as between the owner of the cargo and the libellant, growing out of the fact that the freight is paid into court, and the other circumstances referred to, should be considered and determined upon the hearing of the cause. If the libellant is not entitled as against the cargo or its owner to a larger sum than the value of the cargo in this port, less the freight which he will have paid, his equity in that regard will not be affected or impaired by his giving bond for the value of the cargo. However plain his apparent equity may be, it should not be determined on this motion. The libellant claims to hold a lien on vessel, cargo, and freight, and he, having attached them, may well object to any of the property attached being taken from the custody of the court without the customary security for its value, and the fact that he seems to have much more than sufficient security, is no reason for depriving him of any part of it.

A motion is also made on behalf of the libellant for the discharge and sale of the cargo, which consists of empty petroleum barrels.

Upon the affidavits, it appears that the proceeds of the vessel are likely to be sufficient to discharge the libellant's claim. The cargo will not, therefore, be ordered sold against the opposition of the claimant of the cargo, but if it shall not be bonded nor sold with the consent of the claimant, an order may be entered for its discharge from the vessel within ten days before the time fixed for the sale of the vessel.

A motion is also made by the claimant of the vessel to withdraw his claim filed on the 22d day of March, 1878, and to substitute another claim filed by him on the 12th of April. In the first he claimed as mortgagee in possession; in the second, as owner.

When the first claim was put in, his right to appear and claim was denied, and upon a reference to the clerk and the clerk's report it was determined that he was mortgagee in possession.

Notwithstanding what has taken place, I think the claimant should be allowed to state his claim in the form which he now prefers. The question whether he is owner, or mortgagee in possession, is rather a question of law than a question of fact. The claimant does not now, by his new claim, seek to deny or controvert any of the facts relied upon by him upon the reference to determine his former claim, and I cannot see that any other party has been affected in any way by the proceedings so as to suffer prejudice from the granting of this motion.

Motion granted that the claim filed April 12th, 1878, stand as the claim of said Harrison, claimant of the vessel, upon payment of the costs of the reference under his former claim.

Case No. 508.

The ARCHER.

[10 Ben. 99.]¹

District Court, S. D. New York. Sept. 1878.

PRACTICE—BONDING PROCEEDS OF VESSEL.

1. A libel was filed against a vessel on a bottomry bond. The default of all persons was entered except that of a claimant who was in possession at the time of the attachment of the vessel, claiming under mortgages overdue and unpaid. The vessel was sold and the proceeds paid into court. Both parties applied for leave to bond the proceeds. The libellants claimed that evidence already taken by the claimant, if unexplained or uncontradicted, established their right to the amount of their bottomry bond as against the vessel: *Held*, That, though, in a clear case, when the rights of the libellant were admitted, the court might permit him to take the money from the registry on giving proper security for its return, such was not this case, the libellants' right being denied in the pleadings, and the court would not prejudice it on a partial production of the evidence.

2. Motion of the libellants denied and motion of the claimant granted.

[In admiralty. Heard on motion of claimants to take out of registry the proceeds of sale of the vessel upon giving the customary bond. For report of hearing on the merits, see *The Archer*, Case No. 507.]

T. F. Meyer and R. D. Benedict, for libellants.

W. W. Goodrich, for claimants.

CHOATE, District Judge. Upon a libel on a bottomry bond, default having been entered against all persons except the claimants who, at the time of the attachment of the vessel, were in possession, claiming under mortgages overdue and unpaid, the vessel has been sold and the proceeds paid into the registry. The claimants now move for leave to take out of the registry the proceeds, upon giving the customary bond. The libellants also move to be allowed to take out the money on giving bonds, on the

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ground that the testimony already taken in the cause by the claimants, if unexplained or uncontradicted, establishes the right of the libellants to the amount of their bottomry bond as against the vessel. In a clear case, where the right of the libellant is virtually admitted, he might be permitted to take the proceeds from the registry, giving suitable security for its return; but that is not this case. The right of the libellants is disputed upon the pleadings, and the question can not be prejudged upon a partial production of the testimony. Their motion must therefore be denied. The claimants should be allowed to bond the proceeds, as they would have been entitled to bond the vessel, if still in the custody of the marshal. Their possession of the property has been interrupted by the process of the court to enable the libellants to prove their claim against it, and the same reasons which make it proper that parties from whose possession the vessel is taken should be allowed to bond her, make it also proper and right that they should on the like terms receive the possession of the money into which the vessel has been converted. The system of bonding is intended to mitigate the hardships attendant upon the seizure of the property, while at the same time affording to parties having claims to assert against it a reasonable security for payment of their claims. Upon the bonding of the proceeds the libellants will have all the security that libellants ordinarily have.

Motion of claimants granted.

ARCHER v. The ADRIATIC. See Cases Nos. 89, 90, and 91.

ARCHER, (PLATT v.) See Cases Nos. 11,213 and 11,214.

Case No. 509.

ARCHER v. POOR.

[5 Cranch, C. C. 542.]

Circuit Court, District of Columbia. March Term, 1830.

LIMITATION OF ACTIONS—ACKNOWLEDGMENT—SUFFICIENCY.

An acknowledgment of a claim is not sufficient to take a case out of the statute of limitations.

[See note at end of case.]

At law. Assumpsit for use and occupation. To take the case out of the statute of limitations, the plaintiff offered in evidence the defendant's letter to the secretary of the navy, in which he says, "I could have availed myself of the insolvent laws of the District, but preferred paying all debts as soon as possible, not omitting Mr. Archer's claim."

THE COURT (THRUSTON, Judge, absent) said it was not a sufficient acknowledg-

ment to take the case out of the statute. See Wetzell Bussard, 11 Wheat. [24 U. S.] 309, and Bank of U. S. v. Moore, [Moore v. Bank of Columbia,] 6 Pet. [31 U. S.] 93.

Mr. Dermott, for plaintiff.

Mr. Bradley, for defendant.

[NOTE. In Clementson v. Williams, 8 Cranch, (12 U. S.) 72, Chief Justice Marshall held that it is not enough to take the case out of the act that the claim should be proved or be acknowledged to have been originally just, but that the acknowledgment must go to the fact that it is still due. See Bell v. Morrison, 1 Pet. (26 U. S.) 351; Kampshall v. Goodman, Case No. 7,605. To take a case out of the act, there must be an express promise to pay, or circumstances from which an implied promise may fairly be presumed, in addition to the admission of a present subsisting debt. Moore v. Bank of Columbia, 6 Pet. (31 U. S.) 86. See, contra, Cowan v. Magauran, Case No. 3,292. For other cases in which acknowledgments have been held sufficient, see Arnold v. Dexter, Case No. 557; Penaro v. Flourney, Id. 10,916. Held insufficient in Thompson v. Peter, 12 Wheat. (25 U. S.) 565.]

ARCHER, (TAYLOR v.) See Case No. 13,778.

ARCHER, (UNITED STATES v.) See Case No. 14,464.

Case No. 509a.

The ARCTIC.

[1 Brown, Adm. 347.]¹

District Court, E. D. Michigan. Nov., 1871.

PRACTICE—SECURITY FOR COSTS IN WAGES CASES.

A seaman suing for his wages cannot be compelled to give security for costs for the sole cause that the amount claimed is small, and the indebtedness is denied in the answer.

In admiralty. Motion for security for costs. The libel in this case was for seaman's wages. The answer denied there was anything due to libellants. The claims, as set up in the libel, were for small amounts, being for \$5, and \$11.46, respectively. The motion was founded upon the facts that the claims set up are small in amount, and the denial of any indebtedness contained in the answer.

W. A. Moore, for the motion.

E. E. Kane, opposed.

LONGYEAR, District Judge. It is conceded that under rules 9 and 10 of this court, this motion is addressed exclusively to the discretion of the court. Unless the court is prepared to say that in all such cases where the amount claimed is small and the indebtedness is denied, without any showing of improvidence or bad faith in the bringing of the suit, security for costs shall be given, the motion in this case cannot be granted. The exemption of seamen from giving security for costs in suits for wages, under the proviso to rule 9, is general. No

¹[Reported by Hon. William Cranch, Chief Judge.]

¹[Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission.]

distinction is made as to the amount claimed, and I can find no authority for the court to make any such distinction without an amendment or abrogation of the proviso. And to say that security shall be required in all cases where the indebtedness is denied by the answer, without any showing of bad faith, would be a practical abrogation of the proviso in a great majority of cases; because, that is usually the very question involved, and to try which the suit is brought.

Common seamen are often transient persons, having no fixed place of residence, and generally of no pecuniary responsibility, and therefore unable to give security. It is upon this presumed inability that the exception is founded. To require them to give security in all cases would be a virtual denial of justice, and would place them at the mercy of their employers. They must not, however, abuse the privilege; and in all cases where the presumption of their inability to give security is overthrown, or it is satisfactorily shown that bad faith has been practiced in bringing the suit, or that the suit was unnecessarily brought, the court would not hesitate to exercise the discretion reserved by rule 10, and require security to be given. See *Wheatley v. Hotchkiss*, [Case No. 17,483.]

Motion denied.

ARCTIC, Cargo of The, (CRAPO v.) See Case No. 3,361.

ARCTIC, The, (GEORGE v.) See Case No. 5,330.

ARCTIC OIL CO., (NATIONAL FILTERING OIL CO. v.) See Case No. 10,042.

ARCTURUS, The, (TIBBITTS v.) See Case No. 14,021.

Case No. 509b.

ARCULARIUS v. STAPLES.

[Betts' Scr. Bk. 586.]

District Court, S. D. New York. March Term. 1859.

ADMIRALTY — JURISDICTION — STATE LAW—HALF PILOTAGE — DEFAULT JUDGMENT — VACATION—LACHES.

[1. Act Aug. 7, 1789, (1 Stat. 53,) enacts that "all pilots in the harbors of the United States shall continue to be regulated in accordance with the existing laws of the state;" and by a law of the state of New York a pilot is entitled to receive one-half legal pilot fees from the master of a vessel who refuses to employ or receive such pilot on board. *Held*, that the right to half pilotage is not cognizable by the admiralty side of the district court, but is a legal right triable only on the common law side.]

[2. An action for pilotage commenced June 7, 1857, was by both parties put on the calendar for hearing, and was noticed by libellant from term to term until January 29, 1859, when a default was taken, and the case referred to a commissioner, who made his report February 19, 1859. On March 1, 1859, defendant filed his answer, denying the allegations of the libel, and gave written notice of a motion to set aside all proceedings as coram non iudice, and void. *Held*, that the irregu-

larities and laches of defendant, unexplained by him, debarred him of the right to set aside the libellant's proceedings by such a form of motion.]

[In admiralty. Action by Benjamin F. Arcularius against Capt. Staples for pilot fees. Judgment by default for libellant. Defendant moves to set aside all proceedings as coram non iudice and void. Motion denied.]

This was an action brought by the plaintiff, a licensed Hell Gate pilot, against the master of a sailing vessel belonging to the state of Maine, to recover fees fixed by the laws of the state of New York. The charge was that the pilot offered his services to the master to pilot the vessel, then going through Hell Gate. The master refused to employ or receive him on board. By the laws of the state of New York the pilot is entitled to receive one-half legal pilot fees from the master for such refusal and that such fees amount to \$5.25. The action has been prosecuted to default and reference to a commissioner, and a report made by the commissioner, finding that the sum was due to the pilot. The master applied to the court to set aside all the proceedings as coram non iudice and void. The pilot opposed the motion as irregular, and on the ground that the master has waived, by his acquiescence and laches, all claim to relief.

The action was commenced June 7, 1857, and was by both parties put upon the calendar for hearing; and it was noticed by the libellant every term till January 29, 1859, when the default was taken, and the case was referred to a commissioner who made his report Feb. 19, 1859. On the 1st of March instant, the defendant filed his answer denying the allegations of the libel and to the jurisdiction of the court, giving written notice of this motion.

BETTS, District Judge. This is a case of admiralty and maritime jurisdiction on general principles of maritime law, as in pilotage, service was performance. The right of action is claimed under a statutory provision of the legislature of this state. The act of congress of August 7, 1789, [1 Stat. 53, § 4.] enacts that all pilots in the bays, inlets, rivers, harbors and ports of the United States, shall continue to be regulated in conformity with the existing laws of the states, respectively wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose until further legislative provision shall be made by congress.

If by power of this statute the state law becomes also a law of the United States in respect to the provision giving compensation to pilots who are prepared and tender their services but are refused by masters of vessels, and actually render none, it would not make the right so conferred one of which this court can take cognizance on the ad-

miralty side. It would become a legal right triable on the common law side of the court only. "The irregularity and laches of the defendant unaccounted for on his part, debar him of the right to set aside libellant's proceeding by this form of motion;" but the court will feel compelled to withhold its further action in suffering the interlocutory judgment obtained by the libellant, for want of jurisdiction over the subject matter.

Order accordingly, but without costs.

Case No. 510.

ARDEN v. BROWN.

[4 Cranch, C. C. 121.]¹

Circuit Court, District of Columbia. Dec. Term, 1830.

STATUTE OF FRAUDS — SALE OF LAND AT PUBLIC AUCTION—EQUITABLE INTEREST—PAROL AGREEMENT BETWEEN PURCHASERS.

1. Sales at public auction are not within the statute of frauds.
2. The statute of enrolment of conveyances, 1766, c. 14, relates to estates at law only, not to the transfer of equitable interests.
3. A contract to sell land, or an equitable interest in land, is not void for want of acknowledgment and enrolment.
4. A parol agreement among the purchasers at a public sale, is void under the statute of frauds.

In equity. Bill in equity, filed August 14, 1829, stating that the plaintiff, on the 12th of July, 1826, purchased, for a valuable consideration, half of H. Langley's interest in the property called the Indian Queen Hotel, in Washington, District of Columbia, which interest was one seventh. That Langley, by an instrument in writing, signed by him, assigned to plaintiff one half of that interest, and to the defendant, Jesse Brown, the other half. That Langley was a joint purchaser with the defendant, Brown, and others, of the whole premises, in the name of Brown, who received a conveyance of the same from the commissioners, who sold the same under a decree of this court, in the Case of Crawford's Heirs. That the plaintiff had offered repeatedly, to the commissioners, to comply with the terms of the sale, for the moiety of Langley's interest, but that they refused to permit him so to do. That Brown has refused to recognize him as assignee of Langley, &c.

Mr. Wallach, for plaintiff.

Mr. Marbury and Mr. Cox, for defendant.

CRANCH, Chief Judge, after stating the substance of the bill, answer, and evidence, in delivering the opinion of the court, said: In bar of the plaintiff's claim, under the assignment of Mr. Langley, the defendant pleads the statute of frauds, and the statute of enrolment of conveyances. Sales at auc-

tion are considered out of the statute of frauds, because it has been decided that the auctioneer, or his clerk, is the agent of the purchaser, and authorized by him to sign his name in the sales-book which contains the terms of sale; and that his entry in the book is a memorandum in writing, of the agreement, signed by a person thereunto lawfully authorized by the person to be charged therewith agreeably to the 4th section of the statute of 29 Car. II. c. 3. Mr. Langley, therefore, on the 12th of July, 1826, had a valid interest in the property, which he could, in equity, assign. His assignment to Mr. Arden was by a written agreement, signed by both of them, and therefore not within the statute of frauds.

The statute of enrolment of conveyance, 1766, c. 14, relates to estates at law only, not to the transfer of equitable interests. The words are, "No estate of inheritance, or freehold, or any declaration or limitation of use, or any estate for above seven years, shall pass or take effect, except the deed or conveyance by which the same be intended to pass or take effect, shall be acknowledged," &c., and enrolled, &c. It is believed that it has never been decided, that a contract to sell land, or an equitable interest in land, is void for want of acknowledgment and enrolment. Neither the statute of frauds nor the statute of enrolment is a bar to plaintiff's claim, under the assignment of Mr. Langley. On the 13th of July, 1826, the plaintiff had as good a right to complete the sale, by a compliance with its terms, as Mr. Langley had. The time for complying with the terms of sale was not limited by the advertisement, nor by any verbal notice at the time of sale. The terms advertised, were: "One fourth of the purchase-money in six months, the remainder in equal instalments of one, two, three, four, and five years; the interest to be paid annually upon the whole amount; the several payments to be secured in such manner as the commissioners may hereafter determine and fix upon." A reasonable time, therefore, must have been allowed for the purchasers to obtain and tender to the commissioners the security for the payment of the purchase-money.

The plaintiff, in his bill, has averred that he repeatedly offered to comply with the terms of sale, for the moiety of Langley's interest; but he does not say when he made the offer, nor that it was made before the commissioners had returned Mr. Brown, as the purchaser. Nor does it appear by any averment or evidence in this cause, that the commissioners had any notice of the plaintiff's claim, as assignee of Langley, until after they had made their report to the court. The defendant, indeed, does not deny that the offer was made, but he avers, that if any agreement was made, by which the plaintiff acquired any interest in the purchase, he never complied with the terms

¹ [Reported by Hon. William Cranch, Chief Judge.]

thereof, nor made the payments, nor gave the securities required by the conditions of sale. If the commissioners had no notice of the plaintiff's claim, as assignee of Mr. Langley, they could have received from him no offer to comply with the terms of sale, as to that portion of the property; and there is no pretence that Mr. Langley had ever offered to comply with those terms, as to any part of the property. The commissioners were the sole judges of the security to be offered, and of the time within which it should be received, as a compliance with the terms of sale. It was certainly too late to offer it, after the commissioners had reported to the court, and returned Mr. Brown as the purchaser and he had complied with the terms of sale. The plaintiff, by the assignment from Mr. Langley, acquired only an inchoate right—a right to complete the sale, by giving the requisite security in a reasonable time. There is no complaint that a reasonable time was not given, and no evidence that the security was offered within that time. The plaintiff's right, therefore, was never complete, and he lost the benefit of his inchoate right by not complying with the terms of sale. But the plaintiff claims to be considered as a joint purchaser of one seventh of the property, under a verbal agreement among the purchasers, on the evening of the day after the sale. This, however, being a mere verbal agreement, is void under the statute of frauds. Upon the whole, therefore, the court is of opinion that the plaintiff has not made out any claim to the property which can be supported either in law or in equity, and that his bill must be dismissed with costs. The other judges concurred.

ARDEN, (SMITH v.) See Case No. 13,003.
ARDEN, (YATES v.) See Case No. 18,128.

Case No. 511.

• ARDREY v. KARTHAUS.

[Taney, 379.]¹

Circuit Court, D. Maryland. April Term, 1836.

SEAMEN—"FREIGHT THE MOTHER OF WAGES"—
PRIZE CAPTURE—CONDEMNATION.

1. A vessel owned by the respondent, a citizen of the United States, was captured by a British cruiser, during the last war with Great Britain, near San Andres, in Spain, within a mile of the shore, and within the jurisdiction of Spain, with which nation the United States were then at peace: the owner put in a claim, under the Florida treaty, on the ground that Spain had not discharged her neutral obligations in this matter, and was bound, therefore, to make reparation for the injury sustained by him: he was allowed, on account of such claim, for the vessel and cargo, and for the outward freight, but the amount awarded and received fell far short of the

amount found to be due: the libellant was mate of the vessel, at the time of the capture, and was detained as a prisoner of war, until exchanged, when he returned to the United States, after the lapse of more than a year from the time he had left, having earned no wages after he left the vessel. On a libel filed by him against the owner of the vessel, to recover his wages up to the time of his return to the United States: *Held*, That where freight is earned, or damages recovered in lieu of it, the seamen are entitled to wages.

[See Adams v. The Sophia, Case No. 65.]

2. That the only exception to this rule is, the case of recovery against the underwriters.

[See The Saratoga, Case No. 12,355, and The Two Catherines, Id. 14,288.]

3. That capture by a public enemy forms no such exception.

4. That wages were recoverable in this case only to the day of condemnation, and that no deduction should be made from them, on account of the insufficiency of the sum received by the owner to cover his whole loss.

In admiralty. Circuit court, April term, 1836. Appeal from the district court, in admiralty.

This was an appeal from the decree of the district court, upon a libel filed by Ardrey for wages, against Karthaus, the respondent. Ardrey shipped as a mate on board the schooner Baltimore, owned by Karthaus, who loaded her on his own account, and she sailed from Baltimore for Bordeaux, during the last war with Great Britain; being driven out of her course by the pursuit of enemies, she was finally captured by a British cruiser, on the voyage from San Andres, in Spain, within a mile of the shore, and within the jurisdiction of Spain, with which nation the United States were then at peace. She was carried into San Andres, and detained there a few days, and then carried to an English port, where she was condemned as prize, and the libellant, who had remained on board until her arrival in England, was detained as prisoner of war; after some considerable detention, he was exchanged and returned to the United States at least twelve months after he sailed, but as soon as he could, after his release by the enemy, and having earned no wages after he left this vessel. Karthaus put in a claim under the Florida treaty, upon the ground, that Spain had not discharged her neutral obligations to the United States in this matter, and was therefore bound to make reparation for the injury sustained, and that this was among the wrongs provided for by that treaty. The commissioners decided in favor of the claim for vessel and cargo, and also including freight on the outward voyage, and the respondent received the amount awarded, but which, like all other awards under that treaty, fell far short of the amount found to be due, because the fund provided by the treaty fell short of the valid claims against Spain. The libellant claimed wages until his return to the United States; many objections were raised, and the points fully argued on both sides; the libel

¹ [Reported by James Mason Campbell, Esq., and her: reprinted by permission.]

was dismissed in the district court, where the decree was pro forma, and the case brought to the circuit court by appeal from this decree. The points discussed in the argument will be seen from the opinion delivered by the court.

J. Glenn, for appellant.

C. F. Mayer, for appellee.

TANEY, Circuit Justice. The main point in this case appears to be a new one, and we are not aware of any case in which it has been directly decided; we must form our judgment, therefore, upon those principles which have been settled in analogous cases. The general rule is, that freight is the mother of wages, and where freight is earned, or damages recovered in lieu of it, the seamen are entitled to wages. It has frequently happened that, after the capture of a neutral vessel, and condemnation and sale, the sentence has been reversed in the appellate court, and restoration ordered, and in such cases, where the owner recovers freight, the seamen are, undoubtedly, entitled to wages. The only exception to the rule is, the case of recovery against the underwriters. But that exception stands entirely on principles of policy; for as a seaman is not permitted to insure his own wages (and such a contract of insurance would be void in law), he cannot, for the same reason, protect his wages under the insurance of the owner; for that would allow him to accomplish indirectly what he is not permitted to accomplish directly.

We are not aware of any other exception to the rule above mentioned. The case of collision at sea has been referred to. Without meaning to impeach the decision in the case cited from the Massachusetts Reports,² it may be proper to say, that no other case has been adduced upon the same subject, nor does the point appear to have been very deliberately examined in that case. It can, therefore, hardly be regarded as a settled rule of law, and if it could be so regarded, there are reasons sufficient to distinguish it from damages paid for freight under a decree of restitution, or by public treaty, or any other analogous proceeding. For as the damages given by a jury in a case of collision, would be a gross sum, it would commonly be difficult, and often impossible, to ascertain whether freight was allowed or not, for the voyage; or if allowed at all, to what amount, and upon what principles. The verdict of the jury being for a gross amount of damages, and there being no written and authentic document showing the items which produced this gross amount, it would be difficult, in many cases, by the oral testimony of the jurors, to come to any certain conclusion; for some of the jurors might have arrived at the conclusion as to the proper amount of the result, by allowing

freight, some without allowing it, and often the amount would be a compromise of conflicting opinions, without reference to any particular item, or any settled principle agreed on by the whole jury. The case of collision is not, therefore, an exception to the rule, but stands on principles peculiar to itself.

The court consider the general rule to be as above stated; that wherever freight is earned, or damages recovered in lieu of freight, the seamen are entitled to wages, and that the only exception to it is, the case of recovery against the underwriters, which rests upon principles of policy, as above mentioned. It is now contended, that capture by a public enemy ought also to be made another exception to the rule; the court do not see any principle of justice upon which this exception can be introduced; and they certainly would not be disposed, in the absence of any precedent, to sanction such an exception upon mere technical principles. If, in this case, after the capture, there was no *spes recuperandi*, and the case on that account distinguishable from the capture of a neutral, it would not affect the application of the rule; for, if without hope, and even against hope, the owner afterwards recovered damages in lieu of freight, the claim to wages is within both the letter and the spirit of the rule before stated. The wages of the seamen depend upon a fact—was freight earned? or were damages recovered by the owner in lieu of freight? If either of these facts is shown, it is sufficient; it does not matter whether the owner had or had not a right to hope for such an issue, upon strict legal principles. It is well settled that, in case of capture by an enemy, if the vessel is recaptured and freight earned, the seamen are entitled to their wages for the voyage. It would be difficult, indeed, to find a reason why they should not be entitled to wages in such a case, and equally difficult to assign a reason why they should not be also entitled, where the vessel, or the value of it, was restored to the owner, from any cause whatever, and damages paid to him in lieu of his freight.

But in this case there was a well-grounded *spes recuperandi*; for although, as between the American owner and the British captor, the American owner had no right to complain, nor any defence to make against condemnation in the prize courts of England; yet, as the capture was made within the territorial limits of Spain, and Spain was neutral, the American had a right to demand protection from the Spanish government; Spain was bound to interpose, and if she did not, she failed in her neutral obligations, and the American had a right to demand compensation from her. A neutral power is not at liberty to decide, according to her own convenience, whether she will perform her neutral obligations or not; she is bound to perform them, and if she fails to do so,

²[See *Frothingham v. Prince*, 3 Mass. 563.]

she becomes herself responsible for the injury which she ought to have prevented. In this case, the Spanish authorities ought to have restored the vessel to the owner when she was brought into San Andres; having failed to do so, the government was bound, through its minister, to have interposed before condemnation in England, and to have demanded her restoration; and if this demand had been made, the vessel could not have been lawfully condemned in England, but must have been restored. The American had a right to suppose that Spain would perform her neutral duties, and that England, upon her application, would restore the vessel. There was, therefore, a well-grounded spes recuperandi, if such a state of things could be deemed necessary to entitle the seamen to wages. The result has proved that there was foundation for a hope of recovery, for Spain has acknowledged the obligation, and paid the damages—or what amounts to the same thing, the commissioners have so decided, and the owner has recovered damages for the loss of his vessel, and for freight; and the recovery is against Spain, and founded upon the failure of Spain to perform her neutral duty.

The seamen being entitled to wages, the next question is, for what time? The libellant remained in the vessel until she was condemned, and the freight allowed is for the outward voyage. In the case of a neutral, wrongfully captured by a belligerent, and which the nation or its courts afterwards restores or pays for, and where freight for the outward voyage has been allowed, the seamen are entitled to wages up to the time of condemnation. The reason given is, that as the seaman has a right to suppose that the capturing nation and its tribunals will do their duty, he has a well-grounded hope that the vessel will be restored and allowed to proceed on her voyage, and that his services will, therefore, be needed. The same foundation for hope existed in this case; the owner had a right to expect that Spain would demand the release of the vessel, and that she would be accordingly restored; and allowed to proceed on her voyage; and that hope was not lost until the condemnation in the prize courts of England. This case, therefore, is entirely analogous to the capture of a neutral on her outward voyage, and when after condemnation and sale, the owner receives compensation in damages. The libellant is, therefore, entitled to wages up to the day of condemnation, but no longer.

The remaining question is, whether an account is to be taken, and the wages to be reduced pro rata, on account of the expenses to which the owners have been subjected in prosecuting this claim, and on account also of the reduction to which they

were compelled to submit, by reason of the deficiency of the fund out of which they were to be paid. The case of Sheppard v. Taylor, 5 Pet. [30 U. S.] 675, appears to be conclusive on this point. According to the principles adjudicated in that case, the freight and the ship itself, to its last plank, are liable to wages. The claim of the seamen is a preferred one, to be paid without any deduction for the losses or expenses of the owners; and damages in lieu of freight, or in lieu of the ship, stand on the same footing, according to this decision, with the freight or ship itself, and the wages are not liable to be charged for any share of the expenses which the owner incurred in prosecuting his claim for reparation—nor are they liable to abatement on account of the reduction of his compensation, occasioned by the insufficiency of the fund out of which he is compelled to accept payment. It is admitted, that the amount recovered for the ship and freight greatly exceeds the amount due for wages, upon the principles hereinbefore stated; and the libellant is, therefore, entitled to the full amount of his wages, up to the day of condemnation, deducting only the amount heretofore received by him. The decree of the district court is, therefore, reversed, and a decree made in favor of the libellant for the sum of \$184.49 and costs.

Case No. 512.

ARDREY v. WADSWORTH.

[1 Cranch, C. C. 109.]

Circuit Court, District of Columbia. Dec. Term, 1802.

INSOLVENCY—EFFECT OF DISCHARGE—PENDING ACTION.

A plaintiff who has been discharged under the insolvent act of Maryland, of 1774, since the commencement of the action, is still competent to maintain it.

[See note at end of case.]

At law. Assumpsit. Non assumpsit and issue. The defendant offered evidence that the plaintiff had been released under the insolvent act of 1774, c. 28, since the bringing of this suit, and contended that the plaintiff's right of action was transferred to the marshal, and so the plaintiff has no subsisting cause of action.

THE COURT was of opinion that the plaintiff can still support the action. CRANCH, Chief Judge, doubting.

[NOTE. Act Md. 1774, c. 28, provided for the discharge of an insolvent debtor from imprisonment in certain cases, upon his filing a schedule of his assets, and turning the same over to the sheriff for the benefit of his creditors. Repealed by Act 1817, c. 183.]

[Reported by Hon. William Cranch, Chief Judge.]

Case No. 513.

The A. R. DUNLAP.

[1 Lowell, 350.]¹

District Court, D. Massachusetts. July, 1869.

MARITIME LIENS—SUPPLIES—STEVEDORE'S LIEN—ORDER OF PAYMENT—ATTACHMENT.

1. If it be necessary for libellants to show that the owners of a vessel were not in good credit at the time the supplies were furnished, evidence that the vessel was attached for a common-law debt of the owners in a foreign port, and that they did not dissolve the attachment, and that the master, who was a part-owner, was obliged to mortgage his share of the vessel to procure her release, is sufficient proof of a want of credit.

[Cited in *The Tangier*, Case No. 13,744; *The Clotilda*, Id. 2,903; *Nippert v. The Williams*, 39 Fed. 826.]

2. If a vessel is attached in a foreign port in a suit at common law against the owners, money advanced to pay this debt does not constitute a lien on the vessel, although the owners had no funds, and the master could obtain the release of the vessel in no other way.

[Cited in *The Clotilda*, Case No. 2,903; *Nippert v. The J. B. Williams*, 42 Fed. 542.]

3. The taking of a mortgage by persons furnishing supplies as collateral security does not prevent their enforcing the lien given by the maritime law.

[Cited in *Nippert v. The Williams*, 39 Fed. 828.]

4. Money advanced to pay a debt which is a lien on the vessel, constitutes a lien.

5. A stevedore has no lien on a vessel.

[Cited in *The Tangier*, Case No. 13,744; *The Benjamin English*, Id. 1,306; *The E. A. Barnard*, 2 Fed. 715; *The Gilbert Knapp*, 37 Fed. 211. Disapproved in *The George T. Kemp*, Case No. 5,341; *Roberts v. The Windermere*, 2 Fed. 726; *The Canada*, 7 Fed. 119, 121.]

6. The decision in the case of *The Antarctic*, [Case No. 479,] as to appropriation of payments, does not apply to a running account, and require the creditor to satisfy all the items for which he has no lien. In such a case the law will appropriate the payments to the items in the order of their dates.

[Cited in *The Illinois*, Case No. 7,005.]

7. The case of *Pratt v. Reed*, 19 How. [60 U. S.] 359, discussed.

[Cited in *Nippert v. The Williams*, 39 Fed. 828.]

In admiralty. Supplies furnished a Nova Scotian vessel in New York.—The vessel was attached in New York in a suit in a common-law court for a debt of two of the owners. The master, who was owner of one-third of the vessel, after writing to his owners and finding that they could do nothing to release the vessel, borrowed a sum of money from the libellants to pay this common-law debt, and gave a mortgage upon his share of the vessel to secure this sum, and also to secure them for supplies which they were to furnish the vessel to enable her to go to sea. These supplies were furnished, and supplies were also furnished at subsequent times on different voyages. The master

¹[Reported by John Lathrop, Esq., and here reprinted by permission.]

from time to time paid the earnings of the vessel to the libellants who gave him credit on account. The vessel was afterwards proceeded against in rem in Boston, and mortgagees of the shares of the vessel not owned by the master appeared as claimants. The vessel not being released on bail, and no security for her value being given, she was sold by order of court under the eleventh admiralty rule and her proceeds paid into court.

John Lathrop, for libellants.

1. The libellants are not bound as a part of their case in chief to prove that the owners of the vessel had no credit in New York, and that the supplies could not have been obtained upon their personal credit. The interpretation put upon the case of *Pratt v. Reed*, 19 How. [60 U. S.] 359, by Judge Sprague in *The Sarah Starr*, [Case No. 12,354,] and since followed by this court, is erroneous, and the court is respectfully asked to reconsider it. In *Pratt v. Reed*, [supra,] there was no evidence that the coal had been supplied on the credit of the vessel, and the libel was properly dismissed. The term "necessity for a credit," which is used by the court in that case, has been interpreted to mean that the libellant must, in the first instance, show that there was such a necessity, and that the owner had no credit. By the law, as it was understood before *Pratt v. Reed*, [supra,] a necessity for a credit was presumed. The libellant started with this presumption. The claimant of the vessel might rebut it by showing that the master had funds which he ought to use and that the lender knew it, or that the master was guilty of fraud and the lender connived at it. It is true that the court in *Pratt v. Reed*, [supra,] said: "But the more serious difficulty in the case on the part of the libellant is the entire absence of any proof to show that there was also a necessity, at the time of procuring the supplies, for a credit upon the vessel." This may refer to the libellant's evidence in chief, or to his evidence in reply. If to the former, the case has changed a well-established rule of law. If to the latter, no change has been made. That this form of expression does not necessarily denote that the evidence in chief was meant, is conclusively shown by the language of the court in a case decided at the same term: *Thomas v. Osborn*, 19 How. [60 U. S.] 22, 31. In that case the rule is thus stated by Mr. Justice Curtis: "To constitute a case of apparent necessity, not only must the repairs and supplies be needful, but it must be apparently necessary for the master to have a credit to procure them." If the learned judge had stopped here, it might well be argued that the libellant must show the necessity for a credit in the first instance, but he continues: "If the master has funds of his own which he ought to apply to purchase the supplies which he is bound by the contract of hiring to furnish himself, and if he has funds of the

owners, which he ought to apply to pay for the repairs, then no case of actual necessity to have a credit exists. And if the lender knows these facts, or has the means, by the use of due diligence, to ascertain them, then no case of apparent necessity exists to have a credit, and the act of the master in procuring a credit does not bind the interest of the general owners in the vessel." This is but a statement of the rule laid down in the case of *The Aurora, 1 Wheat*. [14 U. S.] 96, 103, where Mr. Justice Story said: "No presumption should arise that such repairs and supplies could be procured upon any reasonable terms, with the credit of the owner, independent of such hypothecation. If, therefore, the master has sufficient funds of the owner within his control, or can procure them upon the general credit of the owner, he is not at liberty to subject the ship to the expensive and disadvantageous lien of an hypothecatory instrument." Here is a clear recognition of the rule that there is no presumption that supplies or repairs can be procured on the credit of the owner, and that this must be shown as a matter of defense. From all these cases it is submitted that the term "necessity for a credit" means merely that if the master has funds and the lender or person furnishing supplies knows it, this may be shown in defence. See *The Virgin, 8 Pet.* [33 U. S.] 554; *The Neversink*, [Case No. 10, 133;] *The James Guy*, [Id. 7,196;] same case before Judge Benedict, [Id. 7,195;] *The Belfast, 7 Wall.* [74 U. S.] 624. See, also, *The Grapeshot, 9 Wall.* [76 U. S.] 129.

2. That the owners of the vessel had no credit is fully proved.

3. The money advanced to pay the debt of the owners of the vessel and to release her from arrest constitutes a lien. If the money had not been advanced the vessel must have been sold in New York. See *The St. Jago de Cuba, 9 Wheat.* [22 U. S.] 409. The master might have given a bottomry bond to release the vessel from arrest: *The Vibilia, 1 W. Rob. Adm. 1*; *Smith v. Gould, 4 Moore, P. C. 21*; *The Edmond, Lush. 211, 220*.

4. The lien was not waived by the taking of collateral security: *The Kimball, 3 Wall.* [70 U. S.] 37; *Carter v. The Byzantium*, [Case No. 2,473;] *The St. Lawrence, 1 Black*, [66 U. S.] 532; *The Nestor*, [Case No. 10,126;] *The St. Mary*, [Id. 12,242;] *The West Friesland, Swab. 454*; *The James Guy*, [Case No. 7,195.]

5. Money advanced to pay for supplies constitutes a lien: *Thomas v. Osborn, 19 How.* [60 U. S.] 28.

6. Stevedore's bills constitute a lien: *The Medora*, [Case No. 9,391;] *The Circassian*, [Id. 2,722.] In the latter case such a claim would have been allowed had it not been for two cases which were considered as precedents the other way, viz.: *The Amstell*, [Id. 339;] *The Joseph Cunard*, [Id. 7,535.] *The Amstell* was decided on two grounds, 1st. That the labor was performed partly on

land and partly on board the vessel; 2d. That credit was not given to the vessel. The first ground is incorrect in law: *Wortman v. Griffith*, [Id. 18,057.] The second does not apply here, because in our case credit was given to the vessel. In *The Joseph Cunard*, [supra,] the vessel was chartered and the libellants sought to recover the amount of a bill of exchange drawn by the master in favor of the charterers' agent for disbursements made by the agent at Mobile. The owners of the vessel had an agent at Mobile whose duty it was to attend to all charges against the ship, and the master was specially instructed not to draw bills on the owners for disbursements, and this was known to the charterers and their agent. The case was properly decided on these grounds, and the remarks of the judge are merely dicta.

J. C. Dodge, (T. K. Lothrop, with him,) for the mortgagees.

There never was a lien upon the vessel for any part of the libellants' claim.

In order to create a maritime lien upon a vessel for supplies, there must exist,—

1. A necessity for the supplies themselves; such a necessity as arises only under very special circumstances, and in an unforeseen and unexpected emergency.

2. A necessity for the credit upon the vessel. It must appear affirmatively that the supplies could not be had upon the credit of the owner.

The necessity for the supplies and for the credit must be such necessity as would justify the master in taking up money on a bottomry of the vessel: *Pratt v. Reed, 19 How.* [60 U. S.] 359. I am well aware that the principles above stated are at variance with those upon which courts of admiralty have usually proceeded, but they are all of them established by the supreme court of admiralty in the case cited above, and some of them in *Thomas v. Osborn, Id. 22*, and must therefore now be regarded as settled.

A bottomry bond made by the master is invalid if it were possible for him before making it to communicate in a reasonable time with his owner: *La Ysabel, 1 Dod.* 273; *Wallace v. Fielden, 7 Moore, P. C. 398*. So if the master have funds of the owner in possession or within reach, or can borrow on the personal credit of the owner: 1 *Pars. Shipp. & Adm.* 143, 144, and cases cited; *The Golden Rose*, [Case No. 1,658.] So if the bond were given by the master to relieve the vessel from arrest under legal process founded upon a claim that did not itself constitute a lien upon her: *The Aurora, 1 Wheat.* [14 U. S.] 96; *The Osmanli, 3 W. Rob. Adm.* 198; *The Augusta, 1 Dod.* 283, 288; *The Yuba*, [Case No. 18,193;] *The North Star, Lush. 45*; *The Edmond, Id. 57, 66*.

We have seen that the foregoing rules of law, well settled in regard to bottomry bonds, are equally applicable to an implied lien:

Pratt v. Reed, ubi supra. Now, looking at the case before the court in the light of these principles, we find.—1. There existed no special circumstances or unforeseen emergency. The vessel was not wrecked nor in distress. The case stands simply upon the ground that she was in a foreign port and needed ordinary supplies. 2. The master might have communicated with his owner and had a reply by mail in a week, by telegraph in an hour. 3. It is not shown, or attempted to be shown, that the owner had not credit in New York when the supplies were furnished. On the contrary, it may be inferred that he had, from the fact that the amount annexed to the libel shows a large remittance from the libellant to the owner. Again, no implied lien would arise unless it was so intended by the parties, or at least, unless the libellants, when they furnished the supplies, intended to rely upon a lien. The fact that they took a mortgage on the property shows that they had no such intent or understanding. The mortgage conveyed the property to them, and a man cannot be presumed to intend a lien upon his own property. Or if he once had a lien, the taking the mortgage was a waiver of the lien. The express lien created by the mortgage is inconsistent with the implied lien now claimed: The Ann C. Pratt, [Case No. 409;] The Nestor, [Id. 10, 126;] The Chusan, [Id. 2,717;] Ramsay v. Allegre, 12 Wheat. [25 U. S.] 611; Fish v. Howland, 1 Paige, 20; Little v. Brown, 2 Leigh, 353. If for any of the items of the libellants' bill there ever was a lien upon the vessel, the payments made on account, and not specifically applied by the debtor or creditor at the time of payment, must be regarded as applied by the law to such items: The Antarctic, [Case No. 479.]

There are several items in the account annexed to the libel for stevedore's bills. It is settled that a stevedore has no lien upon the vessel for his services. It follows, of course, that the libellant could acquire no lien by paying for such services. The stream cannot rise higher than the fountain.

LOWELL, District Judge. This brig was owned in Nova Scotia, and the libellants, who reside in New York, present a bill for the disbursements, as they are called, of the brig, furnished by them at New York upon the request of the master, and for a certain other sum of money lent to him, as is presently more fully set forth.

The first part of the case has brought into discussion, as usual, the decision of Pratt v. Reed, 19 How. [60 U. S.] 359. That case has been understood to decide that a material-man, in order to maintain his lien, must bring himself within the rule applied to a lender on bottomry, and show not only that the supplies were necessary for the ship, or appeared to be so, but that the master had not, or appeared not to have, funds of the owner in hand to pay for them, and al-

so that the owner had no personal credit on which they could be procured at the place where they were furnished: The Sarah Starr, [Case No. 12,354;] The Sea Lark, [Id. 12,579;] The James Guy, [Id. 7,195;] The Neversink, [Id. 10,132, Id. 10,133.] Accordingly, the main issue in all these cases of late years has been whether the owner had such credit, and judges have been somewhat astute in ascertaining in each particular case that he had not. My own opinion has been guided by those above cited, and I have followed the course of inquiry pointed out in them. A more careful scrutiny of the leading case has brought me to doubt whether it professes to lay down any such principle.

It must be remembered that material-men have often nothing to do with credit at all, any more than other mechanics. If a shipwright puts a new spar into a foreign ship, he expects payment when his work is done. He cannot exact it beforehand, because his labor is furnished from day to day, and the amount is neither liquidated nor due until the last day's work is done. If the master then neglects or refuses to pay him, he brings his libel. It is mere mockery to tell him that the owner is a man of good credit. That is only one more reason why his bill should be paid. The mechanic cannot transmute the owner's credit into money, and the master will not. It is for this reason that he brings his suit, and it is altogether a novel answer to a suit that the person liable to pay is able but unwilling to do so. Such an answer as that, of course, merely amounts to telling the creditor to seek redress at the home of the debtor, which is what he never contracted to do. It was to save him from this necessity, which in most cases would be a total denial of justice, that the lien of material-men was established throughout the mercantile world; and it is for this reason, probably, that in England and America it is confined to foreign vessels. The contracts of material-men are not really maritime, at least many of them are not; they are, in their reason and origin, much more like those of an unpaid vendor than like an ordinary maritime lien. In England the lien has always existed, though for nearly two centuries it was in a state of suspended animation, because the superior courts would not enforce it, nor permit the admiralty courts to do so. The statute 3 & 4 Vict. c. 65, § 6, gave the court of admiralty jurisdiction of suits for necessities furnished to foreign vessels in English ports, and thereupon the liens became operative, although there is not a word in the statute about liens; and the court has ever since enforced these well-known maritime liens, and every decision of that court which upholds such a lien is necessarily a decision upon the general maritime law of liens, as well as upon the statute. Now, in the numerous and important cases which have been reported in that

court on this subject since that statute was passed, no one has appeared bold enough to argue that the credit of the owner has any thing to do with the matter; and it is safe to say that no one ever will take that point, because one main purpose of the act was to save material-men the inconvenience of being obliged to resort to the foreign owner to recover a just debt payable at their own home and not at his. Laws are made for the enforcement of contracts according to their terms against persons in good or bad credit. If the mechanic, in the case supposed, had made inquiry and found that the owner was in good credit, what then? Is he therefore not to put in the spar until he is paid a sum as yet uncertain, contrary to all sense and usage? This example merely illustrates the reason and principle out of which the lien of material-men has grown. The same law applies to the ship-chandler who has agreed with the master for cash on delivery, but whom the master has cheated of his cash after receiving his goods. That the owner has credit, or even that the master has funds, only makes his position the stronger. He asks for his fair dividend of the funds according to his contract. Nor is it any answer to him that by the law of some states and countries he may attach the ship in a common-law action, and hold it as security for his debt. The jurisdiction of the common-law courts is not exclusive. It is no defence to a libel that the libellant has a remedy at common law. And if it were, this remedy is often delusive; for the attachment in most of the cases which have come under my notice would amount to nothing, because the class of vessels that come here from the British provinces are almost always mortgaged for more than they are worth in this market, and the mortgage takes precedence of the attachment. The remedy is not adequate; besides, it exists equally whether the owner's credit is good or bad. It is a mode of enforcing payment of comparatively recent origin, of limited use, and by no means calculated to supersede the old admiralty remedy. I cannot suppose, therefore, that the decision of *Pratt v. Reed*, [19 How. (60 U. S.) 359] was intended to apply to material-men who have given no credit at all.

If the material-man has given credit, he must show that the master had not, or appeared not to have, funds of the owner in hand wherewith to pay for them; because it is an elementary principle of the law of agency that the agent cannot pledge his principal's credit when he has, with the knowledge of the creditor, funds of the principal to apply to the immediate payment of the debt. Not that the law of lien depends always upon that of agency, but in this instance it does. But when this is shown, when it appears that the supplies were necessary and that a credit was necessary, the common law pledges the credit of the

owner, and the maritime law that of the vessel; just as it does to a seaman or a shipper of goods, neither more nor less. Of course, it is a valid defence to an asserted lien to aver and prove that the personal credit of the owner, and that only, was pledged; just as it would be to a suit by a shipper of goods, and might be even to a seaman's libel under some very peculiar circumstances. But it is no defence to say that the personal credit of the owner would have been sufficient, when in fact it was not relied on.

The lender on bottomry stands on a wholly different foundation. He is agreeing for a credit to be liquidated at the home of the ship-owner; and he must furnish that credit at the lowest market rate. As he has agreed to be paid at the home of the owner, and as a solvent owner can be compelled to pay his debts at home, the law says that the lender shall not charge the unusual, and often almost ruinous, marine interest which is allowable in bottomry, if the money can be obtained at the usual rates and on the personal credit of the owner. This is the reason, and the only reason, that the rule in question has been adopted in bottomry law. The very foundation of the right of the master to borrow on bottomry in one class of cases is, that he must pay the material-men whose contract entitles them to payment in the foreign country, and who have a charge on the ship. But the doctrine of the owner's personal credit does not apply to them, for the reasons I have stated, and for those given by Judge Sprague in *The Sarah Starr*, [Case No. 12, 354.] cited above, to which I refer.

If then the case of *Pratt v. Reed* [supra] is to be understood as Judge Sprague and other district judges have understood it, the law is not only new, but it creates this anomaly: that if one of our vessels is repaired or supplied in the British provinces, and a suit is brought in this court by the material-men, my only inquiry must be whether the materials were furnished, and were necessary; but if the case is reversed, the parties remaining the same, and our merchants have supplied the foreign vessel, I must superadd an inquiry, which the creditors did not concern themselves with, whether the ship-owner in the provinces was a man of good commercial standing in his parish. This is not equality nor reciprocity, nor is it sound maritime law. I shall therefore, perhaps, find it my duty to cause such a case to be reviewed by the circuit court whenever the facts render it necessary, for I confess to grave doubts notwithstanding the opinions to the contrary, including my own as expressed on former occasions, whether the supreme court intended to decide anything more than that when a credit was given it must be shown that a credit was necessary. It is, perhaps, more probable that they overlooked for the

moment the distinction between bottomry loans and the debts due material-men, than that they intended to establish a strict analogy between them in this respect.

In this case the largest item of the account is for money furnished to the master, for which the libellants took a mortgage on his part of the vessel. This money was raised to relieve the vessel from an attachment in a court of common law, at the suit of a creditor of the remaining owners. There is no pretence that the debt, thus paid, was a charge on the vessel; and the libellants are driven to maintain that the master may always hypothecate his vessel to relieve her from any detention which interferes with the prosecution of his voyage, and not only so, but that such an hypothecation will be implied. The maritime law contains no such term as that. It is true, as I said before, that bottomry bonds have been upheld when they were given to relieve the vessel from debts which by the law of the country where the vessel was lying would be a charge upon her, though they would not be such, or at least could not be enforced as such, at the home port. But I do not recollect that this doctrine has ever been applied to debts contracted before the last voyage. Even if it has, no law has ever given to the master authority to hypothecate the ship for personal debts of the owners, unrelated to the ship or its navigation. By the law of New England, and in a modified form, by that of most of our States, personal property may be attached and held as security for any debt of its owner. But there is no maritime lien on the property so attached, by reason of the attachment, nor does the fact of attachment give an agent of the owner an authority which he would not otherwise have, to hypothecate it for payment of that debt. The master of a ship is an agent, whose duties and powers are well understood and defined. It is no part of his authority to hypothecate his ship for the general debts of the owner. Nor did he undertake to do so in this case. On the contrary, he gave a mortgage of his own share of the vessel, and an agreement that the ship should be consigned to the libellants, from time to time, till the freight should have paid the debt. This agreement he did not fulfil, and the libellants must obtain their indemnity, if the mortgage proves insufficient, by such personal action as they may be able to maintain. For most of the items of that part of the account which were furnished before the vessel sailed on her last voyage, and which are shown in schedule B., there appears to be a lien. If it be material that the owners were not in good credit, the attachment and mortgage show that they were unable to pay their debts, and were obliged to resort to extraordinary means to satisfy their creditors, even to pledging the property of their master. Under any construction of *Pratt v. Reed*,

[supra,] the libellants could maintain this part of their case. They have been careful, prudent, and diligent. No doubt they relied largely on the freight for their security, but this does not exclude the conclusion that they also relied on the vessel. The cases cited by the libellants establish this point. Each item of schedule B. has been carefully scrutinized by counsel, and fully discussed. The general rule in this country is that the person who advances money to pay the debts which are liens on the ship has himself a lien for his reimbursement: *Thomas v. Osborn*, 19 How. [60 U. S.] 22; *The Gustavia*, [Case No. 5,876;] and this is now the law of England, with some refinements and distinctions not necessary to be here examined. Perhaps the rule has grown out of the doctrine of subrogation. But whether so or not, the lender of money has not usually any more ample remedy than the material-men themselves would have had. See *Davis v. Child*, [Id. 3,628.] It has been decided in several cases, that a stevedore has no lien on the ship: *The Amstel*, [Id. 339;] *The Joseph Cunard*, [Id. 7,535;] *The S. G. Owens*, [Id. 8,748.] The reason given by some of the learned judges, that the contract is not maritime, does not appear to be decisive, because the contracts of other material-men are no more so. The lien is for supplies and repairs to enable the vessel to perform her voyage, and only in that sense are they maritime. The other reason, that the cargo is a collateral matter and no part of the necessary equipment of the vessel itself, is more to the purpose, though not satisfactory, because a ship cannot be used to advantage without a cargo. But it is important to adhere to decided cases, and I shall follow these, though I doubt their correctness as applied to foreign vessels, and should be glad to have the point reviewed by the circuit court. In England, the stevedore may arrest the ship under the statute of Victoria: *The Waban*, cited 1 Pritch. Adm. Dig. 364, tit. "Material-Men," 71. Advertising the vessel for charter has likewise been decided not to create a charge on the vessel. Pilotage and towage are maritime services for which there was a lien on the vessel.

The mode in which the payments should be appropriated, has been discussed at the bar. Judge Sprague decided that when the creditor had two distinct debts, and money was paid him generally without specific appropriation, it was his duty to apply it in the way most beneficial to the debtor, which, in that case, required an appropriation to extinguish a builder's lien: *The Antarctic*, [Case No. 479.] This rule does not apply to a running account, and require the creditor to satisfy first all those items for which he has no lien. To such an account the general rule applies, that, if there is no appropriation at the time, the law will apply the payments to the items, in the order of their dates. Applying this rule, a considerable

part of schedule B. has been paid, if I understand the account. Those that remain, and for which there is a lien, on the principles above stated, can be recovered by the libellants, with costs. Interlocutory decree for the libellants.

Case No. 514.

ARELL'S REPRESENTATIVES v. MARSTELLER et al.

[2 Cranch, C. C. 11.]¹

Circuit Court, District of Columbia. Nov. Term, 1810.

EXECUTORS AND ADMINISTRATORS — ACTIONS AGAINST—ATTORNEY'S FEES.

In suits in equity against executors and administrators in Virginia, a lawyer's fee is not to be taxed.

In equity. Bill, against executors, to account, and pay over distributive share. Decree accordingly.

Mr. R. I. Taylor, moved that the attorney's fee should be charged in the bill of costs. The act of assembly of 19th of November, 1792, § 14, says, "except against executors and administrators."

THE COURT (THRUSTON, Circuit Judge, absent) directed that an attorney's fee should not be taxed.

ARESTA, (FONTAINE v.) See Case No. 4-905.

AREY, (MERRILL v.) See Case No. 9,468.

Case No. 515.

The ARGO.

[7 Ben. 304]¹

District Court, S. D. New York. May, 1874.

SEAMAN'S WAGES—JURISDICTION—STALE CLAIM NOTES.

1. A pilot was engaged on a steamboat in the harbor of New York during several months in 1872 and several in 1873. The owners gave him notes for part of the amount, which notes were not paid. In April, 1874, he filed a libel against the boat. She had in the mean time been sold at sheriff's sale, and had been again sold to H., who had no knowledge of this claim, but had been told that the men on the boat had claims: *Held*, that the libellant's claim was not stale, and that he was entitled to a decree for his wages on his depositing the notes, properly endorsed, with the clerk, for the use of the claimant.

2. A vessel in a basin at Jersey City, which communicates directly with the Hudson river, lying at some piles about 40 feet from the dock, is subject to the process of the United States district court for the southern district of New York.

[Cited in *The L. W. Eaton*, Case No. 8,612; *Kiernan v. The Norma*, 32 Fed. 411.]

¹[Reported by Hon. William Cranch, Chief Judge.]

²[Reported by Robert D. Benedict, Esq., and B. Lincoln Benedict, Esq., and here reprinted by permission.]

In admiralty. This was an action brought by Willett Martin, to recover wages for services on board the steamboat Argo, as pilot, from April 17th, 1872, to October 9th, 1872, and from June 21st, 1873, to October 14th, 1873. The libel was filed April 11th, 1874. It alleges the services performed, and the amount due, and that the owners had given him two notes therefor, which were unpaid, and which the libellant offered to surrender. The claimant, A. H. Harris, set up in answer, that the steamboat was not within the jurisdiction of the court, when she was attached under the process, and that he had bought the steamboat since the libellant's claim accrued, and without knowledge of such claim. It appeared, that the vessel, when attached under the process, was lying in what is called the Morris Canal Basin, at Jersey City, made fast to piles driven into the bottom, and about 40 feet from the side of the dock, and that the basin communicated directly with the waters of the Hudson river. Harris bought the vessel in February, 1874, from one Silbers, who bought her from a purchaser of her at a sheriff's sale. Harris bought without knowledge of the libellant's claim, but was told by Silbers that the men on the boat had claims. The libellant lived at South Amboy, N. J. and had been ill during the previous winter.

W. J. Haskett, for libellant.

H. Wallis, for claimant.

BLATCHFORD, District Judge. In this case, I am of opinion that this court acquired jurisdiction over the vessel by the attachment of her at the place where she was attached; that the libellant did not take the two notes in payment, or waive his lien by taking them; and that the defence of staleness cannot be alleged against his claim. The claimant is entitled to have the two notes, and, whenever they are deposited with the clerk of this court, for the use of the claimant, properly endorsed by the libellant, if that be necessary to pass the title to them, but without recourse to the libellant, then let a decree be entered for the libellant for \$552.81, with interest from May 14th, 1874, with costs.

Case No. 516.

The ARGO.

[1 Gall. 150.]¹

Circuit Court, D. Massachusetts. May Term, 1812.

PRIZE—CONDEMNATION — VIOLATION OF EMBARGO ACT—EXCUSES—NECESSITY.

1. The 3d section of the embargo act of the 9th January, 1808, c. 8, was not repealed by the act of the 1st March, 1809, c. 91.

2. Of the kind of necessity which excuses from forfeiture; condemnation on the facts.

[Disapproved in *The Ella Warley*, Case No. 4,373.]

¹[Reported by John Gallison, Esq.]

[3. Cited in *Beals v. Hale*, 4 How. (45 U. S.) 53, to the point that a second law does not repeal a former one on the same subject without a repealing clause or negative words, unless so clearly repugnant as to imply a negative.]

In admiralty.

Mr. Dutton, for claimant.

G. Blake, for the United States.

[Before STORY, Circuit Justice, and DAVIS, District Judge.]

STORY, Circuit Justice. The only count, relied upon in the information, is for a departure from the port of Boston, and proceeding on a voyage to certain foreign ports, viz. Halifax and Barbadoes, against the 3d section of the act of 9th January, 1808, c. 8. The claim admits the fact of proceeding to Halifax, but alleges, that on the 15th May, 1809, the ship departed from Boston, bound to a permitted port in the West Indies, having given bonds, and being duly cleared, according to the 13th section of the act of 1st March, 1809; that during the voyage, the ship was compelled by stress of weather and necessity, to go to Halifax, where she arrived the 29th of the same month; that by virtue of the president's proclamation of 19th April, 1809, her subsequent voyage to any British port became lawful after the 10th June, 1809, and she accordingly went to Barbadoes, &c. Upon the breaking of the argument, it was at first supposed, that this count was founded on the 13th section of the act of 1st March, 1809, c. 91, and it was contended, that even if the defence of necessity was not made out, (as all the other facts were admitted) the vessel would not be subject to forfeiture, as the only remedy, under that section, was on the bond given on the departure of the ship. I lay all the argument proceeding on this ground out of the question, as the count is clearly founded on another act. It has since been argued, with great ability, that the 3d section of the act of 9th January, 1808, on which this information is founded, was repealed by the act of 1st March, 1809, c. 91, and if the argument be correct, it undoubtedly follows that this prosecution is not maintainable. In support of the argument, it has been assumed as a general position, that subsequent laws respecting the same subject matter, when repugnant to prior laws, repeal them. The propriety of this position is not disputed. The only question is, whether such actual repugnancy exists here in such a shape, as leaves no reasonable doubt of the legislative intention. For a presumed legislative intention of repeal is the ground, on which rests the maxim "*leges posteriores priores contrarias abrogant.*"

It is exceedingly to be regretted, that the legislature have chosen to express themselves in so loose and inartificial a manner, and to leave so important a subject to mere inference and judicial construction. Yet the court cannot avoid the difficulty, and

must content itself with the obscure and wavering lights, which are thinly scattered through the act. The sections of the act, which have been chiefly relied on in the argument, are the 12th, 13th, 14th, and 16th. The 12th declares, that so much of the act laying an embargo, &c. as forbids the departure of vessels owned by citizens of the United States, and the exportation of domestic and foreign merchandise to any foreign port or place, shall be repealed after the 15th of March, 1809, except so far as they relate to Great Britain and France, or their dependencies. The legal effect of this enactment, at first view, would undoubtedly seem to be, that the embargo acts were left in full force, as to Great Britain, France, and their dependencies, and were repealed as to all the rest of the world. At least, it is difficult to give any exact sense and meaning to the terms, unless this be the true construction. For there are no provisions in those acts exclusively directed against Great Britain, or France, or their dependencies. By the operation of this clause, the bonds, required in ordinary cases by the embargo law, would have been completely at an end, as to voyages to permitted ports. The 13th section therefore declares, that during the continuance of so much of the embargo acts, as is not repealed by that act, no vessel bound to a foreign port, with which commercial intercourse shall, by virtue of that act, be again permitted, shall be allowed to depart for such port, unless a bond be given, with condition, that the vessel shall not leave the port without a clearance; nor, when leaving the port, shall proceed to any port of Great Britain, France, or their dependencies, nor be directly or indirectly engaged, during the voyage, in any trade with such port, nor shall put any article on board of any other vessel. These are almost an exact copy of the prohibitory words of the 3d section of the act of 9th January, 1808, c. 8. If the act had stopped here, the whole coasting and fishing trade would have been subject to all the restrictions of the embargo acts, and therefore the 14th section expressly repeals so much of these acts, as compels vessels owned by citizens of the United States, bound to another port of the United States, or vessels licensed for the coasting trade or fisheries, &c. to give bond or to load under the inspection of the revenue officers; or so much as renders them liable to detention merely on account of the nature of their cargo, with the exception of such provisions, as relate to districts adjacent to foreign territories, or to vessels belonging to or bound to such districts. This clause would have completely relieved coasting vessels from all the restrictions of the embargo acts, but the 15th section immediately takes up the case, and provides that no vessels owned by citizens of the United States, bound to another port of the said states, or licensed for the coasting trade, shall be allowed to depart from any port

of the United States, nor shall receive a clearance, nor shall it be lawful to put on board such vessel, any specie, goods, wares, or merchandise, unless a permit shall have been previously obtained from the proper collector, &c. nor unless a bond, prescribed by the section, is given with condition, that the vessel shall not proceed to any foreign port or place, and that the cargo shall be relanded in some port of the United States.

The 16th section provides, that during the continuance of so much of the embargo acts, as are not repealed, &c., if any ship or vessel shall depart from any port of the United States, without a clearance or permit, or having given bonds in the manner provided by law, such ship or vessel, together with her cargo, shall be wholly forfeited. Much stress has been laid on this section, as containing within itself provisions applicable to the same cases, as the 3d section of the act of 9th January, 1808, and therefore that being in pari materia, the latter is repealed by the former. Certainly the clauses will not be contended to be wholly repugnant, although they may be held to apply, in some instance, to the same facts. But because the provisions of different acts may, under certain circumstances, apply to the same subject matter, it does not follow that they are to be construed as totally repugnant, unless they cannot be construed as cumulative. And where several acts exist on the same subject, the last does not repeal the former, unless it be couched in negative terms, or when its matter is so clearly repugnant, that it necessarily implies a negative. 1 Bl. Comm. 89. But I do not rely on this rule. On a careful attention to this section, I am satisfied, that it applies to the cases enumerated in the 13th and 15th sections, and none other. The words, "in the manner provided by law," seem to me to refer to the departure without a clearance or permit, as well as to the giving of bonds, in the cases stated in those sections. If this be the true construction, it avoids most, if not all of the difficulties and repugnancies, which have been so elaborately urged by the counsel for the claimants.

It is said, that the remedy intended by the legislature in cases like the present, where the vessel proceeded to an illicit port, is the forfeiture of the bond, and that when other forfeitures have been intended, express provisions have been made for this purpose. This reasoning however leaves the original question untouched; for as it was competent for the legislature to provide such forfeitures, still the inquiry returns, whether the legislature have not so expressed their will. Much has been said, as to the repugnance of the 13th section of the act, where it refers to the 2d section of the act of 9th January, 1809, c. 7, and if the present forfeiture were claimed under the latter section, it would deserve great consideration.

But all arguments derived from sources of this nature are liable to great objection, when they encounter the positive enactments of a leading section. Now if the construction contended for by the claimant be true, it will follow, that the embargo acts were repealed, not only as to foreign countries, but even as to Great Britain and France, and their dependencies. Unless the provisions of these acts remain in full force, as to those countries, it is difficult to find in any other act a prohibition of trade with either. There is no clause in the nonintercourse act of 1st March, 1809, directly inhibiting a departure for, or exportation to those countries, unless it be in the 12th section. It has indeed been ingeniously urged by the counsel for the claimant, that the exposition of the 12th section assumed by them, may well be maintained by holding, that the embargo acts are altogether repealed, as far as they impose penalties and forfeitures, and that a mere naked embargo and interdict of trade remained as to Great Britain and France, without any other vindictory sanctions, than those contained in the 16th section. But if such had been the legislative intention, the natural course would have been to have repealed all those acts, and to have enacted a direct embargo, as to Great Britain and France. Instead of this, the legislature declare, that so much of these acts, as forbid a departure, &c., are repealed, except so far as they relate to Great Britain and France. It is not a mere naked embargo or interdict, but the acts laying and regulating it, which are to continue as to those nations. It is not simply the original act laying the embargo, (which according to the argument would alone exist in force), but all the acts supplementary to that act, which are excepted from the repealing clause.

In order therefore to effectuate the manifest intention of the legislature, as well as the words of this section, it is necessary to consider the embargo acts as remaining in full force, as to vessels bound to Great Britain, France, and their dependencies; and if in full force, surely a vessel departing from an American port, and proceeding to a prohibited port, must be within the purview of the 3d section of the act of 9th January, 1808. In this view it seems to me, that all difficulties vanish. Vessels bound to foreign permitted ports, or to our own ports, are regulated by the act of 1st March, 1809. Vessels bound to prohibited ports are restrained by the embargo acts, and these operate upon them in the same manner, as though the embargo had not originally extended beyond the prohibited countries; or in other words, the embargo acts, as to all voyages to such countries, remain in full force. When the court is called upon to reject the words of a whole section, upon inferences deduced from supposed incongruities in other sections, the case should be

too palpable to admit of doubt; and if by any reasonable construction, the whole can be reconciled, it is an indispensable duty to adopt such construction. In my judgment, the 3d section of the act, on which this information is founded, was in full force at the time of the Argo's departure. She sailed after the president's first proclamation was issued, (19th April, 1809,) but before it had had effect, (to wit, 10th June, 1809), and consequently must be condemned, unless the facts alleged in justification are fully supported.

Continued for argument on the facts.

STORY, Circuit Justice. The case has now been argued upon the facts, and the single question for the court to decide is, whether the justification set up by the claim is supported by the evidence. The claim alleges that the ship proceeded to Halifax, as stated in the information, but that it was occasioned by stress of weather, and an inevitable necessity growing out of the accidents of the voyage. I need not, after the repeated determinations of this court, state that it is a settled principle, that where the facts constituting a case of forfeiture are admitted, and a justification or excuse is alleged by the claimant, it rests on him to show such justification or excuse free from any reasonable doubt; and if he fail so to do, a decree of condemnation must prevail. It has been argued, that the necessity, which will excuse a violation of the law, need not be an overruling physical necessity, but such facts and circumstances which ought to induce a prudent master, in the exercise of the authority confided to him, to deviate for the purpose of refitting and repairs: and the case has been likened to that of a deviation under a policy of insurance. It may be admitted, that the necessity which will excuse or justify a violation of the law in cases of this nature, need not be irresistible in a physical view; but it can never be successfully argued that the facts, which will excuse a deviation in cases of insurance, will constitute an excuse for offenses committed against the public law. The cases are totally different. There is, from the nature of the contract of insurance, an implied authority to the master, to act upon emergencies, for the benefit of all parties; and if he act bona fide, and with reasonable discretion, he acts within the scope of that authority; but where the law imposes a prohibition, it is not left to the discretion of the citizen to comply or not; he is bound to do every thing in his power to avoid an infringement of it. The necessity which will excuse him for a breach, must be instant and imminent, it must be such as leaves him without hope by ordinary means to comply with the requisitions of the law. It must be such, at least, as cannot allow a different course without the greatest jeopardy to life and property. He is not permitted as in cases of insurance, to seek a

port to repair, merely because it is the most convenient, and the most for the interest of the parties concerned. He is, on the contrary, bound to seek the port of safety which first presents, if it be one where he may go without violation of the law. In a word, there must be, if not a physical, at least a moral necessity, to authorize the deviation. Under such circumstances the party acts at his peril; and if there be any negligence or want of caution, any difficulty or danger which ordinary intrepidity might resist and overcome, or any innocent course, which ordinary skill might adopt and pursue, the party cannot be held guiltless, who, under such circumstances, shelters himself behind the plea of necessity.

Now in the present case I must say, that the evidence is in no degree satisfactory, as to the existence of any necessity for the voyage to Halifax. The witnesses for the claimant, whose depositions are before the court, give testimony, which at most is loose, inaccurate and awkward. The deposition of the mate, which is mainly relied on, presents a very feeble case. The account which he gives of the storms is very mild, compared with the usual exaggerations in these cases. The wind does not appear to have been very violent; the deck load was not thrown overboard; no sails were lost, no spars sprung, no rigging injured. The leak is no where represented as serious, and one hand could always keep the vessel free; the tar, which is said in some degree to have choked the pumps, does not appear to have presented insurmountable obstructions. On arrival at Halifax, it is not pretended that any serious leak was discovered; the upper works were examined, and, says the mate, "the caulker was round the vessel, and I heard him caulking her, as I thought, but I did not see him drive any oakum in her, and he said he could not find any material leak in her." Yet it seems the leak, if any where, was in the upper works, for on lightening the ship it was greatly diminished. Besides, the whole deposition is essentially defective in the most important particulars. It comes from the person who usually keeps the log-book, and from whom we are entitled to expect a full and minute account of the state of the weather, the courses of the ship, the length of the gales, and the general transactions on board during the period in which the disasters are alleged to have occurred. I might add also, that the log book, a most material document, is not produced, and as it is usually called for in cases of this nature, its absence does not add to our general confidence. But independent of these objections, there are certain intrinsic difficulties in this case, from which I cannot relieve my mind. In the first place the owner was at Boston about the time of the vessel's sailing, and though she arrived at Halifax in eight days, he met her there on her arrival. No account is given of his journey thither, nor

of its object. He appears there without surprise to the captain; and a supercargo is put on board at Halifax, who accompanies the ship to the West Indies. I think it is difficult to resist the impression, that there was something like preconcert in these circumstances; at least it throws a shade over the cause which has not been attempted to be removed.

In the next place the ship run down the whole eastern coast of the United States. The winds were very favorable for her to go into any eastern port to refit, yet no effort was made for this purpose, and no reason is assigned why it was not done. Surely no master of ordinary skill could, without cause, be guilty of so gross a misbehavior, as not to make a port in the United States, when so many lay in his way, and the strong injunctions of the law pressed upon him. There are some other striking singularities in the case, but I will not spend time in commenting upon them, because the foregoing, left as they are without explanation, would perhaps be decisive. But when we take into consideration the depositions introduced by the United States, of three of the crew, it is altogether unreasonable to expect, that the court could be free from doubt. Some exceptions have been taken to apparent incongruities and exaggerated statements made by some of the witnesses. Perhaps these exceptions are well founded; but admitting their force, still, taken with all their imperfections on their head, the depositions contain in general a substantial coincidence, as to material facts, which I must say are either corroborated, or not fully contradicted by the testimony on the other side. Now if these depositions are believed, there is no longer any doubt in the case; the justification is wholly unsupported. On the whole, I am satisfied that the decree of the district court ought to be reversed, and that the ship and appurtenances should be condemned, with costs, to the United States.

Condemned.

Case No. 517.

The ARGO.

[2 Gall. 314.]¹

Circuit Court, D. Massachusetts. Oct. Term, 1814.²

DEPOSITION—NOTICE—ATTORNEY OF RECORD.

1. When there is an attorney of record, it is improper to take depositions without notice to him, or to the party.

2. When depositions are taken to be used against the United States, if there be an attorney of the United States within one hundred miles of the place of caption, he must be notified.

[See note at end of case.]

¹[Reported by John Gallison, Esq.]

²[Affirmed by supreme court in *The Argo*, 2 Wheat. (15 U. S.) 237.]

This was an information for a violation of the non-intercourse law.

G. Blake, Dist. Atty., offered in evidence depositions, which had been taken in New York without notice, since there had been an attorney of record for the claimant.

[Before STORY, Circuit Justice, and SHERBURN, District Judge.]

PER CURIAM. Though depositions thus taken have been usually received, there are certainly great objections to the practice; and the court have heretofore intimated a resolution to require notice to be given in all cases, where there is an attorney of record. To prove that the vessel had not been at Guadaloupe, as alleged in the information, the claimant produced the depositions of several of the crew, which appeared to have been taken in Boston, and elsewhere within one hundred miles of the residence of a district attorney, without notice to him. Upon objection by the district attorney, they were rejected for this cause, and the court observed, that in all cases, where there is an attorney of the United States residing within one hundred miles of the place of caption, notice must be given to him of the taking of depositions, to be used in any cause, in which the United States are a party.

[NOTE. The judiciary act of 1789, § 30, (1 Stat. 89,) required notice from the magistrate before whom the deposition is to be taken, to the adverse party or his attorney, "if either is within one hundred miles of the place of caption." See *Dick v. Runnels*, 5 How. (46 U. S.) 8. This provision was modified by the act of 1872, c. 146, (17 Stat. 89,) which requires "reasonable notice" in writing to the adverse party or his attorney. See Rev. St. § 863.]

Case No. 518.

The ARGONAUT.

[Blatchf. Pr. Cas. 62.]¹

District Court, S. D. New York. Oct., 1861.

PRIZE—NEUTRAL PROPERTY—BLOCKADED PORT.

1. Vessel and cargo restored as neutral property, on a lawful voyage, but without costs against the captors, there having been probable cause for the arrest, the vessel having attempted to enter a blockaded port to obtain the necessary supplies.

2. An excuse of that kind is looked upon with distrust by prize court.

In admiralty.

BETTS, District Judge. This cause was submitted to the decision of the court by counsel, on the pleadings and proofs, and a brief oral statement of the points in controversy.

The Argonaut was captured by the United States war steamer *Susquehanna*, September 13, 1861, off Hatteras inlet, and sent into this port in charge of a prize crew, and was libelled by the United States attorney as prize of war. The claimants filed separate

¹[Reported by Samuel Blatchford, Esq.]

answers and claims to, the suit, each alleging that they are British subjects resident in Nova Scotia, and that the vessel and cargo are owned by them and both are British property, and neither is subject to arrest or condemnation as prize of war; and they invoke their own affidavits, appended to the proceedings and the evidence taken in preparatorio, in support of their defences.

The proofs show that the vessel and cargo were neutral property and it is not made a point of contestation by the libellants, since the proofs are in, that the voyage was honest and fair in its inception, and that neither vessel nor cargo are, upon the facts before the court, subject to confiscation; but, on the part of the United States, it is insisted that the direction of the vessel, and her apparent purpose when she was arrested, denoted an intention to enter the blockaded port, so far, at least, as to well warrant her arrest and to impose upon her the necessity of establishing the justifiableness and innocency of her proceedings. On the other side, it is urged that she deviated from the regular course of her voyage for necessary causes, and stands, on that account, exonerated from all blame and all reasonable grounds of suspicion.

The evidence given by the master, mate, and scamen of the captured vessel, on the preparatory examination, is entirely consistent and clear, that the vessel was laden and despatched at Nova Scotia, on a voyage to Key West, and was manned by a British crew and laden with a British cargo, not contraband, and that the voyage was faithfully pursued until, in its regular course, the vessel became short of water for the crew, and also of burning fluid to supply her lamps, a portion of the fluid, shipped in quantity sufficient for the purpose, being found, when at sea, defective in quality and incapable of being used as a light, so that the vessel could not be safely navigated at night. The vessel deviated from the true course of her voyage about fifteen miles, and attempted to obtain from other vessels the supply needed for her wants, and, in so doing, was seized by the United States vessel-of-war.

I perceive no reason to doubt, on all the facts and circumstances in proof, that the master of the vessel and her supercargo acted under an honest conviction that the necessities of the vessel required she should obtain the supplies lost to her in order to continue the voyage safely, and were governed in their proceedings by that motive, and not by an intent to violate the blockade of the port which she sought to enter and near which she was seized. Although the condition of the vessel relieves her from confiscation because of the effort of the master to enter a blockaded port for the purpose of relieving her necessities, yet excuses of that kind are looked upon with marked distrust by prize courts, who scan them cau-

tiously. Lord Stowell holds that nothing but a high necessity justifies an attempt to enter a blockaded port, (*The Hurtige Fane*, 2 C. Rob. Adm. 124,) and that slight and plausible excuses will not be listened to, (*The Fortuna*, 5 C. Rob. Adm. 28,) and the want of provisions is referred to as a simulated reason often set up in excuse of the offence. Still, when the necessity is actual and is the motive which governs the conduct of the master the vessel will be exonerated from the severe penalty which the act of breaking a blockade incurs.

I think the proofs fairly make out such a case for the vessel in this instance, and that, accordingly, the vessel and cargo should be restored to the claimants; but I think there was probable cause for arresting the vessel in an attempt to make a blockaded port and sending her in to make good before the proper court the justification she alleged for her proceedings. The judgment of the court, accordingly, is that the vessel and cargo be restored to the claimants, without costs against the captors.

Case No. 519.

The A. R. GRAY.

[7 Ben. 483.]

District Court, E. D. New York. Oct., 1874.

RELEASE OF VESSEL FROM CUSTODY—PRIORITY OF CLAIM.

Where a vessel was libelled, and seized under the process, then released by the marshal from custody, upon consent of the libellant, and was subsequently libelled by other parties, condemned and sold: *Held*, that the first libellant had no claim to be first paid out of the proceeds; that the consent to release the vessel operated as a waiver of priority of claim.

In admiralty.

Geo. W. Rathburn, for Nathan.

Beebe, Wilcox & Hobbs, for Burtis.

BENEDICT, District Judge. These cases came before the court for a determination of the question of priority between the claims set forth in the libel of A. F. Nathan and others, and the claim set forth in the libel of Divine Burtis and others.

The first mentioned libel was filed on the ninth day of May, 1874, when process was issued, and the vessel was taken into custody. Subsequently by the consent of the libellants, the vessel was released by the marshal, and went about her business, in pursuance of an agreement made between the libellants and the owners of the vessel by which the earnings of the boat should be applied to the payment of the libellants' demand. On the 22d day of July, 1874, the vessel was again libelled by the libellant Burtis, and also by other libellants, to re-

¹[Reported by Robert D. Benedict, Esq., and B. Lincoln Benedict, Esq., and here reprinted by permission.]

cover for supplies, some of which had been furnished since the marshal's release of the vessel from his custody, under the process issued in the case of Nathan & Co. Upon these subsequent processes, the vessel was seized, and she had been condemned and sold under decrees entered in some of them.

Her proceeds being thus in court, the libellants Nathan & Co., now insist that they are entitled to be first paid, because their libel was the first in time; and they say, that as the marshal released the vessel from custody under the process, upon their consent simply, without an order of the court, they have lost no rights by such release. I am of the contrary opinion. It does not lie in the mouth of those who consented that the marshal release the vessel from custody, partly at least for their own benefit, now to say that the release was unauthorized. The fact is patent that the vessel was released and resumed her occupation and incurred additional liabilities, not only with the knowledge of but in pursuance of an agreement with the libellants Nathan et al. Such a release amounted to a waiver of any right of priority which might otherwise have been acquired by the filing of their libel prior to the filing of the libel of Burtis. In distributing the proceeds therefore, the order will be that the claim of Burtis be first satisfied.

A. R. GRAY, The. See Case No. 10,949.

ARGUELLES, (ALLEN v.) See Case No. 213.

ARGUELLES, (LENOX v.) See Case No. 8,244.

Case No. 520.

ARGUELLES v. WOOD.

[2 Cranch, C. C. 579.]¹

Circuit Court, District of Columbia. May Term, 1825.

LANDLORD AND TENANT—ORDER FOR RENT—ACCEPTANCE—ACTION—VERDICT OF JURY—AMENDMENT—ARREST OF JUDGMENT.

1. If the landlord draws an order on his tenant, on account of rent, and the tenant accepts, but does not pay it when due, and suffers himself to be sued for it by the payee, he is not entitled to set it off, under the plea of no rent arrear, in an action of replevin, if the landlord, at the trial of the replevin, produces the order cancelled, and offers to surrender it to the tenant and to pay the costs of the suit brought upon it.

2. If the jury find the amount of the rent arrear in damages, without stating it to be the amount of the rent, the court will permit the verdict to be so amended by the clerk, after the jury have rendered their verdict and retired from the bar, and even after another cause has been tried. And upon such a verdict the court will award a retorno habendo; and will not arrest the judgment because the jury have not found the value of the distress taken.

¹[Reported by Hon. William Cranch, Chief Judge.]

At law. Replevin. Avowry for rent-plea, no rent arrear, and issue. The defendant had drawn an order on the plaintiff on account of the rent, in favor of R. Smith, for \$87.50, which was accepted by the plaintiff. This was outstanding at the time of the distress, and was not credited. The amount distrained for was \$175, on the 7th of August, 1823. Suit was brought by Mr. Smith against the plaintiff upon her acceptance in November, 1823. She now claims credit for this sum of \$87.50, against the rent. The defendant produces the acceptance and offers to cancel and surrender it, and to pay the costs of the suit of Smith v. Arguelles.

THE COURT (MORSELL, Judge, contra) was of opinion that the plaintiff could not now receive credit for that acceptance; it being sufficient for the defendant, at this trial, to produce and cancel the acceptance.

MORSELL, Circuit Judge, was of opinion, that if the acceptance was received by Wood as payment of so much of the rent, the plaintiff was now entitled to the credit, as it was not produced and cancelled, or tendered at, or before, the time of the distress. See Chit. [Bills,] p. 130, note 1; Phil. [Ev.] (Ed. 1821;) Harris v. Johnston, 3 Cranch, [7 U. S.] 311; Sheehy v. Mandeville, 6 Cranch, [10 U. S.] 253; Clark v. Young, [1 Cranch, (5 U. S.) 191,] and other cases cited in the note in Chit. [Bills,] p. 130.

The jury found their verdict for the defendant; damages \$140, with interest from the 20th of July, 1824. After the verdict was taken down by the clerk, and before the jury separated, Mr. Ashton, for the defendant, suggested a doubt whether the verdict was correct, but did not then make any specific motion to amend it, and the court went into another trial, and the jurors in this case retired from the bar and separated. After the trial of the next cause, Mr. Hall and Mr. Ashton, moved for leave to amend the verdict, by stating that the \$140 was the amount of the rent arrear, and

THE COURT (CRANCH, Chief Judge, doubting) permitted the amendment to be made. After the amendment was made, stating that the jury found one cent damages for defendant, that the rent arrear was \$140, with interest, &c., Mr. Jones, for the defendant, moved in arrest of judgment, and contended that the verdict was not good at common law, nor under the statute of 17 Car. II. c. 7, because it has not found the value of the goods distrained; for by the statute the judgment for the defendant must not exceed the value of the distress. 2 Selw. N. P. 1144; Freeman v. Archer, 2 W. Bl. 763; Rees v. Morgan, 3 Term R. 349.

Mr. Ashton, contra. An avowry was a proceeding at common law, and if the verdict is for the defendant, the regular judgment at common law is for a writ de retorno habendo. The finding of the amount of the rent arrear, does not injure it as a common

law verdict. It is surplusage; and we ask only the common law judgment of retorno habendo. Ham. N. P. 493; Rees v. Morgan, 3 Term R. 349. The verdict cannot now be amended so as to justify the statute judgment, but we are entitled to judgment at common law.

THE COURT (nem. con.) ordered judgment to be entered for the writ de retorno habendo.

Case No. 521.

The ARGUS.

[Olc. 304.]

District Court, S. D. New York. April, 1846.

COLLISION—BETWEEN SAILING VESSELS—TACKING
—CUSTOMS ON NORTH RIVER.

1. The estimate or judgment of witnesses formed in the night time, and expressed orally, or exhibited on charts or diagrams on a vessel in motion, are of slight weight in determining the relative position and bearing of another vessel, also under motion.

[See The Narragansett, Case No. 10,019.]

2. A vessel close-hauled on the wind has a right to rely to the last moment on the ability and care of another meeting her with the wind free to avoid a collision, and is not responsible for a wrong movement on her part, caused by the negligence of the one running free; but a vessel close-hauled is bound to hold her tack, so as not to come round in the way of one free and endeavoring to avoid her.

[Cited in The Greenpoint, 31 Fed. 232.]

[See The Catherine v. Dickinson, 17 How. (58 U. S.) 170; The Clara M. Porter, Case No. 2,792; The Clement, Id. 2,879; The John Stuart, Id. 7,427; The M. M. Hamilton, Id. 9,685.]

3. A vessel running free has no right to cross the bows of a beating vessel, unless she has clearly room to do it without disturbing her course; nor to come so closely upon the stern of the other as to create apprehensions of a collision, and alarm her into a change of her course to escape it.

[Cited in The Free State, Case No. 5,090; The Maria & Elizabeth, 7 Fed. 255; The Renovator, 30 Fed. 195.]

[See The Rebecca, Case No. 11,618; Allen v. Mackay, Id. 228; The Blossom, Id. 1,564.]

4. A vessel on the wind has the right to run out her tack, and it is the duty of another vessel approaching her before the wind to take the necessary precautions to avoid a collision.

5. The customs as to the navigation of the North river are in consonance with nautical usages at sea, and the rules regulating such navigation are the same as obtain in regard to sea-going vessels.

[See Newton v. Stebbins, 10 How. (51 U. S.) 586; The Santa Claus, Case No. 12,327.]

In admiralty.

Geo. A. Shufeldt, for libellants.

A. L. Jordan, for claimant.

BETTS, District Judge. This is a case of collision between two sloops on the North river, and the extent of damage incurred renders it one of serious importance to the respective parties. It has been litigated at great expense, and through protracted and

[Reported by Edward R. Olcott, Esq.]

tedious inquires into the facts. The law and facts bearing upon the case have been thoroughly discussed; orally before the court, and by able and well-digested written arguments submitted by the counsel. The statements of the transaction by the witnesses do not strictly coincide with the representations of the parties in their pleadings, but the variances are, perhaps, deserving no special regard, other than in respect to the effect they may have upon the credit of some of the witnesses, whose testimony is called in question. The libellants charge that the sloop Bucktail, owned by them, being on a voyage down the river to the city of New York, and about opposite the end of the long dock at Rhinebeck, and nearly in the middle of the river, making a tack to the westward, the wind ahead, blowing straight up the river, the sloop Argus was seen coming in the opposite direction before the wind, and standing directly for the Bucktail; and as soon as within call, she was hailed by the Bucktail to bear up or to luff; that no attention was paid to the direction; on the contrary, she continued her course, heading for the Bucktail, until her stem struck the larboard bow of the Bucktail, cutting it down to the water's edge, from which injury she afterwards sunk and was totally lost.

The claimant answers, that the night was very dark, and the atmosphere thick and hazy, so that objects could be distinguished but a short distance; that the wind was blowing heavily from the southeast; the Argus was on her course up the river, from New-York to Hudson, bearing about northeast; when she was opposite the long dock at Rhinebeck, and near the west shore of the river, the Bucktail was discerned from her a very short distance ahead, obliquely to the eastward, beating down the river, on a tack from the eastern to the western bank of the river, with the wind so favorable as to be able to hold her course nearly with that of the river. That it was judged advisable to keep the Argus away to avoid a collision, and she was steered in a proper angle towards the westerly bank of the river, so that she could have safely passed the Bucktail on her lee side without danger of collision, if that vessel had kept her course as she was bound to do; but that after the direction of the Argus had been so altered, the Bucktail deviated from her proper course, and ran directly across the bows of the Argus, thus producing the collision complained of. The other parts of the pleadings need not now be rehearsed, as the gist of the controversy is involved in these allegations. Before adverting to the proofs adduced by the parties, it is proper to observe, that the estimate or judgment of witnesses, as to the bearings, distances or relative positions of objects on the water looked at in the night-time, and particularly when the witnesses are placed on vessels in motion, cannot be considered entitled to confidence as facts. They are

little more than conjectures, formed in a state of mind and position disabling the witnesses from speaking with any reliable certainty.

The course of the river, at the place of the casualty, is assumed by the witnesses to be north and south, and the direction of the wind, and the track of the two vessels, are probably estimated with reference to that assumption; and as the true range of the river is a point or more east from the one supposed, the relations of the other particulars would have to be taken with corresponding allowances. Indeed, both the proofs and the arguments concede, that a variance of several points from any of the supposed courses might be reasonably expected and accounted for, without impeaching the veracity or intelligence of the witnesses. These considerations must lead to great caution in adopting diagrams or charts framed upon the courses assigned the two vessels by the respective witnesses, as affording any just criterion by which the facts in controversy may be adjusted. A few prominent particulars in the case, not essentially in dispute, appear to me to settle the question between the parties as to the wrong or negligence of the claimants' vessel, and the right of the libellants to damages. The Bucktail was sailing against the wind, be its exact direction at whatever point may be assumed, and her longest stretch or tack was from the east to the west. She was loaded below, and had bundles of hay on deck so piled up as to require the boom to be raised by a reef in the mainsail, and this trim would somewhat impede and embarrass her management. It was night, but not dark enough to prevent the two vessels being seen by persons on each, at a distance of half a mile to a mile apart. The Argus was light, and running free before the wind, about in the middle of the river, which, at the place in question, was a mile wide, with the channel from shore to shore. The Bucktail came around on her larboard tack a quarter of a mile above the long dock at Rhinebeck, and was supposed by her pilot to range off about a south southwest course, and by those observing her from the Argus, to head southwest. The defence is placed essentially upon the position that she was able on that wind to hold her course, which, if adhered to, would have carried her far east of the track the Argus was running; and, also, on the proposition of law, that the Bucktail was bound to pursue the course she had taken, whilst the Argus was only required to use measures for avoiding her, on her continuing to hold that course as close to the wind as she could be laid until her tack was run out.

The counsel for the claimant submits various diagrams to substantiate the conclusions he draws from these considerations. Whatever nautical theories may be raised in respect to the relative bearing, ability and duty of

the two vessels, I am satisfied, upon the proofs, that up to the point of time at which a collision became apparent and imminent on board both vessels, the Bucktail was managed by her crew with ordinary skill and precaution. There is nothing in the evidence necessarily conflicting with the statements of those on board the Bucktail, that she was kept steadily on her course as near to the wind as her build and trim would permit. She took her direction towards Kingston Point, intending to run out her tack in that vicinity; and upon the evidence, this would bring her scarcely half a mile below a right line across the river from the place of her departure on the tack. The actual course she was making across the water could not correspond with any of the hypotheses of the witnesses on either side, for though it was undoubtedly, by the compass, south of west, yet the notions that it was southwest or south southwest, were only conjectures, and of slight moment in the case, it being satisfactorily proved that she was kept close-hauled to the wind, with a view to Kingston Point on the west shore as the terminus of her tack.

The libellants' witnesses testified in consonance with the libel, that the collision took place near the middle of the river, opposite Rhinebeck dock, which, as appears from the surveys, was about eighty rods below the beginning of her tack. The Bucktail would accordingly have made southing a quarter of a mile, and reached nearly half the distance across the river towards Kingston Point. The witnesses for the claimant concur substantially in placing the two vessels near the middle of the river when they met, and there can be no question, upon the evidence and the plan of the various courses, that if she had made, from the start, a south southwest or southwest course, she could not have run beyond the middle of the river, in falling down a quarter of a mile, opposite to Rhinebeck dock. But the claimants' answer, by which their defence must be governed, avers that the collision took place near the west shore of the river, opposite Rhinebeck dock. This is palpably a gross error, for by no possibility could the Argus be so placed, having a view of the Bucktail at that distance, as to act on the belief that the latter was holding a southwest course, with a wind asserted to be nearly free for her from the time she came about to the moment of collision; and it would be physically impossible the two vessels could, under the circumstances, come in contact on a line nearly at a right angle from the point of departure of the Bucktail. If the Argus saw the Bucktail come about, a mile off, then the two vessels must have run an equal distance in the same time, and directed to the same point, in order to effect the meeting, and the Bucktail, instead of heading down the river, must have been necessarily and obviously to the eye, laying

at nearly right angles across it; which would have been emphatic notice to the Argus not to attempt to cross her bows.

If the distance of a mile and the position of the Argus on the west shore is disregarded, and the Bucktail is assumed to have been seen three-quarters, a half, or quarter of a mile distant, the Argus being in the middle of the river, the difficulty of reconciling the claimants' theories and diagrams with the proved facts, are no way diminished; on the contrary, they are multiplied and enhanced. The nearer the two vessels are placed to each other, at the moment the Bucktail came round on her larboard tack, the more difficult and improbable would be a collision in the manner this occurred; for the Argus continuing her course in the middle of the river, every moment she advanced in that direction, with a speed superior to that of the Bucktail, she would necessarily be running out, and passing the point where the Bucktail must cross her track, even at right angles, and the more oblique the course of the Bucktail on the wind, towards that line, the more improbable would be their meeting on that line. This improbability of contact upon these assumptions would become next to an impossibility, on the allegations of the answer. The Argus is by the answer placed near the west shore, opposite Rhinebeck dock, which, it is seen, is only a quarter of a mile below the position of the Bucktail, on the opposite side of the river; and if, instead of the two running in different directions, both had endeavored, on the most direct line, to reach collision, it would be utterly incredible that the Argus would not, before a strong and free wind, in her trim, have passed the point before the Bucktail, deeply laden, could beat the same and even a greater distance. It is, therefore, most clear, that if the proofs had been *secundum allegata*, and shown the Argus running her course before the wind, near to the western shore, when the Bucktail came about, there could be no rational mode of accounting for the collision on the proofs, but by supposing the Bucktail, after the Argus passed her track, bore up, and by superior speed, overtook and ran into the latter vessel.

The answer and proofs of the respondent do not so correspond that they can stand together and establish the case for him in either aspect, but yet the proofs may be used to countervail the evidence adduced on the part of the libellants, and take away their claim to a recovery. So, also, the claimants' proofs or answer may be invoked by the libellants, in support of their version of the transaction. The statement of Swart, the helmsman, and Warringer, the pilot of the Bucktail, is in substance, that she was beating down the river, westward on her larboard tack, and as close to the wind as she could lie, when it was found that the Argus had taken no measures to

avoid her, and the two vessels were approaching each other rapidly, in a way threatening an immediate collision. That the Argus was hailed loudly to luff, and not obeying the order, the Bucktail bore up, and instantly was run into by the Argus, on her larboard bow; and that if any watch had been kept on the Argus, the danger would have been seen on board her in time, and she could easily have avoided it.

Testimony is given by the claimant tending to impeach the credit of Swart; and direct and strong evidence that a look-out was kept on the Argus, and that the Bucktail was distinctly seen, and her movements watched from the time she came about; and if she had held the course she took on that tack, and which her capacity as a sailer, and the direction of the wind enabled her to hold, she would have gone clear of the Argus, and that the collision was the consequence of her fault in these respects. If Swart's general character is impeached by the evidence, still the answer of the respondent in this behalf directly corroborates his statement, and that of Warringer, so that in respect to this branch of the issue, that testimony must prevail against any number of witnesses offered by the party who put in, and swore to the correctness of the answer. The allegations of the claimant are, that the night was very dark and hazy, that objects could be distinguished but a short distance; that when the Bucktail was first discovered, the Argus was kept away to the west shore, and "when the course of the Argus had been so altered," the Bucktail was made to deviate from her true and proper course, so as to run across the bows of the Argus, and make a collision between the two unavoidable. This places the two vessels precisely in coincidence with the description given by Swart and Warringer, and demonstrates that the Argus did not observe the Bucktail until the moment she attempted to avoid her by bearing away; and the presumption is exceedingly strong, that the attention of the Argus was first called to the Bucktail from the cry of the latter to luff, which was heard by her, and which was so urgent as to call up one of her men from below.

Whether, in that emergency, the most prudent and discreet course was pursued on board the Bucktail, in bearing away, also, it is not important to inquire and determine. She had a right to rely to the last moment upon the ability and care of the vessel before the wind, and if in the alarm, resulting from the instant danger, she adopted a false manoeuvre, that will in no sort excuse the Argus, or take away the right of the Bucktail to claim damages, since the confusion, and all the consequences of the then situation of the two vessels, arose from the fault of the Argus. *The Diana*, 1 W. Rob. Adm. 132; *The Celt*, 3 Hagg. Adm. 321; *The Harriett*, 1 W. Rob. Adm. 182. I am by no

means satisfied that any wrong manoeuvre was made by the Bucktail, or that she had it in her power to take any course, when it was found that the vessels were directly upon each other, which would have rescued her from the danger that was upon her.

The Argus had no right to pass the bows of the beating vessel, unless she had clearly room enough to do it without driving her into the wind, or to come so closely upon her stern as to alarm her for her safety, and induce her, under such apprehension, to bear away before the wind. There was the full breadth of the river to the Argus, with a free wind, and it was her duty to observe the Bucktail and take such a course as to leave her undisturbed on her tack.

It is clear to my mind, upon the evidence, that this was not done, and the unfeeling neglect on board the Argus after the disaster to stop and aid the crippled vessel or ascertain what might be her danger, although urgently appealed to with the cry that she was sinking, and from the refusal on the part of her officers to give the name of the vessel, is impressive evidence of conviction on board of the Argus that the wrong had been wholly on her side. Moreover, the character of the injury received, as detailed by the ship-carpenters, is very strongly corroborative of the statements of the libellants' witnesses, that the Argus struck the Bucktail stem on, and did not receive the blow obliquely from the Bucktail to the windward of her, and in the act of escaping the contact.

There is no conflict between the parties as to the law applicable to the case. The libellants do not deny that it was the duty of their vessel to hold her course down the river, as uniformly as the circumstances under which she was sailing, combining wind, the tide, the lading and trim of the vessel, and her capacity as a sailer would admit, certainly until coming near the Argus, and having great reason to fear the latter would not take measures to avoid her; and the claimant admits that she was entitled to run out her tack, and that it was the duty of the Argus, while such course was pursued, to take precautions, from her having a free wind, to avoid intercepting or injuring the Bucktail, so maintaining her direction. These views are elucidated, and the principles of law applicable to them are very fully discussed in the books. Story, Bailm. §§ 608, 609, 611; [Hawkins v. Dutchess & O. Steam-Boat Co.,] 2 Wend. 452; Rathbun v. Paine, 19 Wend. 399; 3 Kent, [Comm.] 184; The Celt, [Woodrop-Sims,] 2 Dod. 83; The Chester, [The Celt,] 3 Hagg. Adm. 321; [The Chester,] Id. 316; The Diana, 1 W. Rob. Adm. 131; The Harriett, Id. 182; 7 Lou. 222.

The proof of the established usage and custom in navigating the North river is in consonance with nautical usages at sea, and the rules of law laid down in the authorities

above cited. In my judgment, the evidence in this case clearly casts the blame upon the Argus, and imposes upon her the duty of bearing the loss. There was manifestly a want of proper precaution on her part, or of skill and attention in managing her, in her approach upon the Bucktail, and however severe the consequences may be upon the absent owner, the law lays upon him and his vessel the responsibility of repairing the damage which she has occasioned.

I must, accordingly, pronounce for the libellants in this cause, and decree that they recover damages for the injuries they have sustained, which must be a compensation for the actual loss of property. The Dundee, 1 Hagg. Adm. 120.

Case No. 522.

The ARIADNE.

District Court, S. D. New York.

[Cited in The City of Norwich, Case No. 11-202. Nowhere reported; no opinion on file in clerk's office.]

Case No. 523.

The ARIADNE.

Circuit Court, S. D. New York. May, 1870.

[Affirming The Ariadne, Case No. 524. Reported as The Ariadne, Id. 525.]

Case No. 524.

The ARIADNE.

[2 Ben. 472.]¹

District Court, S. D. New York. June, 1868.²

COLLISION OFF BARNEGAT—STEAMER AND BRIG—LIGHTS—SPEED—BURDEN OF PROOF.

1. Where a brig, sailing westward, at night, and keeping her course, was struck on her starboard quarter by a steamer running south by west quarter west, at the rate of about seven or eight knots an hour, the steamer having kept a good lookout, and having, as soon as the brig was seen, no light being visible, stopped and backed her engine, and having, as soon as the course of the brig was seen, put her helm hard a starboard: *Held*, that, on the evidence, the brig did not have burning such a green light as could be seen at the distance of two miles, and that this fault contributed to the collision.

[Cited in The State of Alabama, 17 Fed. 863; The City of Merida, 24 Fed. 236.]

[See note at end of case.]

2. That the burden was on the libellants, the owners of the brig, to establish that the steamer was in fault.

3. That it was not shown that the steamer could have seen the brig sooner.

[See note at end of case.]

¹ [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

² [Decree affirmed by the circuit court in The Ariadne, Case No. 525, but afterwards reversed by the supreme court in 13 Wall. (80 U. S.) 475.]

4. That the speed of the steamer was not too great, as she had the right to rely on the exhibition of a light by an approaching vessel.

[See note at end of case.]

5. That the steamer was not in fault, and the libel must be dismissed.

[See note at end of case.]

[In admiralty. Libel in rem by Archibald M. Pentz and others, owners of the brig William Edwards, against the steamer Ariadne, Charles Mallory, claimant,] for a collision, which took place about 11 o'clock P. M., on the 13th of December, 1865, between the brig William Edwards and the steamer Ariadne. The brig was bound from Havre to New York. The steamer was a propeller, bound from New York to Appalachicola. The brig had taken a pilot, and was about twelve miles from Barnegat, and about eight miles off shore. The libel averred that the brig saw the steamer approaching, at a distance of three miles off; that the brig was at the time close-hauled to the wind, and had all her lights displayed; that she kept steadily on her course, but the steamer continued to approach her and struck her starboard quarter, causing her to sink and be totally lost. The damage claimed was over \$60,000. The answer set up that the night was cloudy and dark; that the wind was from north to north-north-east, a strong whole-sail breeze; that the steamer had her lights properly set and burning, and a competent lookout properly stationed and vigilant; that the steamer had no sails set, and was going from seven to eight knots an hour, heading south by west quarter west, Barnegat light bearing about southwest half south; that the brig was discovered near to the steamer, a little on her port bow, no lights being visible on the brig, and heading towards the shore across the steamer's bows; that the steamer's bells were immediately rung to stop and back, and her wheel was put hard to starboard so as to make her go under the stern of the brig, but, although her engine was immediately stopped and reversed, and her helm was put hard to starboard as quickly as possible, yet, by reason of the proximity of the vessels, it was impossible to clear the brig; that the green light on the starboard side of the brig had gone out, or burned so low and dimly, or had so smoked the glass of the lantern, that it was not visible; and that the brig could not have been seen sooner than she was. [Affirmed by the circuit court in *The Ariadne*, Case No. 525, but on appeal to the supreme court the decree was reversed in 13 Wall. (80 U. S.) 475. See note at end of case.]

J. E. Parsons and T. Scudder, for libellants.
E. H. Owen, and C. Donohue, for claimants.

BLATCHFORD, District Judge. I think the weight of evidence is, that the brig did not have burning, at the time of the collision, such a green starboard light as the

statute requires—a light capable of being seen on a dark night, with a clear atmosphere, at a distance of at least two miles. The night was dark, but not foggy, though cloudy, and the evidence is that the light of a vessel could have been seen that night two miles. No green light on the brig could be seen from the steamer, and the evidence from on board the brig, that her green light was burning at the time so as to be visible, beyond a very short distance, is very unsatisfactory. There had been trouble with both of the side lights of the brig that night, and they had required to be taken down and retrimmed. If the green light had been properly burning, it would have been seen from the steamer, at a sufficient distance to have left the brig wholly blameless, and the steamer wholly in fault, for the collision. This fault on the part of the brig undoubtedly led to the collision.

In any view, the burden is on the libellants to show that the steamer was in fault. But, as the brig did not have a green light properly burning, it is especially incumbent on them to show, that, notwithstanding such condition of their own light, the collision arose from the fault of the steamer. The libellants fail to show this. They do not show that the steamer could, with proper vigilance, have seen the brig in season to avoid her. The speed of the steamer was not too great, in view of the character of the night, there being no fog, and she having a right to rely on the exhibition of a light by an approaching vessel, for the reason that a proper light, if exhibited, could be seen at a distance sufficiently great to avoid a collision. The steamer had a lookout properly stationed, competent and attentive, and it is not made out that the brig could have been seen sooner than she was. She loomed up out of the darkness, but, because her green light could not be seen, her course could not be discerned, and the evidence is, that the steamer was promptly slowed and stopped and backed, and, that when the master of the steamer, by the aid of his night glass, made out the course of the brig, the helm of the steamer was put to starboard, which turned her head to the eastward, and was a proper manoeuvre, as the brig was headed to the westward. The libel must be dismissed, with costs.

[NOTE. This decree was affirmed by the circuit court in *The Ariadne*, Case No. 525, but on appeal to the supreme court it was reversed, with directions that a decree be entered dividing the damages between the steamer and the brig, although the finding of the court below that the brig was at fault in not having her starboard light burning, or burning so as to be visible more than a short distance, was held to be fully sustained by the evidence. Mr. Justice Swayne, speaking for the court, said: "The steamer was about two hundred yards long. * * * When running at her then speed, she could easily be stopped in a space of about twice her length. She approached the brig in the direction most favorable for her lookout to see the hull and sails of the latter. According

to the steamer's testimony, a vessel without a light could be seen the eighth of a mile. Her testimony also shows the following facts: She had but one lookout. The second mate saw the brig first. He asked the lookout if he saw her. The lookout thereupon turned, and saw her. He had not seen her before. He saw no light, and could not tell which way she was heading." (The steamer's engine was stopped and backed as soon as the brig was discovered.) "The lookout says the steamer ran about a length between the time when he first saw the brig and the time when the steamer struck her. * * * For all the purposes of this case, there might as well have been no lookout on the steamer. He could have rendered, and it was his duty to render, a service of vital importance, but he rendered none. * * * We think the conduct of the lookout was marked by gross carelessness, and that it was clearly one of the concurring causes of the disaster." *The Ariadne*, 13 Wall. (80 U. S.) 475.]

Case No. 525.

The ARIADNE.

[7 Blatchf. 211.]¹

Circuit Court, S. D. New York. April, 1870.²

COLLISION—BETWEEN STEAM AND SAIL—LIGHTS AND LOOKOUTS.

1. Where a collision occurred at sea, at night, between a brig and a steamer, whereby the brig was sunk, she having been struck on her starboard side by the steamer's stem, and it appeared that the starboard side-light of the brig was not so burning at the time that it could be seen from the steamer: *Held*, that, the brig being thus in fault, the steamer could not be held liable for the collision, unless some fault on her part was shown, so concurring with the fault of the brig, as to warrant a claim to contribution.

[Cited in *The Sunnyside*, Case No. 13,620; *The City of Merida*, 24 Fed. 236.]

[See note at end of case.]

2. Vessels have a right to assume that other vessels, if in their neighborhood in the night, are acting in obedience to the statute regulations; and when, by reason of the neglect of the brig to carry a proper light, she was not seen in time to enable the steamer to avoid a collision, the brig cannot insist that, by extraordinary vigilance, she might have been discovered from the steamer at a few yards greater distance, and claim contribution on that ground.

[See note at end of case.]

In admiralty. This was a libel in rem, filed in the district court [by Archibald M. Pentz and others, owners of the brig William Edwards] against the steamer *Ariadne*, [Charles Mallory, claimant,] to recover for the damages sustained by the libellants, by the sinking of a brig owned by them, through a collision, which took place between her and the steamer at sea, the steamer having struck, stem on, the starboard side of the brig. The district court dismissed the libel, [*The Ariadne*, Case No. 524,] and the libellants appealed to this court. [Decree affirmed. On appeal to the supreme court, the

decree was reversed in 13 Wall. (80 U. S.) 475. See note to *The Ariadne*, Case No. 524.]

John E. Parsons, for libellants.
Edward H. Owen and Charles Donohue, for claimant.

WOODRUFF, Circuit Judge. After a careful study of the evidence in this cause, aided by the able argument of the counsel for the libellants, and his full written brief, I cannot resist the conclusion that the misfortune which befel the vessel of the libellants, was due to the fact that, at the time of the approach of the *Ariadne*, the starboard or green light of the brig had gone out, or so nearly so that it could not be seen from the steamer. There is, undoubtedly, much conflict in the testimony, but the evidence on the part of the libellants, though it be taken to establish that the light was trimmed and bright twenty minutes or half an hour before the collision, is not inconsistent with the assumption that, either by smoke or other imperfection, it had become nearly invisible within that time, while there is much evidence in the testimony of the libellants' own witnesses which warrants that assumption. They had had much trouble with the lights, the binnacle light, fed by the same oil, required frequent attention to prevent its going out, the side-lights required trimming once, twice, and even three times, during a single watch, and, when the starboard light was last brought from the cabin and put up, it was flaring. When to this added the uniform testimony of every man who testified in behalf of the claimant, that no light could be seen from the steamer, it is clear that, in this respect, the libellants stand with a preponderance of testimony against them. And this is so without imputing wilful falsehood to their witnesses, no one of whom, I think, professes to have inspected the green-light after it was put up, twenty minutes or half an hour before the collision.

Now, in such case, the libellants cannot recover, unless they show fault in the steamer, so concurring with their own as to warrant a claim to contribution. Indeed, the only ground for recovery, even if the brig was free from fault, would be either that the steamer might and ought to have sooner seen the brig, or that, when she did see the brig she did or omitted something which she ought not to have done or omitted. On this point the burthen of proof is upon the libellants.

It is true that, in circumstances of apparent danger, where there is reason to apprehend collision, instant and extraordinary diligence is the duty of a steamer seeing and approaching a sailing vessel, so as to avoid her if possible. But vessels have right to assume that other vessels, if in their neighborhood, are acting in obedience to the statute regulations; and, where the negli-

¹ [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

² [Affirming *The Ariadne*, Case No. 524. This decree was reversed by the supreme court in 13 Wall. (80 U. S.) 475.]

gence of the sailing vessel, and her failure to comply with the statute requiring her to bear a light which can be seen at a distance of two miles, have led the steamer into danger of collision, it is not for the sailing vessel to insist that, by more than usual vigilance, she might, nevertheless, have been discovered at a few yards greater distance, and to claim contribution on that ground. In this case, I think there is a failure to show that the brig could have been seen from the steamer sooner than she was. Certainly, the proof does not show it so clearly as to warrant a decree declaring the steamer in fault.

When the brig was discovered, I do not perceive that any thing was omitted which could have tended to save the brig. The steamer's helm was hove a-starboard, and her engine was stopped and reversed. The propriety of these manoeuvres cannot be questioned. They were done immediately, and the manner of the blow shows that they were very nearly effectual to cause the steamer to pass astern of the brig.

Without discussing the very prolix testimony of the various witnesses, it must suffice to add that, upon a most pains-taking consideration of the case, I think the conclusions of the district court were correct, and that the libellants have failed to put the steamer in fault.

The decree must be affirmed, with costs.

[NOTE. On appeal to the supreme court this decree was reversed, with directions that a decree be entered dividing the damages between the steamer and the brig, for the reason that proper vigilance on the part of the steamer's lookout might have avoided the disaster. *The Ariadne*, 13 Wall. (80 U. S.) 475. See note to *The Ariadne*, Case No. 524.]

Case No. 526.

The ARIADNE.

[1 Pet. C. C. 455.]¹

Circuit Court, D. Pennsylvania. Oct. Term, 1817.

ADMIRALTY PRACTICE — PAYMENT OF PROCEEDS BEFORE DECREE—RULE TO RETURN.

Where money had been paid by an order of the district court, under an erroneous construction of an act of congress, before a final order of the circuit court, in which the suit for the same was pending, the circuit court granted a rule on the person who had received the money to return it.

[In admiralty. Heard on motion for a rule requiring the persons who had received the money resulting from the condemnation of the vessel to return the same to the court. For report of the case as heard in the supreme court, see *The Ariadne*, 2 Wheat. (15 U. S.) 143.]

The supreme court having affirmed the sentence of this court condemning this vessel and her cargo as prize, the mandate was presented at the last term, but no order was made respecting the distribution of the

money. In June last the money was paid into bank, to the credit of this court. At a district court lately held, the judge of that court ordered the money to be paid over in part to the captain of the *Argus*, who made the capture, and a part to the district attorney.

Mr. Woodward now moved for a rule upon the persons who had received the money under the above order, to return the same to this court, or, on failure, that an attachment should issue. He contended, that the whole subject was in this court, under the mandate, and that no order to take the money out of the bank, could issue by any judge in vacation, under the act of the last session of congress, until this court had made an order of distribution amongst the claimants; and that even then, the captain had no right to receive the parts belonging to his officers and crew, without a regular power of attorney from them.

THE COURT granted the rule.

Before WASHINGTON, Circuit Justice, and PETERS, District Judge.

ARIADNE, The. (UNITED STATES v.) See Case No. 14,465.

Case No. 527.

The ARIEL.

[1 Hask. 65.]¹

District Court, D. Maine. Feb., 1867.

CUSTOMS DUTIES—PROPERTY SUBJECT TO—DOMESTIC GOODS SHIPPED FROM FOREIGN PORT TO AID IN CONCEALING FOREIGN GOODS — MANIFEST — ADMIRALTY—GOODS SEIZED ON LAND.

1. Goods shipped from one domestic port to another, and on the voyage taken to a foreign port with the design and purpose to disguise the character of the vessel, and conceal foreign goods there taken on board to be smuggled, become incorporated into, and a part of an entire cargo to be imported from thence.

2. Goods seized on land are not subject to condemnation and forfeiture in admiralty.

3. A claimant, who has voluntarily destroyed the ship's manifest to prevent its being used as evidence, cannot prove its contents by secondary evidence.

4. A sufficient manifest must state, first by whom the goods are shipped, second, if part of the cargo is brought back, by whom shipped out, and to whom consigned inward.

5. For want thereof, goods, belonging to one of the officers or crew of a vessel belonging in whole or in part to an American citizen, are liable to forfeiture under section 24 of the act of 1799, [1 Stat. 646.]

6. If a manifest is not produced to the proper officers, or its nonproduction accounted for to the satisfaction of the court, a forfeiture attaches to the goods imported.

7. An attempt to import merchandise from a foreign port as coming directly from a do-

¹[Reported by Richard Peters, Jr., Esq.]

¹[Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

mestic port is fraudulent, and subjects the same to forfeiture.

In admiralty. Libel in rem by the United States against the schooner Ariel and cargo, claiming a forfeiture of both for violation of the revenue laws. For the vessel and a part of the cargo no claim was made; but the balance of the cargo was claimed as goods brought from a domestic port and not subject to duty.

Geo. F. Talbot, Dist. Atty., for the United States.

Almon A. Strout and Geo. F. Shepley, for claimant.

FOX, District Judge. The Ariel is a registered vessel of about 23 tons. She sailed from Portland about the 11th of July last with only one person on board, her owner, Francis Raymond. Her cargo consisted of 25 hogsheads of salt, which had been taken on board the previous voyage at Portland, and remained on board until it was disposed of by Raymond on the present voyage at Mt. Desert. This salt was the property of Thomas G. Young. Having disposed of the salt, Raymond proceeded in the vessel to Calais, where he found Young, who had purchased there 25 M. of lathes, which he put on board the schooner. Young and Raymond then proceeded in the schooner to Eastport, where Young purchased about 100 quintals dry fish, 1200 boxes herring, and 16 barrels cod-liver-oil. Young states, these articles were purchased by him on speculation, and were put on board the Ariel, consigned to Dana & Co., Portland, that the vessel was cleared from Eastport for Portland, these articles being entered on a manifest as shipped by him to Dana & Co., and that at the time they sailed from Eastport, he did not know that Raymond had any intention of going into Campo Bello. The Ariel with Young and Raymond, the only persons on board, sailed from Eastport Aug. 15th, and the same night went into Head harbor, which is in the island of Campo Bello, and British territory, and there received on board from the British schooner, Frank, 8 hogsheads of alcohol, 75 packages of gin and brandy, 2 casks of brandy, 1 cask of gin, and 8 packages of spices, one J. D. Carlisle being there and aiding in the business, having come there in the Frank. The Ariel remained in Head harbor three days, and then sailed for Portland with Young still on board, Raymond acting as master. She arrived in Casco bay off Mackie's island in the night, and landed Young, and then stood out to sea. She was hovering about the islands in the bay, standing off in the day time, and running in at night to communicate with Young, and whilst so employed, she got ashore on Birch island and filled with water. A portion of her cargo was landed, she was then got off, and the next day was seized by the revenue cutter Mahoning near Cow island,

and within the limits of Portland. Whilst the vessel was ashore, Young returned to her and assisted in saving the cargo. The vessel and cargo were libelled, and upon proclamation, no person appearing as claimant, she was condemned with all the property taken on board of her at Head harbor; but Young has appeared and filed a claim as owner of the lathes, fish, oil and herring, denying their liability to forfeiture, and the controversy is now confined to these articles.

This claimant is shown to be an experienced ship-master; he denies all connection or interest in the illicit undertakings of this vessel, and asserts that he did not know or expect that she would go into Head harbor; he also denies any interest in the property there taken on board. It is certainly the duty of the court not lightly to suspect the truth of statements clothed with the solemn sanctions of an oath, but testimony however positive must in its nature be liable to control by strong presumptive circumstances, and must be weighed with care when it comes loaded with the temptations of private interests and the impressions of personal penalties. It is a melancholy consideration for judges, that in the discharge of public duty, they often find themselves obliged to resist the influence of human declarations, and to rely upon the concurrence of probable circumstances. There is evidence before me, full and uncontradicted, that this same vessel with Young and Raymond on board, in May last went from Portland to Eastport with this same 25 hogsheads of salt, and a quantity of pottery belonging to Young, that Young then bought some cord-wood, put it on board the schooner, that they then sailed to Head harbor, where they met this same schooner Frank with Carlisle, and took from her on board the Ariel a large quantity of alcohol, spices and foreign liquors, all of which were successfully smuggled ashore at Falmouth the latter part of June, Young and Carlisle both aiding in the work. Young was interested in that expedition, served as a hand on board the schooner throughout the voyage, purchased at Eastport the cord-wood for a deck-load, in order, as I suspect, to deceive any revenue boats they might meet, and I cannot but believe that his purchases at Calais and Eastport on this present voyage were for the same object and purpose, to conceal the foreign goods on board, and hold out to any casual observer that the Ariel was a coaster, with her deck-load of lathes, etc., engaged in an honest, legitimate business.

Young joins this schooner again at Calais, acts as one of the crew of this vessel then about 30 years old, and of so little value that Young himself states under oath, he would hardly take the gift of her, and if Raymond is to be believed, he assisted in receiving the liquors on board at Head harbor from the Frank, and continues on board, until they again arrive off Mackie's island, as Raymond swears, where he landed Young in the night

time, as he did on the former expedition. Young, however, denies that he was landed on that island, but says he was put ashore on the east end of Long Island, and that his reason for going ashore at that place was, that he wished to purchase of a person on Haskell's island, a quantity of oil and fish. If such was his object, it is quite extraordinary that he should have pursued just the course he did, as Long Island is 12 or 15 miles to the westward of Haskell's island, and the Ariel on her passage up, passed quite near to Haskell's island, so that Young could have easily been set ashore from the Ariel upon the island, if he wished to land there, instead of being carried a dozen miles away from it to the westward. I am inclined to believe, Young did land on Mackie's island, and there met his accomplices, and finding perhaps, that the suspicions of the government officers had been excited, and that they were on the watch, it became necessary to seek out some other place of landing, and he therefore returned to the vessel, and was set ashore at Long Island for that object. If everything had been fair, legitimate and honest on Young's part, he would not have allowed this vessel to be dodging around the islands with his property at risk, but having arrived so near to her port of destination, he would have required the master to finish his cruise and enter the cargo, which could easily have been done by inserting on the manifest, if correct and according to law, all the goods and merchandise received on board at Head harbor. All the circumstances of the case satisfy me that Young was a participator, interested in this smuggling expedition, and that I am not justified in placing implicit confidence in his testimony; and upon this point his actions and conduct upon the previous voyage of this vessel have, in my view, an important bearing, and are clearly admissible. I find therefore, as a matter of fact in this case, that these articles claimed by Young, although products of the United States, were purchased by the claimant at Calais and Eastport, not for legitimate trade and commerce, but with the design of taking them to a foreign territory in this schooner, there to be used in aid of a smuggling voyage to this port; that they were not taken there for a lawful purpose, but on the contrary, the design was they should be used there and on the homeward trip in concealing the real purposes of the voyage and the foreign goods on board, and in so disguising the cargo and the general appearance of the vessel, that she would not be likely to be overhauled by revenue boats during the voyage. From the time the foreign goods were taken on board at Head harbor, the goods in question became incorporated with them, constituting in the whole but one cargo, which under all the circumstances of the case, I deem it my duty to consider exactly as if it had all been there shipped on board the Ariel, and had been brought and import-

ed from thence into this port; for there can be no doubt that they were all brought in this schooner within the limits of the port of Portland and Falmouth voluntarily by the master, and with the design of here landing them.

This proceeding is on the admiralty side of the court, and the libel alleges in the first count that these goods are forfeited, being seized on navigable waters, etc., because they were landed without a permit and not in open day; but the fact is, that although some of the goods were thus landed, none of the goods so landed were ever restored to the Ariel, but were seized on land by the government officers, and although landed in violation of the statute, yet having been seized on land, they are not subject to condemnation and forfeiture in the admiralty. Of course the goods which had never been landed, but had always remained on board the Ariel, cannot be condemned under this count in the libel. The second count charges an importation of these goods from a foreign place by the Ariel without having a manifest or manifests on board agreeably to the requirements of the statute. It is necessary, therefore, to examine carefully all the evidence relating to the manifest, and ascertain whether the provisions of the statute have in any respect been violated.

Young says "The articles in question were entered on the manifest in his name, consigned to the Dana's in Portland, that he and Raymond went to the custom house in Eastport, and he thinks he saw the name of the collector of Eastport upon the manifest." Raymond in his deposition states "The lathes, fish, herring and oil, were on the manifest. The vessel cleared from Eastport for Portland. They were by a written memorandum from Young to me put upon the manifest in the name of J. D. Carlisle. At the time the schooner was taken, there was in a tin box in my trunk on board of her, her register, a bill of sale from Barton, a manifest and some other papers. The last time I saw them was on Sunday before I got on the ledge, have not seen them since, and don't know what has become of them." On cross examination he again repeats that these articles were on the manifest, and in reply to the inquiry, "what did you do with the manifest," he says, "I cannot tell you. I lost it certainly. I had my papers in a tin box on Sunday, the day I got on the ledge. Since that I don't know what has become of them." Young says he has no doubt Raymond threw the manifests overboard, for he heard him say he should do so if chased by a cutter. Raymond claims there was a manifest on board when the schooner was seized; but this is denied by the officers of the cutter. None has ever been produced, and on the whole, I am inclined to believe Raymond told Young what Young says he did, and that when chased by the cutter, he did destroy it by throwing it overboard. In his deposition he

nowhere expressly denies that he did so, and as he does not pretend that the liquors were entered upon any manifest, he would be quite likely to take that course, if the occasion should arise.

The act of 1799, c. 22, § 23, [1 Stat. 644.] declares, that no goods, wares or merchandise shall be brought into the United States from any foreign port or place, in any ship or vessel belonging in whole or in part to a citizen, unless the master or person having charge, etc., shall have on board a manifest or manifests in writing, signed by such master or other person, containing the name of the port where the goods in such manifest mentioned shall have been taken on board, and the port for which they are consigned or destined, particularly noting the goods, wares and merchandise destined for each port, and the name, description and build of such ship or vessel, her true admeasurements; and the port to which she belongs, with the name of each owner according to the register, together with the name of the master or other person in charge, a just and particular account of all the goods, wares and merchandise so laden and taken on board, whether in packages or stowed loose, together with the marks and numbers as marked on each package, and the number, quantity and description of the packages, in words at length, together with the names of the persons to whom the same are respectively consigned agreeably to the bill of lading, signed for the same, unless when the said goods are consigned to order, when it shall be so expressed in said manifest, together with names of passengers and their baggage; and that the form of a manifest for goods and merchandise imported in a vessel of the United States, shall be as specified in the statutes. If any articles of the outward cargo are brought back, they are to be detailed, specifying by whom shipped outward and to whom consigned inward. It thus appears that the statute explicitly declares what the manifests shall contain to give it validity; it makes all these particulars requisite; they must each and all be found in the manifest to protect the property on board; all these matters as to the vessel, the voyage and her ownership, the ownership of the goods, the consignee, etc., the statute requires should be recited in the manifest. Is there sufficient legal evidence before the court, that such a manifest of these goods was ever on board the Ariel? Is secondary evidence of the character and contents of a manifest voluntarily destroyed by the master admissible? Under such circumstances, is the claimant at liberty to prove by parol, that there was on board a valid statute manifest? A party, who under no pretense of mistake or accident, voluntarily destroys primary evidence to prevent its being used against him, or for other fraudulent purposes, thereby excludes himself from the benefit of secondary evidence.

Ittigs v. Tayloe, 9 Wheat., [22 U. S.] 483.

There is no evidence properly before me, showing that there was any valid manifest on board the schooner during this voyage, and I should be fully justified in condemning this property on this account; but waiving this objection, and conceding that these goods were entered on a manifest of some kind either at Eastport, or after leaving that port, this paper, whatever it was, is not produced in court at the hearing, but was fraudulently destroyed by the master, and I have no satisfactory evidence of its contents. Am I to presume it was a perfect and complete document in accordance with all the requirements of the statute? or from its destruction, should I not rather presume, that it would not answer the requirements of the law. "In odium spoliatoris omnia praesumuntur."

Spoliation of papers is always an aggravated and flagrant circumstance of suspicion, and whilst in prize causes, in England and this country, it does not, as on the continent, create an absolute presumption of guilt, yet in the language of Lord Stowell "a case that escapes with such a brand upon it, is saved so as by fire." But, whatever might be the presumption ordinarily, the testimony of Raymond and Young are in conflict in relation to one particular, which the statute requires should be truly stated in the manifest, and that is, the name of the consignee of the goods. Young says that the goods were consigned to Dana, and so entered upon the manifest, whilst Raymond states they were by Young's written direction entered in the name of Carlisle. It may be claimed that from the language of this witness, it is uncertain whether he intended to be understood that Carlisle appeared by the manifest to be the shipper, or consignee, but this is not of any great consequence for according to the testimony of Young, Carlisle was not the shipper, and had no interest in the goods; and the form prescribed by the act requires that the manifest shall state by whom the goods are shipped. Again, this vessel, being bound from Eastport on a foreign voyage, should have cleared for her port of destination after delivering to the collector a manifest of all her cargo. This is required by the 93d section of act of 1799, [1 Stat. 698,] and by the 23d section of the same act, [1 Stat. 644,] it is provided, that if any part of the outward cargo is brought back, the manifest at the port of arrival shall state, by whom shipped outward, and to whom consigned inward. Of course no manifest, which was ever designed to be presented to the customs officers at the port of arrival of this schooner, would have shown that these goods had been transported to a foreign country, or that she had touched at any foreign port after leaving Eastport.

By the 24th section of the statute of 1799, [1 Stat. 646,] it is enacted, that if any goods, wares or merchandise shall be imported or

brought into the United States in any ship or vessel whatever, belonging in whole or in part to a citizen of the United States, from any foreign port or place without having a manifest or manifests on board agreeably to the directions in the foregoing section, or which shall not be included or described therein, or shall not agree therewith, in every such case, the master or other person having charge, &c., shall forfeit and pay a sum of money equal to the value of such goods not included in the manifest, and all such merchandise, not included in the manifest, belonging or consigned to the master, mate, officers or crew of such vessel, shall be forfeited. The claimant was one of the officers or crew of the Ariel; there was an importation of the goods in question from a foreign port; the vessel is found with the goods on board without a manifest; and I think I am justified in concluding that if there ever was any manifest, it was not one which would answer the requirements of the law, and that the property in question is therefore liable to forfeiture.

It seems to me, that under another view of the provisions of the act of 1799, this property is also liable to forfeiture. The 25th section of that act [1 Stat. 646] requires, that the manifest described in the 23d and 24th sections [1 Stat. 644-646] shall be produced by the master to the boarding officers of the customs on his arrival within four leagues of the coast, and shall also be produced to the officers of the customs, who shall first come on board upon the arrival of the vessel within the limits of any district in which any part of the cargo is to be landed. He shall also deliver to each of these boarding officers true copies of this manifest, and they shall certify on the back of the original manifest to its being so produced to them, and the master shall produce and deliver to the collector his original manifest so certified. The manifest, it appears, should thus be made out before the vessel arrives within four leagues of the coast, and must be on board at the time of the importation, and remain and continue on board until produced to the collector. It is not enough for the claimant to show that a manifest was on board at the time when the vessel arrived within four leagues of the coast, or when she arrived at the port of destination, and that five minutes afterwards it was fraudulently destroyed by the master. The original document is demanded by the law. It has its own work to accomplish. It is to manifest the truth and the facts, and to continue on board, so manifesting them, from the time the vessel is within four leagues of the coast; from that moment to be always in readiness to testify and declare the truth to the different boarding officers, and finally to rest in the custom house, there to remain as part of the public documents of the department. And this re-

sult is confirmed by the proviso of section 24, which enacts, that if it shall be made to appear to the satisfaction of the collector, or to the satisfaction of the court in which a trial shall be had concerning such forfeitures, that no part of the cargo of such ship or vessel had been unshipped after it was taken on board, except such as shall have been particularly specified and accounted for in the report of the master or other person having charge or command of such ship or vessel, and that the manifests have been lost or mislaid without fraud or collusion, or that the same were defaced by accident, or incorrect by mistake, in any such case, the forfeiture aforesaid shall not be incurred.

If the manifest is not produced, I am of opinion that the forfeiture attaches to the importation, unless its non-production is accounted for to the satisfaction of the court, within the terms of this proviso; as in the present case, I believe the manifest was fraudulently destroyed by the master, and as a portion of the cargo had also been discharged without being specified in any report of the master, this claimant cannot derive any benefit from this proviso, but on the contrary is rather concluded by it. I am therefore of opinion that all the property in question which was found on board this schooner, is liable to forfeiture under the second count in this libel.

The last count is founded on the act of 27th of May, 1848, [9 Stat. 232.] in connection with the act of 1866, c. 201, § 4, [14 Stat. 179.] By the former act, registered vessels, trading between one port in the United States and one or more ports in the same, are allowed to touch at foreign ports and take on merchandise, &c., provided they are furnished by the collector of the port in which they take in their cargo in the United States, with a certified manifest of their cargo. In the present case, there is no evidence of any such manifest having been obtained at Eastport; and as the announcement to the collector at Eastport that they were bound to Head harbor, and a request for a certified manifest, would at once have excited his suspicions, and defeated their purpose in going there, I cannot believe that any such certified manifest was obtained there, although from the omission of the government and claimant to procure any evidence touching this point from the files of the custom house at Eastport, the court has not been furnished with that certain and positive testimony, which it was in the power of either party to have produced. By the 48th section of the act of 1799, it is made requisite that merchandise of the growth, product or manufacture of the United States, if exported to a foreign country, should be cleared out, on its original exportation from the United States; if not so cleared out, and it is taken to a foreign place and re-imported from thence, it is subject to duty. In the present case, there is no pretence of

a clearance of these goods from Eastport to any foreign port, and if brought from such foreign port and liable to duty, the manifest should certainly show the true state of the case in regard to them, and it was fraudulent on the part of the claimant to attempt to import them as coming directly from Eastport, and so not subject to duty.

The 4th section of the act 1866, c. 201, [14 Stat. 179,] declares that if any person shall fraudulently or knowingly import or bring into the United States, any goods, wares or merchandise, contrary to law, the same shall be forfeited. These goods were carried from Eastport to a foreign place, Head harbor, without a clearance or certified manifest, and are brought here from this foreign port without the certified manifest required by the act of 1848, or the manifest described in the act of 1799, and under the fraudulent pretext of being brought here directly from a home port. Raymond and Young were both of them experienced ship-masters, conversant with the revenue laws, practiced in the violation of their provisions, and I think I am justified under all the circumstances, in finding that these goods were imported and brought by them into this port fraudulently and knowingly in violation of law, and therefore subject to forfeiture.

Obedying the instructions of the supreme court as declared in *U. S. v. Taylor*, [*Taylor v. U. S.*] 3 How. [44 U. S.] 197, that "revenue laws ought to be so construed, as most effectually to accomplish the intentions of the legislature in passing them, instead of being construed with great strictness in favor of defendant," I do pronounce, declare and decree, that the property here claimed by Thomas G. Young, which was seized on board the *Ariel* to wit: 16 barrels cod-liver-oil, 10 M. lathes, 2,000 lbs. dry fish, 424 boxes of herring, be forfeited to the United States of America, and that the remainder of this property, although equally liable to condemnation, having been seized on land, is not subject to condemnation in the present proceeding.

Case No. 528.

The *ARIES*.

[2 Spr. 198.]¹

District Court, D. Massachusetts. May, 1863.

PRIZE—VIOLATION OF BLOCKADE—ACT OF MASTER—OWNERS OF VESSEL AND CARGO.

1. In case of breach of blockade, the owners of the vessel, in a prize court, are conclusively bound, in all cases, by the act of the master.

2. It is also a general rule that the owners of the cargo are bound in like manner; and the few cases in which persons interested in the cargo are permitted to show that the act of the master in violating blockade was against their wish, are carefully guarded, and are

chiefly such as present a kind of physical impossibility of their knowledge or desire.

3. Examination of facts to show a hostile destination and ownership of cargo.

In admiralty.

R. H. Dana, Jr., U. S. Atty., for the United States and captors.

C. G. Thomas, for claimants of vessel.

H. H. Coolidge, for claimants of cargo.

SPRAGUE, District Judge. The steamer *Aries* was built little more than a year ago, in Sunderland, England, and owned, as the papers show, by a person with a foreign name, and called by some of the witnesses a Spaniard, F. P. Obicini. She sailed from Sunderland directly to Charleston, S. C., running the blockade of that port, with a cargo which was sold there by auction. None of the papers found on board show what was her ostensible destination for that voyage. We learn the fact from the admissions of the master and mate, on the preparatory examination. From Charleston she sailed with a cargo of cotton, again breaking blockade, to Porto Rico, and thence to St. Thomas. At St. Thomas she took in a cargo, and sailed to Gibara, in Cuba, near Havana, where she took in more cargo, and sailed thence for Charleston, and was captured at Bull's bay, near Charleston, by the United States steamer *Stetton*, Captain Devens, on the 28th March last, in the act of attempting to break the blockade. The master, mate, and crew admit, on their examination, that the actual destination was Charleston, while the ostensible destination, on all the ship's papers, was New York. Under these circumstances, the condemnation of the vessel is inevitable. The master, who has been here and returned to England, puts in no claim for the vessel. The only claim is by the British consul, rather a formal and official claim, in behalf of vessel and cargo, for British owners. As the blockade has long been notorious, and the vessel has been in and out of Charleston in violation of it, the owners of the ship cannot be heard to deny that the master was their agent in his acts. Indeed, the rule of prize courts seems to be that, in all cases of breach of blockade, the owners of the vessel are concluded by the act of the master. In this case, there is satisfactory evidence that the owners knew of the blockade, and must have known and assented to this series of acts in violation of it.

A claim is put in for the cargo by Messrs. Riera, Thibaut, & Co., of New York, as agents for Messrs. I. Munne & Co., of Gibara, Cuba. Their affidavit states only that the cargo was consigned to them, at New York, by I. Munne & Co., who sent them three bills of lading of the cargo, and a letter of advice. On learning of the capture, and of the arrival of the *Aries* in Boston, they wrote to I. Munne & Co., and received a reply; but they do not annex the reply to their affidavit, or a copy of it, and only say that it promised

¹ [Reported by Hon. Richard H. Dana, Jr., and here reprinted by permission.]

further information. It is evident that Messrs. Riera, Thibaut, & Co., knew nothing of this consignment beyond the fact that there was an ostensible consignment to them at New York. The preparatory evidence shows that two Spaniards, by the names of Salcedo and Malgar, sailed in this steamer, as passengers, from Sunderland to Charleston, and thence throughout the voyage, until her capture. The mate says he understood they owned the outward cargo, and that they acted as owners at Charleston. At St. Thomas, two other Spaniards, by the names of Pucho and Estoval, joined her as passengers, and were in her when captured. Estoval was examined, and states, without attempt at concealment, that the cargo was owned by these four passengers, he having given the others \$1000 for an interest in it, the extent of which he does not state; that there were no bills of lading or consignees of the cargo; and that it was destined for Charleston, to be sold there by the owners, who accompanied it. He makes no claim to it in this court, apparently considering it as a hopeless case, and says, in his examination, that he lost his adventure by the capture. The three other passengers left the vessel, and have made no attempt to claim their property. The mate also testifies that this cargo belonged to the passengers. The engineer also testifies that it was reported on board that the passengers owned the cargo or a part of it. The testimony of the master, William Richards, is disingenuous. He at first states that the steamer was bound, "by her papers," to New York, and says he does not know who owned the cargo, and refers to the bills of lading as showing who were consignees, and says he thinks Roman & Poa, of Porto Rico, were the shippers, to whom he gave bills of lading; but, at last, admits that she was bound to a Confederate port. The officers, and such of the crew as were examined, all admit their knowledge of her actual destination. Against this testimony, we have only the documents found on board. These, of course, would not be expected to disclose a blockaded port as the port of destination, for that would betray her to any cruisers who might board her. She would have an apparent lawful destination to exhibit to cruisers so long as it would serve her, and until it was necessary to keep off for her destined port, when the ostensible destination would no longer avail her. Her ostensible destination was from Havana to New York, which would account for her position off the southern coast, at any point not too near in shore. But the cargo was of a character it would be absurd to suppose could be sent from the West Indies to New York. It consisted chiefly of the produce and manufactures of the New England and the middle states, which are exported thence to the West Indies, and other articles paying high duties in the West Indies. It would require great credulity to believe that a cargo of

cotton and flannel clothing, flour, breadstuffs, boots and shoes, butter, cheese, tea, nails and spikes, pig lead, and cordage was destined on any mercantile enterprise from St. Thomas and Cuba to New York, rather than to the rebel states.

There are found on board three bills of lading, all dated at Gibara, in the name of J. Munne & Co. as shippers, with Riera & Thibaut, of New York, as consignees, and a letter accompanying them. This letter is from J. Munne & Co. to Riera & Thibaut, and states that this cargo, part shipped at St. Thomas and part at Gibara, chiefly belonging to the writers, but a part to a passenger, is all consigned to them. It requests them not to insure, and says they will advise them hereafter what to do with the proceeds. The custom house documents all contain the same statements as to the consignments of the cargo, and destination of the vessel. If Messrs. Munne & Co. were the real owners of this cargo, I could not permit them to show that they did not know of the intent of the master to break the blockade. The general rule is, that the owner of the cargo is concluded, in respect of breach of blockade, by the act of the master; and the cases in which he is allowed to show that the act of the master was without his knowledge and against his wish, are few and carefully guarded; one being where it was physically impossible that it could have been otherwise, as where no war or blockade existed, or was impending when the vessel sailed, and there had been no chance to communicate since. But, in this case, it is impossible to suppose ignorance in Munne & Co. The blockade of Charleston had long been notorious, and the four passengers, and the master, officers, and crew, all knew that this vessel had come from Charleston, and was bound directly there again; and the letter of Munne & Co. shows that they had relations with one of the passengers respecting part of the cargo, and they of course had dealings with the master, who signed the bills of lading made out for them from printed blanks furnished by them. It seems also that, with full knowledge of the capture and prize proceedings here, they have done nothing which their nominal agents think it necessary to bring before this court. If an owner of a cargo could save his property in a clear case of breach of a notorious blockade, by showing that he did not, in fact, know of the intention of the master of the vessel to attempt a breach of the blockade, such proof could always be given. He would be studiously silent and uninformed on the subject, and have a full supply of documents to show a lawful destination; and probably nominal owners would also be resorted to, who might in fact know nothing, and care nothing, about the cargo and its destination. The rule of the prize courts is doubtless a wise and necessary one on this head. In

the present case, however, the evidence discloses actual ownership in the four passengers, without bills of lading or consignment, and a formal and fraudulent title and papers in Munne & Co., with a false destination and consignment, to cover the transaction as long as the cover would avail it. And even if Munne & Co. were the owners, they would be concluded by the clear force of the evidence in the case, without the necessity of resorting to the presumption of law laid down in the books. Decree of condemnation of vessel and cargo.

[NOTE. For a subsequent hearing in this case concerning the distribution of the proceeds of the condemnation sale, see *The Aries*, Case No. 529.]

Case No. 529.

The ARIES.

[2 Spr. 262;¹ 26 Law Rep. 336.]

District Court, D. Massachusetts. Feb., 1864.

PRIZE—SIGNAL DISTANCE—ACT 1862.

What constitutes signal distance, within the meaning of the act of congress of 1862, c. 204, § 3, (2 Stat. 606,) regulating the distribution of prize money.

In admiralty.

No special counsel appeared for any of the contesting parties, though opportunity was offered to the parties to be so represented. The whole cause was presented, by consent, by R. H. Dana, Jr., U. S. Atty.

SPRAGUE, District Judge. This vessel and her cargo have been condemned. [*The Aries*, Case No. 528.] The actual captor was the United States steamer *Stettin*. Certain vessels of the navy claim to share in the proceeds with the *Stettin*. Their right to participate is the question now for decision. The only one of these vessels which claims to have been within direct signal distance is the *Memphis*. I will consider her case first. The *Stettin* was the most northerly of the vessels composing the blockading squadron off Charleston, and was stationed at Bull's bay something like twenty miles to the northward of the flag-ship. A little after midnight, on the morning of the 28th of March, there being a thick fog, she saw the light of a steamer attempting to run in. The *Stettin* slipped immediately and stood outside of the chase, to cut her off from the inlet, and to prevent her going out to sea, and threw up one or two rockets and fired two guns at the chase; but the fog setting in thick, she lost sight of her. The *Stettin* remained on the watch until daybreak, when she saw the chase ashore in the bay, boarded her with boats, and took possession. The prize proved to be the steamer *Aries*, bound from St. Thomas to Wilmington, with a valuable cargo.

¹[Reported by Hon. Richard H. Dana, Jr., and here reprinted by permission.]

The *Stettin* fired no guns, and made no signals after daybreak.

The officers of the *Aries*, having been brought in, have given their evidence. They say that no vessel was within sight, or, so far as they know, within signal distance, from the time they were seen until the capture, and that they heard no guns and saw no lights except from the *Stettin*. The evidence of the commander and officers of the *Stettin* was to the same effect. The *Memphis* was stationed at Rattlesnake shoals. Her distance from the station of the *Stettin* is variously stated; the nearest being nine miles in an air line, and, by the course of vessels, from twelve to eighteen miles. The United States schooners *Blunt* and *America* were both about one mile nearer than the *Memphis*, at least by the course vessels must take. Neither of them heard guns, or saw lights, or claim to have been within signal distance, or to share in the prize. Mr. Curtis, the executive officer of the *Memphis*, has given his testimony before the commissioner here. He says that he was below, and neither heard nor saw anything, but was told, the next morning, that lights had been seen in the direction of the *Stettin*. He adds that he did not consider the *Memphis* to be within signal distance; that the *Stettin* could not be seen by day except from the mast-head, and neither flags nor Coston lights could be made out from her under the most favorable circumstances. Interrogatories have been sent to the *Memphis*, and to her commander, Lieutenant Watmough, but no answers have been received. Lieutenant Watmough replied by letter to the United States Attorney that his recollections were not sufficiently distinct for answering the interrogatories, and adds that he saw the light of a rocket and the flash of a gun from the *Stettin*, but the fog closed in so thick that he saw no more. It was his duty to answer the interrogatories to the best of his recollection and belief, and his letter is not testimony; but, as his officers and crew are interested, I will consider whether, if full testimony should result in putting the matter where his letter puts it, it would avail the *Memphis*. If so, I might entertain a motion for further proof. According to his letter, the light of a rocket was seen, and the flash of a gun; but no report was heard, and it does not appear that the direction of the rocket was observed; and probably, in the fog, only the glare of its light was seen. The *Memphis* made no attempt to reply by gun, rocket, or otherwise, or to get under way. She could only have conjectured, at the time, from what vessel the lights proceeded, and learned the fact the next day, when she heard the circumstances of the capture.

The question, then, is reduced to this: The *Memphis* was too far distant to make out flags or Coston lights, or to hear, in that state of the wind and weather, the report

of guns of the calibre of those on board the Stettin, but was near enough to see the flash of a gun and the light of a rocket in the air. It is to be observed that the capture was made by daylight, when the evidence shows there was no pretext for saying that any signals could be seen. But I will take the most favorable view for the Memphis, and include the whole time from the sighting of the Ariès until the capture. Can the Memphis be considered as "within signal distance" in the meaning of the statute? Evidence has been taken from the principal officers of the vessels off Charleston, and especially of Commodores Turner and Godon, the successive commanding officers of that squadron, on the subject of signals and signal distances. Some of them say that they do not consider guns and rockets to come within the term "signal distance." Others speak of vessels as not within signal distance unless guns and rockets be included. Others again, and perhaps the larger number, and among them the two commodores, include guns and rockets, with positiveness. No system of signalling by guns and rockets has been adopted by the navy department, or is in general use. What use has been made of guns and rockets for that purpose is by special order of the commander of each squadron. In the squadron off Charleston, the utmost extent to which it has been carried seems to be this: Single rockets were to be thrown in the direction the blockade-runner was taking. One witness says that three rockets indicated the approach of a ram. No one says that a single gun has any special signification; but it is said that, if two guns are heard in rapid succession, it is the duty of the vessel hearing them to go immediately and ascertain the cause of the firing. This does not, in my opinion, amount to a system of signals by guns and rockets, of such a character as to satisfy the requirements of the statute regulating the distribution of prize money. Whether such a system might not be established, I do not undertake to determine. The Memphis did not even hear a gun, but merely saw the glare of one gun and rocket as refracted through the fog. The claim, therefore, of the Memphis must be disallowed.

The flag-ship *New Ironsides* and the *Powhattan*, *Canandaigua*, *Housatonic*, and other vessels of the blockading squadron, have also put in claims to share in the proceeds. They place their claims on two grounds: First, that of co-operation in a common enterprise of blockade, which, they contend, makes them captors of all vessels taken by any ship of the squadron in an attempted breach of the blockade, irrespective of the question of signal distance. This ground of claim was fully considered by this court, and disallowed, in the case of *The Cherokee*, [Case No. 2,640.] Their other ground of claim is, that, although they were not

themselves within direct signal distance of the Stettin, yet, if the Memphis was within signal distance of the Stettin, she could repeat the signals to the vessels nearest to her, and thus they could pass through the fleet. It is sufficient to say that the first link in the chain fails, as the Memphis herself is decided not to have been within signal distance; and, if she had been, I should very much doubt whether the ability to receive signals by repeating can be held to bring a vessel within the benefits of the statute. The decree must be, that no vessel of the navy is entitled to share with the Stettin in the distribution of the proceeds.

See *The St. John*, [Case No. 12,225;] *The Ella & Anna*, [Id. 4,368.]

Case No. 530.

ARKANSAS v. BALL et al.

[Hempst. 541.]

Circuit Court, D. Arkansas. May Term, 1847.

STATE AND STATE OFFICERS—SUIT BY GOVERNOR ON ADMINISTRATION BOND—PLEADING.

1. On an administration bond, payable to the governor by name, and to his successors in office, the suit for the benefit of the party injured must be brought in the name of the governor for the time being, and not by his style of office.

2. Although he is a purely naked trustee for any party injured, yet the legal title is in him, and he must sue.

3. A suit by the style of office, namely, "The Governor of the State of Arkansas, Plaintiff," cannot be maintained.

[At law. Action of debt on administration bond by the governor of the state of Arkansas against Bennett B. Ball, John S. Blair, and Benjamin F. Howard. Defendants demur. Demurrer sustained.]

A. Fowler, for plaintiff.

Daniel Ringo and F. W. Trapnall, for defendants, made the following points on the demurrer to the declaration:

(1.) The legal title to, or interest in, said bond is not in the plaintiff, but in the state of Arkansas, or the legal representatives of John Pope, deceased, to whom it was made payable.

(2.) That there is no such corporate being known to or recognized by law as "The Governor of the State of Arkansas," capable of suing or being sued, or of creating or receiving any obligation; but the right, if any, in the bond set forth in the declaration, is, by law, vested in the present incumbent of the office of governor, who holds the same as a naked trust, for the use of such as have been damaged by a breach of the condition. And in the name of the individual who holds the office, and not in the name of his style of office only, we presume every suit on such obligations has been prosecuted, and so the

¹[Reported by Samuel H. Hempstead, Esq.]

statutes certainly contemplated they should be prosecuted, unless, indeed, they must be sued in the name of the state, by virtue of the provisions of the 171st section of the administration law. See Rev. St. p. 59, § 15, tit. "Abatement," which shows conclusively that such suits, when brought in the name of the governor, must be in the name of the person holding the office for the time being, and not in the name of his style of office, otherwise there could be no substitution of the name of his successor, where the plaintiff dies or is removed from office as there provided.

Taylor v. Auditor, 2 Ark. 174, held that the auditor can maintain suit on sheriffs' bonds made to the governor and his successors in office, by virtue of statute of 1836; but on such bond suit in his name can be maintained, only when the state is the beneficiary, or entitled to the money recovered by the suit. This was adjudged before the taking effect of the Revised Statutes.

Phillips v. Governor, 2 Ark. 382, was instituted before the taking effect of our Revised Statutes, and not subject to the provisions of the 171st section of our administration law, as this suit is; was brought in the name of "James S. Conway, Governor, &c., as Successor of Pope," in whom, as the law then was, the legal interest in the bond was vested, as a naked trust, as Pope's successor in office, and so that suit was properly in the name of Conway; was rightly decided; and the principle there adjudged, as regards the party in whose name the suit on such bond is maintainable, rightly understood, is a direct authority against the plaintiff in this suit; as the law, when this suit was instituted, expressly required it to be in the name of the state; as the law pre-existing required it, to be in the name of the person who, at the time, was the incumbent of the office of governor. To the same effect is one of the cases read by the plaintiff's counsel from the Missouri Reports, while the others read from same book neither uphold the view of the plaintiff, nor militate against that of the defendants; but we infer that it was a suit in the name of the person holding the office of governor. The breaches assigned were various, not confined as here, simply to non-payment of the judgments, and an alleged failure to sell lands and slaves without showing the personal estate insufficient for the payment of debts—in which case only such sale is authorized.

The insufficiency of the first four breaches assigned, (each being for the non-payment of the debt allowed in favor of Pinkard & Arnold,) consists in the omission to show or set forth in any manner, the fact, that upon a settlement of their administration accounts with the county court, or any other court of competent jurisdiction, moneys sufficient to pay the debts and expenses, by law required to be paid, was at any time in the hands of administrators; that the same was

by such court appropriated to the payment of this debt; or that they were ever ordered to pay the same by such court; and neglected to pay the same within ten days after the making of such order. Until these facts are shown the administrators were not bound to pay, in fact could not pay, without taking upon themselves the whole burden and risk of adjusting the rights and priorities of all the creditors, and of making good the loss to any creditor, if, upon settlement made, the court should direct the payment to be made in a different order, or a greater or less proportion, a burden and responsibility of which the law has entirely exempted the administrator, by only requiring him to pay upon the order of the court only. And so it has been expressly adjudged by the supreme court of this state in *Outlaw v. Yell*, 5 Ark. 470, and against the principle of this decision, we confidently believe, no case can be found; besides it applies to proceedings under the statutes in force prior to March 20, 1839, as forcibly as to those contained in the Revised Statutes, as is manifest upon a comparison of their provisions. See Ark. Dig. tit. "Administration," §§ 28-31, 33, 43, 45, to show that the administrator shall only pay over or part with the estate upon settlement made and an order directing the appropriation thereof, whether in discharge of debts, legacies, or distributive shares; and contrast same with the corresponding provisions of the Revised Statutes, tit. "Administration," §§ 104-107, 121-124.

To show that prior to March 20, 1839, as well as subsequently, the amount recovered in any proceeding for waste, shall be appropriated for the common benefit of all the creditors, contrast sections 32, 33, 35-37, in Ter. Dig., with sections 171-173, Rev. St. The two last breaches, one for non-sale of slave, the other for non-sale of land, are respectively defective in not showing a deficiency of other personal estate to pay the debts, legally allowed, and chargeable against the administrator; without which deficiency administrators could neither sell slaves nor lands. Old. Ark. Dig. §§ 22, 26. In regard to all the questions at present presented on the demurrer, as regards the breaches assigned, the law will be found to have been substantially the same before and since the 20th of March, 1839, and the demurrer is, as we conceive and insist, in every point well taken.

Before JOHNSON, District Judge, holding the circuit court.

OPINION OF THE COURT. The only question I deem it necessary to decide on the present demurrer is, whether this suit is brought in the name of a person competent to maintain it. The declaration and writ described the plaintiff in the following manner: "The governor of the state of Arkansas, who sues for the use of Pinckard & Arnold,

&c." This suit is not brought in the individual name of the governor of the state of Arkansas, but in the manner above stated, by the style of office. The administration bond upon which the action is founded was executed to John Pope, governor of the territory of Arkansas, and his successors in office, in 1833, in accordance with the provisions of the 9th section of the territorial act of 1825. Ter. Dig. 50. The thirty-seventh section of the same act provides that "the bond to be given by the administrator may be put in suit by the party injured in the name of the governor of the territory to the use of the party injured." Ter. Dig. 64. And the fourth section of the schedule to the constitution of Arkansas declares that all bonds executed to the governor of the territory in his official capacity shall pass over to the governor of the state and his successors in office, for the use therein expressed, and may be sued for and recovered accordingly. Rev. St. § 40.

In my judgment it is clear, that an action may be maintained if it is brought in the name of the governor of this state at the time it is commenced, and the only question is, has this suit been so brought? The plain and obvious meaning of bringing a suit in the name of a public officer is, that it shall be in the name of the individual holding the office for the time being. He is a purely naked trustee for any party injured,—a mere conduit through which the law affords a remedy. The legal title is in the officer, and in his name alone can an action at law be maintained; and to that effect are adjudged cases. *Brown v. Strode*, 5 Cranch, [9 U. S.] 303; *Wormley v. Wormley*, 3 Wheat. [21 U. S.] 421; *Irvine v. Lowry*, 14 Pet. [39 U. S.] 300; *McNutt v. Bland*, 2 How. [43 U. S.] 9. That this is the meaning of the legislature in using these terms is abundantly manifest from the fifteenth section of the Revised Statutes, under the title "Abatement," which provides that "when an action is directed or authorized by law to be brought by or in the name of a public officer, his death or removal from office shall not abate the suit, if the cause of such suit survive to his successor; but the same may be continued in the name of such successor as plaintiff therein. Rev. St. § 59. Thus showing that the suit is to be brought in the individual name of the officer and not by his style of office.

This action is brought by using the style of office and not by using the name of the officer, and it can hardly be contended that it can be maintained in its present form. This may be said to be mere technical objection as the plaintiff on the record cannot prevent the institution or prosecution of the suit, nor exercise any control over it, the real and only plaintiffs being the persons injured by a breach of the bond. To this it may be answered that the legal right to bring an action upon the bond is alone vest-

ed in the person exercising the functions of governor and his successors in office, to whom, in his individual name as governor, it is executed, and he alone or his successors in office, although naked trustees for others, can maintain an action on the bond. And this accords with the general rule of pleading, that the right of action at law is vested in the party having the strict legal title and interest. 1 Chit. Pl. 3; [*Anderson v. Martindale*,] 1 East, 497, 501; [*Scholey v. Mearns*,] 7 East, 148; [*People v. Hohnès*,] 5 Wend. 191; [*Lawton v. Erwin*,] 9 Wend. 233.

I have seen no case establishing a different doctrine from that here laid down, and the cases, as far as my researches have extended, were all brought in the individual name of the officer, describing himself as holding the office. *McNutt v. Bland*, 2 How. [43 U. S.] 9. Demurrer sustained.

NOTE, [from original report.] The plaintiff obtained leave to amend; but subsequently dismissed the suit.

Case No. 531.

In re ARKELL.

[15 Blatchf. 437; 4 Ban. & A. 80; Merw. Pat. Inv. 170.]

Circuit Court, D. Connecticut. Jan. 9, 1879.
PATENTS FOR INVENTIONS—PATENTABILITY—NOVELTY.

A notch in one thickness of a paper bag with an evenly cut mouth, such notch facilitating the opening of the mouth, being in existence, a paper bag made with such a notch in one thickness of a mouth cut with jagged or serrated edges, with a view to facilitate the opening of the mouth, is not a patentable invention.

[Cited in *Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U. S. 18, 12 Sup. Ct. 604.]

In equity.

H. D. Donnelly and Augustus Brandegee, for plaintiff.

SHIPMAN, District Judge. This is a bill in equity, which is brought under section 4915 of the Revised Statutes, praying for an adjudication that the applicant is entitled to receive a patent for an improvement in paper bags. Application for a patent was duly filed on December 14th, 1876, and was rejected by the commissioner of patents, upon appeal from the examiners in chief, on June 5th, 1877. Upon appeal to the supreme court of the District of Columbia, sitting in banc, the decision of the commissioner was affirmed, on January 22d, 1878. A copy of this bill was served upon the commissioner of patents, who has filed a brief in support of his views. The improvement

[Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 80; and here republished by permission. Merw. Pat. Inv. 170, contains partial report, only.]

relates to the well known class of paper bags, in the manufacture of which the paper is first folded and pasted to form a continuous flattened tubular blank, and the bag blanks are then cut from the continuous blank, by a serrated knife moving more rapidly than the blank. This process of cutting leaves both the cut edges in a serrated or jagged form, and produces a bag having a "jaggedly cut mouth." It is admitted, that, in this kind of bag, the two cut edges naturally clinch together, and that the rough edges of the fibrous material tend to become felted together during storage or transportation in bulk, so that it is difficult to open the mouth of the bag without an expenditure of time and labor. This disadvantage has impaired the usefulness of this class of paper bags to the consumers.

The applicant states, in his specification, that the improvement consists in "forming in one of the two adjacent cut edges, a notch or cut-away portion, or a series of such notches, which prevent any clinching, or any subsequent felting together, of the rough edges at such points, and thus afford an opportunity for the more ready opening out of the mouth of the finished bag, while at the same time they render easier the separation of the adjacent cut edges that have to be opened out, folded and pasted to form the bag bottom, during the manufacture." The benefit prior to the completion of the bag was not commented upon in the affidavits, and it is manifest, that the main, if not the only, object of the improvement is, to facilitate the opening of the bag mouth after it has been closed, and its edges have been felted together in cutting and packing. The claim of the applicant, as stated in his specification, is, for "paper bags made with a notch or cut-away portion or portions in one thickness of the jaggedly cut mouth, whereby the clinching and tendency to felt together of the edges of the mouth so cut are overcome, and the opening of the mouth of the bag for use rendered easier, substantially as described." On December 19th, 1876, the applicant obtained a patent for his described method of manufacturing this kind of paper bags.

The main question in the case is, whether the applicant is entitled to a patent for his improved article of manufacture, in view of the bag described and shown in the specification and drawings of the patent to Luther C. Crowell, No. 137,533, dated April 8th, 1873. The Crowell bag was not made from a flattened tube, and the severing of the blanks was made by a clean cut, so that the jaggedly cut mouth is not a feature of his bag. There was a semi-circular incision in the centre of the band of paper, so that the bag, when folded and cut, had a notch in one thickness of the bag, at its mouth end. The object of this notch is not explained in his specification, and the notch is not claimed in the patent, but the existence

of the incision and of the notch is clearly shown both in the specification and the drawings. His bag had, in fact, an evenly cut mouth and a notch therein, and the notch facilitated the opening of the mouth. It is not important that the process by which the notch is made in the respective bags is very dissimilar. As the article of manufacture only is claimed in the application, the question now of importance is, whether the improved article had been patented or described in some printed publication prior to the alleged invention by the applicant, or whether he was the first and original inventor thereof. *Cohn v. U. S. Corset Co.*, 93 U. S. 366.

The question resolves itself into this: "Plain edged" and "jaggedly cut" bags being both well known at the date of this alleged invention, does a plain edged paper bag, notched at the mouth, which notch facilitates the opening of the bag, anticipate a notched "jaggedly cut mouth" paper bag, the notch being for the express purpose of enabling the consumer to overcome the resistance of the felted edges to the opening of the bag? The application of an old contrivance to a new purpose is not patentable, when the old and new purposes, and the objects to which the contrivance is applied, are merely analogous. If the use of an old contrivance produces a new effect, the new manufacture or process may be patentable, because the new use is not analogous to the former one; but, if the new use is simply upon a new occasion, not producing a new effect, the use is analogous to what had been done before. *Curt. Pat. § 56.*

In this case, the new use to which the notch was put was to facilitate the opening of the mouth of a jaggedly cut bag. The old use was to facilitate the opening of the mouth of a plain edged bag. The uses were the same, and the effect was the same in kind. The old result of opening the mouth was attained by the same means which were used when the former result was attained. It is true, that, in jaggedly cut bags, the fibres clinch and felt together, and the object of the notch is to prevent clinching and felting, but the object of preventing felting is simply that the mouth may be easily opened. The notch, in either bag, is to afford an easy means of grasping one lip of the mouth and thus disengaging it from its fellow. The difficulty of opening the mouth of a plain edged bag is slight, because either lip is easily grasped by the finger, whereas, in a jaggedly cut bag, there is a serious difficulty in inserting the fingers between the felted fibres of the paper, but the object of having a notch and the use of the notch are the same, and the difference in effect which the notch produces is one of degree and not of kind. If the effect of the old contrivance, when applied to the new object, is simply a better and, therefore, more useful accomplishment of the old effect, in an analogous

object, by the use of precisely the same means, the application of the new use is not patentable. If a person had before him a notched plain edged bag, it would require no invention to discover that such a contrivance would also facilitate opening the mouth of a jagged bag, although it might require much exercise of invention to ascertain the means by which the notch could be produced in a bag of the latter class. Those means have already been patented in favor of the applicant. The bill should be dismissed.

Case No. 532.

ARKELL et al. v. J. M. HURD PAPER-BAG CO.

[7 Blatchf. 475.]¹

Circuit Court, N. D. New York. June, 1870.

PATENTS FOR INVENTIONS—PATENTABILITY—INFRINGEMENT—PAPER BAGS.

1. The claim of letters patent granted to James Arkell and Benjamin Smith, June 6th, 1865, for an "improvement in paper-bags," namely: "Softening the upper parts of paper-bags and making them pliable, substantially as and for the purpose above described," is a claim to a paper-bag having its upper end softened and made flexible, while its lower portion is strong and stiff with the sizing of the paper.

2. A paper-bag which has its extreme upper end unsoftened, but has a strip or band around it, at a short distance from its top, crimped or softened and thus made pliable, is an infringement of such patent.

[In equity. Bill for injunction by James Arkell and Benjamin Smith against the J. M. Hurd Paper-Bag Company,] founded on letters patent granted to the plaintiffs, June 6th, 1865, [No. 48,036,] for an "improvement in paper-bags." The specification said: "This invention consists in making or preparing paper-bags in such a way as to give them, at their upper ends, a flexible character, so that, when properly filled with flour or other substances, the sides of the bags, at their upper ends, will come together after the manner of the sides of a cloth-bag. * * * We prepare paper-bags of every size and quality and strength of paper in such a way as that their top parts can be gathered and brought together in easy lines, and with uniformity, towards a common centre, much after the manner of gathering the top of a bag made of cloth. We accomplish this result by making the upper part of the bag flexible or soft, but without lessening the strength and toughness of the material. The drawing shows side views of two bags which have had this character of flexibility and softness imparted to their top parts by mechanical means. In these illustrations of our invention we have produced this result by subjecting those parts

¹[Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

to a crushing or brushing action between corrugated surfaces, the depth of the corrugations, or the degree of pressure, being greatest at the highest part or edge of the bags, and decreasing gradually from such edges downwards, so that the line of termination of the corrugations, or of the limits of pressure, will be as near as possible insensible or imperceptible. If the softening process is effected in any other manner, as, for instance, by chemical action, the same result is to be produced, that is to say, the soft or flexible character of the top of the bag is to be least along the lowest lines, and is to be increased thence upwards, to the edges or top of the bag, where it is to be greatest." The claim was this: "Softening the upper parts of paper-bags and making them pliable, substantially as and for the purpose above described." The defendants had made and sold paper-bags having near their top a strip or band around them, crimped or softened by passing the bag, at a distance of two or three inches from its top, through a machine with two sets of fluted rolls. This operation crimped or softened a strip or band around the bag, equal in width to the length of the flutes on the rolls, and left the top unsoftened. These bags were constructed in accordance with letters patent granted to John M. Hurd, November 12th, 1867, for an "Improved paper flour-sack." The specification of that patent stated, that the invention of the patentee consisted in crimping a band around below the top of the sack, and leaving the top of the sack unsoftened or uncrimped, for the purpose of preventing the string used in holding the mouth of the sack closed, from slipping off over the top, and allowing the mouth of the sack to open and the flour to escape.

Charles M. Keller, for plaintiffs.
David Wright, for defendants.

WOODRUFF, Circuit Judge. 1. The invention of the plaintiffs is a paper-bag, having its upper end softened and made flexible, while the lower portion is strong and stiff with the sizing of the paper. Although the language of the specification is not very well chosen, this is the substance of their description. The patent itself is for a "new and useful improvement in paper-bags." It is this that the patent is issued for and which it is intended to secure. It is this that the specification is intended to describe. Softening and making flexible the upper portion of the bag produces the improved bag; and that is the proper subject of the patent. It is not softening and making flexible, as a result of some or any means which can be suggested, that is the subject of the patent; but it is the improved bag, or the improvement in the bag, as a result, which the patent is intended to protect. The improved bag is the result. The softening and making flexible at the top are the means by which

the improvement is effected. It is this which distinguishes the present case from the principle sought to be invoked from *O'Reilly v. Morse*, 15 How. [56 U. S.] 62; *Corning v. Burden*, Id. 252; *Le Roy v. Tatham*, 14 How. [55 U. S.] 156; *Burr v. Cowperthwait*, [Case No. 2,188;] and other cases cited by the defendants from *Law's Digest*, p. 483, &c.

The machine, manufacture, or product in this case, is an improved bag for packing flour and other substances. The means by which such improved bag is produced is the softening and making flexible the upper part thereof. When produced, it is better adapted to use. The patent gives the plaintiffs no exclusive right to any process of softening or making flexible sized paper, as a result, nor do the plaintiffs profess to have any exclusive right in, or to have invented any new device for, doing this, as a result. It is the paper-bag, constructed in its improved state, by softening and making flexible the upper part thereof, which is new, useful, and within the protection of the patent. In this view, the specification declares the invention to consist "in making or preparing paper-bags in such a way as to give them, at their upper ends, a flexible character, so that, when properly filled with flour or other substances, the sides of the bags, at their upper ends, will come together after the manner of the sides of a cloth-bag." The plaintiffs do not claim to have invented paper-bags for the uses referred to, nor any mode of preparing the paper, nor of giving them the form of a bag, nor the closing of the bottom or sides, but the superadding, (by softening and making pliable the upper portion thereof,) an improvement in their usefulness and value. Hence, they limit their claim to the softening and making pliable of those upper parts, as the means of producing the improved manufacture. The language of the claim, I must concede, read by itself alone, is not the best which might be employed; and it has laid the foundation for the elaborate argument of the defendants' counsel, wherein he treats the softening, &c., as the thing patented, and a result, instead of the means of producing the thing patented, namely, the improved bag. Taking the whole patent, specification and claim together, the latter is, I think, the just construction of the claim, and relieves it from the operation of the cases cited. In this view, the plaintiffs could not, and do not, claim any exclusive right to any process of softening or making pliable. Any process known to art may be employed for that purpose; and any new mode of performing it would be the subject of a patent. The whole apparent doubt suggested arises from treating this softening as the result which the plaintiffs seek to secure to themselves, whereas it is the means of producing a new and other result, namely, an improved bag. True, the plaintiffs have, in their specification, men-

tioned various means by which it can be done, and one mode in which they do it, but those means are open to the use of others. All may use them. If they do not employ them to produce the improved paper bag, they infringe no right of the plaintiffs.

The defendants, on the other hand, have sought to secure to themselves a particular mode of crimping or softening, and describe the machinery they employ for the purpose. Whether they have secured, by their patent, the exclusive right to employ such machinery for crimping or softening, it is not necessary, for the purposes of this case, to inquire. If they do not manufacture the plaintiff's improved bag, they do not violate the rights of the latter.

2. Is, then, the bag produced by the defendants an infringement of the exclusive right of the plaintiffs to manufacture and sell the improved bag described in their patent? On that question I have much less doubt than upon the question first considered. They do manufacture and sell a bag crimped, softened and made flexible at the upper end, where the string is to be applied, so that the sides of the bag will come together after the manner of cloth-bags. The substantial end, purpose and usefulness of the plaintiffs' invention was this and only this. It may be quite true that the bag produced by the plaintiffs was susceptible of improvement. It may be, that, leaving the extreme upper end of the bag unsoftened, or, in another form of words, extending the bag upward and beyond the portion made soft and pliable, produces a more useful bag. It may be that this improvement is an invention of the defendants. There is conflict in the evidence upon the last two points, but I deem it quite immaterial. If the defendants have made an improvement, they have not thereby acquired the right to produce a bag embodying the plaintiffs' invention. They cannot apply their improvement without appropriating the very thing which is the substantial end and purpose of that invention. Practically, they say—"Crimping the upper end of the bag, as the plaintiffs do, produces a bag with an important and useful capacity of being tied with ease and preserving the strength and usefulness of the bag; but the string is liable to slip. We, therefore, propose to create an impediment to the slipping of the string, by allowing an extension of the bag beyond the softened portion and above the string, more effectually to retain it." In my judgment, upon the whole proofs, this is in fact no improvement, but a mere artifice to evade the plaintiffs' patent. But, if it be an improvement, it is superadded to the plaintiffs' invention, and the defendants have no right to use that invention without the plaintiffs' consent, although that is essential to enable them to use their improvement at all. It is a familiar rule, that a patent for an improvement does not, per se, give the right to use the thing

Improved and the patentee of the thing improved may not use the patented improvement. On the question, whether the defendants can be deemed inventors at all of what they deem an improvement, I express no opinion.

A decree must be entered for the plaintiffs, for an account, and for an injunction as prayed, with costs.

[NOTE. Patent No. 48,036 has not been involved in any other cases reported prior to 1880.]

Case No. 533.

In re ARLEDGE.

[1 N. B. R. (1873), 644, (Quarto, 195.)]

District Court, S. D. Georgia.

BANKRUPTCY—THE ASSIGNEE—PRIOR ASSIGNMENT FOR BENEFIT OF CREDITORS.

[An assignment for benefit of creditors, without fraud, of all a man's property, a year before his petition in bankruptcy, is valid as against the assignee in bankruptcy, who takes only such rights as the bankrupt had at the time of his bankruptcy.]

[See *Mayer v. Hellman*, 91 U. S. 496; In re *Kimball*, Case No. 7,770.]

[In bankruptcy. Certificate to district court by register of question arising before him. Affirmed.]

I, the undersigned, having been designated by the court as the register in bankruptcy before whom the proceedings, in the above matter of the bankruptcy of George H. Arledge are to be had, do hereby certify, that in the due course of such proceedings the following question pertinent to the same arose, and was stated by Peter V. Robinson, assignee of the effects of the said bankrupt, namely: The said George H. Arledge, some twelve months prior to his filing his petition in bankruptcy, conveyed by deed of assignments, for the benefit of all his creditors, all his stock in trade, choses in action, books of account and property of every kind to one John H. Thomas; from the proceeds of the sale of said property a dividend of ten per cent. has been paid by the said Thomas, a balance of money, and the books of account, still remain in his hand. Is the said assignee in bankruptcy entitled to receive from the said John H. Thomas the money and property not yet distributed among the creditors? And the said party requested that the same should be certified to your honor for your opinion thereon. Frank S. Hesseltine, Register in Bankruptcy for Said District.

Opinion of the Register. It is my opinion that the assignee is not entitled to recover the said money and books of account in the hands of the said John H. Thomas. The deed of assignment conveys to the assignee "all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commence-

ment of said proceedings in bankruptcy." Bankrupt Act, § 14, (Rice's Manual, general clause 46). By this clause of the bankrupt act it appears that all the property of the bankrupt—the title and right to which was in the bankrupt at the time of filing his petition—and that only, passes to the assignee. Property which previous to that time had been lawfully conveyed or assigned to any person by the bankrupt does not pass to the assignee, the title having gone out of the bankrupt and become vested in the person to whom it was conveyed or assigned. The assignee acquires by the deed of assignment the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the property or estate as the bankrupt might or could have had if no assignment had been made. Bankrupt Act, § 14, (Rice's Manual, general clause 52.)

By section 35 of the act a conveyance or assignment, made by a person being insolvent within four months before the filing of the petition by, or against him, of any part of his property, a person having reasonable cause to believe such a person insolvent, with a view to give a preference to any creditor; or a like conveyance within six months before the filing of the petition, with a view to prevent the property from coming to his assignee in bankruptcy, or to defeat the object of, or in any way impair, or delay the operation of this act, &c., are void, and the assignee may recover the property, or the value of it. This section does not apply to this assignment, made more than twelve months before the filing of his petition by the bankrupt, and made for the benefit of all his creditors. In the case of *Mitchell v. Winslow*, [Case No. 9,673,] Justice Story says: "that it is a well established doctrine that (except in cases of fraud) assignees in bankruptcy take only such rights and interests as the bankrupt himself had, and could himself claim and assert at the time of his bankruptcy."

Lord Hardwicke, in the case of *Brown v. Heathcote*, 1 Atk. 160-162: "The ground that the court go upon is this, that assignees of bankrupts, though they are trustees for the creditors, yet stand in the place of the bankrupt, and they can take in no better manner than he could; therefore assignments of choses in action for a valuable consideration have been held good against such assignees." In the case of *Mitford v. Mitford*, 9 Ves. 87, 100, Sir William Grant said: "I have always understood the assignments from the commissioners, like any other assignments by operation of law, passed his (the bankrupt's) rights precisely in the same plight and condition as he passed them." See, also, *Bedford v. Perkins*, 3 Car. & P. 90; [*Fisher v. Miller*,] 1 Bing. 150; [*Young v. Taylor*,] 2 Moore, 336; [*Crowfoot v. Gurney*,] 9 Bing. 372. The said Arledge's right and interest in this property claimed by the assignee,

ceased on the execution of the deed of assignment to Thomas, subject to the condition that if, after the payment in full of the creditors, there should be a balance in his hands, that remainder would be the property of Arledge, and the right to receive that remainder is all the right his assignees in bankruptcy acquired by the deed of the register. That is the reason why the forms of proceedings in bankruptcy adopted by the supreme court of the United States require that property previously conveyed should be set forth under the heads of Property in Reversion, Remainder and Expectancy, Schedule B, 4. There has been no claim proved against this bankrupt, and he has petitioned for his discharge.

Frank S. Hesseltine, Register.

ERSKINE, District Judge. The decision of the register is affirmed. The clerk will certify accordingly.

ARLEDGE, (BOYLE v.) See Case No. 1,758.

ARLETH, (WHITE v.) See Case No. 17,536.

Case No. 534.

The ARLINGTON.

[2 Ben. 511.]

District Court, S. D. New York. Oct., 1868.

SALVAGE—TOWAGE—TENDER—COSTS.

1. Where a libel, claiming \$1,000 as salvage, for service rendered by a steam-tug in towing a schooner away from a slip where there was a fire, was filed by the owner of the tug, who was not personally present when the service was rendered: *Held*, that the case was not one of salvage, but that the libellant was entitled to reasonable compensation for the use of his vessel.

[See note at end of case.]

2. It appearing that the service occupied but two or three hours, that another vessel was towed out at the same time, that the steam-tug was not diverted from any other occupation, that her usual compensation was from \$10 to \$15 an hour, and that the master of the schooner had refused to pay more than \$50: *Held*, that that sum was sufficient, and that the libellants should recover that sum without costs. That, if the \$50 had been tendered or brought into court the court would have awarded costs to the claimants.

In admiralty.

W. J. Haskett, for libellant.

R. H. Huntley, for claimants.

BLATCHFORD, District Judge. This is a libel filed by the owner of the steamboat Thomas Kiley, against the schooner Arlington, claiming \$1,000 for salvage, by reason of services rendered to the schooner, by the steamboat, on the 20th of August, 1866, in towing her from a slip in Jersey City, New

Jersey, into the Hudson river, during a fire which was burning on shore. The libellant was not on board of the steamboat at the time, and did not personally render any of the services. The case, therefore, is not one of salvage. The Charlotte, 3 W. Rob. Adm. 68, 72; The Jack Jewett, [Case No. 7, 122.] But the libellant is entitled to an equitable compensation for the use of his steamboat in towing the schooner. On the evidence, the libel grossly exaggerates the danger both to the schooner and to the steamboat at the time the service was performed. It avers that the master and owner of the schooner refused to pay more than the sum of \$50 for the service, and that that sum is too trifling. I think it is sufficient. The service did not occupy more than from two to three hours, another vessel was towed out by the steamboat at the same time, and the steamboat was not diverted from any other occupation to render the service, as she voluntarily went to the spot to render such service as she could, and was engaged by the other vessel, before referred to, prior to the time when the schooner applied to her. The evidence is that the steamboat usually received from ten to fifteen dollars an hour for towing. A decree will be entered for \$50, but without costs to the libellants. If the claimants had shown a tender of the \$50, or had brought that amount into court, I should have awarded costs to them.

[NOTE. For cases in which aid or assistance in extinguishing a fire on shipboard has been held to be a salvage service, see "The Connemara, 108 U. S. 352. 2 Sup. Ct. 754; Murphy v. The Suliste, 5 Fed. 99; The Cloud, 29 Fed. 272. The owners of a steamboat are entitled to a reasonable compensation for towage in towing a burning vessel from one shore of a river to the other; but they are not, for that service alone, entitled to salvage. Emerson v. The Pandora, Case No. 4,442. So, also, was it held that a tug assisting in extricating a burning vessel was only entitled to compensation for the towage. The Cyclone, 16 Fed. 486. But a tug which had brought up to a pier, within reach of the fire department, a burning barge, was held entitled to salvage, but not as upon derelict property. Corwin v. The Jonathan Chase, 2 Fed. 268. A steamship and cargo valued at \$433,000 were towed into the stream from a pier on which a fire was spreading rapidly. The service occupied about an hour, and the steamship was entirely unharmed. There were other tugs near, which might have performed the service. Each tug was awarded \$2,000 as salvage. The New York, 34 Fed. 922. A steamship and cargo valued at \$600,000 requested a tug to tow her away from a burning slip. Two others assisted, and in about two hours the steamship was moved out of danger. The steamer could have been warped across the slip by her donkey engines, which had steam up. Salvage to the amount of \$4,500 was awarded the three tugs, in proportion to their relative merits. Baltimore & O. R. Co. v. The Holland, 44 Fed. 362.]

ARLINGTON CASE. See Cases Nos. 8,191 and 8,192.

ARLINGTON, Town of. (FIRST NAT. BANK OF NORTH BENNINGTON v.) See Case No. 4,806.

¹[Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

Case No. 535.**ARMA' v. UNION BANK OF GEORGETOWN.**[2 Cranch, C. C. 180.]¹

Circuit Court, District of Columbia. June Term, 1819.

LOST INSTRUMENTS—ONE-HALF OF BANK NOTE
LOST—RECOVERY.

If the owner of a bank-note lose one half of it, he may recover the amount of the whole note, in an action against the bank which issued it, the plaintiff having offered security to indemnify the bank against the claim of any other person upon the lost half.

[See *Bullett v. Bank of Pennsylvania*, Case No. 2,125.]

At law. This cause was submitted to the court upon the following case stated, by Mr. Key, for the plaintiff, and Mr. Jones, for the defendant: A note for \$100, duly issued and put in circulation as cash by the Union Bank of Georgetown, was cut in two by one T. C. Amory and one of the said halves remitted in payment by him to the plaintiff by mail from Gloucester Court-House to Baltimore; but never arrived by mail, nor in any other manner came to the hands of the plaintiff; but has ever since the said remittance, been missing, and never since heard of, and is lost to the plaintiff. That said Amory afterwards, and before the institution of this suit, delivered the remaining half to the plaintiff, who presented it to the bank and demanded payment of the whole sum of \$100; at the same time offering to prove to the satisfaction of the said bank, the miscarriage and loss of the other half, and to indemnify them by security against any loss from the reappearance and demand of the half so lost. The said half so presented is hereto annexed, and it is agreed that the said note, before the same was cut as aforesaid, was in the form hereunto annexed; and was one of a considerable number of one hundred dollar notes issued and put in circulation by the said bank, and not otherwise distinguishable from the said note, than by a certain number and letter on the left of each of the said notes respectively. The said defendants offered to pay to the plaintiff, on presentation of the said half, one half of the amount of the said original note, that is to say, \$50; but refused to pay the other half. It is agreed to be the custom of the said bank, and of banks generally, to pay one half of the original sum due upon the whole note, upon presenting one half of a cut note, without accounting at all for the other half. The point now submitted is, whether the said bank is not bound to pay the whole amount of the original note, upon due proof of the loss of one half of the note, and an offer to indemnify as aforesaid.

Mr. Key, for plaintiff. If the whole note had been lost, and the plaintiff had offered

¹ [Reported by Hon. William Cranch, Chief Judge.]

indemnity, he would have been entitled to recover, as upon a lost note. A man does not lose his debt, by losing the best evidence of it.

Mr. Jones, for defendant. The \$100 notes are only distinguishable from each other by a number on the left half. These notes pass as cash. They are payable to bearer. Trover will not lie for them. If stolen and presented by a bona fide holder, the bank is liable. *Pierson v. Hutchinson*, 2 Camp. 211; *Grant v. Vaughan*, 3 Burrows, 1516; *Peacock v. Rhodes*, 2 Doug. 633. The custom to pay half was generally known, and an agreement may be presumed to that effect. The innocent holder of the other half, may, perhaps, show as good a right to recover upon it as the present plaintiff. It was payable to bearer on demand.

THE COURT (nem. con.) said: This is to be considered as a note destroyed. The plaintiff is admitted to have been owner of the whole note. The holder of the other half cannot aver the same fact, and therefore can never recover upon it. Judgment for the plaintiff.

ARMFIELD, (BRENT v.) See Case No. 1,833.

Case No. 536.**ARMIJO v. UNITED STATES.**[Hoff. Land Cas. 248.]¹District Court, D. California. June Term, 1857.²MEXICAN LAND GRANTS—BOUNDARIES—SPECIFIC
QUANTITY FROM LARGER TRACT.

This claim is entitled to confirmation under the rulings of the supreme court in *Fremont's Case*, [17 How. (58 U. S.) 542.]

[See note at end of case.]

Claim [by the heirs of Jose F. Armijo] for three leagues of land in Solano county, rejected by the board, and appealed by the claimants.

Jeremiah Clarke, for appellants.

P. Della Torre, U. S. Atty., for appellees.

HOFFMAN, District Judge. The documentary evidence produced from the archives shows that in November, 1837, Jose F. Armijo petitioned for the land claimed in this case, and obtained from M. G. Vallejo, director of colonization and military commandant of the district, permission to occupy it. On the twenty-eighth of February, 1840, he presented his petition to the governor, reciting the previous proceedings and soliciting a final grant. This petition was referred to the prefect of the district, and a favorable informe returned. On the third of

¹ [Reported by Numa Hubert, Esq.]

² [Affirmed by supreme court, sub nom. *U. S. v. Armijo*, 5 Wall. (72 U. S.) 444.]

March, 1840, a grant in the usual form was issued by Governor Alvarado. The original grant delivered to the party is produced by him and its genuineness proved. The authenticity of the papers produced from the archives is not disputed, nor is the bona fides of the grant questioned. It also appears that from a period shortly subsequent to the grant, the grantee took possession of his land, built a house upon and stocked it with cattle. From that time to the present the rancho has been in possession of Armijo and his heirs.

Some doubt is raised as to whether the house built by Armijo was within the boundaries of the land granted to him, or within those of the adjoining rancho of Gen. Vallejo. It is evident, however, that Armijo occupied the land, claiming it to be his under his grant; that he continued to assert his title from the date of his grant until his death, and that his representatives were found by the United States, at the conquest, living on the land and claiming to own it. It is clear, therefore, that Armijo never abandoned his rights, and the case has no analogy to that indicated by the supreme court as amounting to an equitable forfeiture of the rights acquired by the grant, viz.: an abandonment of the grant during the existence of the former government, and an attempt to resume it from its enhanced value. The land is described in the grant as known by the name of "Tolenas," and bounded by the Arroyo of Suisun, the Estero of Julpinas, the Arroyo of Ololatos, and the Sierra. The fourth condition describes it as of three leagues in extent, as shown by the map in the expediente. The surplus is reserved in the usual form. The exterior boundaries are shown to embrace a tract considerably larger than the quantity mentioned in the condition. Any objection to the grant on this account is disposed of by the supreme court in the Case of Fremont, [17 How. (58 U. S.) 542.] The claimants are therefore entitled to a decree of confirmation to three leagues of land, to be located within the exterior limits mentioned in the grant, and in the form and divisions prescribed by law for surveys of lands in California, and in one entire tract.

[NOTE. On appeal to the supreme court, this decree was duly affirmed. Mr. Justice Field, in delivering the opinion of the court, held that, the grant being of a specific quantity within more extensive limits, there is no obligation to allow the quantity to be selected in accordance with the grantee's wishes, and that the latter's right of selection is only a privilege given by the generosity of the government. Continuing, the learned justice said: "The alleged priority of occupation and settlement consists in the fact that Armijo, after obtaining his grant, built a house upon a portion of the land included in the patent to Ritchie, and occupied it. But this fact is met by the further fact that the erection of the house gave rise to a suit between the owners of the two grants as to the boundary between them, which finally led to an arbitration of the matter. The award, as we construe it, fixed the Sierra Madre as the common boundary

of their respective claims. The patent of the Suisun tract does not embrace any land situated on the Armijo side of this boundary, and cannot, therefore, be justly a ground of objection by the claimants under the Armijo title. The objection that the survey does not locate the land in a compact form cannot be sustained. Compactness of form must depend, in many instances, upon a variety of circumstances; such as the character of the country, its division into different parcels by mountains, rivers, and lakes, and sometimes by the relation of the tract to neighboring grants. In this case, the Tolenas tract is surrounded by three grants, confirmed, surveyed, and patented. The survey is made so as to avoid collision with any of the elder patents, and, under these circumstances, is in reasonable conformity with the decree of confirmation,—the only conformity which the law requires." U. S. v. Armijo, 5 Wall. (72 U. S.) 444.]

ARMIJO, (UNITED STATES v.) See Case No. 14,406.

ARMISTEAD, (BLACKWELL v.) See Case No. 1,474.

Case No. 537.

The ARMITAGE BREARLEY.
The DUDLEY S. GREGORY.

[9 Ben. 108.]

District Court, E. D. New York. April, 1877.

COLLISION IN NORTH RIVER — FERRY-BOAT AND STEAMBOAT — FOLLOWING COURSES — RIGHT OF WAY—DANGER SIGNALS.

1. Where a steamboat on her regular trip across the North river, came up after a propeller also on her regular trip, which was going along close to the piers, and attempted to swing into her berth, having exchanged signals with the propeller and given a danger-signal which the pilot of the propeller heard but disregarded, and collision ensued: *Held*, that both vessels were in fault, the ferry-boat for attempting to swing in and cross the course of the propeller when she did, being the following vessel, and the propeller, for disregarding the danger-signal and not stopping when there was sufficient time for her to do so.

2. Under the circumstances, the ferry-boat, though compelled to enter her slip in a particular way, was not absolved from the general rule of navigation thereby, but should have held herself in the tide till she could swing in with safety.

In admiralty.

W. W. Goodrich, for the Propeller.
Beebe, Wilcox & Hobbs, for the Ferryboat.

BENEDICT, District Judge. These are cross actions instituted to recover for damages to the above named vessels, arising out of a collision that occurred in the afternoon of the 1st of September, 1876. The Dudley S. Gregory was a ferry-boat, making one of her regular trips from Jersey City to Desbrosses street, New York. The Armitage Brearley was a propeller bound up the river

[Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

from a pier below Desbrosses street, upon one of her daily trips from New York to Tarrytown. The weather was clear, the tide ebb. The Brearley came out of a slip at pier 34, and straightened up the river in the ebb tide upon a course parallel to the piers. The Gregory also straightened up her course parallel with the piers, so that when the Brearley was off pier 35 the two vessels were on parallel courses, the Gregory being outside and astern of the Brearley but gaining upon her, as the Gregory was the faster boat. At this time there was a lighter also sailing up the river, between the courses of the propeller and the ferry-boat and ahead of them. The ferry slip to which the Gregory was bound is between piers 39 and 40. Pier 42 above the ferry slip extends out some 140 feet beyond the ends of the piers below. The usual method by which the Gregory makes her slip in an ebb tide is to keep up about parallel with the piers until she is opposite pier 40, there she swings sharp in towards the piers, passing the lower corner of pier 40 at no great distance, and upon the tide, so reaching her berth, which is inside the line of the piers.

The course of the Gregory was observed by the pilot of the Brearley, and he knew that the Gregory was a ferry-boat bound to the ferry slip at the foot of Desbrosses street. After so straightening up, the Gregory and Brearley continued their parallel courses until the Gregory reached a point opposite pier 40, having by this time passed the Brearley and also the lighter ahead of the Brearley. Then the Gregory swung in and headed for her slip in the usual manner, and when in the neighborhood of the end of pier 40 she was struck by the Brearley upon her starboard side forward of her paddle-box and cut into, through seven beams. At the time of the blow the Gregory was moving ahead; the propeller was also moving ahead; her engines having been reversed but her speed scarcely checked.

In regard to the facts as thus far stated, there is no conflict of evidence. The conflict relates to the distance off the piers at which the Brearley was sailing and signals exchanged between the vessels prior to the collision. In regard to the distance I conclude from the evidence that the course of the Brearley was sufficiently far out to carry her outside of the end of pier 42, which pier, as before noticed, extends 140 feet further out than the piers below. It is also evident that the course of the Brearley was such as to bring her inside of the point at which the Gregory would naturally turn to swing into her slip upon such a tide. In regard to the signals, several witnesses swear that while the two vessels were passing up, the Brearley gave the Gregory one whistle and received one whistle in reply. This is denied by the Gregory, in whose behalf it is claimed that no whistle was given on the Brearley until the Gregory gave a signal

of two blasts, to which signal the Brearley replied with one blast. Whereupon the Gregory at once gave a signal of three blasts, she at that time being about to swing. It seems unnecessary in the view I take of this case to determine more in respect to the whistles than that the Gregory gave a signal of three blasts as she was about turning in towards her slip, which blasts were heard by the pilot of the Brearley.

The facts now stated are sufficient to determine the result of this case, and they compel a decision that it is a case of mutual fault. The fault on the part of the Gregory consists in attempting to cross the course of the Brearley, when she had not passed sufficiently far ahead of the Brearley to enable her to cross in safety. When off pier 35 the Gregory was outside and astern of the Brearley, and she was not entitled to cross ahead of the Brearley until she had reached a point where she could do so in safety. To cross where she did was a dangerous manoeuvre, as her own whistles show, and she is guilty of fault in attempting it.

If any doubt exists as to whether it should be deemed a fault on the part of the Gregory to have attempted to cross the Brearley when she did, it arises from the fact that the Gregory was a ferry-boat, bound to a slip which she was compelled to approach and enter in a certain way, from which she could deviate but slightly without danger to herself and the passengers on board. This fact has been greatly relied on in behalf of the Gregory, and reference has been made to the case of *The Favorita*, [Case No. 4,694,] as an authority in favor of her right to swing when she did, and as decisive of the responsibility of the Brearley for this collision. But there is no evidence in the case to show that the Gregory could not, when she reached the point where it was necessary for her to turn in, have held herself in the tide until the Brearley had passed up, and I cannot say from the testimony that such a course would have caused any serious delay in her trip, or any embarrassment to her in the manoeuvre of going into her berth. In the absence of such evidence it is impossible to consider the case of the Gregory to be special, and upon that ground hold her absolved from the obligation to obey the rule applicable to one vessel following another. Judged by that rule, the Gregory is condemned, for she was the overtaking boat, and she had the Brearley on her starboard side.

This fault of the Gregory was gross indeed, if it be the fact, as claimed by the Brearley, that the Gregory had previously received from the Brearley a single whistle, and answered it by a single whistle, for such signals would be notice of her intention either to wait for the Brearley to go by, or to pass under her stern. But aside from the question of whistles, upon the evidence as it stands I cannot regard it as other than

a fault to undertake to swing into her slip when she did. I do not intend by these remarks to decide that a ferryboat is not entitled, when once she has commenced the operation of entering her slip, to complete that manoeuvre without molestation or embarrassment from other vessels. The fault I find in the ferryboat was in commencing the manoeuvre when she did. There was also clear fault on the part of the Brearley, and that whether it be true or not that she had received a single whistle from the Gregory, for it is beyond dispute that she received a signal of three whistles from the Gregory, and her pilot, who is also part owner, admits that he could then have stopped or sheered so as to avoid collision with the Gregory if he had regarded those signals as indicating danger.

The pilot of the Brearley does not claim for his vessel the right of way as against a ferryboat, but gives as an excuse for keeping his course and maintaining his speed in the face of three blasts from the Gregory and of the obvious danger of collision, that he was misled by the signal. He says the signal was not three blasts but three "toots," and three "toots" he supposed to mean, "All right, keep on as you are going." But the pilot had no right whatever to entertain such a supposition in regard to the signals. Three blasts of the whistle is the well-known signal of danger. Upon the evidence in this case, no such distinction as is here sought to be established between toots and blasts can be held to exist. According to the evidence of the pilot, and part owner of the Brearley, then he saw the Gregory and knew that she was bound to the slip he was approaching. He also knew that he was running along the piers so as to cut off the boat from her slip if he kept on. As he approached the slip he heard a danger signal from the ferryboat, and could then have avoided a collision, but in face of the signal he kept on until he came in contact with the ferryboat as she was about entering her berth. The course adopted by the Brearley placed her under a peculiar responsibility in regard to the ferryboat, because it was so close along the piers, and if maintained would necessarily carry the Brearley inside the point where she knew the ferryboat must swing to make her slip. Certainly it gave her no right to disregard the danger signal, as it is admitted she did, and to maintain her course. On the contrary it imposed upon her the obligation by an instant and prompt attention to the danger signal to avoid the ferryboat, which, as before mentioned, the pilot admits was then possible.

In accordance with these views, fault on both sides being found, the damages must be apportioned.

ARMOUR, (JENKINS v.) See Case No. 7,260.

Case No. 538.

ARMROYD et al. v. WILLIAMS et al.¹

[2 Wash. C. C. 508.]²

Circuit Court, D. Pennsylvania. April Term, 1811.³

RES JUDICATA—DECREE OF FOREIGN COURT OF ADMIRALTY—PRIZE.

1. The schooner *Fortitude*, owned by the appellees, citizens of the United States, and merchants resident at New-London, on her return voyage from Martinico, a British island, having on board part of her outward cargo, and the remaining portion of her loading having been shipped at Martinico, was captured as prize by a French privateer, carried to St. Martin's, where the vessel and cargo were sold by order of the governor, and part of the latter sent by the purchaser to the appellants in Philadelphia. The *Fortitude* and cargo were afterwards condemned by a French court of prize, sitting at Guadaloupe, for an asserted violation of the Milan decree, in trading with a British colony.

2. The sentence of a court of exclusive jurisdiction, operating directly on the thing itself, is conclusive between the same parties, upon the same matter coming in any manner before another court of co-ordinate jurisdiction, not only of the right which it establishes, but of the fact which it has decided.

[See note at end of case.]

3. So long as the decree of a court of admiralty, foreign or domestic, remains in force, unreversed, it is conclusive to change the property upon which it operates; and the interference of another court of co-ordinate jurisdiction, is not authorized, whether the decree is erroneous or not. The sentence of such a court is not examinable at all, in another court.

[Cited in *The Waterloo*, Case No. 17,257.]

[See note at end of case.]

4. Whatever may be done by foreign tribunals, in reference to the established principles of the law of nations, relative to the conclusiveness of sentences of foreign prize courts, the courts of the United States will not, for purposes of retaliation, depart from the fixed principles of the law of nations, which declares that they are conclusive.

[Cited in *The Waterloo*, Case No. 17,257.]

[See note at end of case.]

In admiralty. Appeal from the district court. The schooner *Fortitude*, belonging to Williams and others, the libellants, citizens of the United States, with a cargo taken in at Martinico, and a part of her outward cargo carried from the United States, sailed on the 20th of August, 1809, from the said island to New-London, consigned to one of the libellants. On the next day, she was captured on the high seas by a French privateer, and carried into St. Martin's. The cargo and vessel were sold, by order of the governor of St. Martin's, at public auction.

¹ This cause was argued in January last, and held under advisement.

² [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States.]

³ [Reversing an unreported decree of the district court. Affirmed by the supreme court sub nom. Williams v. Armroyd, 7 Cranch, (11 U. S.) 423.]

Ninety-seven hogsheads of molasses, part of the cargo, were sold on the 15th of October, and sent to Philadelphia, consigned to Armroyd & Co., restitution of which was demanded by the libellants, and refused; upon which this libel was filed. The molasses was claimed as the bona fide property of Richardson & Carty, of St. Martin's, and others. The claim states, that at the time of the capture, and before war existed between England and France, the Fortitude, on her return from Martinico, a colony under the dominion of Great Britain, where she had been trading with the enemies of France, contrary to the decrees of France, was captured by a French privateer as prize, carried into St. Martin's, a French possession, and, with her cargo, sold by order of the governor; that the molasses claimed was purchased, bona fide, by certain persons, and afterwards sold by them to those for whom the claim is made; that on the 12th of October, 1809, the court of prize, established at Guadaloupe, a French island, condemned the said schooner Fortitude and her cargo. The sentence of the court at Guadaloupe, after setting forth the purport of the papers of the schooner, proceeds thus:—"It results from these papers, that the schooner is the property of a citizen of the United States; that she sailed from New-London, bound to Martinico, where she sold her cargo, and took in another cargo for New-London, and therefore she has incurred the penalty pronounced by the Milan decree, dated September 17th, 1807, (which is set out,) and after hearing the opinion of the inspector, &c., we declare the said schooner to have been duly captured, and to be forfeited to the captors. Consequently, she and her cargo are awarded to the captors, to be sold, if the sale has not already taken place," &c.

A pro forma decree having been made by the district court in favour of the libellant, an appeal was prayed to the circuit court.

The points made by Hare and Rawle, counsel for the appellees, were—First, that the foreign sentence, professing to proceed upon the Milan decree, acknowledged to be a violation of the law of nations, is not valid to change the property, and ought to be disregarded. 2 Ersk. Inst. 793; [Burton v. Fitzgerald,] 2 Strange, 1078; 1 Marsh. 397. Second, that the condemnation and sale were fraudulent. Third, that as France disregards the sentences of foreign courts, we are not bound by those of her courts. Id. 391; 1 Emerig. [Ins.] 458; 2 Pet. Adm. 331, [Hollingsworth v. The Betsey, Case No. 6,612.]

Cases cited on the other side: [Bolton v. Gladstone,] 5 East, 155; [Lothian v. Henderson,] 3 Bos. & P. 547; [Croudson v. Leonard,] 4 Cranch, [8 U. S.] 434; [Geyer v. Aguilar,] 7 Term R. 695; [Rose v. Himely,] 4 Cranch, [8 U. S.] 271.

Before WASHINGTON, Circuit Justice, and PETERS, District Judge.

WASHINGTON, Circuit Justice, delivered the opinion of the court. The question is, is the sentence of the prize court at Guadaloupe conclusive to divest the right of the original owners of the property, condemned by that sentence, and to vest it in the purchaser under it? The doctrine of the British courts, acknowledged and adopted by the courts of the United States, is, that the sentence or decree of a court of exclusive jurisdiction, operating directly on the thing itself, is conclusive between the same parties, upon the same matter coming directly or incidentally in question, in another court of co-ordinate jurisdiction, not only of the right which it establishes, but of the fact which it directly decides. This doctrine applies emphatically to the decisions of the courts of admiralty, whether foreign or domestic. They are courts of the law of nations, and to their proceedings all the world are parties; that is, any person having an interest in the thing which forms the subject of the suit, may make himself a party, and contest the right of the libellant. It is the conclusive effect of such a sentence upon the facts decided, which has given rise to the many questions which have perplexed the common law courts of Great Britain and the United States, in respect to warranties of neutrality. If the foreign sentence has proceeded upon ground obviously inconsistent with the neutral rights of the captured, it will be disregarded by the courts of common law, in deciding the question whether the warranty has been falsified; not because the fact which it professes to decide is not conclusively decided by the sentence, but because it concludes nothing in respect to the point at issue—namely, the neutrality of the property, or the neutral conduct of the owner. But as to the direct effect of the sentence upon the thing condemned, no doubt has ever been entertained, that it is conclusive to work a change of the property, so long as that sentence remains in force, unreversed by a superior and appellate tribunal. If the principle be thus general and inflexible, it is unimportant whether the foreign sentence be erroneous or not, or whether the error consist in the mistake of the court in matter of fact, or a misconception of the acknowledged law of nations, or is founded upon foreign laws avowedly repugnant to the law of nations. The validity of the sentence rests upon this ground, that it is not examinable by any other court having a concurrent jurisdiction over the subject; and consequently, the objection is met in limine, before the nature of the error committed can be got at. And in the essence of the thing, where is the difference between a decision obviously unjust, and unwarranted by the facts on which it is founded, or by the acknowledged principles of the law of na-

tions—and one which professes to disregard that law? The injury to the individual is the same, and redress is equally due to him by his own government, the only power competent to redress him. It was contended, that where the foreign court professes to proceed upon a ground not warranted by the law of nations, its decree is not binding on other courts. This, as was before observed, is true, if a conclusive effect is attempted to be given to it, for the establishment of a collateral fact, which the decision does not warrant. But the tribunal itself does not lose its character of a tribunal of the law of nations, because its decisions are repugnant to the law which ought to govern it.

An attempt was made to invalidate this sentence, upon the ground that the agent of the original owners of the vessel and cargo was deprived of an opportunity to put in a claim, and to contest the right of the captors; and also because the sale of the property was unfairly conducted. As to the first objection, the fact upon which it is founded is not very clearly made out. The examination of the master at St. Martha's, which stated the nature of his owner's claim, was before the prize court at Guadaloupe, and was considered; nor does it appear that he was prevented from attending the court, and being heard. But if he had been heard, it is evident that the decision proceeded upon acknowledged facts, and could not possibly have been different from what it was, in a court bound by the edicts of the government which constituted it. The other objection has still less weight in it. The property of the original owners being conclusively changed by the sentence of condemnation, and vested in the captors, it is unimportant, in this suit, whether the sale was regular and bona fide, or not.

The last point insisted upon by the counsel for the appellees, was, that as France does not acknowledge, in her own courts, the conclusive effect of the sentences of foreign prize courts, this court, upon the principle of reciprocity, ought not to regard the decisions of her courts, where they are manifestly wrong. Whether the adoption of the rule of reciprocity, in any case, would be proper or not, need not now be decided. It certainly does not prevail, even in England, in the common law courts; and it has never, to our knowledge, been admitted into the prize courts of our own country. We do not, however, mean to say, that it ought not. In matters of salvage, where the amount of compensation rests in the discretion of the court, and perhaps in other instances, where no moral principle, nor established doctrine of law, would be violated by retaliating upon foreign courts their own rule, there is possibly no other objection to the rule of reciprocity in the admiralty court, except the uncertainty in the law, which the rule is calculated to introduce. But most

certainly, a court which means to act correctly, will never depart from the rule of right, or reverse fixed principles of law, because a foreign tribunal has done so.

The rule of law which governs the court in deciding this case, is, in our opinion, a wise one; and it has appeared otherwise only during a few years past, because the regular order of things has been disturbed and disfigured by the violence and rapine of the belligerents. We confess that we sicken with disgust, in giving to the appellees the benefit of a general principle of law, which compels submission to so daring an outrage upon our neutral rights. But we must obey the law, and leave to our government the task of protecting its citizens.

Sentence reversed.

[NOTE. On appeal to the supreme court, this decree was affirmed; Mr. Chief Justice Marshall holding that, although the sentence of the court at Guadaloupe was "avowedly made under a decree subversive of the law of nations, that will not help the appellants' case in a court which cannot revise, correct, or even examine, that sentence." *Williams v. Armroyd*, 7 Cranch, (11 U. S.) 423.]

ARMS & AMMUNITION of The AMELIA
v. UNITED STATES. See Case No.
14,466a.

Case No. 539.

In re ARMSTRONG.

ROOT v. HILLIARD.

[9 Ben. 212;¹ 16 N. B. R. 275.]

District Court, D. Vermont. Aug., 1877.

BANKRUPTCY — MORTGAGE IN FRAUD — BELIEF OF
INSOLVENCY — PREFERENCE.

1. A., who was a farmer, owed H. a large sum of money for a considerable time and, after repeated failures to pay, gave H. a mortgage to secure the debt. H. [A.] subsequently went into bankruptcy, and his assignee having brought suit to set aside the mortgage: *Held*, That the repeated failures to fulfil his promises to pay, by the bankrupt, with the knowledge of his other debts that the defendant had, were reasonable cause for the defendant to believe that insolvency existed;

[Cited in *Metcalf v. Officer*, 2 Fed. 643.]

2. That defendant, knowing there were other large debts unsecured, knew that, if the mortgage was valid, he was obtaining a preference fraudulent under the statute.

[Cited in *Metcalf v. Officer*, 2 Fed. 643.]

In bankruptcy.

WHEELER, District Judge. Upon hearing in this cause upon bill, answer, oral testimony taken pursuant to written stipulations filed, and argument of counsel, there is no question made but that the mortgage sought to be set aside was made within the time prescribed to be subject to the proceeding; nor but that the bankrupt was insolvent

¹[Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

and made it with a view to give preference to the defendant; but question is made as to whether the defendant received it having reasonable cause to believe the defendant was insolvent and knowing it was made in fraud of the provisions of the statute relating to bankruptcy.

The debt due the defendant was quite large and had stood during a considerable time. He had been urging payment more than two years and received several promises that it should be paid at specified times, which had not been kept. It clearly appears that he had known for considerable time that there were other debts, to an amount greater than his; for he has testified that on enquiry he was informed by the bankrupt about six months before, that it would take a sum greater than twice his debt to pay all the debts. It is true, as has been urged, that the defendant was not in mercantile life, but was a farmer, and prompt payment was less to be expected, and failure to pay would excite less suspicion than if he had been a trader or a banker; but still repeated failure to pay when promised is not usual among men of his class and, when repeated times enough, would come to be quite out of the usual course of business and indicate inability.

The question as to cause for belief is, whether in this case it had, at the time of the mortgage, got to that, that the defendant either knew, or ought to have known, that the bankrupt, because he could not, did not pay according to the usual course. There was a promise to pay when a child, that the defendant wanted the money for, became of age in 1874, and another to pay when another child came of age soon after, and another to pay at the expiration of thirty days, that expired just before the mortgage was given, none of which were kept. So many successive failures to meet engagements were not to be expected of a man in the otherwise apparent circumstances of the bankrupt without some unusual cause, and, in connection with the knowledge of other debts that the defendant had, would naturally indicate to him that want of ability to pay was the cause. These indications, as now viewed, constituted within the meaning of the law according to the settled interpretations, reasonable cause for him to believe that the insolvency, which in fact existed, did exist.

As to whether the defendant knew the mortgage was made in fraud of the provisions of the statutes relating to bankruptcy, it is necessary, in order to avoid it, that he should have known it would operate to the contrary of what the effect of those provisions would be. The effect of those provisions would be to divide the property of the bankrupt, liable for debts, rateably among his creditors without preference of any of those then unsecured over the rest. He knew there were other unsecured creditors to a large amount whom the bankrupt

could not pay more than he could him; that a large part of the property was common to all from which to get their pay; and he must have known when he took the mortgage that if it was valid to secure his debt, he was lessening their chances to get their pay as much as he was improving his own to get his, and that he was thereby obtaining a preference over the rest. So he knew what the effect would be, and the effect he knew of would be fraudulent in the eye of the provisions of those statutes.

It is urged that there was such an agreement to mortgage, made before, that taking this one was not fraudulent. But the evidence, although it shows security was talked about, fails to show any definite agreement to make this or a similar, or in fact any mortgage, earlier than this one was made, and therefore it cannot be found that this mortgage was made in pursuance of a previous agreement to make it earlier. This makes it unnecessary to consider what sort of an agreement in that direction would be sufficient for the purpose. For these reasons, let a decree be entered setting aside the mortgage, with costs.

Case No. 540.

The ARMSTRONG.

[1 Brown, Adm. 130.]¹

District Court, E. D. Michigan. May, 1866.²

NEGLIGENT TOWAGE—EQUIPMENT OF TUGS—LOOK-OUT—INEVITABLE ACCIDENT.

1. A tug, whose master also acts as pilot and engineer, is not properly manned.

[Cited in *The Coleman and Foster*, Case No. 2,981.]

2. It is the duty of a tug towing a vessel through a narrow channel and encountering a snow storm so heavy as to obscure the sight, at once to stop and cast anchor.

3. The want of a competent lookout is a fault of the grossest description.

[Cited in *The Steamer Ancon*, Case No. 348.]

4. The opinion of the master and crew of a tug, that their vessel was properly managed, and that the accident was inevitable, is entitled to very little if any weight.

In admiralty. Libel for damages occasioned by negligent towage. The libellant, the owner of the schooner *Swallow*, brought his action to recover damages for careless and reckless towage across the St. Clair Flats in December, 1866. By the contract set forth in the pleadings and proofs, the tug agreed to tow the schooner safely from Algonac to New Baltimore, a distance of only 14 miles, employing competent power, skill, experience, and a knowledge of the channel, for such an undertaking at that season, and with the vessel as she then was. The tug ran her aground, a few hours after she had taken

¹[Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission.]

²[Affirmed by an unreported decree of the circuit court.]

her in charge, on the morning of the 7th of December, and the libel alleges fault in the reckless and ignorant towage of the respondent. The answer admits the grounding of the schooner, denies that it was the fault of the tug, but alleges that it was the mismanagement of the master of the schooner, after and while the tug was aground. It appeared in evidence that the master of the tug also acted as pilot and engineer, and the mate was also serving in the capacity of wheelsman. [This case was affirmed by the circuit court, but the circuit court decree has not been reported.]

J. S. Newberry, for libellant.
W. A. Moore, for claimant.

WILKINS, District Judge. From the answer the important fact is elicited that the tug ran out of the channel and got aground, and in consequence, the schooner, being attached to the tug, was also grounded, and in the hurry and confusion of such an incident, neglected to detach the line or to cast out an anchor. Neither of these allegations, if clearly proved, would exonerate the tug—because, 1st, the captain of the tug knew the condition of the schooner before he made the contract, as to her active force in case of such an emergency; and, 2d, if his ignorance and incompetency ran the tug aground, he is not excused from responsibility as to the schooner, by her neglect to detach herself immediately from the tug, or stop her own progress by casting anchor. The contract was safely to tow her through the channel for 14 miles, under her then existing condition as to her crew and power of self-control; and it was the grounding of the tug that rendered such other but then unavailable help necessary for her safety. This defense is, therefore, dismissed from consideration.

The business of towage is one of great importance in navigation, and, both in England and in this country, is governed by rules of justice and common sense as certain as those which regulate any other business. Experience and skill are implied in most contracts for work and labor to be performed. A carpenter is not a blacksmith, a tailor is not a lawyer or a physician, neither is a farmer a steam navigator. Holding one's self out as such, against the fact, is a fraud; and, where it embraces the skillful care of property and life upon the water, the fraud amounts to a crime. My mind was strongly impressed during the hearing, that the father and brothers, who owned and had the control of this tug, had not the necessary experience as sailors to warrant them in entering into such a contract; and, though their presence on the witness stand was prepossessing and inviting of confidence, I could not give to their testimony that reliance which would lead to an acquittal from great blame. They ventured the Pass with-

out sounding line or small boat, to feel their way, beset with obstructions, with no other instrumentality but a small pole to exhibit depth of water as they progressed, through a hazardous channel, and at the season of peril. The posts of duty were not sufficiently manned; three persons undertaking the duties at one and the same time, of master, engineer, wheelsman, and lookout, and the master, working the engine one moment, and then hastening to the bow to look ahead and about for the channel. Neither can I determine the case in their favor on their testimony as experts. Their opinion, as to the correct management of their boat, should not be and is not reliable. They swear the blame away from themselves, and attribute it to the act of God, as an unavoidable accident—the result of a blinding snow storm.

Until the act of congress of 1864, [13 Stat. 351, § 3, and page 533, c. 113,] forbidding the exclusion of interested witnesses in civil actions, I had resisted the adoption of the state practice, admitting such as competent, and clinging to the old common law rule as the safest and wisest. When such testimony is offered to a jury, the court has nothing to say, but, as the credibility of witnesses in admiralty is a question for the court, I frankly declare that I will give to such testimony very little confidence, and, more especially where it is but the mere opinion of the witness—under oath, it is true, but a swearing away of personal liability. The yarn spun by sailors, assuming the solemn dignity of testimony, must always be received with caution, and scrupulously sifted, however carefully woven. Sailors will, from habit, compare notes with each other, and where there is a minute exactitude of agreement in narrative, it will lead to suspicion. But the Armstrong brothers and their father were not educated seamen, or so far experienced in the business as to justify the rejection of their statement, simply on that ground. Their concurrent opinion, however, is open to a different objection.

With honorable men—and I know nothing to the contrary but what this father and these brothers are such—interest will not lead to the manufacture of falsehood, or the suppression of truth; but, in ninety-nine cases out of one hundred, such a relation to the case obscures the judgment, and generates mistake. The question of fact is, whether or not the incident was an unavoidable accident, the snow drift blinding the vision of the tug's master and wheelsman, and their judgment that it was so cannot safely be made by the court the basis of its decree in their favor. The occurrence was either an unavoidable accident or the fault was in the tug. The proof exonerates the Swallow. She was to follow, not to lead the tug. The tug first ran out of the channel, and then aground. This caused the Swallow to swing and get aground. Had the tug kept the channel, neither the tug nor schooner

would have got aground. This is clear. But whether she ought to have cast her anchor after the tug was aground, does not affect the question of blame. It is not probable that it would have prevented her grounding; she had not a competent crew to do it, and this the tug's captain well knew when he entered into the contract to tow her through the channel, only 14 miles, in daylight. There was no fault in the Swallow, and her swinging to and fro in this narrow channel, and running into the bank, was caused by her tug pilot running herself ashore. Was it an unavoidable accident? This would excuse. Man is not held responsible for the act of God. But the proof of this must be clear, direct and unquestionable. There was a snow storm while the vessels were in the channel. If it was such as to blind the vision, it was the duty of the tug to stop and await its abatement. Was such the conduct of the captain? He swears, on folio 95: "I did not stop entirely, because I wanted to preserve steerage-way until it cleared up," and "I ran about ten minutes after the snow storm had set in, and did not sing out to stop until my father, by a pole, discovered that we were out of the channel, and the schooner in danger." If, then, the storm was such as they describe, anchorage or stopping the engine was an imperative duty. Ten minutes' run, or a mile, under such circumstances, was imperiling the safety of the schooner, and a gross fault on the part of the tug. The appellate court, in the case of *The Morton*. [Case No. 9,864,] emphatically establishes the rule, that under such incidents the duty of the tug is forthwith to resort to other measures of precaution and prudence to protect her tow, either by slowing, stopping, or sounding. "The tug," says Mr. Justice Swayne, "has no right to dash blindly on, and incur danger she neither knows nor can avoid." If danger threatens, to stop at once is her duty. Where the vision is obscured, in the navigation of a narrow channel, there is imminent danger, and to continue the course, and not stop, is such negligence as makes the tug responsible for the consequences. The alleged storm cannot protect them; their own folly condemns, and that is not inevitable which can, by common prudence, be avoided.

Although sufficient reason is adduced, in the foregoing considerations, for the rendition of a decree for the libellant, I deem it proper to remark, as an admonition to tug masters, that this and the appellate court have determined that, if the catastrophe in these cases can be at all attributed to the want of a proper lookout, such destitution will of itself render the tug liable. Such is the law in this district, and governing the navigation of these contiguous lakes. It is idle to say that the business will not warrant the expense, or that the captain and wheelsman can, on these boats, keep up a sufficient lookout. Recent exposition of the law de-

clares otherwise; and tugs, engaged in towing most of the time property only, are as much required to have competent lookouts as larger steamers, intrusted with the care of human life. A lookout is a functionary in navigation, with duties distinct from the captain, or mate, or wheelsman, and neither of the latter class can supply his place and attend properly to his own specific charge. As well might the captain work the engine, or the engineer manage the wheel, as either engineer or captain keep up a constant, vigilant lookout. It is true, life is more precious than property, and its protection ranks higher in the law, but admiralty makes no preference in administration, and casts its ample aegis over both.

In *The John Fretter*, [Case No. 7,342,] Judge Swayne says: "Where there is no lookout, the fault is of the grossest character, and every doubt relating to the consequences is to be resolved against the tug. It is impossible, in the nature of things, that the captain can perform properly his other duties and also that of the 'lookout,' and he must not attempt it. A crew is not competent without a lookout, either on tugs or steamers. If there be none, the tug cannot avoid her responsibility by the oaths of the captain or crew, if there be the slightest doubt as to the spring-head of the catastrophe." Such is the strong language of the appellate court, and I am sure, as now constituted, will never be modified. Of this our tug-owners may be certain. If the damage accruing can by possibility be attributed to this cause, the essential allegation of a competent crew is disproved, and the oaths of the captain and crew will be received with suspicion.

The proofs in this case establish the fact that the mismanagement of the tug and the ignorance of the channel caused the libellant's vessel to run ashore, and a competent lookout, acquainted with the channel and its banks, might have avoided this grounding, notwithstanding the alleged storm. Piloting a vessel through a narrow channel, although for a short distance, in stormy weather, demands a full crew—master, lookout, wheelsman and engineer—each of whom shall be at their posts; and the lookout cannot be dispensed with, and is as essential to avoid collision with natural obstructions as with other vessels.

Collating, then, in a condensed form, the answer and the reliable proofs, the following facts are prominent, incontestable and conclusive: 1. The *Armstrong*, having the *Swallow* in tow, first got out of the channel, and first ran aground. 2. The contract was for safe towage, and implied a knowledge of the channel, of the condition of the schooner, and the shifting peril of the weather. 3. There was not sufficient time to detach the tow, or to cast anchor, so as to secure the schooner in the channel. 4. To detach the schooner, by cutting her tow-line, would have, from the narrowness of the

channel, and the ignorance of her captain of its banks and breadth, most certainly have run her ashore. 5. The tug continued her course for some minutes after the snow storm had commenced. 6. Instantly stopping might have avoided the catastrophe. 7. The crew of the Armstrong was incompetent for the peril encountered, either for safety or extrication. The grounding of the tug proximately occasioned the grounding of her tow, and if the first could have been avoided by ordinary care and forecast, the proximate was not overruled by any paramount power. If the storm was foreseen, and its peril could have been avoided, the responsibility is with the tug, and cannot properly be ascribed to "a blinding snow storm."

Decree for libellant.

NOTE, [from original report.] Upon appeal to the circuit court, the decree in this case was affirmed.

Case No. 541.

ARMSTRONG v. BEADLE et al.

[5 Sawy. 484; 8 Reporter, 36.]

Circuit Court, D. California. May 12, 1879.

DEATH BY WRONGFUL ACT—EXTRA-TERRITORIAL EFFECT OF STATUTE—DEATH ON THE HIGH SEAS—RIGHT OF ACTION.

1. The statute of California giving a right of action for negligence, resulting in death, has no extra-territorial operation.

[Cited in *The Harrisburg*, 119 U. S. 209, 7 Sup. Ct. 144.]

[See *Crapo v. Allen*, Case No. 3,360.]

[See note at end of case.]

2. Death, resulting from negligence, on the high seas is not within the statute.

3. The statute gives a new right of action, not merely a remedy for an existing right.

[See note at end of case.]

[In admiralty. Heard on demurrer to answer. Demurrer overruled.]

T. P. Ryan, for plaintiff.

Andros & Page, for defendants.

SAWYER, Circuit Judge. The complaint alleges that the plaintiff and his wife took passage upon the steamer Eastport, owned by the defendants, at Empire City, in the state of Oregon, for San Francisco, in the state of California; that on the voyage the steamer, near Point Arena, struck a rock and settled down in the water and became immovable; that plaintiff's wife afterwards entered a surf boat, by direction of the master, whereupon one end of the boat fell suddenly into the sea, in consequence of the negligence of those in charge, and plaintiff's wife was precipitated into the sea and drowned. The action is brought under section 377 of the Code of Civil Procedure, for damages sustained by the loss of the wife. The provision is, that "When the death of a

person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death." The answer admits the principal facts; but alleges, that while said steamship was proceeding on her voyage, and on the high seas, the said steamship was, by the perils and accidents of the seas, forced and cast upon a rock, whereby the ship and cargo became a total loss, and the death of plaintiff's wife thereby occurred without the privity or knowledge of defendant. Other facts were alleged, designed to bring the case within the provisions of section 4283 of the revised statutes of the United States. The plaintiff demurs to this answer, on the ground that it does not state facts sufficient to constitute a defense.

The first point presented is, that the statute has no extra-territorial operation, and is limited to accidents occurring within the territorial jurisdiction of the state; and as the death occurred upon the high seas, beyond the legislative jurisdiction of the state, the statute is inapplicable. There was no liability at common law for the death of a party, resulting under circumstances like those set out in the complaint; and unless the statute in question gives the right of action, the plaintiff cannot recover. The statute, undoubtedly, creates a new right of action, and does not merely give a remedy for a right already existing. If it operates beyond the territorial jurisdiction of the state, then it becomes a universal law, applicable to all countries, and the legislature of California would be adopting a code of laws affecting the rights of parties arising out of acts done wholly in foreign countries as well as upon the high seas. If California can pass laws of the kind, operating extra-territorially, then other states and countries can pass laws upon the same subject operating upon the high seas, and these laws may be in conflict; but there is nothing in the statute to indicate that it was intended to operate beyond the limits of the state. After giving a synopsis of the statutes of the several states which have legislated on the subject, Shearman and Redfield, in their work on Negligence, state the rule, as to their effect, as follows: "The operation of these statutes is limited to the territory of the states which have enacted them. No action can be maintained upon one of these statutes, if the deceased person received the fatal injury at a place not within the limits of the state by which such statute was enacted, whether such place be in another state, or upon the high seas." Section 296. The rule as stated is fully sustained, both by reason and the authorities. *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Mahler v. Norwich & N. Y. Transp. Co.*, 35 N. Y. 352; *Needham v. Grand Trunk R. Co.*, 38 Vt. 295; *Selma R. & D. R. Co. v. Lacy*, 43 Ga. 461, 49 Ga. 107; *Woodward v. Michigan S. & N. I. R. Co.*,

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10 Ohio St. 122. In the latter case, where the death resulted from negligence in Illinois, the statute of which state gave a right of action for the death to the administrator, the court go so far as to hold that the statute of Illinois can have no operation in Ohio, and that the action, though maintainable in Illinois, cannot be maintained in the state of Ohio. So, in Massachusetts, it is held that the action upon the statute cannot be maintained outside of the state enacting it. In this case, it appears both from the complaint and answer, that the negligence complained of, and the death occurred upon the high seas, outside of the territorial jurisdiction of the state. It is, therefore, not within the operation of the statute.

There was a total loss of vessel and cargo, except as to three hundred dollars, for which the wreck was sold by the underwriters after abandonment, and whatever insurance money was due. This case is, undoubtedly, within the provisions of section 4283 of the Revised Statutes of the United States, limiting the liability of owners of vessels, as it was engaged in inter-state and foreign commerce. *Lord v. Goodall, Nelson & Perkins S. S. Co.*, [Case No. 8,506.] But, as it is held that the case is not within the statute, and there is no liability at all, it is unnecessary to consider the other points, as to whether there can be a recovery to the extent of the insurance money, or the three hundred dollars for which the wreck sold. Demurrer overruled.

[NOTE. In a number of cases, courts of admiralty have followed the rule of the civil law that civil actions do not die with the person, and have permitted the recovery of damages for wrongful death by libel in rem or in personam. *Cutting v. Seabury*, Case No. 3,521; *The Charles Morgan*, Id. 2,618; *The Sea Gull*, Id. 12,578; *Holmes v. Oregon & C. Ry. Co.*, 5 Fed. 75; *The Towanda*, Case No. 14,109; *The City of Brussels*, Id. 2,745. This doctrine was subsequently overruled by the supreme court in *The Harrisburg*, 119 U. S. 209, 7 Sup. Ct. 144. Mr. Chief Justice Waite, in delivering the opinion of the court, reviewed the authorities, both English and American, and said: "We know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land; and the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched. It is not mentioned in the laws of Oleron, of Wisbuy, or of the Hanse Towns, (1 Pet. Adm. Append.) nor in the Marine Ordinance of Louis XIV., (2 Pet. Adm. Append.) and the understanding of the leading text writers in this country has been that no such action will lie in the absence of a statute giving a remedy at law for the wrong. *Ben. Adm.* (2d Ed.) § 309; 2 Pars. Shipp. & Adm. 350; *Henry, Adm. Jur. & Proc.* 74. The argument everywhere in support of such suits in admiralty has been, not that the maritime law, as actually administered in common-law countries, is different from the common law in this particular, but that the common law is not founded

on good reason, and is contrary to 'natural equity and the general principles of law.' Since, however, it is now established that in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. The rights of persons in this particular, under the maritime law of this country, are not different from those under the common law; and, as it is the duty of courts to declare the law, not to make it, we cannot change this rule."]

Case No. 542.

ARMSTRONG v. BROWN.

[1 Wash. C. C. 43.]¹

Circuit Court, D. Pennsylvania. April Term, 1803.

DEPOSITIONS—COMMISSIONERS NOT ACTING—SET-OFF—UNLIQUIDATED DAMAGES.

1. A commission directed to five commissioners, to be executed by them, must be executed by the whole five persons; although the commissioners nominated by the party objecting to the execution, were present, but did not act.

2. The drawer of a bill of exchange, protested after acceptance, having paid the damages, cannot set off the same, in an action against him by the acceptor, on another account, although the acceptor had funds in his hands to pay the bill, the damages being unliquidated.

[See *De Taslet v. Crousellat*, Case No. 3,827; *Id.* 3,828.]

Ruled in this case, that if a commission for taking depositions be directed to five commissioners, of whom three are named by the plaintiff and two by the defendant, and is executed by three only, or by any number less than the whole; the deposition is not well taken, and cannot be read; although the two commissioners named by the defendant, by whom the objection is made, were present. Their authority is special, and must be executed according to the tenor of it. It is unusual to require that more than two or three of the commissioners named shall act, so that one in each nomination be present, to execute it.

Secondly: It was ruled that the drawer of a bill which was protested, having paid twenty per cent. damages thereon, cannot, in an action against him by the acceptor on another account, offset them against the acceptor, who had funds in his hands to have paid the bill, because they are unliquidated damages.

¹[Published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

Case No. 543.

ARMSTRONG v. CARSON.

[2 Dall. 302.]¹

Circuit Court, D. Pennsylvania. April Term, 1794.

ACTION ON JUDGMENT—PLEADING.

Plea of nil debent to action brought on a judgment obtained in a state court of another state, inadmissible.

[Cited in *Banks v. Greenleaf*, Case No. 959; *Jacquette v. Hugumon*, Id. 7,169; *Taylor v. Carpenter*, Id. 13,785; *Burnham v. Webster*, Id. 2,179.]

At law. A judgment having been obtained in the supreme court of the state of New Jersey, an action of debt was brought upon it here; and the defendants pleaded nil debent.

But Bradford contended, that, consistently with the federal constitution, (article 4, § 1,) and the act of congress of 26th May, 1790, (1 Swift's Ed. p. 115,) the plea was inadmissible. The constitution declares that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." And the act provides, that those records and judicial proceedings, being authenticated in the mode prescribed, "shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state, from whence the said records are, or shall be taken." It is a general principle, that a debt cannot be denied, without denying the instrument on which it is founded; and the only question left open, by the act of congress, is—whether the courts of New-Jersey would sustain any other plea than nul tiel record, if the present action had been brought there.

Ingersoll declined arguing the point for the defendant, thinking it clearly against him.

WILSON, Circuit Justice. There can be no difficulty in this case. If the plea would be bad in the courts of New-Jersey, it is bad here: for, whatever doubts there might be on the words of the constitution the act of congress effectually removes them; declaring in direct terms, that the record shall have the same effect in this court, as in the court from which it was taken. In the courts of New-Jersey no such plea would be sustained; and, therefore, it is inadmissible in any court sitting in Pennsylvania.

Bradford then proposed settling the interest; but WILSON, Justice, observed, that he had had more than one occasion to object to the court's interposing, in any form, to assess damages. In some states, he said, it had, indeed, grown into a practice; and the courts had in that, and, perhaps, in many other instances, done the business

which ought to go to a jury. Lewis referred to a case in the supreme court of the United States, in which this point had been made, tho' not directly, decided: but the judge said, it was not the foundation of the judgment, of the court, and that, in his opinion, a writ of enquiry was the regular mode of proceeding.

It being suggested, however, that the usage in the state courts was to enter the judgment generally; and that the plaintiff must ascertain the debt, and issue execution at his own peril; that mode was adopted on the present occasion. Judgment for the plaintiff.

ARMSTRONG, (DAVIS v.) See Case No. 3,624.

Case No. 544.

ARMSTRONG v. HANLENBECK et al.

[3 N. Y. Leg. Obs. 43.]

Circuit Court, S. D. New York. Feb. 29, 1844.

PATENT RIGHT—ASSIGNMENT—AGREEMENT—INJUNCTION.

1. A., being the patentee of a machine for cleaning and polishing knives, entered into an agreement with H. whereby he assigned and released to the latter all his right, &c., to the patent, so far as the exclusive right of manufacturing and vending the machine should extend for a term of years, in consideration of a weekly payment of \$10 for such privilege. The agreement contained a proviso as follows: "It is further provided and agreed that, if the weekly payments aforesaid shall remain due and unpaid for four successive weeks, that then it shall be at the option of the said party of the first part, (A.) (upon showing proof of his having demanded payment thereof,) to claim and take back the interest in the said letters patent." &c. On the 4th January, a demand was made of H. for \$100 weekly arrears since October preceding, and the next day a suit was instituted by A. against H., upon which H. appeared on the 8th January, and confessed a judgment for a \$100 for arrears due from 15th October to December 25th, 1843. A. subsequently served a notice on H., claiming to exercise the option of taking back the interest in the letters patent conformably to the terms of the agreement. H., however, disregarded the notice, and continued to manufacture and vend the machines. On a bill filed for an account and general relief: *Held*, that the confession of judgment by H. at the suit of A. amounted to an admission by H., that the weekly payments were in arrear, and that legal demand of payment had been made,—that consequently the proceedings of H. since the 8th January were not justified by the agreement, but were in violation of the complainant's right.

2. *Held*, also, that the agreement conveyed no interest in the patent right, but amounted to a mere licence, with a limitation or condition at its continuance.

3. *Held*, also, that the institution of proceedings by A. to recover the arrears due, did not thereby affirm the licence, and that the doctrine in respect to forfeiture of leases in cases of re-entry and distress for arrears of rent, had no application to such an interest as that assigned.

[In equity. Bill for injunction to restrain further infringement of patent No. 2,435, granted to M. N. Armstrong, January 24, 1842. Injunction ordered.]

¹[Reported by A. J. Dallas, Esq.]

John Cook, for complainant.
A. Crist, for defendant.

BETTS, District Judge. The bill prays an injunction and account, and general relief in respect to the violation of a patent right granted the complainant.

The essential facts upon which the suit is founded are, that under letters patent issued January 4, 1842, to the complainant, he became proprietor of the right to a machine for cleaning and polishing cutlery, and that by an agreement in writing entered into between him and the defendant Hanlenbeck, on the 17th of March, 1843, he assigned and released to the latter, all his right, title and interest in those letters patent, as far only as the exclusive right of manufacturing and vending the said machine shall extend, for the term of seven years from the 5th of April, 1842, on the consideration of a weekly payment of \$10 for such privilege, with the right to the assignee at any time during that term to terminate the agreement by re-assigning his interest to the grantor. Neither party was "to have the power to sell or use the patent right or any part, right, title or interest thereof, without the written consent of the parties." The agreement concluded with this stipulation, "It is further provided and agreed between the said parties, that if the weekly payment aforesaid shall remain due and unpaid for four successive weeks, that then it shall be at the option of the said party of the first part, (upon showing proof of having legally demanded payment thereof,) to claim and take back the interest in the said letters patent, hereby conveyed to the said party of the second part, and to have and to hold the same as fully and entirely as if the same had been re-assigned to him by the said party of the second part."

On the 4th of January demand was made of the defendant Hanlenbeck for payment of \$100 weekly arrears since October 16th preceding, and the next day, suit was brought therefor on summons in the marine court, returnable the 8th day January. On the latter day the defendant appeared and confessed judgment on the demand to \$100 for arrears from October 16th to December 25th, 1843. On the same day the complaint served a written notice on the defendant Hanlenbeck, that he exercised the option secured him by the agreement, and took back the interest, &c., conveyed by it, "because the stipulated weekly payments have been and are in arrear and unpaid for more than four successive weeks, and payment thereof has been legally demanded." The bill charges that the defendants since the 8th of January last have continued to manufacture and vend the machines, and now have them on hand and in process of manufacture. The bill is opposed upon two general grounds, 1. That the defendant always tendered the weekly payments within the times limited,

but the complainant refused to receive them, and that accordingly there was no default. 2. That the complainant cannot enforce the forfeiture of the grant for any default antecedent to the 8th of January, because he then took a judgment at law for the amount in arrear, and the suit and judgment were a waiver in law of the forfeiture if any had occurred.

Depositions of several witnesses are referred to in the written arguments as supporting the allegations of tender, but no such depositions are submitted with the papers, and none are on file in the clerk's office. Accordingly the fact must be determined by the statements of the bill. The bill admits various propositions to pay the weekly arrears, but asserts they were never made by the defendant, and that a receipt to him therefor was offered by the complainant and refused by those proposing the payments, the complainant then supposing and now alleging that the purpose was to lead him to recognize other parties than Hanlenbeck as possessing the right in question, which he refused to do. It is, however, unnecessary to weigh the effects of those offers, because by confessing judgment to \$100 the defendant admits the weekly payments in arrear for ten weeks prior to the 25th of December, and he cannot now be allowed to go behind that judgment, and prove there was no default of payment. The judgment must be regarded as establishing the fact, that default was made by defendant for more than four successive weeks, and that legal demand of payment was made.

The second point has been urged with great strenuousness, and it is supposed the doctrine in respect to the forfeiture of leases applied in cases of re-entry and distress for rent, governs this case. On that subject the law is claimed to be that a forfeiture accruing upon a clause of re-entry in a lease is waived, if the landlord distrain for rent, or subsequently does any act amounting to a recognition of the lease as existing and in force. The supreme court of this state seems to consider the established rule of common law to be that distraining for rent after condition broken deprives the landlord of the right of re-entry, under a re-entry clause in his lease. [Jackson v. Sheldon,] 5 Cow. 454. If this be a true interpretation of the rule, it is certainly one turning on a very narrow point. The same case however conceded that the landlord may have a right of action on the contract to pay rent, and also enforce the forfeiture of the lease by re-entry. [Jackson v. Sheldon,] 5 Cow. 457; [Walker's Case,] 3 Coke, 64. But although the relation of landlord and tenant has some similitude to that of these parties, it is by no means identical with it, and ought not therefore to be resorted to as supplying the law of the case. It is to be observed that the agreement between these parties conveyed no interest in the patent right,

The defendant has accordingly no assignment or letting of the estate of the complainant. He could protect the privilege granted him only as against the complainant, he had not such an interest as would enable him to maintain actions against third persons for a violation of the patent right. The grant accordingly amounted to a mere license with a limitation or condition as to its continuance.

The doctrine of forfeiture in its strict sense would not be applicable to an interest of that character—no estate being imparted, and it being no more than a covenant letting to hire, a method or discovery of the complainant, upon a condition of recall or revocation on the omission by the defendant to pay the stipulated hire therefor. Upon the bill, I think it clear that the defendant has failed to fulfill the condition on the performance of which alone his right to use the privilege given him was to continue. And that accordingly upon the fact of his default, and the notice from the complainant that he has therefor exercised his option to terminate the agreement, his license to manufacture and vend the machine ceased on the 8th of January last. The motion that bringing an action to recover the arrears due for the use of the privilege, was a re-affirmance of the license, abrogates one main feature of the contract, for the agreement was absolute to pay the stipulated hire, and also that the right should cease if that part of the contract was not fulfilled: it would accordingly be incongruous to hold that the complainant could not terminate the license without losing his remedy for past dues, or prosecute for those without re-asserting the continuance of the privilege.

In my opinion, the claimant could resort to either or both remedies, and his action for the debt being in no way incompatible with his resumption of the privilege under the contract. I hold that the proceedings of the defendant since the 8th of January are not protected or justified by the agreement, and are in violation of the complainant's patent right. Upon the case as it stands, the defendants are found manufacturing and vending the patented machines without any subsisting authority or license from the patentee, and the injunction prayed for must accordingly issue. Injunction ordered.

Case No. 544a.

ARMSTRONG v. HOYT.

[5 Hunt. Mer. Mag. 76.]

Circuit Court, S. D. New York. April, 1841.

CUSTOMS DUTIES—EXPORT VALUE—WOOL.

[Taking section 15 of the tariff act of 1832 as explanatory of section 2, which provides that unmanufactured wool, "the value whereof at the place of exportation shall not exceed eight cents per pound shall be imported free of duties," the charges and expenses at the place of exportation, which, by section 15, in

computation of ad valorem rates of duty, form no part of the actual value, are not to be taken in determining the value of the wool, with the view of ascertaining whether it is dutiable.]

[At law. Action by Armstrong against Hoyt, collector, for the return of import duties illegally collected on certain importations of wool. Judgment for plaintiff.]

Before THOMPSON, Circuit Justice, and BETTS, District Judge.

This is an action against the collector, presenting a question as to the construction of the second section of the tariff act of 1832: by this act, "wool, unmanufactured, the value whereof at the place of exportation shall not exceed eight cents per pound, shall be imported free of duties:" if of greater value, it is subject to duty.

The invoice is relied on by both parties. If the charges and expenses at the place of exportation are added to form the value, then the wool would appear to have cost more than eight cents per pound—otherwise to have cost less: and the question is whether these charges are to be taken as forming part of "the value at the place of exportation," in the meaning of this law. The fifteenth section of the act is referred to as explanatory of the term "actual value." By that, the ad valorem rates of duty are to be computed on actual cost or actual value, and this phraseology appears—"to the actual cost, if the same shall have been actually purchased, or to the actual value, if the same shall have been procured otherwise than by purchase, at the time and place when and where purchased or otherwise procured. shall be added all charges, except insurance." Now "the charges" are not expressly mentioned in the second section, as constituting part of the actual value: but in the fifteenth section, the actual value is treated as a thing to which the charges are to be added: as something distinct from the charges, and of which, of course, the charges are no part. The words "actual value" in each section must mean the same value. If it is exclusive of charges in the fifteenth section, so it must also be in the second section; and the charges therefore must be left out of view in determining if the actual value of the wool was eight cents per pound. Judgment, therefore, is rendered for a return of the duties.

Case No. 545.

ARMSTRONG v. MECHANICS' NAT. BANK.

[6 Biss. 520.]

Circuit Court, N. D. Illinois. March, 1876.

SETTLEMENT WITH CREDITORS—PREFERENCE—MISREPRESENTATIONS.

Where a debtor who has made a settlement with his creditors, seeks to recover a certain

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sum paid by him to one creditor, above the percentage paid to others, it is a good answer that the settlement was obtained by misrepresentation, and that the debtor concealed a valuable portion of his assets.

[Cited in *Owens v. Ohio Cent. R. Co.*, 20 Fed. 15.]

[In equity. Bill by Edwin R. T. Armstrong against the Mechanics' National Bank of Chicago] to recover the sum of thirteen hundred dollars paid by the complainant under the following circumstances: Early in 1873, complainant became embarrassed, and being unable, as he claimed, to pay his debts in full, he entered into a composition arrangement with all his creditors, among whom was the defendant, by which he agreed to pay and they agreed to accept fifty cents on the dollar of their claims, such payment to be secured by notes indorsed or guaranteed by a third party. The complainant alleged, however, that the defendant refused to sign the composition unless it should receive notes for ten per cent. in addition to the fifty per cent. agreed to be paid to the other creditors. This was denied by the defendant, which insisted that Armstrong regarded its claim as of a higher character than those arising from commercial transactions, it being for borrowed money, and that, after the composition was signed, he volunteered to give the defendant his notes for the extra ten per cent. It was admitted that the defendant did receive the complainant's notes for ten per cent. of its claim, in excess of what was received by the other creditors. These notes were assigned by the defendant to another bank, before maturity, and paid by the complainant. He thereupon filed this bill to recover the amount of the ten per cent. thus agreed to be paid to the defendant, alleging that the notes for the same were obtained from him in fraud of the rights of his other creditors, and without their knowledge. The defendant insisted that the complainant had himself been guilty of fraud in not making a full disclosure of his assets to his creditors at the time the composition was obtained.

E. A. Otis, for complainant, cited:

Wood v. Barker, L. R. 1 Eq. 139; *Breck v. Cole*, 4 Sandf. 79; *Lawrence v. Clark*, 36 N. Y. 128; *Way v. Langley*, 15 Ohio St. 392; *Russell v. Rogers*, 10 Wend. 473; *Cockshott v. Bennett*, 2 Term R. 763; *Jackson v. Lomas*, 4 Term R. 166; *Horton v. Riley*, 11 Mees. & W. 492; *Bean v. Brookmire*, [Case No. 1,170;] *Hatch v. Hatch*, 9 Ves. 292; *Jackman v. Mitchell*, 13 Ves. 581; *Story, Eq. Jur.* 378; *Saddler v. Jackson*, [Ex parte Sadler,] 15 Ves. 52; *Howden v. Haigh*, 11 Adol. & El. 1033.

McCagg, Culver & Butler, for defendant, cited:

Seving v. Gale, 28 Ind. 486; *Huntington v. Clark*, 39 Conn. 540; *Richards v. Hunt*, 6 Vt. 251; *Clarke v. Tipping*, 4 Beav. 588; *Phetti-*

place v. Sayles, [Case No. 11,083;] *Mallalieu v. Hodgson*, 16 Q. B. 689.

BLODGETT, District Judge. This bill is filed to recover from the Mechanics' National Bank thirteen hundred dollars, which, it is alleged, was extorted by the bank from the complainant, by moral duress, or, by taking an unfair advantage of the circumstances in which the complainant was placed at the time of the alleged transaction. In 1873, Armstrong, then a merchant in this city, finding himself embarrassed in his pecuniary affairs, sought a composition with his creditors, and for that purpose made out a statement of his financial matters, assets, and liabilities, and presented it to his creditors, representing that from that showing he would be able to pay them fifty cents on the dollar. The Mechanics' National Bank was a creditor for money loaned, and interest accrued thereon to the amount of thirteen thousand dollars.

The allegation of the bill is, that Armstrong applied to the Mechanics' National Bank to have them sign the composition; that they refused to do so unless he would also, in addition to paying them fifty cents on the dollar, give them his notes for ten per cent. more, making sixty cents on the dollar, and that in order to secure the assent of the bank to his composition, he did give them his notes according to the terms of the composition for the fifty cents, and then his further notes for the sum of thirteen hundred dollars, to make up the additional ten per cent. which was exacted from him. This bill is now brought to recover back the excess over the fifty cents on the dollar, on the ground that it was extorted from him because of the peculiar circumstances under which he was placed.

The defense set up, is that the composition itself, offered and obtained by Armstrong, was fraudulent.

The evidence shows that Mr. Armstrong made out what purported to be an abstract, from his books, showing his liabilities and assets, which he presented to his creditors, claiming it to be a true one, and offering to allow his creditors to examine his books; that Mr. Page was the vice-president of the bank, and that his firm were also creditors of Armstrong to the amount of several hundreds of dollars, and that in his own behalf, as a member of the firm, and also as an officer of the bank, he examined Armstrong's books, was satisfied that fifty cents on the dollar was all that he could pay, and recommended the officers of the bank to accept the proposed compromise. Mr. Scammon, the president, claimed that an indebtedness to a bank for borrowed money stood upon a different footing from a commercial indebtedness for goods sold, and that the bank ought not to compromise for the same amount. It is claimed that on making out this statement, upon which the compromise

was finally effected, Mr. Armstrong omitted from his statement of assets, a valuable farm in the central part of Illinois, which cost him over three thousand dollars, and a thousand dollars full paid stock in the Republic Life Insurance Company, and the evidence shows very satisfactorily and completely, that he did keep back from some of the creditors the knowledge of his interest in this farm.

The law undoubtedly requires that parties seeking or making a composition with their creditors should make a full and honest disclosure of their affairs. Any withholding information valuable to creditors vitiates the entire transaction. It also, undoubtedly, authorizes a party who, for the purpose of getting a given creditor to sign, is compelled to pay more than he pays other creditors to recover back from the extorting creditor the amount which he is paid in excess of the others. But it strikes me very forcibly, and I can see no escape from the position, that a creditor, coming as Mr. Armstrong now does into this court, to recover money which he claims has been extorted from him, must come with clean hands and be able to show that the composition which he sought to, and did, obtain from his creditors, was such an one as they would have indorsed if they had known all the facts. Now, here are four thousand dollars of this debtor's assets concealed from the creditor whom he now calls into court to answer for unfair practice, and I have no doubt that this creditor may reply to such demand by saying that the composition obtained was a dishonest one; nor have I any doubt that if Armstrong were now solvent, a cross bill might be filed to recover the full amount of the debt.

The evidence regarding this farm has been extorted from Armstrong in such a manner as to make it at least a very strong circumstance against his good faith. Of course, there may be such a thing as a man with fifty or sixty thousand dollars assets, overlooking an item of this kind; but in the first place, Armstrong's commercial books, to which he invited his creditors' scrutiny, contained no reference whatever to this farm, and it does not appear that Mr. Page's attention or notice was called to it. Nor does it appear in his exhibit of assets and liabilities. When the defendant first began to ascertain that there was any withholding of information regarding assets, Armstrong was asked if the exhibit which he presented to Mr. Page, and upon which this composition was negotiated, contained a true statement of his liabilities and assets. He said, finally, after some hesitation—"Certainly it is true, as far as the liabilities are concerned." Subsequently, he was asked if he had any interest in this farm: he stated that the title was in his wife. It was subsequently developed—extorted item by item—that the facts regarding the farm were these:

Sometime in 1868, he bought this farm at

a cost, including improvements, of over three thousand dollars, placed the title in the name of his wife, and his father in possession. In 1871, Mrs. Armstrong died, leaving a will in which she devised this property to her husband, which will was never probated, but was retained by Armstrong in his own possession. During the time this settlement was being negotiated with his creditors the facts regarding this farm were certainly withheld from Mr. Page, and the officers of the Marine Bank. It seems to me that there was clearly such concealment of some part of this party's assets, as to at least constitute a sufficient answer to his present claim of having been unfairly dealt with; that the complainant is not in such a position that he can complain of unfair dealing on the part of the defendant. The bill is dismissed.

NOTE, [from original report.] To pay one creditor or his agent a larger sum than was to be paid to others, as a condition of accepting a compromise is void, and if the creditor's agent was specially retained by the debtor to urge the compromise, any promise to pay the agent for such service is void. *Bullene v. Blain*, [Case No. 2,124.]

ARMSTRONG, (MORRILL v.) See Case No. 9,822.

Case No. 546.

ARMSTRONG v. RICKEY.

[2 N. B. R. 473. (Quarto, 150); 1 Ch. Leg. News, 145; 2 Amer. Law T. Rep. Bankr. 65.]

District Court, N. D. Ohio. Jan. Term, 1869.

BANKRUPTCY—JUDGMENT ON NOTE—LEVY—VALIDITY.

[1. A judgment on a note with a warrant of attorney to confess judgment, which is not paid at maturity, and a levy on the debtor's lands on the day before the petition in bankruptcy is filed,—the debtor having supposed himself solvent when he made the note, and the payee, up to the day of the judgment, having no reasonable cause to believe the debtor insolvent, or that he intended a fraud on the bankrupt law,—will not be declared void in bankruptcy proceedings.]

[2. A levy made by the sheriff's merely getting a description of the debtor's lands at the recorder's office, and endorsing on the execution the fact of a levy and a description of the lands, without going near them, according to the usual mode in Ohio, since it would be held good by the state courts, should be so held by a federal court in bankruptcy proceedings. The sheriff's return, being a matter of record, is conclusive, and cannot be inquired into in such proceedings, but, if false, must be answered for by him in an action by the proper party.]

[Cited in U. S. v. Hess, Case No. 15,358.]

[In bankruptcy. Petition by Charles Armstrong, assignee of George Garlinghouse, to declare void a levy in favor of Messrs. Rickey & Brother. Denied.]

SHERMAN, District Judge. Charles Armstrong, assignee of George Garlinghouse, a

bankrupt, files in this court a petition, in which he states, that on the 19th day of March, 1868, the said Garlinghouse filed his petition to obtain the benefits of the bankrupt law, and that on the same day he was declared a bankrupt; that on the 9th of April, 1868, the said Armstrong was appointed his assignee; that he took possession of the property and assets of said Garlinghouse as such assignee; that among the assets were lands in Delaware county, Ohio; that the said lands were much encumbered by mortgages and judgment liens, and that subsequently, by order of this court, he sold said land, and has now the money, the proceeds of said sale, in court; that among the judgment liens is a judgment and levy in favor of Messrs Rickey & Brother, of Columbus, Ohio, which he alleges is void and invalid under the bankrupt law, and prays the court to so declare it. To this petition Rickey & Brother have fully answered, and claim that the judgment and levy is a valid and subsisting lien upon said lands.

A large amount of testimony has been taken, and from the petition, answer, and testimony, the following facts are established: George Garlinghouse, the bankrupt, had been for some years a resident of Delaware county, of large means, and of good reputation as a business man and for solvency. He had frequently borrowed money of the Rickey Brothers, bankers, in Columbus, Ohio, and had always met his paper. In December, 1869, he borrowed of the Richeys three thousand dollars at ninety days, and gave therefor his note with a warrant of attorney to confess judgment, with one Hunt and one Adams as his sureties. This note was not met at maturity, and on the 18th day of March, 1868, the Richeys caused judgment to be entered on it in the court of common pleas of Franklin county. On the same day they caused an execution to be issued on that judgment to the sheriff of Delaware county, which was taken to the sheriff by one of the Richeys and their attorney, and on the morning of that day was by him levied on the lands of Garlinghouse, in Delaware county. On the same 18th day of March, Garlinghouse was in Columbus, engaged with his attorney, in preparing his petition and schedules in bankruptcy, to be filed in this court. Garlinghouse and his attorney, and one of the Richeys and his attorney, were both in the same train of cars, one going to Cleveland to file the petition, and the other to Delaware to make the levy. Garlinghouse, at the date of the execution of the note and warrant of attorney to the Richeys, had a good reputation for solvency, and thought himself perfectly solvent. He had no suspicion or knowledge of his insolvency until some ten days before the filing of his petition. There was no proof whatever that the Richeys knew, or had reason to believe him to be insolvent, down to the 18th day of March, the date of their

judgment, and there is but very slight evidence that they even knew it then, not until next day. The assignee, under this state of facts, claims: First, that the warrant of attorney and the judgment thereon was an act done for the purpose of and by way of making a preference in favor of the Richeys. The thirty-fifth and thirty-ninth sections of the bankrupt act, and the whole scope of the law, intends and declares that to make any act of preferring one creditor over the others invalid, it must be done under such circumstances and state of things that the creditor had reasonable cause to believe the debtor to be at the time insolvent, and intending to commit a fraud or violate the provisions of the bankrupt act. The question here arises, at what time in the history of this transaction should the creditor's knowledge of the debtor's insolvency and his fraudulent intent be established. Should it be at the date of the warrant of attorney, or the date of the judgment and levy. A debtor can only be declared and adjudged a bankrupt by reason of his own acts. The acts and doings of his creditors or other persons cannot constitute and make him guilty of an act of bankruptcy. He must do some act himself which the law declares shall cause him to be adjudged a bankrupt. In this case the only act done by Garlinghouse was the execution and delivery of the warrant of attorney to the Richeys, and that was done on the 4th of December, 1867, more than three months before the judgment thereon and the levy. The judgment and levy were acts of the Richeys, the creditors, and officers of the law, and not the act of Garlinghouse. The judgment and levy were independent and outside of him. It was not done at his instance nor could he control it, and he should not be answerable for them. When he executed and delivered the note and warrant of attorney on the 4th of December previous, it was his act, and he is bound for the consequences of the act. It is a principle of law in bankrupt cases, that if the intent and actions of a debtor are to give a legal construction to a transaction, it must be an intent governing the act done by himself and not by others. *Buckingham v. McLean*, 13 How. [54 U. S.] 169. We must therefore inquire whether Garlinghouse intended to commit an act of bankruptcy at the date, December 4th, and not on March 18th, the date of the judgment and levy.

On this point it is not claimed by the petition that Garlinghouse knew he was insolvent, though he may have been so in fact, or that he intended to give the Richeys a preference. Nor is it claimed that the Richeys had reasonable cause to believe Garlinghouse insolvent, or that he intended a fraud on the bankrupt law. On this point the assignee has failed to sustain his claim. But he secondly claims, that the levy made by the sheriff of Delaware county, on the even-

ing of the 18th of March, 1868, was invalid and void. The facts are these, that on the evening of the day judgment was entered on the note and warrant of attorney, in Franklin common pleas, an execution issued thereon was placed in the sheriff's hands by one of the Rickeys and their attorney; that the sheriff went to the recorder's office of his county, there obtained a description of Garlinghouse's lands and made his levy, by endorsing the fact of a levy and a description of the lands on the back of the execution. He was not on the lands—not near them nor in sight of them. Under this state of facts it is claimed that, under the laws of Ohio, this levy was invalid, and because of the mode of the levy it was not a lien upon the lands. It is possible that this mode of levy may not be quite regular. But it is the usual mode of making levy in Ohio, and been so practiced for years. It would be treated as a good levy by the courts of the state, and whatever is declared and treated as a valid and subsisting lien by the state laws and courts will so be treated by this court. But the answer to this claim is, that the return of the sheriff is a matter of record, and therefore conclusive, and cannot be enquired into by us in this proceeding. If the return is false, if the sheriff did not make a legal levy, he is answerable for it to the proper party, in a proper action, but its truth or falsity cannot be enquired into at this time and in this proceeding. *Hill v. Kling*, 4 Ohio, 136; [*Hall v. Crocker*,] 3 Metc. [Mass.] 245; [*Wendell v. Mugridge*,] 19 N. H. 109. We, therefore, hold that the debt and judgment of the Rickeys is valid, and that it was not given by way of preference, and that the levy of the execution upon the lands of Garlinghouse, the bankrupt, is a lien upon them, and that the judgment should be paid out of the proceeds of the sale in the hands of the assignee.

Case No. 547.

ARMSTRONG v. The RYDESDALE.

[Betts' Ser. Bk. 684.]

District Court, S. D. New York. April 3, 1862.

FOREIGN SEAMEN—WAGES—JURISDICTION OF DISTRICT COURT—PLEADING—SECURITY FOR COSTS.

[1. On libel against a vessel for wages, an affidavit of a person representing himself as her agent, that she is a foreign vessel, will not overcome the oath of the libellant that she is an American vessel, so as to entitle the claimant to a dismissal of the libel.]

[2. The district court may, in its discretion, take cognizance of such suits by foreign seamen against foreign masters or owners or the foreign vessel itself, if the service has terminated or the contract does not stipulate against its enforcement in a foreign jurisdiction.]

[In admiralty. Libel by Robert Armstrong against the brig Rydesdale for seaman's wages. The agent of the brig moves to dismiss the libel for want of jurisdiction. Denied.]

The libel alleged that the vessel was an American vessel, and that the libellant served on board from July 25 to Dec. 6, when he was discharged, leaving \$32 wages due and unpaid, but it did not say where he was discharged, nor that he was an American seaman. On that libel, process of attachment issued against the vessel. An application was made, on the affidavit of a person representing himself to be an agent and consignee of the vessel, that she was not an American, but a British, vessel, that the court dismiss the libel, as out of its jurisdiction, and also because the libellant gave no stipulation for costs before instituting the suit.

Mr. Hart, for libellant.

Judge Beebe, for claimant.

BETTS, District Judge. The motion cannot prevail for either of those causes. The affidavit of the agent does not countervail or displace the oath of the libellant, that the vessel is an American vessel. The jurisdiction of the court does not depend upon the nationality of the vessel. The court may, in its discretion, take cognizance of such suits brought by foreign seamen against foreign masters or owners, and under urgent circumstances, against the foreign vessel itself, if the service has terminated or the contract does not stipulate that it shall not be enforced within a foreign jurisdiction. The proceeding might have been disregarded by the libellant because the notice of motion was not given in the name of any proctor of the court, and because no claimant is before the court. But on the papers, and on the concession of the libellant's counsel, that he is a foreigner, there is *prima facie* reason for an order that he file security for costs, or show cause why he should be excused from so doing. Order accordingly.

ARMSTRONG, (TOLER v.) See Case No. 14,078.

ARMSTRONG, (UNITED STATES v.) See Cases Nos. 14,467 and 14,468.

Case No. 548.

ARMSTRONG v. UNITED STATES.

[Gilp. 399.]¹

District Court, E. D. Pennsylvania. May Sessions, 1833.

OFFICE AND OFFICERS — NAVY AGENT — APPOINTMENT — SETTLEMENT OF ACCOUNTS — EXPENSES AND COMMISSIONS — WARRANT OF DISTRESS.

1. A warrant of distress, under the provisions of the act of 15th May, 1820, [3 Stat. 592,] has the effect of a judgment.

2. The bill of complaint of a debtor, against whom a warrant of distress has been issued, under the provisions of the act of 15th May, 1820, is in the nature of a motion to stay execution on a judgment, and the beginning and conclusion of the argument are with the debtor.

3. A permanent agent is one appointed by the president, with the advice and consent of the senate, in contradistinction to one specially appointed by the head of a department, for some particular service, and on terms agreed upon.

[Cited in *Strong v. U. S.*, 6 Wall. (73 U. S.) 789.]

4. A permanent agent commissioned under the act of 3d March, 1809, is entitled to no more than a commission of one per cent. on the moneys disbursed by him for the use of the United States, and also on the value of stores furnished by the United States, and distributed though not purchased by him.

5. In the act of 3d March, 1809, [2 Stat. 535,] there is no distinction between foreign and domestic agents, as to either the mode of appointment, the tenure and permanency of their offices, or the terms on which they may receive them.

6. A navy agent stationed abroad, who has been removed, or whose office has been vacated, cannot charge the government with his return home, nor with his travelling expenses in going to the seat of government to settle his accounts.

7. Where an article is furnished by a navy agent, and expressly received and accepted by the United States for the public use, he is entitled to a credit for its value, although the article is not one which an agent is authorised to purchase on public account.

8. Where a bill of exchange, properly drawn by an authorised agent on the head of a department, is permitted by him to be protested for non-acceptance and non-payment, under a mistake of a fact concerning it, the agent is entitled to a credit for the damages paid by him in consequence of the protest.

On the 30th July, 1832, the solicitor of the treasury, according to the provisions of the second and third sections of the act of 15th May, 1820, issued a warrant of distress against the complainant Andrew Armstrong and his surety, directed to the marshal of the eastern district of Pennsylvania, specifying the sum of twelve thousand nine hundred and forty-nine dollars and sixty-three cents, as the amount with which the said Andrew Armstrong was chargeable, for public moneys received by him and not paid over ac-

ording to law. 3 Story's Laws, 1791, [3 Stat. 592.] On the 1st August, the marshal, in pursuance of this warrant, made a levy on the person of Mr. Armstrong and on the goods and chattels of his surety. On the 3d August, the complainant, alleging that he was aggrieved by these summary proceedings, and not only denying that he was chargeable with the amount stated in the warrant, but claiming the sum of four thousand six hundred and eighty-one dollars and seventy-four cents, as actually due to him from the United States, over and above all moneys received, preferred a bill of complaint to the district judge of the United States for this district, setting forth the injury thus done to him, and praying the judge to grant an injunction to stay proceedings on the warrant altogether. On the same day, the judge being satisfied that the application was not merely for the purpose of delay, and the complainant having given bond, with approved surety, conditioned for the performance of such judgment as should be ultimately awarded against him, an injunction was granted to stay proceedings on the warrant of distress; and a subpoena issued to the solicitor of the treasury to appear and answer on behalf of the United States. On the 5th October, the attorney of the United States for this district filed an answer on their behalf, as well in regard to the matters of fact stated by the complainant, as to his claims alleged to be derived under certain acts of congress and established usages of the government. On the 12th October, he further prayed the court to dissolve the injunction altogether, and to permit the United States to pursue their legal remedies for the recovery of the whole sum of money demanded by them from the complainant.

On these pleadings the case came to be heard before the district court, on the 24th June, 1833, when the material facts established were as follows: Andrew Armstrong was appointed by the president, by and with the advice and consent of the senate, navy agent for the port of Lima, in Peru, in South America. His commission was dated on the 24th April, 1828, and was to continue in force during the term of four years from that day. From a conversation shortly afterwards with Mr. Charles Hay, at the time chief clerk of the navy department, he derived the belief that all navy agents, at foreign ports, were allowed the customary commercial commissions of their respective stations, as had been especially done in the cases of Michael Hogan, navy agent at Valparaiso, and Richard M'Call, navy agent to supply the Mediterranean squadron. On the 16th January, 1829, he received written instructions from the secretary of the navy, relative to the duties of his office, instructing him to supply the necessary stores and to draw on the department for the requisite funds; he was also directed to furnish accounts and vouchers regularly on the first days of January,

¹[Reported by Henry D. Gilpin, Esq.]

April, July, and October, and referred to the act of congress of the 3d March, 1809, as that by which he was to be governed in the keeping and settlement of his accounts. He left the United States, and commenced the duties of his office at Lima, on the 1st July, 1829; and continued to exercise them until superseded in the following year. On the 5th April, 1830, the secretary of the navy informed him by letter, that the president had revoked his commission, it being considered more for the benefit of the public service, that the duties of a navy agent on that coast, should be performed by a purser specially appointed for the purpose. This letter reached Mr. Armstrong at Lima, on the 20th October; and he was informed also that his successor was Mr. Philo White. Commodore Thompson, then commanding the squadron on the station, requested Mr. Armstrong to continue to perform the duties of the office until the arrival of Mr. White, which he did up to the 1st June, 1831, when that person received from him all the stores in his possession. He continued, however, to reside at Lima until the 20th January, 1832, when he went to Valparaiso; there he embarked on the 9th March, and arrived in the United States in the month of June following. He repaired to Washington and exhibited his accounts, claiming a balance to be due to him from the United States, of four thousand six hundred and eighty-one dollars and seventy-four cents. In his account, as settled by the accounting officers of the treasury, on the 14th July, they certified, on the contrary, a balance of twelve thousand nine hundred and forty-nine dollars and sixty-three cents to be due by him. This difference, amounting altogether to seventeen thousand six hundred and thirty-one dollars and thirty-seven cents, constitutes the subject of the present controversy. It consists of the following charges, made by Mr. Armstrong, which were rejected by the accounting officers of the treasury. 1. The sum of five thousand seven hundred and fifty-five dollars and eighty-six cents, and also of four dollars, being four per cent. commission on all the disbursements made by Mr. Armstrong; one per cent. was allowed him according to the act of 3d March, 1809, but he claimed five per cent. as "the customary commercial commission of the station." 2. The sum of ten hundred and forty-three dollars and ninety-nine cents, being five per cent. on the value of the stores distributed by him, and claimed on the same ground. 3. The sum of one hundred and eighty-three dollars and twenty-four cents, five per cent. on the value of the stores delivered over by him to his successor in office, Mr. Philo White, claimed on the same ground. 4. The sum of two hundred and sixty-eight dollars and seventy-five cents, charged for the hire of a clerk, over and above the sum allowed by the department, and claimed on the ground that it had actually been paid in the necessary service

of the United States. 5. The sum of eight hundred and sixty-three dollars and thirty-three cents, for damages paid on a bill drawn by Mr. Armstrong on the secretary of the treasury, but protested by him, and claimed on the ground that the bill was properly drawn, while the refusal to accept arose from a mistake made by the officers of the United States, without any fault of his. 6. The sums of sixteen hundred and nine dollars and eighty-seven cents, and three thousand two hundred and twenty-nine dollars and fifteen cents, making together, four thousand eight hundred and thirty-nine dollars and two cents, for board and compensation, from the time he was superseded until he left Lima, claimed on the ground that he was detained on account of the protest of his bill, and also to fulfill the duties of the office until his successor arrived. 7. The sums of three hundred and fifty dollars, and forty-three dollars and fifty cents, making together three hundred and ninety-three dollars and fifty cents, for the cost of his passage to the United States and his journey to Washington, claimed on the ground of his sudden and unexpected recall, without the least alleged misconduct on his part. 8. The sum of four thousand two hundred and seventy-nine dollars and sixty-eight cents for tobacco furnished and actually delivered by him to the agent of the United States, for the use of the squadron.

At the outset, a question arose between counsel, as to which party belonged the right to commence and conclude the argument. It was claimed by the attorney of the United States, on the ground that this stage of the proceeding was, in fact, the trial of the issue between the United States and the debtor, the ascertainment of the sum due, in which the affirmative rested with them, while the debtor was to disprove their claim in whole or in part. The counsel for the complainant contended that this was, by the very terms of the law, a prayer for relief by him; that he was to show the injury he had sustained; and that he was exactly in the situation of a party against whom a judgment exists, making application to a court to open it and set it aside in whole or in part.

On this preliminary point, HOPKINSON, District Judge, delivered the following opinion: The right to begin and conclude is with the complainant. By the act of congress of 15th May, 1820, [3 Stat. 592,] on the certificate of a balance due being given by the comptroller of the treasury, the United States may issue their warrant of distress, which is, in fact, an execution and levy for the amount certified on the person, goods, and lands of the debtor. It has then all the effect of a judgment, and the party indebted must get rid of it, by showing that none or a portion only of the sum is due. When a motion is made to stay proceedings

or an execution, on a judgment entered, and to let the party into a defence, the beginning and conclusion are with the defendant. The district attorney has nothing to show but his warrant of distress, which is prima facie evidence of the debt, and is already in possession of the court, being in the hands of its officer. The question before the court relates only to the continuance or removal of this warrant; not to the final settlement of the debt or balance between the parties. It is incumbent on the complainant to show that there are sufficient grounds for its removal in whole or in part. In this he is the actor.

The case was then argued by Dallas and J. R. Ingersoll for complainant, and Gilpin, Dist. Atty., for United States.

Dallas, for the complainant.

Mr. Armstrong was commissioned by the president, as a navy agent, from the 24th April, 1828, for a period of four years, but his appointment was revoked, and he received notice of it on the 20th October, 1830. In settling his accounts after his return home, a difference arose between him and the treasury; as to the items and amount of this difference there is no dispute; it is only as to the legality or equity of his claims. The first ground taken against him is, that he is entitled but to one per cent. on his disbursements, instead of five per cent. the customary commercial commission at Lima. It is assumed at the outset that he was appointed "a permanent navy agent" under the act of 3d March, 1809, [2 Stat. 535,] which limits his compensation to one per cent. on the public moneys disbursed by him. He was not, however, appointed under that law, nor is he subject to its provisions. He was appointed "a foreign and special agent," and as such was entitled to charge and receive the customary commission of five per cent. 1. As to the first position, that he was not appointed under the act of 1809. There are two sorts of navy agencies known to the laws of the United States, which vary substantially; those at Gibraltar, Valparaiso, London, Marseilles, and St. Thomas are confessedly different from those at Philadelphia, New York, and elsewhere in the United States. This difference arises not from any diversity in the mode of appointment; it may be in any case, whether at home or abroad, either by commission or special authority. Nor does it arise from the circumstances of one being, and the other not being, expressly established by law; the establishment of both or neither may be by law; it is well known that there are various modes of constituting officers who are not expressly appointed by a particular statute, but who are recognised by the government and by the courts as equally legal, and who are bound to perform their duties, and entitled to their com-

ensation; there is, in fact, no law whatever, establishing any navy agencies, permanent or special, foreign or domestic. Nor does it arise from any difference in the duration of the office; in this case a distinction has been set up between such as are permanent and such as are temporary, but both are equally dependent on the discretion of the executive; we here see the navy agency of Mr. Armstrong, at Lima, called permanent, which expired in fifteen months; and that of Mr. M'Call, at Gibraltar, called temporary or special, which lasted for fifteen years. No. The real difference arises out of the nature of things. One class is foreign and the other domestic; Lima is like Gibraltar, and the act of 1809 can apply neither to one nor the other; it evidently refers only to a domestic agent, it requires him to keep the public money in some incorporated bank, it obliges him to settle his accounts monthly, things which are absurd in regard to a foreign agent. Nor did the secretary of the navy think so, for he revokes the appointment; he does not remove the incumbent; he abolishes the office instead of changing the officer; had the office been created by the act of 1809 he would have had no authority to do so. 2. If then Mr. Armstrong was not appointed under this act, his compensation does not depend on it; it is not limited to one per cent. but he is entitled to customary commercial commissions. This court has the power to decide on principles of equity and ought to do so. There should not be one rule for individuals and another for the government; if there were nothing to bind it to a uniform rule it would be just and equitable. But the government has itself fixed such a rule; Mr. Hay, a principal officer of the department, gave Mr. Armstrong reason to believe so when he accepted the office. Mr. Hogan's compensation at a port on the same coast with Lima was five per cent. Mr. M'Call was allowed two per cent. on the immense disbursements made by him in the Mediterranean. Mr. Hayne at Marseilles, and Mr. White, afterwards in the Pacific, received large and liberal commissions.

The refusal to allow Mr. Armstrong five per cent. on the value of the stores distributed by him, and delivered over to his successor, rests on the same assumption, that being appointed under the act of 1809, his sole compensation is "one per cent. on the public moneys disbursed." It is of course met by the argument heretofore offered, but in regard to these items it presents the additional hardship, that it actually deprives the agent of all compensation for the largest and most responsible branch of his duty, the distribution of stores. It proves also conclusively that this act applies only to domestic navy agents, for they do not distribute the stores, that duty being intrusted to the naval storekeepers, officers appointed in all the domestic agencies for that purpose, but not

known in the foreign agencies. The claims by Mr. Armstrong for the repayment of the clerk hire and the damages on a protested bill, seem to be too just to admit of discussion. He was authorised to employ a clerk, and he has proved that he paid him the amount claimed; if the sum of one thousand dollars was the limit fixed by the department, that was not known to the complainant, and, had it been, could not be complied with; he did a thing which was permitted, and is entitled to be paid what it cost him. So as to the bill of exchange; he was expressly authorised to draw it by his original letter of instruction; it was drawn before he received any notice that he was superseded; and as the refusal of the government was founded on a belief that this was not the case, which belief proved to be erroneous, they must bear the cost of the mistake.

The payment of Mr. Armstrong's expenses and compensation while detained at Lima, and the cost of his return and visit to Washington, is a demand properly addressed to the equitable consideration of the court. He was five thousand miles from home, holding an office which he expected to retain for four years at least, and had incurred expenses under that impression. No complaint was made or fault found; not only this, but his bills rightfully drawn were protested; he was obliged to remain in order to meet them, and also to perform the duties of his office, at the express request of the commander of the squadron, until his successor arrived. Under such circumstances, if no indemnity be given, he should at least be protected from loss. His return home was, as it were, compulsory, made suddenly, and without his means being prepared. It was necessary too, in order to settle his accounts; in the naval service an allowance would be made to an officer brought back under such circumstances. The refusal to allow the remaining claim for the value of the tobacco furnished by Mr. Armstrong, seems to have arisen from some vague notion of his having acted improperly about it. The evidence does not confirm this. It is true he formerly owned the tobacco himself, but he has proved a bona fide sale of it to a Mr. McCulloch; and when he repurchased it, he had the positive instructions of the commander of the squadron. He is actually allowed a credit for a small part of it, which was used by the vessels of the United States. He delivered all of it to their agent, by whom it is still retained, and he is surely entitled to be paid for that which they keep from him, as well as that which their sailors actually consume. 2 Story's Laws, 1123, [2 Stat. 535;] U. S. v. Macdaniel, 7 Pet. [32 U. S.] 16.

Gilpin, for the United States.

On the 24th April, 1828, the complainant was appointed an officer of the United States; the appointment was made as the constitution directs, by the president, by and with

the advice and consent of the senate; he received a commission under the seal of the United States; that commission designates him as "navy agent at Lima, in Peru." This, then, is his office, expressly designated; he is a navy agent; he is to perform the duties and receive the compensation of such an officer. He does perform the duties until the 1st October, 1830. In presenting his claim for compensation, he demands certain allowances which are refused by the accounting officers of the treasury, because a navy agent is not entitled to them. He appeals to this court to reverse that decision. The first and preliminary question is, whether or not the law has recognised the office of a navy agent, described its duties, and fixed its compensation? By the first law relating to supplies for the navy, passed on the 7th August, 1789, the secretary of war was directed to purchase stores for the navy as well as the army, but no arrangement was made for subordinate officers. On the 23d February, 1795, the office of purveyor of public supplies was established, with a salary of two thousand dollars, for the purchase of all naval and military stores; and on the 16th July, 1798, the navy department having been in the meanwhile organised, that officer was placed under the orders of the secretary. By the same law, all 'agents' for supplies for the navy were required to settle their accounts with the accountant of the navy; and in the appropriation law of 1807, there is an allowance for their commissions. During the whole of this period they were thus mere subordinate agents, under the purveyor of supplies, holding no commissions, and not being officers appointed by law. This system being found very inconvenient, a law was passed on the 3d March, 1809, [2 Stat. 535,] directing that all permanent agents for purchasing supplies or disbursing money for the navy, should be appointed by the president and senate, receive a compensation not exceeding that of the purveyor of supplies, which was two thousand dollars a year, and give bond; the compensation to be derived from "a commission of one per cent. on the public moneys disbursed by them." This established the present system of navy agencies, and led to the abolition of the office of purveyor of supplies soon after. On the 15th May, 1820, [3 Stat. 592,] a law was passed declaring that "navy agents shall be appointed for the term of four years, but shall be removable from office at pleasure."

Such was the law relative to navy agents when the complainant became a public officer; he was appointed, commissioned, and gave bond in the usual mode; he performed the usual duties; he has received the authorised compensation of one per cent. on his disbursements. He claims, however, the large additional sum of seventeen thousand six hundred and thirty-one dollars and thirty-seven cents, under various pretexts.

1. He asks to be allowed four per cent. ad-

ditional on his disbursements. To sustain this he must show either a law, contract, or usage. He can produce no law authorising it, for none exists. The contract he alleges is a conversation with Mr. Hay, chief clerk of the navy department; if that officer had made a contract, it would not have bound the United States, especially when a law fixed the compensation; but in fact, it was altogether too vague to be regarded even as an understanding. What is meant by customary commercial commissions? They vary under a thousand circumstances; in this very case it is proved that M'Call got two per cent. and Hogan five; there is no date given, but this conversation is said to have been "about the time of his appointment;" long afterwards the secretary writes him formally, instructs him at large; would he have omitted so important a contract, varying as it did from the law? Besides, he is directed to govern himself by this law in keeping and rendering his accounts: was it meant he should so totally deviate from it in charging compensation? It is impossible to establish a contract between the United States and the complainant on such grounds as these, especially a contract directly in the face of an existing law, to which he was explicitly referred. But he says he is entitled to this additional compensation by the usage of the department. To prove such usage he must produce a similar allowance in a similar case. He cites those of M'Call, Hogan, Hayne and White. They all differ materially; each was a special agent of the navy department, acting under a written contract with the secretary, and performing services specially designated; neither of them was appointed by the president, or commissioned; their compensation and duties varied according to a previous written agreement; it is no ground of similarity of office that both were in a foreign country, unless their appointments were similar; navy agents may be appointed at home or abroad; special agreements may be made by the department with persons at home or abroad; it is identity in the mode of appointment or terms of agreement that establishes a right to equal compensation, and any such identity the complaint has entirely failed to establish. If, therefore, he can show neither usage, contract nor law which gives him a different compensation from that allowed him by the act of 1809, his claim has been justly refused.

2. He asks five per cent. on the stores he distributed. The law does not allow it; his compensation is confined to the commission on money disbursed. But would it be just? There is no difference between the moneys disbursed and the value of the stores distributed; he disburses the money he has received from the government in buying these stores; he receives his commission on it; and to receive it again on the distribution would be to charge a double commission on the same funds.

3. He asks five per cent. on the stores delivered to his successor. This is not allowed by law; nor is it just, since, as in the case of those distributed, he has already received his commission on their purchase.

4. He asks for clerk hire beyond a liberal allowance already made. The only ground for such a claim at all is the usage of the department, and the sum that recognises has been already paid him.

5. He asks for the return of damages on his protested bill. He had a large amount of funds on hand when he drew it; besides his own commissions, he had twelve thousand dollars at least of public money. In every case where such payments have been allowed, it is where the government have been mistaken in supposing the agent had funds; to allow him to draw ad libitum would be the height of indiscretion; and if he does so when he was not in want of the money, he must suffer the loss.

6. His demands for compensation at Lima and on his passage home, are entirely without law or precedent; he was not an officer of the United States during the time he asks for it; he was a private merchant, and remained there at his own pleasure; he produces neither law, agreement nor precedent to sustain it: where such allowances are granted it is by express law, as in the case of foreign ministers, or when an officer is ordered home, as sometimes in the navy; he could not have waited on account of the protest of his bill, since that was not to be anticipated; and if it was, his claim to damages would have been equally good without such delay; he could not have believed that a mere request, by the commander of the squadron, to perform an occasional service, would entitle him to the emoluments of an office in which he was formally superseded.

7. His claim to be paid for the tobacco has been allowed, for all that he actually furnished, but he has no right to ask payment for all he chose to purchase; it is proved that he bought it for himself, not for the United States; he had no right to buy it for the United States, because by express regulation it was not an article included in the stores to be supplied by the navy agents; an order from the commander of the squadron to him, to do what was forbidden by the department, offered him no excuse; and finally he never did transfer it to the United States, since their officers refuse to receive it.

The complainant having thus failed to establish his claims for additional compensation, must limit himself to that allowed by law; this amount he has already received; consequently he is authorised to make no deduction from the balance of public moneys still in his hands; but the United States have a right to the removal of this injunction altogether, that they may proceed to recover their money in the usual course of law.

J. R. Ingersoll, for the complainant, in reply.

Mr. Armstrong received an appointment important to the public; he discharged its duties faithfully; he abandoned his own concerns; he returned to the United States when all was over; and what was his pecuniary account at last? The sum which has been proved to be the usual cost of living, added to the expenses of his passage, exceeds by nearly three thousand dollars, the amount allowed him by the accounting officers of the treasury. This may be said to be his ill fortune; yet surely it must infuse a spirit of equity into his case. The difference between him and the United States is seventeen thousand six hundred and thirty-one dollars and thirty-seven cents. Of this, the largest and most interesting item, is the charge for commissions, whether on disbursements of money, or distribution and delivery of stores; these are identified in their principal features, in none are they essentially different; the grounds taken are applicable to them all. That the complainant has earned the legal compensation of his office or place is admitted; the quantum of that compensation only is disputed. It is perfectly clear the United States made no contract with him, at the rate of one per cent; and if that only is due, it is on account of the express provision of the law. But on the other hand, there was an arrangement positively made, which might not indeed be a contract, for it wanted the formalities of one, yet was a complete understanding between the complainant and that officer of the United States who, in the absence or illness of the secretary of the navy, took his place; and this arrangement fixed the compensation as Mr. Armstrong asks it. When formal instructions were afterwards given to him, not a word was introduced to change it; on other points they were broad and full, as to this they left him where he had been already placed. The opinion he thus had a right to form, was strengthened by what he observed as to every one in a similar situation; he saw the allowances to the same officers at Barcelona, Marseilles, Valparaiso, and elsewhere abroad; he observed no resemblance between his duties and expenses, and those of navy agents at home, but every resemblance between himself and those abroad. The result of all this is therefore exactly the same, whether deduced from actual arrangement or the want of it; from what is usual in similar circumstances, or what ought to be expected in those which are entirely new; this result is, that, at the worst, there is an implied assumpsit, a quantum meruit, a compensation in proportion to his services. When exception is taken to so just a principle, it must be, it ought to be extremely clear. Is that so, which is now taken by the government? They found it on a difference, said to be created by the law of 1809, between permanent and special agents; but

this does not help them, unless they can show which is one and which is the other. To do so, they produce a commission as the badge of distinction; for this, there is no reason except that it suits the present case; surely it does not make Mr. Armstrong's like a one per cent. agency, if unlike it in every other particular. The difference really is, that in the special agencies there are previous special agreements, previous special instructions; it was so in this case, in M'Call's, and in others alluded to; when, therefore, we are told that the law of 1809 forms the rule, we answer that Mr. Armstrong is not within the law, more than those persons were. When the law of 1809 created permanent agents, it created entirely new officers; no permanent navy agencies existed before; after this, these offices were created, places attached to the navy yards, and in their character, steady and durable; but certainly in doing this, it did not transform the duties arising from the transient visit of a squadron in a distant ocean into a permanent office. Nor can the mere granting a commission do so, as seems to be supposed, even if this be a commission which wants the attestation of the secretary of state, and which the president can, as he has done, summarily revoke. It has been attempted to meet this argument, by endeavoring to show that the agency of the complainant differed from those abroad, and resembled those at home; this attempt has failed in nearly every particular; in the nature of his duties, his powers, responsibilities, residence, and mode of settling his accounts, he is like the former not the latter. If then the United States have failed to show any agreement with him at the rate of one per cent., or any law limiting him to that sum, within which he can be fairly brought, he is entitled to the usual compensation for such services at Lima, and that is certainly as much as he has claimed. 1 Story's Laws, 49 [1 Stat. 68;] *Marbury v. Madison*, 1 Cranch, [5 U. S.] 155.

His claims for clerk hire, for compensation during his detention at Lima, and for his expenses home, as well as for the repayment of damages on his protested bill, rest on grounds of incontrovertible equity. They were payments actually made by him, either for the United States or on account of requests or mistakes of their officers. It has been already seen that his aggregate expenditure very far exceeded what is allowed him; if it be shown that this excess arose from duties actually imposed upon him, it becomes highly unjust to refuse its payment. The only remaining claim is that for the tobacco. Mr. Armstrong was expressly ordered in his instructions to furnish supplies to the commander of the squadron, when they were called for; there was no limitation in this order, and the supply in question was made on the positive requisition of Commodore Thompson; it would

have been his duty to do so, under his instructions, even had there been a regulation such as is supposed; but there is no proof whatever of any such, at least communicated or known to Mr. Armstrong. As to the allegation that it was a speculation of his own, it is sufficient to say that the property was wanted by the United States, examined and approved by their officers, paid for at a price which they deemed fair, and is now actually in their use and possession.

HOPKINSON, District Judge, delivered the following opinion:

On the 24th day of April, 1823, Andrew Armstrong, the complainant, was appointed, by the president, by and with the advice and consent of the senate of the United States, navy agent for the port of Lima, in Peru, in South America. The commission which testifies this appointment bears the date above mentioned, and declares that it is "to continue in force during the term of four years from the 24th of April, 1823." The letter of instructions given to Mr. Armstrong, from the navy department, is dated on the 16th January, 1820. By the act of congress passed on the 15th May, 1820, [3 Stat. 592,] it was enacted that navy agents, with other officers mentioned in the act, "shall be appointed for the term of four years, but shall be removable from office at pleasure." In April, 1830, the president revoked the commission or appointment of the complainant, but the notice of the revocation, contained in a letter from the secretary of the navy of that date, did not reach the complainant until October following. He continued to reside at Lima until January, 1832, when he left it to return to the United States, going first to Valparaiso, from which port he sailed in March. On a settlement of his accounts with the government in July, 1832, a balance was struck against him of twelve thousand nine hundred and forty-nine dollars and sixty-three cents, which, by a subsequent small credit, was reduced, in August, to the sum of twelve thousand eight hundred and seventy-five dollars and forty-four cents, now claimed by the United States. On the other hand, the complainant has presented an account or claim for credits against the United States, which, if allowed him, will not only absorb the whole demand upon him, but will turn the balance in his favour to the amount of four thousand six hundred and eighty-one dollars and seventy-four cents. The United States, to enforce the payment of the amount they allege to be due to them from the complainant, proceeding under the directions of an act of congress passed on the 15th day of May, 1820, [3 Stat. 592,] have issued a warrant of distress against the alleged delinquent officer and his sureties, directed to the marshal of this district, in which the said officer and his sureties reside. This warrant has been executed by the said

marshal according to the provisions of the said act. By the fourth section of the act, "if any person shall consider himself aggrieved by any warrant issued under it, he may prefer a bill of complaint to any district judge of the United States, setting forth therein the nature and extent of the injury of which he complains; and thereupon the judge aforesaid may, if in his opinion the case requires it, grant an injunction to stay proceedings on such warrant altogether, or for so much thereof as the nature of the case requires." Under this provision the complainant filed his bill of complaint, whereupon, he having complied with the requisitions of the act, an injunction was issued to stay proceedings on the warrant of distress. The district attorney has filed a full answer to all the matters complained of in the bill, and the cause has been heard on this bill and answer, with the vouchers and other evidence produced by the parties respectively. The complainant complains of the rejection or refusal of certain credits in the settlement of his accounts with the government to which he alleges he is entitled in law or equity; and the district attorney denies altogether his right in law or equity to any of the allowances he claims, and prays that the injunction may be dissolved, so that the marshal of this district may proceed, under his warrant of distress, to levy and collect the said sum of twelve thousand eight hundred and seventy-five dollars and forty-four cents, remaining due from the complainant to the United States. It is now to be decided, so far as this court may decide it, whether the said injunction shall be continued altogether, or dissolved altogether, or in part; and, if the latter, for what amount it shall be dissolved, and the United States be permitted to proceed under their warrant of distress against the complainant and his sureties. To determine this question, it is necessary to examine every item of credit claimed by the bill and denied by the answer.

The first credit claimed by the complainant, which has been refused to him by the accounting officers of the United States, is a charge of five thousand seven hundred and fifty-five dollars and eighty-six cents, being for commissions on his disbursements of moneys as navy agent at Lima. On these disbursements an allowance has been made to him of one per cent., and the present claim is for an additional or further allowance of four per cent., making a commission of five per cent. in the whole. On the part of the government it is contended, that a navy agent of the United States, whether he reside abroad or at home, is entitled to no more than one per cent. on his disbursements of moneys, by the express enactment of the act of congress of 3d March, 1809, [2 Stat. 535.] On the other hand the complainant avers, that he was not appointed under that act, and is not subject to its provisions

nor bound by its restrictions, but is entitled to a compensation for his services according to their nature and extent and the usual mercantile commissions for similar services at the same place, which were five per cent. The real question on this part of the case is, whether the complainant was appointed a navy agent under and subject to the act of congress of 3d March, 1809, or not; for, if he were so, that act, after declaring the manner in which agents shall be appointed for the disbursements of moneys for the use of the navy of the United States, authorises the president to fix the number and compensations of such agents; "provided, that the compensation allowed to either shall not exceed one per centum on the public moneys disbursed by him." If, then, the complainant was a navy agent described by the said act; if he received his appointment and authority under and by virtue of it; he must be bound by all its provisions. The argument on this item has, therefore, been directed to this question.

The attorney for the United States has contended that the complainant was an officer of the United States, not the agent of a department; that he was a navy agent of and for the United States, appointed as such by the president and senate by virtue of the act of congress referred to; that previous to that act no appointments or commissions of such agents were ever given by the president, or by the president and senate, as this was, and as this act directs; that previous thereto, persons had been, from time to time, appointed by the secretary of the navy, at his pleasure, to perform certain prescribed duties for his department, under such contracts and arrangements as he chose to make with them; but that the appointment of the complainant was clearly not of this description, but was made or could have been made only under the act of 1809. The counsel for the complainant deny that he was an officer of the United States at all; they deny that he was appointed to the service he performed under the authority of the act in question; but that his services were performed for the navy department, in the same manner, by the same authority, and with the same rights of compensation as the agents that had been appointed by the secretary of the navy at other places. The cases of, and allowances made to, Messrs. Hogan, M'Call and others, have been much insisted on as forming precedents for this; and the distinction relied upon between such agencies as are, and such as are not, within the regulations of the law of 1809 is, that they are to be applied only to those navy agents whose duties are to be performed in the United States; not to those who must reside in a foreign port.

After giving a close and careful attention to the arguments and illustrations of the counsel for the complainant, I cannot follow them to their conclusion. It appears

to me to be entirely clear that the appointment of the complainant, as a navy agent at Lima, was an office of the United States, and not a mere limb of the navy department; that he was an officer of the United States deriving his authority from the constitutional appointing power, the president and senate; that their power to appoint navy agents was derived from the act of congress which created or established the office. Previous to the passage of the law of 1809, there were no such officers, either at home or abroad, properly so called, under the constitution of the United States. The constitution gives the power to the president to nominate, and, by and with the advice and consent of the senate, to appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. In conformity with this provision of the constitution, congress have established, by law, the office of navy agents, and the president, with the senate, has appointed the officer. Prior to this law the purchase of supplies and the disbursements of moneys for the use of the navy, were made, directly or indirectly, by the secretary or his agents; the state of the navy did not require a distinct office and officers for these purposes. These duties or services were performed by persons named for the occasion by the secretary, and, as I have said, they were his agents, his arms, and not officers of the government. They were neither appointed nor removable by the president, any more than a clerk in the department; their agency began and ended with the pleasure of the secretary, or with the particular service for which they were employed. As our naval establishment was extended, and these services became numerous and important; as the operations of these agents became of great magnitude, involving the expenditure of vast sums of money; it was wisely thought they should no longer be entrusted to the agents of a department, irresponsible in some degree directly to the government, and without any security beyond their own responsibility, for the faithful performance of their trust. The patronage, too, may well have been thought to be of too high a character and value to be attached to a department. The law of 1809 was intended to put these concerns under a better regulation. The third section enacts, "that exclusively of the purveyor of public supplies, paymasters of the army, pursers of the navy, military agents, and other officers already authorized by law, no other permanent agent shall be appointed, either for the purpose of making contracts, or for the purchase of supplies, or for the disbursement, in any other manner, of moneys for the use of the military establishment, or of the navy of the United States, but such as shall be appointed by the president

of the United States, with the advice and consent of the senate." It is then enacted that the president may fix the number and compensation of such agents, but with a limitation as to the latter, "provided that the compensation allowed to either shall not exceed one per centum on the public moneys disbursed by him." The fourth section requires a bond from the agent, with one or more sufficient sureties, for the faithful discharge of the trust reposed in him. All this appears to me to be very intelligible. We see no intimation of the distinction, essentially and necessarily relied upon by the counsel of the complainant, between foreign and domestic agents, in the mode of appointment, the tenure and permanence of their offices, or the terms on which they may receive them. The construction contended for, taking the foreign agents altogether out of the act, would not only deprive the president and senate of their appointment, but dispense, in their case, with the security to be given for the faithful discharge of the trust reposed in them, as well as of their limitation of the compensation to one per centum on their disbursements. As regards the bond or security, it would seem to me, to be infinitely more necessary in the case of a foreign than a home agent, who is always under the eye and control of the government, whereas the other carries on his operations in a distant country, and might be guilty of the grossest irregularities and frauds for a long time, before they would be known; and when known the delinquent would be out of the reach of the government with all his spoil. It has not been pretended that domestic agents are not subject to the provisions of this law, for this would be to repeal it wholly as to all navy agents, and I think it has not and cannot be shown, that any distinction is made by the law, or by the reason and design of the law, between the agents appointed for foreign or home stations. These are equally within or without the law; they are both clearly within it, in their appointments, their duties, their responsibilities, and their compensation.

It has been argued, with great earnestness, that this act has relation only to permanent agents, and that a navy agent abroad is not a permanent agent, for he is removable at the pleasure of the executive, and, in fact, in this case a removal was made in fifteen months, whereas the foreign agents appointed before the passage of this law continued undisturbed for many years. The first difficulty this argument has to encounter is, that it applies with the same force to the agents at home, who hold their offices in the same way, and may be removed by the same power that acts upon those abroad; and thus the distinction so carefully set up between foreign and domestic agents is overthrown. What is the meaning of a permanent agent as understood in the law? Cer-

tainly it does not designate the place of residence as affecting the description. Can we say that the complainant was not a permanent agent because he was removable, or because he was actually removed, by the president? Does the legal character or description of the appointment depend upon the exercise of the right of the president over the officer? This is clearly not the meaning of the law, as is apparent from the act of 15th May, 1820, which enacts, that 'navy agents,' with other enumerated officers, "shall be appointed for the term of four years, but shall be removable from office at pleasure." The navy agents here referred to are certainly those which are appointed under the law of 1809 by the description of permanent agents. The phrase then 'permanent agents,' signifies those agents which shall be appointed by the president, with the advice and consent of the senate, in contra-distinction to those persons who had been or should be appointed by the secretary of the navy, on some special occasion or service, in his discretion and on such terms as he, on his official responsibility, should choose to arrange and make with the persons so appointed by him. The officer who takes his appointment from the president and senate, under the constitution and law of the United States, testified by his commission, which makes him independent of the secretary, and removable only in the manner and by the power given by the constitution and the law, may well be considered, legally, to be a permanent officer or agent of the United States. When the law declares that no permanent agent shall be appointed but by the president and senate, it, in effect, declares that the agent who is so appointed, is, within the meaning of the law, a permanent agent. The district attorney is a permanent officer of the government, although removable at pleasure, and commissioned just as a navy agent is, in contra-distinction to a special or temporary attorney, who may be employed for a particular cause or service. The cases of Messrs. Hogan and M'Call have been frequently urged upon the court in the argument. It might be enough to answer that they clearly were not appointed under the law of 1809; but made their contracts with the secretary of the navy for the services they undertook to perform. They were not officers of the United States; they were not appointed as such officers must be. They did not derive their agencies, such as they were, from the president and senate, nor were they appointed under the authority of the act of congress. Contracts were made with them by the secretary of the navy under a discretionary power exercised by him. It is true that abuses may be practised in this way; but they are not to be presumed. It is true that under the pretence of making a special agent, under a special contract, a navy agent may be placed in a foreign port by the secretary, with any rate of compensation

he may agree to, and without the securities required by law from navy agents for the faithful discharge of their trust, and such an agency may be continued for many years, as has been done, performing all the duties of a permanent navy agent and no more. Such cases might be an evasion of the provisions of the law by the secretary; but they are always under the control of the president, who, by appointing a permanent agent, would supersede the special agency. The complainant in this case went abroad, nor with any such special contract in his pocket, but with his commission as the only evidence of his appointment; the only source of his authority. This commission was given to him under the law of 1809; it could have been given to him under no other legal authority, and he took it as an appointment under that law, and subject to all its provisions. I am of opinion that he is entitled to no more than one per centum on the moneys disbursed by him for the use of the navy of the United States; and, of course, that he cannot be allowed the credit he now claims of an additional four per cent., amounting to the sum of five thousand seven hundred and fifty-five dollars and eighty-six cents. The one per cent. he has already received a credit for.

I have said nothing of the alleged conversation between the complainant and Mr. Hay, a clerk in the navy department. Our knowledge of it and of the time it occurred, is by no means satisfactory; but no such conversation, nor any opinion or representation of Mr. Hay, or any other officer of the government, can have any effect upon the provisions of the act of congress. If the complainant can show that he accepted his commission in consequence of these representations of Mr. Hay, he may have a case for the equity of congress; but we are bound to obey the law.

The next credit claimed by the defendant, and which has been rejected by the accounting officers of the treasury, is a charge of commissions on the distribution of stores, amounting to six hundred and sixteen dollars and twenty-three cents. There is another claim on the same account of four hundred and twenty-seven dollars and seventy-six cents. They will be considered together. The act of 1809, which creates the office of a navy agent, has also fixed his compensation wholly or in part. We must return to it for the decision of the question on the distribution of stores; obeying the directions of the law, where they are clear and explicit, and giving it a fair and reasonable construction where they are not so. It enacts, that the president may "fix the number and compensation of such agents; provided that the compensation to either shall not exceed one per cent. on the public moneys disbursed by him." There is, in my mind, something equivocal in this form of expression. Does it mean that the whole compensation of the

agent, for all his services, shall not exceed one per cent. on the moneys he shall disburse; or that the compensation for or on account of his disbursement of moneys shall not exceed that rate. Perhaps the more strict and the more obvious construction of the words, as they stand in the law, would be that the whole compensation, for all the services of the agent, shall be one per cent. on the moneys disbursed by him. But it is not explicitly so said; and if we are permitted to resort to construction, as in a doubtful clause, it does not appear to be the most equitable interpretation of it. What is the difference in labour or responsibility, between distributing stores, and disbursing moneys for the use of the navy; unless we should say that the first is the more laborious and troublesome of the two. They are distinct services in every respect, and why should they be confounded in their compensation? If we look to the practice, under contracts made by the secretary with his agents, these subjects of service have been kept separate, and a commission charged and allowed for each. I must be understood to comprehend in this view only, such stores as were sent out by the government to the agent to be distributed by him to the navy, and not those which have been purchased by him, and for which he has already received his compensation in a charge of commission on the moneys disbursed for the payment. The charge now made by the complainant is understood to be only for the stores furnished by the government.

If we adopt a more rigorous construction of the law, and allow to an agent nothing but his commissions on the disbursements of money for all his services, a case of manifest injustice might occur. The location of an agent might be such, that it would be more convenient or economical for the government to send him every thing, or nearly so, that could be there wanted for the use of the navy; he would then have little or no money to disburse; while his labour in taking care of the stores and distributing them would be very great and unrewarded. By turning to the third section of the act, which creates this office, the duties of the officer, in the view of the legislature, and to which the stipulated compensation may be supposed to refer, are as follows: the "making of contracts, the purchase of supplies, and the disbursements of moneys for the use of the navy." No stores or supplies seem to have been contemplated by this law, but such as were purchased by the agent, and for which, of course, he had received his commission on the disbursements in making the purchase. But the distribution of stores or supplies not purchased by him, and for which service he has, in no shape, received any compensation, seems not to have been considered or distinctly provided for in the description of the duties to be performed by the agent, or in fixing his compensation for his services. It

the credit now claimed, such a one as the head of the department was authorised to allow, in the exercise of his equitable discretion in the settlement of the accounts of a public officer? Or is it so clearly prohibited by the act of 1809, that to allow it would be a violation of that law? In the latter case neither the secretary nor the court has any power over it; in the former, the court may do whatever the secretary might have done. We may give the credit, if we are satisfied to consider the service for which it is claimed, as a *casus omissus* in the law, not provided for by it, and not within the restriction of compensation there imposed. In such a case we may consider the equity of the claim arising from the performance of a service, for which no remuneration has been made, and its allowance or disallowance would be subject to the discretion of the court under all the circumstances of the case. It is not a credit of positive right, for it is not promised by the act of congress, or by any contract with the government; and its allowance, as an equitable charge, will always depend upon the facts upon which the equity is founded. Such an equity may be found in one case and not in another; and each will be governed by its own circumstances. On this item, I have concluded, not without much doubting, to allow a commission of one per cent. on the value of the stores or supplies distributed by the complainant, and not purchased by him, but furnished by the United States. The credit claimed in his account, is five per cent. or ten hundred and forty-three dollars and ninety-nine cents; the allowance will be one fifth of that sum, or two hundred and eight dollars and eighty cents. As connected with this part of the case, I will dispose of the charge of one hundred and eighty-three dollars and twenty-four cents, commissions on stores and provisions delivered over by the complainant to his successor, Philo White. This charge is wholly inadmissible. It has none of the considerations in its favour which have influenced my decision on the last two items. The whole service was probably the delivery of a key to Mr. White. It was his duty to put his successor in possession of the public stores, and can afford no ground for a commission, on any principle of the most liberal equity.

A charge for clerk hire is not deemed, at the treasury, to be an improper credit to the complainant, and one thousand dollars have been allowed for that object. The balance two hundred and sixty-eight dollars and seventy-five cents, was rejected as an excess of what was thought to be a necessary or reasonable expenditure on this account. The complainant has exhibited receipts showing that the whole amount claimed by him has been actually paid to his clerks. He asks only for reimbursement. It must be allowed, as there is no evidence of any bad faith or wanton extravagance in the expenditure.

The sum of eight hundred and sixty-three dollars and thirty-three cents, is claimed for damages and interest paid to Alsop & Co. on a bill drawn by the complainant on the secretary of treasury, on the 16th August, 1830, which was protested for non-acceptance and non-payment. The protest of this bill was permitted by the government under a mistake of the facts concerning it. The complainant, while legally acting as navy agent, had an unquestionable right to draw bills on the government; and many had been drawn and paid. The only reason for refusing this, was a suspicion or belief that it had been drawn after the complainant had notice of the revocation of his appointment, and, of course, after his right to draw had ceased. This was altogether a mistake. The letter of revocation was dated in April, 1830, but did not come to the knowledge of the complainant until October following, several weeks after the date of the bill, which was, therefore, rightfully drawn. When the truth of the transaction was known, the bill was paid; but the damages, which were paid by the complainant in consequence of the protest, by the mistake of the government, and for no fault in the complainant, have been withheld, and the loss thrown upon him. I cannot see on what principle of law or equity this has been done. In such a case, between a factor and his principal, can it be doubted that the factor would be entitled to a full reimbursement of such a payment. This credit must be given to the complainant.

The next two items will be considered together. They are so manifestly unsupported by the facts and reason of the case, that it is a subject of regret as well as surprise, that the complainant should have introduced them into his account. The first is a charge of sixteen hundred and nine dollars and eighty-seven cents, for his board during his detention in Lima, owing to the protest of his bills, say from the day he ceased to be navy agent, the 1st of October, 1830, to the 20th of January, 1832, at three dollars and thirty-seven cents per diem. The second is a charge of three thousand two hundred and twenty-nine dollars and fifteen cents, for his compensation for the above time, at the rate of two thousand five hundred dollars per annum.

As to the detention at Lima, owing to the protest of his bill, if we could agree that the protest of this bill, drawn by him as an officer of the United States, and for the payment of which he was not responsible, could afford a reason for his remaining at Lima at the charge of the United States, it is not to be doubted, on the clear evidence of the case, that he did not remain there for any such reason, but for his own purposes, or at least, at his own pleasure. He remained at Lima, after notice of his removal from office, eight months before he knew of the protest of his bill, and during that time he had not any

suspicion that it would be protested. Yet these eight months are a part of the period during which he alleges that he was detained at Lima, "owing to the protest of his bills." Again, he was informed of the payment of the bill in October, 1831, but his charge for detention runs on to the 20th of January, 1832, and he did not actually sail for the United States until March, 1832, either because he was attending to business of his own, or, it may be, waiting for a suitable conveyance. In the face of such facts I cannot admit that the protest of the bill had anything to do with his remaining at Lima; and if it had, I do not see that the protest made such a necessity for his detention, as to raise a claim against the United States for it.

The claim of compensation, amounting to three thousand two hundred and twenty-nine dollars and fifteen cents, for services as navy agent, after the revocation of his appointment and during the alleged detention at Lima, is still more unreasonable. The claim is made for the time between the 1st of October, 1830, and the 20th of January, 1832. Now it is not questioned that Philo White, the official successor of the complainant, arrived at Lima, took possession of the stores, and assumed all the duties of the appointment, in May, 1831; and yet, in the face of this fact, the complainant has made a charge as an acting navy agent, until January, 1832, full eight months after he had ceased to have any connection with the office, its duties, or services. It is true that when, in October, 1830, the revocation of the complainant's appointment came to Lima, he was requested by Commodore Thompson, to continue to act as agent, as his substitute had not arrived, in procuring supplies for the squadron, and taking charge of such stores as might be sent out for its use. We may presume that he did so. But what were the services he performed under this appointment or request of Commodore Thompson? Merely to procure supplies, and receive and distribute stores. For these he has been paid by his commissions on the moneys disbursed for the purchases, and on the stores distributed by him. I cannot but observe that in the same account, in which he has charged a commission of five per cent. for these services, he has also claimed a compensation for them, in the shape of a salary, at the rate of two thousand five hundred dollars a year.

I have felt a strong disposition to allow the credit of three hundred and fifty dollars paid by the complainant for his passage home. He left his country, and his business and prospects here, whatever they were, under an appointment by the government, which purported, by the terms of his commission, to continue for four years, and as much longer as the office and his services might be thought useful and acceptable. It is true he had no legal right even to this period of enjoyment, but he had a reasonable

expectation of it, provided he gives no cause for disappointment by his own conduct. No complaint seems to have been made of his ability or fidelity, and he had been but about fifteen months in the enjoyment of the place, when his appointment was revoked. Under such circumstances, we can see and feel that a strong moral equity arises, to bring him back to the place he was taken from. Between individuals, a conscientious and just man would, I think, have done so. But no instance has been shown, under any such circumstances, of the recognition of a right, legal or legally equitable, in an officer who has been removed, or whose office has been vacated, to charge the government with his return home. I am afraid to set a precedent contrary to all usage, and must disallow this credit or charge. So with the complainant's traveling expenses in going to Washington to settle his accounts. The only remaining item or charge in the complainant's account, is for the tobacco sold or furnished by him to the United States, amounting to four thousand two hundred and seventy-nine dollars and sixty-eight cents. I can have no hesitation in allowing it.

In the letter of the secretary of the navy, to the fourth auditor, of the 25th June, 1832, he says, the tobacco must depend on the fact whether the authority to purchase was revoked generally; and whether the revocation reached the Pacific station before this purchase was made. If not it should be allowed; otherwise it should not. This is a very partial and imperfect view of the question; and it is probable that all the facts of the case were not known to the secretary. We have them now in evidence. The answer of the United States to the bill of the complainant does not deny or admit, that a report of this tobacco was made by the complainant, in his accounts, to the department, nor that it was surveyed by order of Commodore Thompson, as part of the public stores of the United States, and, as such delivered over by the complainant, to the successor in office, and regularly receipted for by him on behalf of the United States. But it is insisted, that if all these things are true, they do not authorise the charge. And why? Because it is denied that the tobacco was purchased on public account; or by authority or instructions of any officer of the government; and it is averred that tobacco is not an article which a navy agent is authorised to purchase on public account, but that it is to be furnished to our ships by the pursers as part of their stores. It is also averred that the tobacco was the private property of the complainant, shipped to him from Norfolk, on his own account, and still remains his private property, and has never been accepted or legally transferred to the United States; that the navy department has never received any part of it, or interfered with it, or done any thing to recognise the validity of any transfer or

purchase thereof; and that no officer of the department or the navy, had any authority to do so.

In answer to all these denials and averments, what are the plain and uncontradicted facts of the transaction? This tobacco was originally purchased in Virginia, as the United States allege, as the private property of the complainant; after its arrival at Lima, it was sold by him to a Mr. M'Culloch; it was afterwards re-purchased by the complainant, as he alleges, for the United States. A part of this tobacco was distributed or delivered by the complainant, before his removal from office, to certain ships of the United States, and the residue, remaining in the store of the United States, was handed over, with the other stores, to Mr. White, the successor of the complainant, having been first surveyed by order of Commodore Thompson. From that day to this not a pound of it has been in the possession or under the control of the complainant; but that which has not been consumed in the ships of the United States, has continued in the possession of their agent. Why need we inquire whether, by the regulations of the navy, tobacco is to be furnished to our crews by a navy agent or a purser? If such be the regulation, undoubtedly it would have been a good and sufficient reason for refusing to receive this tobacco, either on board of the ships, or as part of the stores of the United States, and for leaving it on the hands of the complainant, for profit or loss as might happen; but it can never afford a justification for receiving the article, for actually consuming a part of it, and for retaining the residue, and refusing to pay for it. As for that part which has been delivered to the ships, a credit has been allowed, and thus far, at least, the purchase and sale have been recognised and adopted by the department, notwithstanding the alleged navy regulation. In what respect, or on what principle of justice or equity, does the part of the tobacco, for which the complainant has been allowed a credit, differ from that for which it has been refused. The first was delivered to the pursers of the ships and has been consumed by their crews; the other has been delivered to their agent authorised to procure supplies for the navy, and has been by him distributed to the ships, or is still retained by him as the property of the United States. If he was not authorised to receive it, let him answer for it. It is enough for the complainant that he did receive it, and has received for it as the agent of the United States, and on their behalf. Suppose we should consider that the complainant was not warranted as a navy agent to make the purchase from Mr. M'Culloch for the United States. The consequence is, that it was his own property, and by him sold and delivered to Mr. White, who was the agent of the government. Is it any answer to the seller of an article to

such an agent, to tell him that, by the navy regulations, the pursers and not the navy agents are to furnish tobacco to our ships, and therefore the United States may keep and use the article but are not bound to pay for it? This cannot be. If the tobacco was received from the complainant as public stores, then he has a right to charge for it the price he gave for it; if it was a sale by him to the public agent, then he has a right to receive its fair price or value for it, and we have no better way of ascertaining it than by taking the actual cost of it to him. I cannot deny that a suspicion hangs upon my mind, that the sale to Mr. M'Culloch was not a real transaction, but a contrivance to enable Mr. Armstrong to sell his tobacco to the United States at an advance or profit on its cost, which, as a public agent, he was not authorised to do. If this were clearly shown, it would have no effect on the case other than to deprive him of the profit, a few cents a pound, and compel him to pass it to the United States at its first cost in Virginia, and the charges of taking it to Lima. The evidence is not sufficiently explicit on this point, to enable me to take this ground; and the objection has not been made at the treasury, from which, I presume they were satisfied in relation to it. I have, therefore, allowed the credit for the sum claimed in the complainant's account.

Decree: This cause coming on for final decision upon the bill, answer, replication, exhibits, depositions and other evidence: It is ordered, decreed and adjudged that the injunction heretofore granted in this cause, be and the same is hereby perpetuated, for and as to the sum of five thousand six hundred and twenty dollars and fifty-six cents, part of the sum or charge of twelve thousand eight hundred and seventy-five dollars and forty-four cents claimed by the defendants of and from the complainant, and for the recovery of which the warrant of distress in the bill mentioned was issued; and that the said defendants be and they are hereby perpetually enjoined from proceeding further against the complainant upon the said warrant of distress, for or on account of any claim or demand of and for the said sum of five thousand six hundred and twenty dollars and fifty-six cents. And it is further ordered, decreed, and adjudged, that the said injunction be dissolved, and it is hereby dissolved, for and as to the sum of seven thousand two hundred and fifty-four dollars and eighty-eight cents, the balance or remaining part of the said sum or charge of twelve thousand eight hundred and seventy-five dollars and forty-four cents, for the recovery of which the said warrant of distress was issued.

The following statement, to be filed with the decree, having reference to the account

or claim of credits which accompanies the bill of the complainant, exhibits the items of that account which have been allowed and disallowed to him, in making the above decree.

He has been allowed
 A commission of one per cent on stores distributed..... \$ 208 80
 Clerk hire..... 268 75
 Damages on protested bills..... 863 33
 For tobacco delivered to the United States navy..... 4,279 68

 5,620 56

He has not been allowed
 Commissions rejected at the last settlement \$ 5,755 86
 His board while detained at Lima.. 1,609 87
 Compensation for the same time.. 3,229 15
 The two items for distribution of stores together..... 1,043 99
 His passage home..... 350 00
 Traveling to Washington, two items Commissions for stores handed over to Philo White..... 183 24
 Commissions on \$80, paid to Mr. Henderson 4 00

 \$12,219 61

Case No. 549.

ARMSTRONG et al. v. UNITED STATES.

[Pet. C. C. 46.]¹

Circuit Court, D. New Jersey. Oct. Term, 1811.

BOND OF INTERNAL REVENUE COLLECTOR — CONFORMITY TO STATUTE — SURETIES — VALIDITY AS TO COLLECTIONS PREVIOUSLY MADE.

1. A bond, given by a collector of the internal revenue, with sureties, conditioned that the collector had accounted and would account, for all taxes collected or to be collected, is not binding on the sureties, as to collections previously made; and the court granted a perpetual injunction against proceedings on such bond, except for the sums received by the collector after its execution.

[Cited in *Bonaparte v. Camden & A. R. Co.*, Case No. 1,617.]

2. When a bond is taken under a statute, it ought to conform in substance to the requisitions of the law, and if it goes beyond it, it is void, so far as it exceeds those requisitions.

[Cited in *U. S. v. Brown*, Case No. 14,663; *U. S. v. Mynderse*, Id. 15,851; *U. S. v. Humason*, Id. 15,420.]

[In equity. Bill for injunction by Thomas Armstrong and Charles Case against the United States.] The bill stated, that in June, 1796, one Smith was appointed by the supervisor of New Jersey, to collect the internal revenue, within a particular district; and that he gave bond, with one Willis as his security. He was afterwards required to give additional security, and on the 1st of January, 1799, he, together with the complainants, as his sureties, executed a new bond, with condition that the said Smith had faithfully executed the duties of a collector, and would thereafter faithfully execute the same. That, at the time when this latter bond was given, the said Smith was considerably indebted to the United States for collections theretofore made; and that dur-

¹[Reported by Richard Peters, Jr., Esq.]

ing the year 1799, he became also indebted, in an additional sum, for money collected by him, which he had not accounted for. That a suit was brought by the United States on the last mentioned bond, in the district court, in order to recover the whole sum. The plaintiffs offered to pay, and are still willing to pay the amount collected and not accounted for since the 1st January, 1799, which the officers of the United States refused to receive. That a judgment was recovered by the United States for the whole sum; against which an injunction is prayed.

The answer admits the above allegations in the bill, and adds, that before the trial took place in the district court, the counsel for the complainants, and the district attorney, made a statement of the case, for the opinion of the secretary of the treasury; who decided that the complainants were bound to pay the whole sum. The cause came on for a hearing, when a witness was examined, to prove an allegation in the bill, that Willis, the surety on the first bond, owned real property in this state, to nearly double the amount of the debt which had accrued prior to January, 1799, which he sold subsequent to the year 1800.

Mr. Stockton, for the plaintiffs, stated, that the first law which required a bond to be given by the collector of the internal revenue passed the 11th July, 1798, [1 Stat. 591.] and merely says, that the supervisors, inspectors and collectors, shall within three months after being thereto required, give bonds, with sureties, for the true and faithful execution of their respective offices, and settlement of their accounts. This is purely prospective. The law, as to bonds to be given by collectors of duties on imported goods is otherwise.

[Before WASHINGTON, Circuit Justice, and MORRIS, District Judge.]

WASHINGTON, Circuit Justice. One object of this bond most clearly seems to have been, to secure a debt previously due to the United States; and the court does not mean to say, that security in such cases may not be legally taken by the officers of the United States; but when a statutory bond is taken, it ought to conform, in substance at least, to the requisitions of the statute; and if it go beyond the law, it is void, at least so far as it does exceed those requisitions. This is an official bond, which the supervisor had a right to demand, and Smith was obliged to give, if he meant to continue in office; but the substantial form of the bond required by the act of congress, was prospective only, and no other could be legally taken. A contrary doctrine would open the door to great oppression, and ought therefore to be discontinued. Injunction made perpetual, except as to the sum liquidated, and stated as having been due since January 1st, 1799, with interest from the time the suit at law was brought; and to be dissolved for the residue.

ARMSTRONG, (WINTER'S BANK v.) See Case No. 17,899.

Case No. 550.

ARMSWORTHY v. MISSOURI RIVER, FT. S. & G. R. CO.

[5 Dill. 491.]¹

Circuit Court, D. Kansas. 1879.

CONSTRUCTION OF THE RIGHTS OF SETTLERS UNDER THE TREATY RELATING TO THE CEDED NEUTRAL LANDS IN KANSAS.

The case of Stroud v. Missouri River, Ft. S. & G. R. Co., [Case No. 13,547,] followed; and it was held in this case that, under the provisions of the treaty referred to, the actual settler whose improvements were wholly upon the west half of a quarter section of land was only entitled to buy the portion of the quarter section on which the improvements had been made.

Suit by complainant [W. W. Armsworthy] to acquire the legal title to the southeast quarter of section four, township twenty-eight, range twenty-five, in Crawford county. The facts appear in the opinion of the court.

Hill & Sallee, for plaintiff.

Wallace Pratt and Blair & Ferry, for defendant.

Before DILLON, Circuit Judge, and FOSTER, District Judge.

FOSTER, District Judge. The material facts in this case are precisely like those in the case of Stroud v. Missouri River, Ft. S. & G. R. Co., [Case No. 13,547,] excepting that the improvements in this case are all on the west half of the quarter section, and the complainant makes claim for the whole quarter, as in the Stroud Case. In that case the improvements being on every sub-division of the quarter, the question which arises in this case was not passed upon.

In the first proviso of article 17 of the treaty, [14 Stat. 804,] the rights of the actual settler who has made improvements of the value of fifty dollars and occupies the land for agricultural purposes at the date of the signing of the treaty are clearly defined. In making his proofs, he was entitled to buy at the appraised value the smallest quantity of land in legal sub-divisions which would include his improvements—not exceeding, however, in the aggregate, one hundred and sixty acres. Under the second proviso, as it was originally drafted, the secretary of the interior might sell all these neutral lands in a body, for not less than \$800,000 cash. This proviso was general and sweeping in its terms, and did not save the rights of the settlers in the event of such a sale. When the treaty came before the senate for ratification, July 27th, 1866, this last proviso was stricken out, and the following inserted

¹ [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

in lieu thereof: "Provided, that nothing in this article shall prevent the secretary of the interior from selling the whole of said land not occupied by actual settlers at the date of the ratification of this treaty, not exceeding one hundred and sixty acres to each person entitled to pre-emption under the pre-emption laws of the United States, in a body, to any responsible party, for cash, for a sum not less than one dollar per acre." This amendment to the treaty was evidently intended to protect the actual settlers on these lands in the event they were sold in a body. But it imposes a further limitation to the first proviso of the article—that is, the settler must have been entitled to pre-emption under the pre-emption laws of the United States in order to be entitled to a preference in the purchase of the land; and it extended the time from the signing to the date of the ratification of the treaty.

1. Was it intended by this amendment to do more than impose this personal qualification and extend the time, leaving the value and kind of the improvements and the quantity of land to be determined by the first proviso?

2. Or was it intended to go further, and confer all the rights of the pre-emption laws as to improvements and quantity of land, etc., on the settler?

3. Or was it intended, as claimed by the plaintiff, that to the personal limitation was also given the right of the pre-emption laws as to the quantity of land, leaving the kind and value of the improvements to be determined by the first proviso?

If the second theory is the correct one, then the rights of the settler are to be determined by the provisions of the pre-emption laws of the United States, not only as to the person, but also to the kind of improvements and the quantity of land to which he is entitled, and the provisions of the first proviso are immaterial. Certain rights were given the settler if the land was sold in parcels, and entirely different rights given, and restrictions imposed, if the land was sold en masse. So it would result, from such a construction, that any individual settler might or might not be entitled to his improvements, depending upon which way the secretary of the interior should happen to sell these lands. It does not seem reasonable that it was the purpose of this amendment to go to that extent. We can see no reason why such a wide distinction should be made, or why the court should construe the law as making such difference. Now, if it was not intended to remit the settler to the pre-emption laws for his rights in toto, was it intended to do so in part—i. e., as to the quantity of land to which he was entitled, but not as to the improvements? This is what the plaintiff contends for, but we cannot find a reason for such a construction of the act, unless it be to compensate for the personal restriction imposed.

No one would contend that it is in the

power of courts, in construing statutes, to apportion advantages to compensate for disadvantages. That is a legislative power, and we can only declare what the law is, not what it ought to be.

Holding, as we do, that these provisos are in pari materia, as intimated in the Stroud Case, and construing them together, there is still an unmistakable difference as to the rights of the settler in the two cases. In the one case the settler need not be entitled to pre-emption rights under the laws of the United States; in the other case he must be—that is, he must have the personal qualifications of a pre-emptor—such as citizenship, being the head of a family, or widow, or a single person twenty-one years of age, and not owning three hundred and twenty acres of land elsewhere, nor have abandoned his residence on his own land in the state to reside on these lands. Such restrictions might well have been deemed proper to cut off adventurers and speculators, who might go on to these lands without a bona fide intention of remaining and making a home. Further than this, and the extension of the time of settlement, we cannot think this amendment qualified the first proviso. It may be argued that such construction imposes a restriction on the settler in the one case without giving any compensating benefits therefor. But if that were true, the hardship of the case would not alone be a controlling consideration. But is it true? It extends the time named in the first proviso from the date of signing the treaty to the date of its ratification; and as to the original proviso for which this was substituted, it seems to have been intended by its terms to cut off the rights of the settlers altogether in case the lands were sold en masse.

The secretary of the interior was authorized to sell the whole of these lands in a body. There were eight hundred thousand acres of these ceded neutral lands, and it provided for selling them as a whole for \$800,000 in gross, which would be one dollar per acre, making no deduction for the lands of settlers. If it was the intention to reserve those lands, it is altogether probable the price to be paid for the body of these lands would have been governed to some extent by the amount of lands remaining after deducting the improved lands. The amendment saved the rights of the settlers, and further provided for a sale as a whole of the remainder of the lands for one dollar per acre.

It is hardly probable that this proviso, which was substituted for one saving nothing to the settlers, was intended to enlarge the rights given by the first proviso of this article, or to fix a different rule as to improvements or the quantity of land reserved to the settler. Under our view of the law, the complainant was entitled to buy only the west half of said quarter section at the appraised value. Decree accordingly.

Case No. 551.

In re ARNOLD.

[2 N. B. R. (1868,) 160, (Quarto, 61.)]

District Court, D. California.

BANKRUPTCY—DEBTS PROVABLE—PREFERENCES.

[1. H. was indorser for A. on a note in bank, and also held two notes executed to him by A. A. was insolvent, and H., apprehending protest of the note in bank, advanced to A. \$500 to be applied thereto, and received from A. a bill of sale of a lot of flour, worth about \$1,400, in course of shipment to a distant market. Held that, though the transaction may have been a preference in favor of H. as to the note in bank then due, yet, there being nothing to show that the flour was to be held as a security for the other notes not due, no preference was created as to them, and H. was not debarred from proving them against the estate of A. in bankruptcy.]

[Cited in Martin v. Toof, Case No. 9,167.]

[2. Cited in Singer v. Sloan, Case No. 12,899, as a case in which a distinction between "knowledge" and "reasonable cause to believe" has been recognized.]

[In bankruptcy. Certificate by register to district judge of question arising upon exception by a creditor to the rejection of his proof of debt. Proof of debt allowed.]

By the Register: At the first meeting of creditors in this case, on the 24th day of January, 1868, I. H. Ham offered in proof of a debt against the bankrupt, the annexed affidavits with the notes attached, to which the Russell & Erwin Manufacturing Co. filed the objection hereto attached, and thereupon the proof of the debt was postponed to a future day. Upon the application of Henry C. Hyde, who was appointed the assignee of the bankrupt estate, the testimony hereto attached has been taken before me in relation to the claim of the said I. H. Ham, and upon the submission of the same, and of the argument of the counsel of the claimant and the Russell & Erwin Manufacturing Co., the following question is to be determined: Has I. H. Ham "accepted any preference, having reasonable cause to believe the same was made or given by the bankrupt, contrary to any provision of the bankrupt act," and thereby made himself subject to the twenty-third section thereof, which further provides that if he has accepted such a preference "he shall not prove the debt or claim, on account of which the preference was made or given; nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all of the property, money, benefit or advantage received by him under such preference?"

Before entering upon a discussion of the facts involved in the case, I propose first to dispose of the legal questions presented by the counsel for the claimants. Section thirty-five of the bankrupt act provides that "if any person being insolvent or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any * * *

sale * * * of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such * * * sale * * * is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, * * * the sale * * * shall be void and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such sale * * * is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud." Section thirty-nine of the bankrupt law provides, any person "who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any * * * sale * * * or transfer of money, or other property * * * with intent to give a preference * * * to any person * * * who are, or may be liable for him as endorser * * * shall be deemed to have committed an act of bankruptcy * * * and if such person shall be adjudged a bankrupt * * * the person receiving such * * * conveyance had reasonable cause to believe that * * * the debtor was insolvent * * * such creditor shall not be allowed to prove his debt in bankruptcy."

Now, upon the several sections, the counsel for creditor claims that the transaction which is alleged to have resulted in giving to his client a preference, was a sale of the property of the bankrupt for five hundred dollars, cash paid, and that it was not made in contemplation of bankruptcy by either party, and cannot be held to be void, or as affecting his right to prove his debt. The provisions of the bankrupt law of 1867, applicable to this case, are entirely different from those of the law of 1841, and the decisions to which my attention has been directed are all based upon the law of 1841. By reference to the several sections (of which I have quoted so much as is applicable to this case,) it will be observed that any sale made by a person "insolvent or in contemplation of insolvency or bankruptcy," to another having "reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency * * * shall be void," and that "the person receiving such * * * conveyance had reasonable cause to believe that a fraud on this act was intended, or that the debtor was insolvent * * * shall not be allowed to prove his debt in bankruptcy." It matters not whether either party contemplated proceeding in the bankrupt court; if the fact existed that the debtor was insolvent, and that the creditor had reasonable cause to believe him insolvent, he could not deal with him in any way by which a preference would result to his benefit.

The theory of bankrupt law is, that an insolvent debtor is to husband the estate in his hands as a trustee for his creditors,

and that neither the debtor nor creditor shall be a party to any transaction which shall result in giving to one creditor an advantage over another creditor, when he has reasonable cause to believe the debtor is insolvent, and the language of this act could not be more explicit than it is, in declaring this just and equitable principle. That Arnold, the bankrupt, was insolvent on the 18th day of November, 1867, is conceded. On that day it is claimed that Ham, the creditor, purchased of him his interest in two lots of flour afloat on the way to New York, for five hundred dollars cash, without reasonable cause to believe he was insolvent or contemplated bankruptcy, and that that transaction does not preclude him from proving his debt.

Having already determined that insolvency, as well as contemplation of bankruptcy, would vitiate certain sales, it only remains for me to determine whether—

First. Ham had reasonable cause to believe Arnold insolvent.

Second. If he had, whether the sale resulted in giving him an advantage over other creditors, and was made for that purpose.

I. Without especially referring to all the testimony upon which my opinion is based, I am satisfied that Ham, at the time the transaction transpired, which is claimed to be a sale to him of the interest in the flour, had reasonable cause to believe Arnold was insolvent. The peculiar circumstances under which the sale was made were such as were calculated to excite suspicion of Arnold's inability to pay his debts. Had Ham believed him solvent he would not have questioned him as to the amount he could raise to meet his note, and have fixed the amount he would give for his interest in the flour by his ability to pay more or less. Nor would he have made it a condition of the purchase that the five hundred dollars cash he paid him should be applied on Arnold's note in bank endorsed by him. The transaction was not such an one as usually transpires "in the usual and ordinary course of business," and, in the language of the bankrupt law, affords "prima facie evidence of fraud" being committed by the bankrupt against the rights and interests of his other creditors. When Ham testified, "I had to make the trade, because I had to pay the money or let the note go to protest," he confessed that he had good cause to believe Arnold could not meet his liabilities, and that if he did not make the purchase and furnish him with five hundred dollars, he would be liable to have his property attached before night and have his business broken up, and such being the fact, he proposed to him to give him a bill of sale for the amount necessary to pay his note, save him from the immediately impending liability to be attached, and that he would aid him on those terms only. The additional fact that appears from the testimony, that when Ham made the negotiation for the re-purchase of the flour

for five hundred dollars, it was worth, had it been in the city of San Francisco, over and above the advances, eight hundred dollars, and that, taking into account the prospective profit to be realized from it above the advances made upon it, in New York city, upon its arrival there, as appears by the prices current affixed to the testimony, it was worth, say, one thousand four hundred dollars, is an additional circumstance to prove that the transaction was made with a view to give to Ham an advantage not to be enjoyed by the other creditors. All of the circumstances, it seems to me, are such as would have induced any prudent man to believe Arnold was insolvent, and I cannot doubt that the cash was paid and the bill of sale given and received by Ham, believing Arnold to be insolvent.

II. Having determined that Ham had good reason to believe Arnold insolvent when he purchased the flour, did the purchase result in a preference of Ham's debt, and was the sale for that purpose, is now to be discussed and settled. The transaction was a singular one, and it is somewhat difficult to determine precisely whether it was a sale for five hundred dollars cash, or an arrangement that if Ham would advance five hundred dollars to Arnold, to be used for his own benefit in taking up a note on which he was an endorser, upon condition that he would give him a bill of sale of property, worth more than that sum in the market, out of which he was to be partially secured for Arnold's liability on the three notes that were then outstanding against him—one in the bank, on which Ham was endorser, and the other in Ham's hands as the original payee. If it was a purchase for five hundred dollars cash, the application of the money to pay the note in bank, which was made a condition of the advance, the payment of this note was giving a preference to the holder, and made with Ham's knowledge and for his benefit as endorser, and was a fraud upon the thirty-ninth section of the bankrupt act, and would preclude Ham from proving his debt. If it was an arrangement by which Ham was to furnish the larger portion of the money to pay a note on which he was an endorser, upon condition that he was to be secured by the bills of sale for Arnold's liabilities on three notes, there can be no question it was giving a preference that cannot be sanctioned under the bankrupt law, and is null and void; and that as a penalty for Ham's being a party to it, he cannot be allowed to prove his debt in bankruptcy. It matters not, therefore, whether the theory presented by the claimant's counsel be adopted, that it was a sale for five hundred dollars cash, or the theory presented by the party opposing the proof of the claim, that the transaction was an advance of five hundred dollars, to be applied to the payment of an outstanding note, upon which he was an endorser, upon

the condition that Ham should become the nominal owner of the flour, with the understanding that the proceeds realized from it was to be applied in liquidation of the notes now offered to be proved. Adopting either alternative, the register is forced to the conclusion that it was the intention of Arnold to give a preference to Ham, and that Ham received the bill of sale with reasonable cause to believe Arnold was insolvent, and must take the consequences. The question is not now before me, whether the transaction subjects Ham to an action to be commenced by the assignee of the bankrupt to recover the value of the property transferred, as assets of the bankrupt, but if my conclusions of law and fact are right, such a result must follow and it will be the duty of the assignee to take action in the matter. It will also, in its results, preclude the bankrupt from obtaining his discharge, though that question is not now under discussion. The results that must follow from this decision, if sustained by Judge HOFFMAN, who will probably be required to review it, may be regarded as a hardship upon both debtor and the creditor offering his claim for proof, as they were not probably anticipated at the time of the transaction, upon which I have commented, as the bankrupt law is not generally understood by the mercantile community, as I have reason to believe, by proceedings almost daily taken before me; yet they are just and right. The bankrupt law is intended to afford a rule of action for the debtor and creditor that will secure a proportionate distribution of the assets of an insolvent person among all of his creditors, and prevent one creditor profiting at the cost of another, and imposes upon the debtors and creditors all alike, a penalty for the violation of its just principles. Asher B. Bates, Register.

Upon announcing the foregoing decision, the creditor offering his debt for proof excepted to the same, and prayed the register to certify the question discussed to the Hon. OGDEN HOFFMAN, district judge of the district court, together with the testimony and the opinion of the register, that the same may be reviewed by him.

Pursuant to the provisions of the bankrupt act, the undersigned, as register of the first congressional district, upon the prayer of the said I. H. Ham, hereby certifies to the said Hon. OGDEN HOFFMAN, the papers hereto attached, for his decision thereupon, and as the question presented has not been adjudicated upon in this district, respectfully asks that counsel for the debtor and the contestant may be heard upon the question presented, at such time and place as may be fixed by the district judge.

San Francisco, 23d day of July, 1873.

Asher B. Bates, Register.

HOFFMAN, District Judge. This was a question certified to the court by A. B. Bates,

Esq., register, pursuant to section four of the bankrupt act. I am disposed to entirely assent to the general views of the register as to the intent and construction of the various sections of the act referred to by him. I also decline [incline] to take the same view of the facts of this case as presented by him in his opinion. But it has appeared to me that these questions do not properly arise in the present case. If a preference was given by the bankrupt and received by the creditor, who had reasonable cause to believe that the debtor was insolvent, or acting in contemplation of insolvency, such preference was given only in respect of the note then due. The money paid for the flour was applied to the payment of that note, and it was not alleged on the argument that the proofs showed any understanding or agreement that the flour was to be held as security for the other notes not due, or that its proceeds were in any to be applied to the payment of those notes, or in any way credited to the debtor. The sale of flour was absolute on its face, and, so far as appears, transferred the whole property in it to the purchaser, with no obligation on his part to account for the proceeds or to pass them to the credit of the seller on account of the other notes given by the latter. If this be so, the preference was given only in respect of the note then due, and I think it clear that the provisions of the thirty-ninth section, which deprives the creditor who receives a preference of the right to prove his debt, only refers to the debt sought to be preferred and not to other debts, and especially those not then due, in respect of which no preference was attempted to be given. I therefore think that in this case the creditor should be allowed to prove the debts evidenced by the two notes not due at the time the flour was sold to him.

ARNOLD, In re. See Case No. 17,118.

Case No. 552.

ARNOLD v. BISHOP et al.

[1 MacA. Pat. Cas. 27; Cranch, Pat. Dec. 103.]
Circuit Court, District of Columbia. Oct., 1841.

PATENTS FOR INVENTIONS—JOINT INVENTORS— INTERFERENCE—PROCEDURE.

[1. One who reduces to practice the theory of another, with the help of the latter, cannot be considered as the sole inventor of the machine or device; and, if such a one could be regarded as the originator of the invention, his right to a patent would be lost, when it appears that such machine had been in public use for more than two years before the filing of the application.]

[2. An objection that the officer before whom a deposition by a joint inventor in opposition to an application for a patent was taken failed

[Printed "decline" in 2 N. B. R. 167, octavo edition, but in the quarto it is given as "incline."]

to certify thereon that it was sealed by him, as required by the rules in force in the patent office, is sufficient ground for the exclusion of the deposition from the consideration of the commissioner.]

[Appeal from decision of the commissioner of patents rejecting an application for letters patent. Affirmed.]

Upon the final hearing of this interference the commissioner, the Hon. H. L. Ellsworth, made the following order: "The commissioner, as at present advised, considers from the joint operations of Arnold, Bishop, and Aiken that neither can consistently claim the whole, and that, since they all advisedly aided and consulted together in the progress of the matter, justice will be promoted by suspending a patent to either separately, and informing them that it is considered a joint invention; and inasmuch as the company claim that Arnold and Bishop unitedly and separately have bound themselves to convey all improvements on the machine first patented and sold to the company, the parties will be heard why the present patent should not issue on a petition to the company, provided Aiken, who was not a party to the covenant, assents to the same; and as the commissioner is verbally informed, Mr. Aiken consents."

From this order or decision appeal was taken to the court by Arnold, who alleged that the conclusions of the commissioner were erroneous in fact and were based upon testimony which was not competent or admissible under the rules of the office. The rules of the office referred to in the decision were as follows:

"Rules for Taking and Transmitting Evidence, &c., to the Commissioner of Patents.

"1st. That all statements, declarations, evidence, &c., shall be in writing, setting forth minutely and particularly the point or points at issue, and shall be verified by oath or affirmation.

"2d. That all statements, declarations, proofs, and evidence shall be filed in the patent office by the parties respectively before the day of hearing.

"3d. That before the deposition of a witness or witnesses be taken by either party notice shall be given to the opposite party of the time and place, when, and where such deposition or depositions will be taken, so that the opposite party, either in person or by attorney, shall have full opportunity to cross-examine the witness or witnesses. And such notice shall, with proof of service of the same, be attached to the deposition or depositions whether the party cross-examine or not; and such notice shall be given in sufficient time for the appearance of the opposite party and for the transmission of the evidence to the patent office before the day of hearing.

"4th. That no evidence, statement, or declaration touching the matter at issue will be considered upon the said day of hearing

which shall not have been taken and filed in compliance with these rules: Provided, that if either party shall be unable, from good and sufficient reasons, to procure the testimony of a witness or witnesses within the above-stipulated time, then it shall be the duty of said party to give notice of the same to the commissioner of patents, accompanied with statements of the cause of such inability, which last mentioned notice to the commissioner shall be received by him ——— days previous to the day of hearing aforesaid, viz., the ——— day of ——— next.

"5th. That all evidence, &c., shall be sealed up and transmitted to the commissioner of patents by the persons before whom it shall be taken, and so certify thereon."

Thos. P. Jones, for appellant.
Mr. Morfit, for appellee,
Mr. Fitzgerald, for commissioner.

CRANCH, Chief Judge. On the 19th of September, 1840, John Arnold made application for a patent for his invention of a "new and useful manner for forming the web of felt-cloth and web for other purposes," and in October following complied with the other requisites of the act of the 4th of July, 1836. A caveat, however, had been entered by George G. Bishop and John Aiken, who claimed to be joint inventors with the said John Arnold of the same machine; and on the 20th of March, 1841, the said Bishop and Aiken made application by petition for a patent for the same invention in the name of the said Bishop, Aiken, and John Arnold, averring it to be the joint invention of the three. The commissioner, on the 30th of March, 1841, decided them to be interfering claims, and notice was given to the parties by the commissioner that he would hear them on the second Monday in May, 1841, and they respectively took the depositions of several witnesses. On the 16th of June, 1841, the commissioner decided that it was to be considered a joint invention, and that neither of the parties can claim the whole, and rejected the application of all the applicants. From this decision Mr. Arnold has appealed; and the reasons stated are, in effect, that the commissioner has considered and acted upon evidence not competent according to the general rules of law, and upon testimony not taken according to the regulations prescribed and promulgated by himself; and that, independent of the evidence thus objected to, there is not sufficient evidence to establish the fact of joint invention. And Mr. Arnold's attorney asks leave to be further heard if his objections to the evidence should be overruled.

The evidence objected to consists of—

1. John Aiken's ex-parte affidavit in support of the same joint claim.

2. Letters from Mr. Rowley to the commissioner of patents, dated, respectively, March 15th, May 2d, and June 9th, 1841.

3. George G. Bishop's letters to the commissioner of 7th of May and 12th of June, 1841.

4. Mr. Rowley's deposition.

One of the objections to the deposition of Mr. Rowley is that the commissioner of deeds before whom the deposition was taken has not certified upon the deposition, according to the third rule, that it was sealed up by him. By the act of March 3d, 1839, section 12, it is enacted "that the commissioner of patents shall have power to make all such regulations in respect to the taking of evidence to be used in contested cases before him as may be just and reasonable." Under this authority, the commissioner made out and promulgated the following rules: (See statement of the case.) The first of these rules is evidently intended to apply to the initiatory proceedings in applications for patents and to uncontested cases where the commissioner may consider all the circumstances which may come to his knowledge. The other rules, viz., the second, third, fourth, and fifth, are applicable to contested cases where parties are to be heard; and in such cases, inasmuch as each party is bound by the rules, each party is also entitled to the benefit of them. The fourth rule says "that no evidence, statement, or declaration touching matters at issue will be considered upon the same day of hearing which shall not have been taken and filed in compliance with these rules." This is a restraint imposed upon the commissioner himself as much as if the very words of the rule had been contained in the statute; for the rules, made in conformity with the law, while they remain unabrogated, are as binding as the law itself. The rule is an assurance, an engagement, by the commissioner that he will not at the hearing consider any evidence not taken and filed in compliance with these rules, one of which was that the person taking the deposition should certify thereon that it was sealed up by him. This is not an immaterial form. It is a security that the deposition has not been altered after it left the hands of the magistrate before whom the deposition was taken. In the rules which the commissioner has promulgated he has not reserved any right to dispense with them in particular cases at his pleasure. After a deposition was taken while the rules were in force his dispensation cannot affect that deposition. A revocation of the rules can affect only subsequent proceedings. After a contest has arisen, the parties have a right to insist, not only that the evidence should be taken agreeably to the rules prescribed by the commissioner, but that it should be evidence competent in law. It is one of the rules in law that no man can be a witness in his own cause, unless made competent by statute, or by being called upon by the opposing party to answer upon oath, as in cases in equity and admiralty jurisdiction, &c.

If the witness is interested, he is excluded,

however small the amount of interest may be.

Objection was made to the taking of the deposition of Mr. Rowley at the time of taking it because of his interest, and because the notice was too short, because the magistrate was not named before whom the deposition was taken, and because the time was so late that Mr. Arnold would not have time to take countervailing testimony. The interest of Mr. Rowley in the patent right is the same, whether the patent should be granted to Mr. Arnold alone or jointly to the three applicants; for his only interest is as a member of the company, to whom all the applicants have bound themselves to convey the patent right when obtained. If the covenants do not cover the claim for a patent, then Mr. Rowley is not interested at all. If they do cover it, then it is immaterial to him which of the claimants obtain the patent.

The objection to the shortness of the notice is answered by the fact that Mr. Arnold did appear at the time and place, and cross-examined the witness. The lateness of the time is no cause for rejecting the deposition, but it might, perhaps, have been good ground for an application to the commissioner of patents to allow further time for taking other testimony which he might deem important in the cause.

But the objection that the magistrate before whom the deposition was taken did not certify thereon that it was sealed up by him is sufficient ground for excluding that deposition from the consideration of the commissioner of patents.

This evidence, then, being excluded, there remains only, on the part of Messrs. Bishop and Aiken, the deposition of Mr. Lownsberry. This deposition is admitted to have been taken and transmitted according to the rules; but it is said that it shows Mr. Lownsberry to be so interested as to be an incompetent witness. In that respect, however, he stands on the same ground with Mr. Rowley, and the same answer is applicable to him.

It appears by his deposition that the idea of crossing the wool diagonally was suggested by Mr. Bishop and Mr. McLean, or one of them, before Arnold was applied to or had any connection with the company in which Lownsberry, Bishop, and McLean were concerned; that upon the recommendation of Mr. Moulton, Bishop, as agent of the company, applied to Arnold to make the necessary machinery, who undertook the work, and was to have one-fifth of the profits; that he made a machine for crossing wool at right angles, and obtained a patent for it in 1829 or 1830, which was afterwards improved by him and Bishop, who obtained a patent for the improvement in their name; that Bishop frequently, from 1828 to 1837, urged the building of a machine to cross the wool diagonally, to which

Mr. Lownsberry was opposed; the machine, however, was built in 1837, by Arnold and Aiken for the company, who paid them for building it; it has always been in possession of the company, and owned by them; that the machine is the same spoken of by Alonzo C. Arnold in his deposition, and the model of which was sent to the patent office by Bishop in March, 1834; that one objection to adopting the diagonal machine was, that it would interfere with a patent machine then in operation at Catskill, but the right-angled machine did not interfere, and made a better article; that the claim of Bishop and Aiken is made for the benefit of the company, and whether the patent be taken out in the joint name of Bishop, Aiken, and Arnold, or of Arnold alone, the benefit of it is to be assigned and transferred to the company under certain covenants entered into by all of them to the company; and copies of these covenants are filed with the papers in this cause. He does not know who invented the machine built by Arnold in 1837, but it is the same mode which had been agitated by Bishop, and occasionally by Arnold, during their connection in business; that Aiken suggested alterations while the machine in 1837 was putting up, and after it was up, to make it go better; that he did the greater part of the work; cannot explain the alterations nor the difficulties to be overcome, but it did not operate at all. It seems to me that there is enough in this deposition to show that Mr. Arnold was not the sole inventor of the principle of crossing the wool diagonally, or the machine for reducing that principle to practice; and if not the sole inventor, he is not entitled to a patent.

There is no claim before me upon this appeal but that of Mr. Arnold. Bishop and Aiken have not appealed from the decision of the commissioner rejecting their joint claim. It appears by Lownsberry's deposition that the principle or mode of crossing the wool diagonally was suggested and contemplated by Bishop and McLean before Arnold was employed by them to reduce their ideas to practice. The machine did not constitute the whole invention. The next material part of the invention was the principle, i. e., the diagonal motion, which was to distinguish this machine from all other felting machines; and it is the vibratory and rotary motions which produce the diagonal crossing of the wool which Mr. Arnold claims as his invention, and for which he asks a patent. The man who reduces to practice the theory of another who assists in the reduction of it to practice cannot be considered as the sole inventor of the machine. Arnold would not have made the machine unless informed by Bishop of the discovery he had made of the effect of the diagonal crossing of the wool. The invention consisted both of the discovery of the principle and the reduction of it to prac-

tice. Neither Bishop nor Arnold, therefore, could be considered as sole inventor. It appears also by the deposition of Henry Lamb, taken by Mr. Arnold, that the machine when first put up "would not go;" that Aiken went up to remedy the defect, and that the witness afterwards saw it in operation in the fall of 1837 or spring of 1838; and that he never heard Arnold claim the patent right until within a year.

I see nothing in the deposition of Alonzo C. Arnold inconsistent with the facts stated by Mr. Lownsberry in his deposition; but if there were, Alonzo C. Arnold seems by his own showing to be interested by the promise of his father to give him a share in the patent if it should be obtained; for, although afterwards, in answer to the leading question, he said the agreement was abandoned, yet it is in evidence in the preceding part of his deposition that he thought it depended upon his generosity whether he should have an interest in the patent when obtained. If this interest, however, was not sufficiently certain to exclude his testimony, it cannot fail to have some effect upon his credibility. But he states that the machine was put in operation in 1837, and his father never spoke with him about getting the patent now applied for until the summer of 1840, and after his father had ceased to be a member of the Union Manufactory, which claims the benefit of the patent under the agreement before mentioned if it should be obtained by either or all of the claimants. It may be inferred from this that, so long as he remained a member of the company, he did not claim a sole right, or any right, to the invention. Another strong argument that he did not claim to be the inventor during those three years results from his suffering the machine to be set up and used during that period without taking any steps to procure a patent, when, by the terms of the acts of 1836 and 1839, the use of the machine, with his consent, for two years prior to his application is a bar to his claim. The fact, indeed, seems to be a bar to all other claims, and to put an end to this controversy; for if a patent should now be granted to any of them, and an action should be brought by the patentee for a violation of the patent right, it seems that the defendant might defend himself under the fifteenth section of the act of 1836 and the seventh section of the act of 1839, by showing that the machine had been in public use, with the consent of the patentee, for more than two years prior to the application for the patent.

It is suggested in the reasons of appeal that if the decision of the commissioner is sustained, there does not seem to be any possible mode of determining this question, and that it is only by granting the patent to Arnold that the rights of the individuals interested and of the public can be determined according to the intention of the acts

of congress for the promotion of the useful arts. But upon comparing the sixteenth section of the act of 1836 with the eleventh section of the act of 1839 it will appear that "in all cases where patents are refused for any reason whatever, either by the commissioner of patents or by the chief justice of the District of Columbia, upon appeals from the decision of said commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties, and other due proceedings had, may adjudge that such applicant is entitled, according to the principles and provisions of the act of 1836, to have and receive a patent for his invention, as specified in his claim; and such adjudication, if it be in favor of the right of such applicant, shall authorize the commissioner to issue such patent on his filing a copy of the adjudication and otherwise complying with the requisitions of that act." The reservation of a right to a further hearing on the part of Mr. Arnold's attorney was confined to the case of my admitting the evidence which he objected to; and as I have rejected that evidence, any further hearing is unnecessary.

Upon the whole, then, after rejecting the evidence, I am of opinion that Mr. Arnold has not supported his claim as sole inventor, and that if he had he has lost his right to a patent, for suffering the machine to be in use for more than two years before his application for a patent; and that, therefore, and upon both grounds, the decision of the commissioner of patents rejecting his claim ought to be, and it is hereby, affirmed.

Case No. 553.

ARNOLD v. BISHOP et al.

[1 MacA. Pat. Cas. 36; Cranch, Pat. Dec. 109.]
Circuit Court, District of Columbia. Nov., 1841.
PATENTS FOR INVENTIONS AND SOLE INVENTOR—
APPEAL FROM COMMISSIONERS.

[1. Under Act 1836, § 6, an application for letters patent for an invention will be refused when it appears that the applicant is not the sole inventor, but one of three joint inventors.]

[2. By Act 1839, § 11, on an appeal from a commissioner's decision rejecting an application for a patent, the review must be confined to the points involved in the reasons of appeal, and, in the absence of error in such points, the decision must be affirmed, although the judge should be of opinion, upon the evidence and merits of the whole case, that the patents ought to have been granted; and, if the judge should reverse the decision of the commissioner upon those points, the patent must issue, although the judge should be of opinion, from the whole case, that the patent should not issue.]

[On appeal from the commissioner of patents.]

Statement of the case: Subsequent to the preceding decision of the honorable judge, [Arnold v. Bishop, Case No. 552,] he transmitted a second opinion to the office in the following words:

GRANCHI, Chief Judge. After I had sent my opinion in this case to the commissioner of patents, on the 30th day of October last, I was satisfied that I had misapprehended the attorney of Mr. Arnold in supposing that in case I should sustain his objections to the testimony and evidence on the part of the appellees he would not desire to be further heard. I therefore determined to hear his further argument on the 20th instant at my chambers, of which I gave notice to the attorneys of the parties, and they attended, viz., Doctor Jones on the part of the appellant and Mr. Morfit on the part of the appellees. Mr. Fitzgerald also attended on behalf of the patent office, to give any explanations, &c., which might be required. Doctor Jones then presented his further argument in writing, in which he contended that the claim of Mr. Arnold for a patent is not included in the covenant to the Union Manufacturing Company, of which Mr. Lownsberry is a member; and, therefore, that the interest of Mr. Lownsberry "cannot be the same whether the patent should be granted to Arnold or to the three applicants." I cannot, however, perceive how that consequence should follow. It is only by introducing the assignments and covenants by Mr. Arnold to the Union Manufacturing Company, and by showing that those covenants cover this claim, that Mr. Lownsberry is supposed to be interested. If those covenants do not cover this claim, then Mr. Lownsberry is not interested; and if they do, then, as all the applicants are bound by similar covenants, it is not material to him which prevails. The only question for me to decide is that which is suggested by the reasons of appeal, viz., whether Mr. Arnold was the sole inventor of the machine. To that question it is wholly immaterial whether it be an entirely new machine or an improvement upon an old one. Upon a careful review of the depositions of Alonzo C. Arnold, Mr. Waters, and Mr. Lamb, taken on the part of the appellant, and of that of Mr. Lownsberry on the part of the appellees, I am still of opinion that Mr. Arnold has not supported his claim as sole inventor.

But it is suggested that there is no law which authorizes the commissioner of patents to withhold the grant of a patent in the case in question; that is, where the applicant is not the sole inventor; that it is not one of the grounds, stated in the seventh section of the act of 1836, which would justify the commissioner in refusing the patent; and that the only one of these grounds which can be supposed to apply to this case is its appearing to the commissioner that the same thing had been invented or discovered by some other person prior to the alleged invention or discovery by the applicant. By the sixth section of the same act the applicant must be the inventor. One of three joint inventors cannot with propriety be called the inventor; and if he applies for the patent,

the commissioner is bound to refuse it. This seems to be admitted in the reasons of appeal, where it is said that Arnold, who has sworn that he was the first and original inventor, cannot, without admitting that he has been guilty of perjury, acknowledge that Bishop and Aiken were joint inventors with him; and upon their own showing, a patent cannot be granted to Bishop and Aiken without the concurrence of Arnold. Here, then, is the authority of the commissioner to withhold a patent from an applicant who is not the sole inventor.

In my former opinion in this case I stated as one of the grounds for affirming the decision of the commissioner of patents rejecting the claim of Mr. Arnold, that he had lost his right, if he had any, by suffering the machine to be in use for more than two years before his application for a patent. I should have said "public use," which are the words of the statute. But, upon reflection, I doubt whether I can decide upon any other matter than that which arises upon the reasons of appeal. The words of the act of 1836, § 11, which confer the jurisdiction upon the judge, after allowing the applicant a right to appeal by giving notice thereof to the commissioner, filing his reasons of appeal, and paying into the office twenty-five dollars to the credit of the patent fund, are: "And it shall be the duty of the said chief justice, on petition, to hear and determine all such appeals, and to revise such decisions in a summary way on the evidence produced before the commissioner at such early and convenient time as he may appoint, first notifying the commissioner of the time and place of hearing; whose duty it shall be to give notice thereof to all parties who appear to be interested therein in such manner as said judge shall prescribe. The commissioner shall also lay before the judge all the original papers and evidence in the case, together with the grounds of his decision, fully set forth in writing, touching all the points involved in the reasons of appeal to which the revision shall be confined," i. e., the revision by the judge shall be confined to the points involved in the reasons of appeal; he is to hear and determine such appeals; but he is to revise the decision of the commissioner only in respect to the points involved in the reasons of appeal. If the commissioner did not err in those points, his decision upon those points must be affirmed, although the judge should be of opinion upon the evidence and the merits of the whole case that the patent ought to have been granted. So, if the judge should reverse the decision of the commissioner upon those points, it would seem that the patent must issue, although the judge should be of opinion that, upon the whole case, as it appears in evidence before him, the patent ought not to issue. I say that this would seem to be the effect of such a decision, because the effect of such a decision upon the further proceedings of the

commissioner would depend upon the question whether the reasons of appeal thus affirmed by the judge involved the merits of the case. If they did not, the commissioner might well say it is true that I erred in those points, but my objections to the issuing of the patent still exist untouched by the decision of the judge.

The words of the act are, that the judge's decision "shall govern the further proceedings of the commissioner in such case." This must apply only to so much of the case as is involved in the reasons of appeal; and the appeal itself can be considered only as an appeal to so much of the decision of the commissioner as is affected by such reasons. If, therefore, after the judge shall have decided in favor of the applicant upon the points involved in his reasons of appeal, other sufficient reasons remain for refusing the claim for a patent, untouched by the decision of the judge, it would seem that the commissioner might properly still reject it. Whether such new rejection would be subject to appeal, is a question which may be left, as well as the effect of the judgment of the judge in regard to the subsequent proceedings of the commissioner, to future decisions, as cases may arise, requiring a decision upon these points. For these reasons I doubt very much whether it was competent for me to decide in this case that Mr. Arnold had lost his right to a patent by suffering the machine to be in public use for more than two years before his application for a patent. So much, therefore, of my former opinion in this case may be considered as extra-judicial and as withdrawn. This renders it unnecessary to answer the very ingenious argument of Mr. Arnold's attorney upon that point, which argument, however, has not in any degree diminished my confidence in the correctness of the opinion which I have thus withdrawn. This withdrawal does not in any manner affect the judgment which I certified on the 29th of October, 1841, inasmuch as I am still of opinion that Mr. Arnold has not supported his claim as sole inventor of the machine for which he claims a patent.

The judgment, therefore, rendered by me and certified on the 29th of October last must stand as my final decision in this case.

Case No. 554.

ARNOLD et al. v. BUFFUM.

[2 Mason, 208.]¹

Circuit Court, D. Rhode Island. Nov. Term, 1820.

ESTATES—VESTED AND CONTINGENT REMAINDERS.

A devise to the testator's wife, until his son P. should attain the age of 21 years, and after P. should attain that age, that he should enter into possession, &c. &c. to him, his heirs and assigns, forever. But if the said P. should die before he attained the age of 21, or without

lawful issue, then the premises to descend to the testator's heir male in fee simple. P. attained 21 years of age, but died without ever having had lawful issue. Held that P. took an immediate vested estate in fee simple, liable to be defeated by his death before 21, but having attained that age, it became an indefeasible estate.

[At law. Action of ejectment by Ahaz Arnold and another against Thomas Buffum.] The cause turned altogether upon the consideration of a clause in the will of Thomas Arnold, and was argued on the following statement of facts, agreed upon by the parties: "At the time of the making of Thomas Arnold's will, and also at the time of the testator's death, Peleg Arnold was under the age of twenty-one years, being the testator's youngest son. John Arnold was the second son of the testator, and was then over twenty-one years of age; and Thomas Arnold was the testator's eldest son. These three sons were by different wives. Peleg Arnold lived to be upwards of sixty years of age, and died in February, 1820, without ever having had lawful issue. The estate now in question, is that which was devised to Peleg. The plaintiffs claim under Thomas, and the defendant under Peleg. The said Thomas Arnold, the testator, made in his said will, the following bequests to his wife, and the said Peleg. 'I give and bequeath unto my beloved wife, Patience Arnold, the use and income of my homestead farm, whereon I now dwell, situate in said Smithfield, for the support and education of my young children, and in lieu of her right of dower, until my son, Peleg Arnold, attain the age of twenty one years.' After describing the land, he goes on to say, 'And after my said son Peleg, attain the age of twenty one years, my will is, that my said wife have the profits of the one half of the aforesaid land and real estate, with the appurtenances, during her natural life, provided she remain my widow, for the use and benefit of educating my children, and in lieu of her dower as aforesaid. And after my said son Peleg, attains the age of twenty-one, my will is, that he enter into possession of one moiety thereof. And at the death or marriage, if that should happen, of my said wife, my said son Peleg enter into the possession of the other half of the aforesaid lands and premises, with all the appurtenances thereunto belonging. And I do hereby devise and dispose of the whole of the reversion of all the aforesaid lands and real estate, unto my said son Peleg Arnold, together with one other tract of land, &c., (describing it) to be and remain to him, my said son, his heirs and assigns, forever. But if my said son Peleg, should die before he attain the age of twenty-one, or without lawful issue, then the aforesaid devised premises, with all the appurtenances, to descend to my male heir in fee simple.'

The testator left several daughters as well as the said three sons, for all of whom he

¹ [Reported by William P. Mason, Esq.]

provided in said will, and made his eldest son Thomas, (who was by the then laws of Rhode-Island, his heir at law) his residuary devisee of all his real estate undisposed of by his will."

Tristram Burgess, for plaintiffs.

The devise in question, is to Peleg Arnold. It is of the homestead farm, and also of sixty acres at Woonsocket Hole, on the south-east end of Black Plain. The homestead is devised to Patience, the mother of Peleg, one moiety in freehold, the other for years to wit, during his minority. In none of the farm could Peleg have any interest, until the age of twenty-one, his interest in the one moiety being a contingent remainder supported by a freehold, and in the other, arising from an executory devise, to take effect on the determination of his minority. By the very form of the devise, therefore, it is evident that Peleg could in no event take any thing under it, in the homestead farm, according to the intention of the testator, unless he should live to the age of twenty-one years. When therefore, he uses the words, "But if my son Peleg should die before he attain the age of twenty-one," he does not use them to create a contingency in the estate of Peleg, for that contingency had already been created by giving the estate to Peleg's mother, until he should attain the age of twenty-one, and not giving it to him until he should have attained to that age. For giving Peleg the homestead farm, when he should arrive to the age of twenty-one, is giving it to him if he attain to that age, and is as much a contingent devise, as if the testator had said, I give my said son said estate, provided he attain to the age of twenty-one years. The words of the testator, therefore, "but if my son Peleg" &c. have no effect on Peleg's estate by the devise, and could not have been used for the purpose of having any, since if those words had been left out of the will, and Peleg had died before twenty-one, he could not have had the estate, for it was not given him until he arrived to that age; and was all actually given to his mother until that event should happen. But for another reason, the words, "but if" &c. could have no effect on Peleg's estate, for they create a contingency, which, if it happen, will divest an estate already vested, and so was the determination in the case of *Barker v. Suretees*, 2 Strange, 1175. So also in all the cases from *Price v. Hunt*, Poll. 645, down to *Fairfield v. Morgan*, 5 Bos. & P. 38. But by the devise to Peleg, he could not take the estate in question, until he attained the age of twenty-one, his arriving to that age, being a condition precedent to the vesting of the estate in him. The words, "but if," &c. therefore, could not create a contingency by the happening of which an estate should be divested, which could not possibly vest, until it ceased to be possible

that this contingency should happen. For Peleg's estate could not vest until he arrived at the age of twenty-one, and the possibility of his dying before twenty-one, must be passed the moment he arrived to the vesting of his estate.

Now if the words, "but if," &c. have no effect on the estate of Peleg, then they cannot be considered as used with reference to it; and in considering the exact nature of it, these words may be expunged, and the will read thus, "If my son Peleg die without lawful issue, then," &c. The whole devise will then read thus, "And I do hereby give, devise, and dispose of the whole of the reversion (meaning one moiety of the estate aforesaid, when he should attain the age of twenty-one, and the other moiety at the death or marriage of his mother) of all the aforesaid lands and real estate, unto my son Peleg Arnold, together with one tract of land containing sixty acres, &c. to be, and remain unto my said son, his heirs and assigns, forever. But if my said son Peleg, should die without lawful issue, then the aforesaid devised premises, with all the appurtenances, to descend to my male heir in fee simple." According to this reading, Patience takes in the homestead farm, a freehold in a moiety thereof, and an estate for years in the other moiety, both conditional (if she remain the widow of the testator); she takes nothing in the sixty acre lot. Peleg takes after the interest of Patience in the home farm, and after twenty-one in that and the sixty acre lot, an estate subject to the condition of his arriving at the age of twenty-one. Thomas takes all the remainder, whatever it may be, in fee simple, not indeed by this clause in the will only, but by the residuary devise in the 5th clause of the will. Concerning the estate of Thomas, we need not inquire, for it is agreed that the defendant cannot hold, and that the plaintiffs must recover, unless Peleg took a fee simple in the premises. I think it has been demonstrated, that the condition annexed to the estate of Peleg, is contained in the very form of the devise, and is a condition precedent; and that the words, "but if," &c. have no effect at all on his estate. They were used by the testator solely with reference to the estate of Thomas in the premises, and for the purpose of determining on what event (to wit, the dying of Peleg before the age of twenty-one) the estate of Thomas should commence, or become unconditional, for it could not come into his possession until the estate of Patience determined. The estate of Peleg then being given to him and his heirs, when he should arrive at the age of twenty-one, must be a conditional fee, and whether a fee simple or a fee tail, must depend on the meaning of the word "heirs" in the devise.

If Peleg took a fee simple, there is an end of the plaintiff's case, if he took a fee tail, there is an end of the defendant's. What

kind of estate then did he take? Had the testator stopt at the words "twenty-one years," and not added, "or without lawful issue," Peleg would doubtless have taken a fee simple. In using the words "or without lawful issue," the testator must have either meant, first, to convey another condition to the estate of Peleg; secondly, to limit the word "heirs," to heirs of his body; or thirdly, to create a contingency, on the happening of which (to wit, the dying of Peleg without issue) Thomas should take the estate. But if the testator had either of these intentions in using the words, "or without lawful issue," then is the case surely with the plaintiffs. For if he meant that the continuance of the estate of Peleg should depend on his having issue, in the same manner that the commencement of it should depend, on his attaining the age of twenty-one years, then forasmuch as he died without issue, the contingency or condition on which his estate was to determine, has happened, and so the defendant can take nothing by the deed of Peleg, and the estate passed to Thomas, by force of the devise. From him the plaintiffs derive their title. But if the testator meant by the words, "or without lawful issue," to limit the word heirs, to heirs of his body, then Peleg took a fee tail, but he did not convey as tenant in tail to the defendant, and so the defendant takes nothing by his deed. But because the estate tail created by the devise, determined by the death of Peleg without issue, the remainder being the fee simple, vested in Thomas, or his heirs, by force of the residuary clause of the will, and it passed to the plaintiffs from Thomas. But if the testator meant by the words, "or without lawful issue," to annex a contingency to the estate of Thomas, on the happening of which the fee simple should vest in him, then that contingency, viz. "the dying of Peleg without lawful issue," having happened, the estate has vested in Thomas, and through him in the plaintiffs: But it seems clear, that the testator had in view all these three meanings, when he used the words, "or without lawful issue." 1st. He meant the estate should not determine by the death of Peleg before he arrived at the age of twenty one, if he died leaving issue. 2d. He meant to limit the word heirs, to heirs of Peleg's body, and formed this condition in favour of Peleg's children, and not of his other brothers and sisters, or his heirs generally. 3d. He meant the estate of Thomas should not commence, unless Peleg died without issue, or upon the determination of Peleg's estate tail, upon failure of his issue. According to this construction, the devise is to Peleg, if he attain the age of twenty-one, and to his issue if he have any issue, at his demise, whether before or after he attain twenty-one. It cannot be supposed, that the testator, who would not give the estate to Peleg, unless he attained the age of twenty-one, would give it to his collateral heirs,

whether he attained that age or not. But it is very reasonable to suppose, that he would give it to the children of Peleg, although he might die in his minority. The words, "or without lawful issue," are words of limitation, and confine the meaning of the word heirs, to heirs of the body of Peleg. This gives Peleg an estate tail, and so the case is with the plaintiffs. This construction is the only one consistent with all the authorities.

The first case in point, is *Soullé v. Gerrard*. Cro. Eliz. 525. In that case, Richard Baker being seized devised to his son Richard, and to his heirs forever; and if Richard died within the age of twenty-one years, or without issue, then the land should be equally divided amongst his three other sons. Richard, the devisee, had issue, Mary, and died within age. In this case it was adjudged, not that or was and, but that the words, "if he die within the age of twenty-one years," were void, and that the words, "or without issue," limited the meaning of the word "heirs," confining it to heirs of the body, and gave Richard an estate tail. Judge Anderson adjudged the words, "if he die within the age of twenty-one years," to be void in this case, and I think I have demonstrated that in the case in question, the words, "but if my son Peleg die before he attain the age of twenty-one," have no reference to the estate of Peleg. It is therefore clear, that the plaintiff's case comes completely within the principles of *Soullé v. Gerrard*, and that Peleg took an estate tail, with remainder over to Thomas in fee, on failure of issue of Peleg. The case of *Dutton v. Engram*, Cro. Jac. 427, is a similar case, and decided in the same way. *Chadock v. Cowley*, Id. 695, is almost in the same words, and governed by the same principles. *Doe v. Rivers*, 7 Term R. 276, is on the devise of W. Fifield, to his daughter Mary, on her attaining the age of twenty-one, and to her heirs forever; and in case said Mary "should die without issue," then, &c. Mary married and had issue, and the question was, what estate she took by the will of her father. It was adjudged, that she took a fee tail. In what does this case differ from the case in question? Peleg's estate was given to him when he should attain the age of twenty-one. They are both given to them and their heirs forever, and they are both to go over to the right heirs of the deviser, if the devisees die without lawful issue. If Mary took an estate tail, why does not Peleg take an estate tail? Indeed it is a principle of law, from which there has been no adjudged departure, that "although a devise to a man and his heirs, gives him an estate in fee simple; yet, if the word heirs, is qualified by any subsequent words, shewing the intention of the testator to restrain them to the heirs of the body of the devisee, the devise will in that case create only an estate tail."

In *Fearne on Ex Devises*, (page 180,) the rule is said to be the same, where the remainder is limited to the heirs of the testator himself, if such heirs must also be heirs to the first devisee. This is also true in the case in question. Thomas was heir to Peleg, and to the testator likewise. A number of decided cases illustrate and confirm this principle; and no case can be found, where an estate is devised to one and his heirs forever, with proviso, that if he die without issue or heirs, then a devise over to the heirs of devisor or devisee, in which, where that question has been made, it has not been decided that the first devisee took an estate tail. The case of *Walsh v. Peterson*, 3 Atk. 193, though it seems to be such a case, does not raise the question, whether the estate then devised was a fee simple or fee tail. The discussions on the technical meaning of the word *or*, in wills and deeds, are all in plaintiffs' favour. These discussions are, that *or* should be read and in certain cases. These are when the manifest intention of the party using the word, requires such reading. This intention is presumed in favour of the issue of the devisee. In the cases where the issue of the devisee would be disinherited by a contrary reading *or*, has been read and, but in no other cases. The reason constantly given for reading *or*, as if it were and, is, that otherwise the issue of the devisee might be disinherited. But if all such cases were decided to be tenancies in tail, as the leading case of *Soullé v. Gerrard*, [*Lowell v. Garrett*,] *Moore*, 422, has been, the issue could not be disinherited. Lord Hardwicke in *Woodward v. Glasbrook*, 2 Vern. 388, reads *or* as *and*, doubtless because the case was in form, and not by implication, a fee tail. The case of *Glaswarke v. Claggett*, [*Goshawke v. Chiggel*,] *Cro. Car.* 154, retains the grammatical meaning of *or*, because the interest of the issue did not require a different meaning. The case of *Fairfield v. Morgan*, 5 Bos. & P. 38, which Judge Kent declares, has "closed the controversy forever," was a question about leasehold estates, concerning which there could be no question of inheritance, either fee simple or fee tail. It appears clearly the intention of the testator to give the remainder to Thomas, after failure of the issue of Peleg, and the determination of the estate tail carved out for the benefit of him and his children. This is most agreeable to the principles of law. It is an essential rule of law to exclude executory devisees when the estate can pass as a remainder. [*Hawley v. Inhabitants of Northampton*,] 8 Mass. 38. In the case of *Soullé v. Gerrard*, Lord Chief Justice Anderson decided that the devising a fee upon a fee, by way of executory devise, was a vain will, and the words, "if said Richard die before twenty-one years of age," utterly void, so that the limitation over was a remainder in fee simple after the determination of Richard's estate in fee tail. The intention of the testator

must govern in the construction of wills, and nothing can be more clear, than that Thomas, the testator, did not intend to give a fee simple to any of his children or devisees, except to Thomas his eldest son and heir at law. It is true in the devise to John, he uses words peculiar to the creation of a fee tail, so does he in his devise to Asa. From this it may be inferred, that he knew what words created a fee tail. He knew also what words would create a fee simple; and had he intended such an estate for Peleg, why did he use words, which have so often been adjudged to limit the word heirs, and create a fee tail? Lord Hardwicke says, there is no magic in words, and if he conveys his meaning, the testator has a right to use such words as he may choose. He may use the same words for different purposes, and different words for the same purpose. It may not be strictly logical to do so; but by the laws of the land, a man does not lose the right to dispose of his estate according to his choice, because he is a bad logician. The case of *Brownsword v. Edwards*, 2 Ves. Sr. 243, is strong on this point, and did I not consider the case conclusively with the plaintiffs under the other views of it, I would go into a consideration of that case.

Searle, for the tenant, argued the case shortly, on the ground that the case was completely settled by authority; and cited the following cases.

Price v. Hunt, *Poll.* 645; *Pells v. Brown*, *Cro. Jac.* 590; *Barker v. Suretees*, 2 *Strange*, 1175; *Framlingham v. Brand*, 3 *Atk.* 390, 1 *Wils.* 140; 1 *Rolle, Abr.* 833; *Fairfield v. Morgan*, 5 *Bos. & P.* 38; *Denn v. Kemeys*, 9 *East*, 366; *Right v. Day*, 16 *East*, 67; *Eastman v. Baker*. 1 *Taunt.* 174; 6 *Cruise*, *Dig.* 440, 450; *Doe v. Webber*, 1 *Barn. & Ald.* 713; *Porter v. Bradley*, 3 *Term R.* 143; *Roe v. Jefferey*, 7 *Term R.* 589; *Holmes v. Holmes*, 5 *Bin.* 252; *Jackson v. Blanshan*, 6 *Johns.* 54; *Ray v. Enslin*, 2 *Mass.* 554; *Lippett v. Hopkins*, [Case No. 8,380.]

STORY, Circuit Justice. The question for the consideration of the court is, what estate Peleg took under the will. If he took a fee simple, which became absolute upon his attaining twenty-one years of age, then the tenant is entitled to judgment. If he took a fee tail, or a fee simple determinable upon his dying without issue, notwithstanding his arrival at twenty-one years of age, (and in this latter view the question, whether the executory devise over be not too remote, becomes immaterial because it is a devise to the heir at law) then the demandant is entitled to recover.

The counsel for the demandant contends, 1st. That Peleg took a contingent remainder in the estate devised to him, depending as to one moiety, upon his arrival at age, and as to the other moiety, upon the death or

marriage of the testator's wife. 2d. That Peleg took an estate tail only by the devise. If these grounds fail, there is an end of the controversy.

As to the first point, it seems to me impossible to read the terms of this will, and not come to the conclusion, that upon principles of law, the estate devised to Peleg, was a vested estate in remainder, to take effect in possession upon the regular determination of the preceding estate, as to one moiety upon his attaining 21 years of age, and as to the other moiety upon the death or marriage of the testator's wife. The case differs not at all in principle, from a devise to A. for 21 years, and afterwards to B. or to A. during widowhood, and afterwards to B.; in which cases it is clear, that the estate to B. would be vested in interest and not be contingent. To constitute a vested estate, it is not necessary that it vest in possession; it is sufficient if it vest in interest, that is, that there be a present fixed right of future enjoyment, and there be no condition precedent to its vesting in possession, if the prior estate were immediately determined by its natural limitation. On the other hand, a contingent remainder always supposes, that the remainder is limited to depend on an event or condition which may never happen or be performed, or which may not happen or be performed, till after the determination of the preceding estate. *Fearne, Con. Rem. (Butler's Ed.) 3*. In the case at bar, there was no such uncertainty as to the event on which the remainder depended; the arrival at age and the death or marriage of the testator's wife, created no condition without which the estate could not vest, but only denoted the time when the remainder was to vest in possession. *Fearne, Rem. (Butler's Ed.) 242*.

The authorities, too, on this head, are decisive of the question. One of the earliest is *Boraston's Case, 3 Coke, 19*. There was a devise of land to A. and B. for eight years, and after the said term to remain to the testator's executors till such time as H. should accomplish his full age of twenty-one years; and when the said H. should come to his full age of twenty-one years, then the testator willed that H. should enjoy the lands, to him and his heirs forever. H. died under twenty-one years, and it was contended, that the remainder did not vest in H. because he did not live to attain twenty-one years of age, for that as he was not to have it until twenty-one, it was contingent on that event, it being uncertain, whether he could ever attain that age. But it was held, that the case was nothing in effect but a devise to the executors till H. attained twenty-one years of age, remainder to H. in fee; that the adverbs of time, when, &c. and then, &c. do not make any thing necessary to precede the settling of the remainder, any more than in the common case of a lease for life or years, and after the death of the lessee or the expiration

of the term, the remainder to another, in which cases the remainder vests presently; that when these adverbs refer to a thing, which must of necessity happen, there they make no contingency; and it is certain, that every man must die, and every term end, and that H. would or might accomplish his age of twenty-one years, which are all one in construction of law; and that these adverbs expressed the time when the remainder to H. should take effect in possession, and not when the remainder should vest.

Another case is *Manfield v. Dugard, 1 Eq. Cas. Abr. 195, pl. 4*, where the devise was to the testator's wife for life, till his son should attain to his age of 21 years, and when his son should attain to this age, then to his son and his heirs; the son lived to the age of thirteen years, and then died; and it was held, by Lord Harcourt, that the remainder vested presently in the son upon the testator's death, and was not to expect till the contingency of his attaining his age of twenty-one years should happen. These, as Lord Chief Justice Willes declared, are two very great authorities, and both of them in point; and upon these authorities, in a case where the devise was to W. U. and A. his wife, to hold to them for so long a time, and until B. C. and D. sons of W. U. and his wife, should come to and attain their several and respective age of twenty-one years, then to the said B. C. and D. and to their heirs and assigns equally to be divided between them as tenants in common, and not as joint tenants, and to take and hold their respective shares of and in the same, as they shall severally arrive at their said ages of twenty-one years, and not before, unless W. U. and his wife should, before that time, depart this life, and that then immediately on the death of the survivor of them, W. U. and his wife, to the said B. C. and D. their heirs and assigns, in manner as aforesaid; the same learned judge, and his brethren of the common pleas held, that the estate devised to B. C. and D. in case they had survived the testator, would immediately have vested in them, and have descended to their heirs, although they had never attained the age of twenty-one years. *Doe v. Underdown, Willes, 293*. There are many other cases to the same effect. I will mention a few of the later cases, and merely refer in general terms to the others. In *Doe v. Lea, 3 Durn. & E. [3 Term R.] 41*, where the devise was to trustees and their heirs, until M. L. should attain the age of twenty-four, and unto M. L. when and so soon as he should attain his age of twenty-four years; and M. L. died after twenty-one but before twenty-four, it was solemnly held by the court of king's bench, that M. L. took a vested interest in the estate descendible to his heir at law. In *Bromfield v. Crowder, 4 Bos. & P. 313*, there was a devise (after two life estates) in remainder, to J. D. Bromfield, if he should live to attain the age of twenty-one years, but in case he should die

before he attained that age, and his brother C. B. should survive him, in that case to C. B. if he attained the age of twenty-one years, &c.; and it was resolved, that J. D. B. took a vested estate determinable upon the contingency of his dying under twenty-one years. Then came the case of *Doe v. Moore*, 14 East, 601, where there was an immediate devise to J. M. when he attained the age of 21 years, to hold to him and his heirs forever; but in case he should die before he attained the age of 21 years, then to his brother, &c.; and it was adjudged, that J. M. took an immediate vested interest, liable to be divested upon his dying under 21 years of age. A still later case is *Doe v. Nowell*, 1 Maule & S. 327, where the devise was to J. R. for life, and on his decease to and among his children lawfully begotten, equally at the age of 21 years, and their heirs as tenants in common; but if only one child should live to attain such age, to him or her, and his or her heirs, at his or her age of 21; and in case J. R. should die without lawful issue, or such lawful issue should die before 21, then a devise over; and it was resolved, that the children of J. R. took vested remainders. I forbear to quote other cases, although the books abound with them on the same point. *Fearne*, Rem. 242, 401, 547; [*Pills v. Brown*,] *Palmer*, 132, 1 Eq. Cas. Abr. p. 188, pl. 8; *Goodtitle v. Whitby*, 1 Burrows, 228; *Doe v. Lea*, 3 Durn & E. [3 Term R.] 41; *Doe v. Cundall*, 9 East, 400; *Stanley v. Stanley*, 16 Ves. 491; *Chambers v. Brailsford*, 18 Ves. 368; *Perrin v. Lyon*, 9 East, 170; *Edwards v. Symons*, 6 Taunt. 213; *Goodright v. Parker*, 1 Maule & S. 692; *Denn v. Satterthwaite*, 1 W. Bl. 519; *Fairfield v. Morgan*, 5 Bos. & P. 38. They present a mass of authority, against which it is difficult to offer any reasoning, which would not go to unsettle the most solid foundations of the law.

We may then pass to the second point made by the demandant. And I am clearly of opinion, as well upon principle as authority, that the estate devised to Peleg, was a fee simple, and not a fee tail. Consider the terms of the will; the devise is to Peleg, after his arrival at age, "to be and remain to him, his heirs and assigns, forever." These are the very terms in which a fee simple is technically expressed. To narrow the fee simple thus expressly given to a fee tail, it ought to be apparent from the context, that such was the testator's intention. Let us see, therefore, if any such intention can fairly be inferred from the subsequent clause. It is in these words. "But if my said son Peleg, should die before he attain the age of 21, or without lawful issue, then the aforesaid devised premises, &c. to descend to my male heir in fee simple." Now, in order to maintain the demandant's case his counsel is driven to contend, that "or," is to be construed in the disjunctive, so that the devise over may take effect upon the happening of

either of the events stated; or that the words, "before he attain the age of 21," are superfluous and inoperative, and are therefore to be struck from the will.

In respect to the first position, the necessary result of the construction contended for, would be, that if Peleg had died under age, leaving lawful issue, the devise over would have taken effect to the exclusion of such issue, against the apparent intention of the testator. It is upon this principle, that in a long line of cases upon analogous devises, it has been decided, that "or," ought to be construed "and." Several of these cases are referred to in *Lippett v. Hopkins*, [Case No. 8,380,] and I will barely cite as auxiliary, the very recent case of *Right v. Day*, 16 East, 67, in which the doctrine is acknowledged and confirmed, if indeed, a doctrine can be said to require confirmation, which has been acted upon ever since the decision in *Soule v. Gerrard*, [*Sowell v. Garret*,] in the reign of Queen Elizabeth, *Moore*, 422, 2 Rolle, 282.

As to the other, which is the favorite position assumed in the argument, it seems equally unsupportable. It is the duty of courts of justice, to give the natural construction to the words of a will, unless some manifest incongruity or repugnancy would arise; and where the words are sensible in the place they occur, and import a condition or contingency, to strike them out, or render them inoperative, would be to create and not to construe a will. Construing, then, the words as we find them in the clause now under consideration, there is no reason to restrain the estate of Peleg, to an estate tail. If that had been the intention of the testator, there is no reason, why he should have inserted the contingency of Peleg's arrival at age, in the devise, since it could have no operation upon the estate devised to him. But if he intended a fee simple, as his previous words import, then the contingency was necessary to be expressed, as otherwise, the estate would rest absolutely in Peleg, although he should die under age, and without issue. The rule of law is indeed very well settled, that a devise to A. and his heirs, and upon an indefinite failure of his issue, a devise over to another person, shall be construed an estate tail only in A.; and the reason of the rule is, that otherwise the remainder over would be void, as the contingency would be too remote. And the like rule prevails, if the devise over be on failure of heirs, to a person who could be an heir of the first devisee, for heirs in the second devise here, must be construed merely as issue, since the first devisee could never die without heirs, while the second devisee or his heirs were in existence. But the like construction would not prevail, if the second devisee were a stranger, for no such repugnancy would exist, and then the natural meaning of the word heirs, would prevail,

although thereby the devise over would be too remote, and consequently be void. See the cases cited in *Lippett v. Hopkins*, [Case No. 8,380;] *Doe v. Bluck*, 6 Taunt. 485, 2 Marsh. 170; *Lillibridge v. Adie*, [Case No. 8,350;] and cases there cited.

The reasoning, on which these rules proceed, does not apply to a case where the devise over is not on an indefinite failure of issue, but on a failure of issue within a limited period. In such a case, the devise over would not be too remote, construing the first devise to be a fee simple. Nor would there be any incongruity in the second devisee's being heir of the first, for the event on which the estate is to go over, is not an indefinite failure of heirs generally, but of issue, within the limited period. There being, then, no obvious inconvenience or incongruity from construing the words of a will of this kind, according to their natural sense, courts of law are not at liberty to abandon that construction. And, accordingly, the rule has become inflexibly incorporated into the law, that in such cases, the first devise shall be construed a fee simple, upon the plain ground of effectuating the intention of the testator, apparent upon the face of the will. Hence, whenever the devise is to A. and his heirs, and if he die under age without issue, then over, the devise to A. is uniformly held to be a fee simple, and upon his arrival at age, it becomes absolute, and descendible to his heirs at law, though he should afterwards die without issue. The cases in the books upon this subject, are so numerous, that the danger is of being overwhelmed in examining them. *Pells v. Brown*, in the reign of King James the first, is the leading case, and it has never since been shaken. *Cro. Jac.* 590, and cases cited; *Lippett v. Hopkins*, [supra,] and cited in this case, [ante, p. 1173.] I will barely cite a few cases, which are directly in point to the case now at bar, leaving a more minute examination to those, who have the ingenuity to doubt, or the courage to compare them. [*Price v. Hunt*,] *Poll.* 645; *Barker v. Suretees*, 2 *Strange*, 1175; *Frammingham v. Brand*, 1 *Wils.* 140, 3 *Atk.* 390; *Collenson v. Wright*, 1 *Sid.* 148; *Fairfield v. Morgan*, 5 *Bos. & P.* 38; *Denn v. Kemeys*, 9 *East*, 366; *Porter v. Bradley*, 3 *Term R.* 143; *Roe v. Jeffrey*, 7 *Term R.* 580; *Right v. Day*, 16 *East*, 67; *Doe v. Webber*, 1 *Barn. & Ald.* 713; *Doe v. Wetton*, 2 *Bos. & P.* 324. The first is reported in 1 *Eq. Cas. Abr.* p. 188, pl. 8. One devised lands to his wife, till his son came to the age of 21 years, and then that his son should have the lands to him and his heirs, and if he died without issue before his said age, then to his daughter and her heirs; and it was held to be a good executory devise to the daughter, if the contingency happened; and in the mean time, the fee descended to the son as heir; and if he lived

to 21, though he afterwards died without issue, or if he should leave issue, though he died before 21, yet the daughter was not to have the lands, because he was to die without issue, and before 21, to entitle her. In *Eastman v. Baker*, 1 *Taunt.* 174, the devise was to J. B. and her heirs forever, but in case the said J. B. should fortune to die, and not attain the full age of 21 years, or having no such issue as aforesaid, then over to her mother. J. B. died before her mother without issue, but having attained 21 years of age; and it was held, that J. B. took an estate in fee simple, which became absolute upon her attaining full age, and that the executory devise over was contingent upon the event of the daughter's dying in the life of the mother, without attaining 21 years of age, and without having issue. In *Fairfield v. Morgan*, 5 *Bos. & P.* 38, the devise was in effect to B. the testator's brother in fee, but in case B. should die before he attained the age of 21 years, or without issue living at his death, then to the testator's mother. B. attained 21, but died without issue, and the house of lords, in conformity with the opinion of all the judges, held that B. took a fee simple, which became absolute on his arrival at 21 years of age, and that the mother took nothing upon the death of B. by the executory devise. The very late case of *Doe v. Rawding*, 2 *Barn. & Ald.* 441, is to the same effect. There the devise was as to one moiety, to testator's wife for life, and subject to that all his estate to his daughter M. and her heirs forever, but in case his daughter M. should die under the age of 21 years, unmarried and without lawful issue, then and in such case, the entirety of his estate, &c., to his wife in fee. The daughter died under 21, without lawful issue, but was married. And it was held, that the daughter took an estate in fee simple, which became absolute by the event of her marriage; and that the devise over did not take effect. These are decisions in the English courts, sufficient in point of authority and reasoning, to satisfy the most scrupulous juridical mind. But, I trust, it will not be deemed unfit to add a few from the American Reports, entitled to very great weight from the learning and dignity and ability of the judges. In *Jackson v. Blanshan*, 6 *Johns.* 54, the devise was of all the testator's estate to his six children by name, and to their heirs forever, to be equally divided among them all, share and share alike; but if any of the children should die before they arrived at full age, or without lawful issue, then his share to devolve upon and be equally divided among the rest of the surviving children, and to their heirs and assigns forever. All the testator's children survived him and attained full age. Four of them afterwards died, leaving issue, and a fifth, after arrival at full age, died without having had lawful issue. The learned judges of the

supreme court of New York, held, that "or" was to be construed "and," and that as all the children survived 21, they took an absolute estate in fee simple, and consequently that the devise over never took effect. *Holmes v. Holmes*, 5 Bin. 252, in the supreme court of Pennsylvania, is to the same purpose. There the devise to the testator's grandson H. to hold to him and his heirs and assigns forever, to be entered upon and taken possession of by him, as soon as he arrived at the age of 21 years, or the day of his marriage, which should first happen; but that if H. should die under age, or without issue, that his estate should descend to his next brother and his heirs; but if he left no brother, then to his sisters and their heirs, share and share alike. H. entered into possession, and died seized, of full age, but unmarried, and without issue; and it was held, that H. took an estate in fee simple, with a good executory devise over in case he died under age, and without issue; but that on attaining his full age of 21, his estate became indefeasible, and on his death descended to his heirs. A similar doctrine was recognized by the supreme court of Massachusetts, in *Ray v. Enslin*, 2 Mass. 554, Supp., where the devise was to the testator's daughter and her heirs forever, but in case the daughter should happen to die before she come of age, or have lawful heir of her body begotten, then after his wife's decease, to his sister one third, and two thirds to his wife, so to be divided unto them or their heirs forever. The daughter survived the testator, and afterwards married and died, leaving lawful issue. And it was held, that she took a fee simple, defeasible upon a contingency seasonably determinable, and that her estate became indefeasible in the events that happened. I do not know, that any American decisions have ever been made, that bring the principle of these into question. I take them to be settled law, and have not scrupled to follow them on a former occasion, *Lippett v. Hopkins*, [Case No. 3,350,] and do not now hesitate to adopt them.

One word, as to some of the cases cited by the counsel for the demandant, which have been supposed to intimate a different doctrine. As to *Soullé v. Gerrard*, Cro. Eliz. 525, it is sufficient to say, that the case was rightly decided, but the doctrine held by the court, (strange enough in several respects) is not law, and is against the current of authority. *Dutton v. Engram*, Cro. Jac. 427, is good law, but inapplicable, for it turned on the contingency being an indefinite failure of issue, and therefore fell within the rule already stated. *Chadock v. Cowley*, Cro. Jac. 695, admits of the same answer, for it was held not to be a contingent limitation to the survivor, on either's dying without issue in the life time of the other. *Fearne*, Rem. (Butler's Ed.) 243. The only

remaining case, is *Doe v. Rivers*, 7 Term R. 276, where the devise was in effect to the testator's daughter on her attaining 21, and to her heirs, and in case his daughter should die without issue, then he empowered her to dispose of the whole by will, &c. as she should limit and appoint, and for want or such issue, that the same should descend and go to his own right heirs. And it was held, that the daughter took but an estate tail. The case turned altogether upon the intent of the will, and the devise over being upon an indefinite failure of issue. It was deemed so plain, that it was given up by the defendant's counsel, and involved no question as to the estate, being devised over upon the dying of the daughter under age.

Upon the whole, unless I were prepared to overturn a series of the best considered judgments, (which I have not the rashness to attempt) it is most clear, that upon the principles of law, Peleg took an indefeasible estate in fee simple, upon his attaining 21 years of age, and therefore that the judgment in this case ought to be for the tenant. Let it be so entered accordingly.

Case No. 555.

ARNOLD v. CLIFFORD.

[2 Sumn. 233.]

Circuit Court, D. Rhode Island. June Term, 1835.

CONTRACTS TO INDEMNIFY FOR PUBLICATION OF LIBEL.—VALIDITY—PUBLIC POLICY.

1. A promise to indemnify another for doing a private wrong, or committing a public crime, is against public policy, and is void in law. Therefore, a promise to indemnify the publisher of a libel is void.

2. The liberty of the press does not sanction the publication of libels.

[Cited in *The Hudson*, 15 Fed. 167.]

At law. This was an action on the case [by Isaac Arnold against Benjamin Clifford] for a libel, by publishing, in April, 1835, in the *Providence Republican Herald*, a false and injurious account of the trial of a cause, in which the plaintiff was a party. There was a special plea in justification, and issue thereon.

At the trial, the principal question was, whether the publication contained a true, fair, and accurate account of the trial of the former cause; and it was argued by Tillinghast and Webster for the plaintiff, and by Richard W. Greene and Whipple, for the defendant. In the course of the trial, the question arose, whether, supposing the publication to be a libel, a promise, by the defendant, to indemnify the publisher, was valid in point of law.

¹ [Reported by Hon. Charles Sumner]

STORY, Circuit Justice. I have not the least doubt upon this point. A promise to indemnify another for doing a private wrong, or for committing a public crime, is against public policy, and is void in law. It is common learning, that among tort-feasors, who are knowingly such, there can be no contribution for damages recovered against any one of them, even although there be a promise of indemnity or contribution. A fortiori, the same doctrine applies to cases of indemnity for the commission of a public crime. No one ever imagined, that a promise to pay for the poisoning of another, was capable of being enforced in a court of justice. It is universally treated as illegal, it being against the first principles of justice, and morals, and religion. The man, who is hired to publish a libel against another, is guilty of an offence equally reprehensible in morals, though not so aggravated in its character; for the publication may not only be ruinous to the reputation of the individual aspersed; but may involve an innocent family in agonizing distress, and, perhaps, destroy its peace forever. There is no such right recognized in civil society, or at least in our forms of government, as the right of slandering or calumniating another. The liberty of the press does not include the right to publish libels. Much less does it include the right to be indemnified against the just legal consequences of such publications. See the case of Colburn v. Patmore, 1 Crompt. M. & R. 73, 4 Tyrw. 677; Pearson v. Skelton, 1 Mees. & W. 504.

Verdict for the plaintiff.

Case No. 556.

ARNOLD v. DELCOL.

[Bee, 5.]¹

District Court, D. South Carolina. 1794.²

SHIPPING—PUBLIC REGULATIONS—REGISTRY—FOREIGN FLAG—FOREIGN CLEARANCES—PRIZE.

1. An American vessel does not forfeit her neutral character merely by hoisting a foreign flag in conformity to the regulations of a particular trade.

2. Spanish clearances found on board an American ship are not proofs of double papers, if no other marks of fraud appear.

[3. Cited in The Jane Campbell, Case No. 7,205, to the point that the burden is always on the captain to prove the necessity for the spoliation of property found on a prize, or the separation of the officers or crew from the vessel.]

[In admiralty. Libel by one Arnold against Delcol and others, the owners of the French privateer La Montague, and of the ship In-

¹ [Reported by Hon. Thomas Bee, District Judge.]

² [Affirmed by the circuit court, (not reported); and also affirmed by the supreme court in Del Col v. Arnold, 3 Dall. (3 U. S.) 333.]

dustry, for the capture of the American brig Grand Sachem, commanded by Ebenezer Baldwin, and owned by Arnold. Decree for libellant. Affirmed by the circuit court, but not reported; also affirmed by the supreme court in Del Col v. Arnold, 3 Dall. (3 U. S.) 333.]

A short statement of this case [Del Col. v. Arnold] may be seen in 3 Dall. [3 U. S.] 333.

A plea to the jurisdiction of the district court had been over-ruled, and after argument upon the merits, a decree was pronounced in favour of Arnold for the sum of 33,000 dollars and upwards.

Upon appeal from this decision to the circuit court, BEE, District Judge, assigned the following grounds of his opinion in the district court: 1st. Because it appeared in evidence that the Grand Sachem had a regular register and sea-letter, to shew that she was an American vessel, and to entitle her to all the privileges of one. 2d. That the property in Arnold, an American citizen, was fully proved. 3d. That by the 25th article of the treaty with France, the production of sea-letters was sufficient in itself to prevent any just detention of the vessel. 4th. That the witnesses, who maintained that the trade to New-Orleans could only be carried on in Spanish bottoms, speak of a time prior to the period when Arnold's vessel was there, and prior also to the edict of 1793, by which that trade was opened. 5th. That there was much contrariety of evidence as to the legality of trade with New-Orleans, which, though prohibited generally in other than Spanish ships, was sometimes carried on, by express permission, in foreign bottoms. It was proved by one of the witnesses, that two American vessels laden with provisions had arrived at New-Orleans under such permission, notwithstanding which they could not proceed up the river till they had procured Spanish colours. That a compliance with this indispensable requisite was not sufficient to divest the Grand Sachem of her American character and privileges. 6th. That there was no pretence of double papers, or of any fraud or collusion supported by legal proof. That the only Spanish papers were a receipt in that language by the captain, produced to shew that the property on board belonged to Cox and Clark; (but the captain swears he signed it from ignorance of the Spanish language alone, as he knew that the whole belonged to Arnold,) and some Spanish clearances, without which the brig could not have departed from a Spanish port. Clark, too, swears positively that the property was in Arnold, and that he himself was only an agent.

The decree of the district court, founded upon these and other reasons, was confirmed in the circuit court, and that decision was finally supported in the supreme

court. See Dallas's Reports [Del Col v. Arnold, 3 Dall. (3 U. S.) 333 as above cited.

[NOTE. Affirmed by the supreme court, upon other grounds, in Del Col v. Arnold, 3 Dall. (3 U. S.) 333.]

Case No. 557.

ARNOLD v. DEXTER.

[4 Mason, 122.]¹

Circuit Court, D. Rhode Island. Nov. Term, 1825.

LIMITATIONS—ACKNOWLEDGMENT—NOTE AS GOOD AS MONEY.

If a party says, on his promissory note's being produced to him, that it is as good as money, this is sufficient evidence of a new promise to take the case out of the statute of limitations.

[See Cowan v. Magauran, Case No. 3,292; In re Reed, Id. 11,635; Penaro v. Flournoy, Id. 10,916; Otterback v. Brown, 2 MacArthur, 541; City of Ft. Scott v. Hickman, 112 U. S. 150, 5 Sup. Ct. 56. For cases in which particular acknowledgments were held insufficient, see Clementson v. Williams, 8 Cranch, (12 U. S.) 72; Thompson v. Peter, 12 Wheat. (25 U. S.) 565; Moore v. Bank of Columbia, 6 Pet. (31 U. S.) 86.]

At law. Assumpsit [by Samuel G. Arnold against Edward Dexter] on a note dated 16th February, 1815, for \$600.80, payable to plaintiff or order. Plea, general issue and statute of limitations, and issue thereon. The suit was commenced on the 12th of May, 1824. At the trial the execution of the note was admitted. It was farther proved, that on the 14th of May, 1818, the plaintiff sent an agent to the defendant with the note, with directions to enter an indorsement on it for a sum, which the defendant claimed to be due to him from the plaintiff in some other right. The defendant, on that occasion, declined to have the indorsement made on the note, but it was made, and the defendant said that his note was as good as money.

William A. Burgess, for plaintiff, contended that this was sufficient evidence of a new promise within six years.

Mr. Searle, for defendant, argued e contra.

STORY, Circuit Justice. I think the evidence sufficient to establish a new promise, and to take the case out of the statute of limitations. The defendant did not deny the validity of the note, but, on the contrary, admitted it to be as good as money. How could this be, unless he meant that the money was still due on it, and he was responsible to pay it? I will leave the facts, however, to be passed upon by the jury.

Verdict for the plaintiff.

ARNOLD, (DEXTER v.) See Case No. 3,855, etc.

¹[Reported by William P. Mason, Esq.]

Case No. 558.

ARNOLD et al. v. FROST et al.

[9 Ben. 267.]¹

District Court, S. D. New York. Dec., 1877.

BOND ON APPEAL.

1. On an appeal to the circuit court from a final decree in a suit in equity in this court, the defendant F. executed a bond, with three sureties, to three obligees, who were the plaintiffs in said suit, conditioned "that if the above-named appellant shall prosecute said appeal with effect, and pay all damages and costs which shall be awarded against him as such appellant therein, if he shall fail to make said appeal good," the bond should be void. After the affirmance of the decree by the circuit court, two of the three obligees brought a suit on it in this court against the obligors, to recover on it: *Held*, that this court had jurisdiction of the suit.

2. That the plaintiffs could sue jointly on the bond.

3. That, where the terms of a bond on appeal comply with the provisions of section 1,000, Rev. St., in regard to a supersedeas and stay of execution, the bond operates as a supersedeas and stay of execution, without any order to that effect.

In a suit in equity in this court, [by Olney Arnold and Alfred H. Littlefield against Jonathan F. Frost and others,] the defendant Frost, after a final decree, took an appeal to the circuit court. On such appeal he executed a bond, with three sureties, to three obligees, who were the plaintiffs in said suit, conditioned "that if the above-named appellants shall prosecute said appeal with effect, and pay all damages and costs which shall be awarded against him as such appellant therein, if he shall fail to make said appeal good," the bond should be void. A citation on the appeal was then issued. The circuit court affirmed the decree, with costs to the appellees. Two of the three obligees in the bond brought a suit on it, in this court, against the principal and the sureties, to recover on it. Among the defences set up were these—that this court had no jurisdiction of the suit, and that the interests of the plaintiffs were not joint but several, and they could not bring the suit jointly.

Francis N. Bangs, for plaintiffs.

Elliott F. Shepard, for defendants.

BLATCHFORD, District Judge. This court has jurisdiction of this suit. It is not an original suit, but is an offshoot or out-branch of the suit in which the bond was given, and jurisdiction of that suit gives jurisdiction of the subject-matter of this suit, the defendants having been duly served with process in this suit. Jones v. Andrews, 10 Wall. [77 U. S.] 327; Christmas v. Russell, 14 Wall. [81 U. S.] 69; Bobyshall v. Oppenheimer, [Case No. 1,592;] Hatch v. Dorr, [Id. 6,206;] Gwin v. Breedlove, 2 How. [43

¹ [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

U. S.] 29; *Dunn v. Clarke*, 8 Pet. [33 U. S.] 1.

Arnold and Littlefield had a sufficient joint interest with each other and with the Savings Bank, under the transactions litigated in the original suit, to bring that suit in their joint names, and the defendants gave their bond to the three parties jointly. This is sufficient warrant for the only two of those three parties who now claim any interest in the bond, to bring suit on it in their joint names.

Under section 1000, of the Revised Statutes, the security to be taken on signing a citation on an appeal is good and sufficient security that the appellant shall prosecute his appeal to effect, and, if he fail to make his plea good, shall "answer all damages and costs," where the appeal "is a supersedeas and stays execution, or all costs only, where it is not a supersedeas as aforesaid." Section 1000 is applicable to the present case. (See sections 1012 and 4981 and General Order No. 26, in bankruptcy.) It is contended, for the defendants, that a bond on appeal is not a bond for any part of the decree below, unless it operates as a supersedeas and stay of execution and as an agreement to pay the decree; that the bond in this case did not so operate; and that, for the bond to operate as a supersedeas, there must be an order to that effect.

It is well settled, that an appeal becomes a supersedeas and stays execution in the court which rendered the decree, not by virtue of any order to that effect, but by virtue of a compliance with the conditions prescribed by the statute. When those conditions are complied with, the statute operates to suspend the jurisdiction of the court below, and to stay execution in the case, pending the appeal. *The Slaughterhouse Cases*, 10 Wall. [77 U. S.] 289, 291; *Kitchen v. Randolph*, 93 U. S. 88; *Goddard v. Ordway*, 94 U. S. 673. The terms of the condition of the bond in this case made the bond operate as a supersedeas and stay of execution, without any order to that effect; and the obligors in the bond are liable to the extent of the penalty of the bond, the decree having been affirmed on appeal, for all damages and costs which have been awarded against Frost, as appellant.

Case No. 559.

ARNOLD v. JONES.

[Bee, 104.]¹

District Court, D. South Carolina. July 14, 1798.

NEW TRIAL—APPLICATION—STAY OF EXECUTION—ENTRY OF JUDGMENT.

Motion for a new trial does not suspend the entering of judgment after one verdict; but

¹[Reported by Hon. Thomas Bee, District Judge.]

execution will be stayed on application to the court.

BEE, District Judge. Notice has been given in writing to the attorney of the plaintiff, that a motion for a new trial will be made in the circuit court in October next, or sooner if possible; and reasons are assigned in the said notice agreeably to the 30th rule of court as established in May term 1797. The question for my determination is whether by any law of the United States the defendant may stay judgment till the next circuit court; or whether the 18th section of the judiciary act [1 Stat. 83] is to be strictly followed. It is not contended that the right of new trial is taken away, though modified by the latter. This 18th section has, indeed, entirely altered the system pursued in the state courts, and derived from those of Great Britain; and the same is done by other parts of the judiciary act; which also gives a general power to the courts of the United States to make rules for the government of their own proceedings. In doing this, great care has been taken to avoid what might be repugnant to the laws of the United States; and the act of March 1793, entitled "an act in addition to the judiciary act," [1 Stat. 333,] expressly provides, that all such rules and orders as may at any time be made shall be fit and necessary for the advancement of justice, and to prevent delay, &c. The judiciary act also holds out the doctrine of appeals from the inferior courts in almost every instance, and has materially changed the common law in this respect. The system provides that, in cases of writs of error, and motions for new trial, execution may be stayed, on certain conditions; and motions for new trial are allowed by it after judgment contrary to the practice at common law.

Writs of error, if lodged within a prescribed time, operate as a supersedeas to execution; and so far the interests of one of the parties is consulted. On the other hand, this writ cannot be had till security is given to answer damages. Motions for new trial may also be granted even after judgment; but such judgment shall be signed and stand as security in the first instance; after which, on petition, and certificate of the judge, that he allows the same, execution shall be stayed to the next circuit court. If these cautions were disregarded, the consequence would be a delay of justice almost equal to a denial of it. Motions for new trial might succeed each other to the ruin of the plaintiff, and in spite of two or three verdicts in his favour; and the 18th clause of the judiciary act would be rendered nugatory. It is true, that at common law, a third trial has sometimes been granted, but only under peculiar circumstances. Besides which it must be recollected that the verdict of a jury cannot otherwise, by that system, be reconsidered. Whereas, after new trial in the courts of the United States, the dissatisfied

party may still appeal to the supreme court, if the matter in dispute exceed the value of 2000 dollars.

Upon the whole, I think the law intended that judgment should be signed previously to the motion for a new trial.

ARNOLD, (LYMAN v.) See Case No. 8,626.

Case No. 560.

ARNOLD v. MARSHAL OF UNITED STATES.

[1 U. S. Law Int. 56.]

Circuit Court, D. Georgia. Nov., 1828.

RIGHT TO SUE IN UNITED STATES' COURTS.

The question was whether the plaintiff was a citizen of Rhode-Island, and entitled to sue in the circuit court of the United States. He proved that he was born in Rhode-Island, and had always resided there until a few years since, when he obtained a considerable property in Georgia, since which time he has passed the winter months in Georgia on his plantation, and the summer months in Rhode-Island; he keeps a furnished dwelling-house in both states all the year. The court decided that whilst he might be liable in Georgia to the performance of certain duties, such as military, jury, &c., yet he could not be deprived of his privileges as a citizen of Rhode-Island, since it appeared from the evidence, that he had exercised or claimed no privileges as a citizen of Georgia, and when compelled to perform jury duty, had protested against its compromising his privileges as a citizen of Rhode-Island. Under the circumstances of this case, the will of the party must decide, and the plea is overruled.

Case No. 561.

ARNOLD et al. v. MAYNARD.

[2 Story, 349; 5 Law Rep. 296.]

Circuit Court, D. Massachusetts. May Term, 1842.

INVOLUNTARY BANKRUPTCY—PREFERENCES—MORTGAGE TO CREDITOR.

1. Where a trader gives a mortgage to one of his creditors, in contemplation of bankruptcy, and for the purpose of giving such creditor a preference over the others, it is an act of bankruptcy within the meaning of the statute.

2. Where the bankrupt act speaks of a conveyance or transfer by a debtor "in contemplation of bankruptcy," it does not necessarily mean, in contemplation of his being declared a bankrupt under the statute, but in contemplation of his actually stopping his business, because of his insolvency and incapacity to carry it on.

[Cited in *Dennett v. Mitchell*, Case No. 3,780; *Everett v. Stone*, Id. 4,577; *Morse v. Godfrey*, Id. 9,856; *Ashby v. Steere*, Id. 576; *Ex parte Quackenboss*, Id. 11,489. Distinguished in *Jones v. Sleeper*, Id. 7,496.]

3. Where a retailer of merchandise mortgaged his whole stock in trade, of the nominal value of four or five thousand dollars, and comprising the whole mass of his visible property, to a creditor, to secure to him the sum of about seventeen hundred dollars, and against

¹ [Reported by William W. Story, Esq.]

a liability for about five hundred dollars, the debtor owing debts to the amount of five thousand dollars, then over due, and the whole amount arising from a sale of his goods at auction being less than five thousand dollars: it was held, that the debtor must be taken in law, to have known, that he was, at the time of making the mortgage, insolvent, and must stop and break up his business, and that the mortgage having been executed in order to give the mortgagee a preference or priority over the rest of his creditors, it was "in contemplation of bankruptcy" within the meaning of the statute.

[Distinguished in *Doan v. Compton*, Case No. 3,940.]

4. Such a mortgage may subject the debtor to be proceeded against as an involuntary bankrupt, notwithstanding he did not, at the time of making it, intend to apply for the benefit of the bankrupt law, or to make himself liable to be proceeded against in invitum.

5. Nor does it make any difference as to the character of the act, whether the mortgage was voluntary and spontaneous on the part of the mortgagor, or was given upon the request or demand of the mortgagee, or upon a verbal promise made in general terms when the debt was contracted, to give security upon request, if at the time of giving [such security] the mortgagor knew that he was insolvent, and must stop his business, and intended thereby to give a preference or priority to the mortgagee over the rest of his creditors.

[Cited in *Van Kleeck v. Thurber*, Case No. 16,861; *In re Connor*, Id. 3,118; *In re Jackson Iron Manuf'g Co.*, Id. 7,153. Distinguished in *Ex parte Ames*, Id. 323; *Sawyer v. Turpin*, Id. 12,410.]

In bankruptcy. This was the case of a petition by Charles Arnold, Henry Adams, and Joseph C. Hicks, of Boston, praying, that Charles Maynard, of Lowell, might be declared a bankrupt. The petition set forth that the said Maynard, on the 5th of April, 1842, made a fraudulent mortgage to John L. Perry, his former partner, conveying all his stock in trade, the same being all his visible property, to secure a debt amounting to \$2,200.00. That the said Maynard, on the 10th May, following, made a certain other fraudulent mortgage to one Burton, of all his stock in trade, to secure a debt amounting to \$850.00; that he then falsely confessed, as due to the said Burton, the sum of \$500; and the said Burton afterwards took possession of the said property under the said mortgage, wherefore the petitioners prayed, that the said Maynard might be declared a bankrupt, within the provisions of the act of congress, in such case made and provided. When this petition came before the district court, the following questions were ordered to be adjourned into this court for a final determination, namely:

First. Whether, if a retailer of merchandise, on the 25th day of April last, mortgaged his whole stock in trade, consisting of goods to the nominal amount of from four to five thousand dollars, and comprising his whole property, excepting debts due to him to the amount of about two hundred dollars, to a creditor, to secure him the sum of about seventeen hundred dollars, and against a liability of about five hundred dollars, he,

the debtor, owing debts to the amount of five thousand dollars, all then over due, and the cash value of all his goods, if sold at auction, not exceeding twenty-three hundred to four thousand dollars, it is an act of bankruptcy within the meaning of the statute?

Second. Whether, if a retailer of merchandise, knowing himself to be insolvent, makes such mortgage, without intending to apply for the benefit of the bankrupt law, or to make himself liable to be proceeded against in invitum, it is a security, conveyance, or transfer of property, made or given in contemplation of bankruptcy, within the meaning of the act?

Third. Whether, if such mortgage be made upon request, or demand of the creditor, and upon a verbal promise made in general terms, when the debt was contracted, to give security upon request; and without any spontaneous act on the part of the debtor, to induce such request, it is a security, conveyance, or transfer, for the purpose of giving the creditor any preference or priority over his general creditors, within the meaning of the statute?

Fourth. Whether, if such mortgage be made in contemplation of bankruptcy, and for the purpose of giving such preference, it is an act of bankruptcy within the meaning of the statute?

The cause was argued upon the adjourned question by Butler, of Lowell, for the petitioners, and by Parker, of Lowell, for the respondent, Maynard.

Before STORY, Circuit Justice, and SPRAGUE, District Judge.

STORY, Circuit Justice. This is the case of a petition by certain creditors of Charles Maynard, proceeding in invitum, to have him declared a bankrupt under the bankrupt act of 1841, c. 9, [5 Stat. 440.] There are four questions adjourned into this court for consideration and decision. The questions arise under that clause of the first section of the bankrupt act, which declares, that if any person, being indebted to a certain amount, and being a merchant or a retailer of merchandise, &c., &c., shall "make any fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods, or chattels, credits, or evidences of debt," he may, upon petition of his creditors, be declared a bankrupt. All the questions turn upon this, whether the mortgage and conveyance stated in these questions, is to be deemed, under the circumstances therein stated, to be a fraudulent mortgage or conveyance, in the sense of the clause. Fraud, in any conveyance, is, and rarely can be, a mere matter of law; but, for the most part, it is a matter of fact, dependent upon the intent of the parties. But when all the facts and circumstances are ascertained, it may, and, indeed, often does, resolve itself into a mere question of law, as to the intent fairly de-

ducible from those facts and circumstances. There is not the slightest doubt in my mind, that if the mortgage, in the present case, was made in contemplation of bankruptcy, and for the purpose of giving a preference to the mortgagee over the other creditors of the mortgagor, it would be an act of bankruptcy within the clause of the bankrupt act already referred to. Indeed, such a case falls directly within the second section of the act, which, among other things, declares, That all "securities, conveyances, or transfers of property, &c., made or given by any bankrupt in contemplation of bankruptcy, and for the purpose of giving any creditor, &c., &c., any preference or priority over the general creditors of such bankrupt, &c., shall be deemed utterly void, and a fraud upon this act." So that the fourth question must be answered in the affirmative, upon the very language of the act, as the mortgage under the circumstances stated in the question, was a "fraud upon the act."

The first question contains, what I suppose are the real merits of this case. And for the purpose of answering it, I must assume, that the retailer was conscious of his own insolvency, and of his utter inability to pay all his creditors, or to carry on his business any longer, and designed to give the mortgagee a preference and priority over all his other creditors by the mortgage. Now, under such circumstances, I must presume, that in point of law, he knew the natural consequences of such an act, and that he must thereby contemplate his own immediate bankruptcy, that is, his utter inability to pay his debts, and to proceed in business, and his own right to petition for the benefit of the bankrupt act of 1841, and his liability to be proceeded against at his own choice, as well as his liability to be proceeded against by his creditors in invitum, in bankruptcy, at their election, for such act, if it was intended to give a preference to the mortgagee over all his other creditors, as being against the provisions and policy of the act. In this view of the matter, and upon the facts stated, I should answer the first question in the affirmative, and say, that the mortgage so given, was an act of bankruptcy, within the meaning of the statute.

The second question involves more difficulty in being answered in direct terms, because it states, what I apprehend cannot, in point of law, be stated, that is, that a man does not intend and contemplate precisely what the law pronounces the necessary result of his acts. No man can be permitted to aver his ignorance of the law as a qualification of his acts. On the contrary, every man is presumed to know the law, and he is bound to know, what are the legal results of his acts; or, as Lord Ellenborough said in *Newton v. Chantler*, 7 East, 143, every man must be taken to contemplate the ordinary consequences of his own act at the time of the act done. "Ignorantia legis neminem ex-

cusat," is a maxim laid up among the earliest rudiments of the law. If the question meant to be asked, was, whether, if the mortgagor, at the time of executing the mortgage, knowing his own insolvency, and inability further to carry on his business, but having no immediate intention on his own part, to seek by petition the benefit of the bankrupt act, or thereby to enable his other creditors to proceed against him in invitum, to have him declared a bankrupt under that act, but actually designing and intending thereby to give a preference to the mortgagee over all his other creditors, it was such a security, conveyance, or transfer as was fraudulent, and in contemplation of bankruptcy within the meaning of the bankrupt act, then I say, that his mere private intention cannot overcome the legal intention and purport of the act; and it is to be treated, in the sense of the statute, as made in contemplation of bankruptcy, although it was not done by him with the intention to be declared a bankrupt. When the statute speaks of a conveyance or transfer in contemplation of bankruptcy, it does not necessarily mean, in contemplation of being declared a bankrupt under the statute; but in contemplation of actually stopping his business, because he is insolvent and utterly incapable of carrying it on. And this certainly was the primary sense, in which the language was used and understood in the English bankrupt laws, from which it has been borrowed and incorporated into our statute, whatever may have been the more modern construction put upon it. The very word bankrupt, supposes a man to be broken up in his business, and insolvent, or as Mr. Justice Blackstone, (2 Bl. Comm. 472, note,) puts it, the word is derived from bancus, or banque, which signifies the table or counter of a tradesman, and ruptus, broken, denoting thereby one, whose shop or place of trade is broken or gone. Now, when a man, being about to fail, and to stop all his business, with a perfect consciousness, that he is insolvent, and with the intention to break up all his business, makes a conveyance to a particular creditor, with a view to give him a preference over all his other creditors, of the whole, or of the mass of his visible property, we must understand, that he does the act with a design to evade the provisions of the bankrupt act, which provide for an equal distribution of his property among all his creditors. If such a conveyance should be held valid, what is there to prevent the party at a future time, at his leisure, or his pleasure, from applying for the benefit of the act? If the present mortgage should be held valid, what is there to prevent Maynard from now applying for the benefit of the bankrupt act, since he might say, that at the time, when he gave the mortgage, he had no fixed intention of that sort, and did not make it in contemplation of then taking the benefit of the act?

I agree, that the mere fact of a man's be-

ing insolvent, and knowing the fact, does not necessarily establish, that he means to stop business and break up his establishment; for he may hope and believe, that he can still carry it on, and perhaps redeem himself from insolvency. But, when he is deeply in debt, and intending to fail, and break up his whole business at once, he makes a conveyance to a particular creditor, to give him a preference over all the rest, it seems to me irresistible evidence, that he does the act in contemplation of bankruptcy. I do not think, that it is necessary, for this purpose, that he should contemplate the conveyance, as an act of bankruptcy, or that he should make it with a present and immediate intention to take the benefit of that statute. It is sufficient, that he must know, that in making that conveyance, he defeats the provisions of the statute, and yet that if it be not a fraud upon the act, he may still at any time, at his pleasure, take the benefit of the act, and thereby make the preference conclusive and perfect. Now, such a result is manifestly at war with the whole objects of the statute. It would put it in the power of the debtor to avail himself of all the benefits of the act, and yet would enable him at the same time, upon his own secret and unknown intention—inscrutable to others, and admitting of no possible certainty—to do the very acts, which the statute was designed to prevent. I do not think, that the English decisions upon this subject can have any very direct application to govern the construction of our statute. Their bankrupt acts apply for the most part, to cases of involuntary bankrupts; whereas the main purposes of ours are for the benefit of voluntary bankrupts. But the cases of *Flook v. Jones*, 4 Bing. 20, and *Poland v. Glyn*, Id. 22, note, and *Ridley v. Gyde*, 9 Bing. 349, proceed upon principles quite analogous. I am aware, that the authority of some of these cases, so far as they apply to the English bankrupt laws, has been questioned; that they have been thought to go too far; and that they did not meet the approbation of the court in *Morgan v. Brundrett*, 5 Barn. & Adol. 289. But this last case, as well as the other cases, shows, that the words "in contemplation of bankruptcy," are not necessarily limited to acts done, which would, per se, be acts, for which the party might, or would be declared a bankrupt under the bankrupt laws; but which must and would produce on his part, a positive state of bankruptcy, in which he might become a proper subject of the bankrupt laws. Mr. Justice Parke, in this case, said: "The meaning of these words 'in contemplation of bankruptcy,' I take to be that the payment or delivery must be with intent to defeat the general distribution of effects which takes place under a commission of bankrupt." Mr. Justice Patteson said; "The recent cases have gone too great a length; they seem to have proceeded on

the principle, that if a party be insolvent at the time when he makes a payment or a delivery, and afterwards becomes bankrupt, he must be deemed to have contemplated bankruptcy at the time when he made the payment. But I think, that is not correct; for a man may be insolvent, and yet not contemplate bankruptcy." Lord Chief Justice Gibbs, in the case of *Fidgeon v. Sharpe*, 5 Taunt. 539-541, was still more expressive. "With respect," (said he) "to this doctrine of contemplation in cases of bankruptcy, we have nothing, either in the common or statute law, to show what it is. The cases, in which this doctrine was introduced, make it depend upon the *quo animo*: if a trader thought he should not ultimately have enough to pay all his creditors, it must be presumed, that if he gives full payment to one, he does it in contemplation of bankruptcy. But if a man, honestly believing he shall have enough ultimately to pay all, but having bought goods with intent to apply them to the particular purposes of his trade, and finding, that it is necessary, that he should discontinue his trade, and therefore cannot make the intended use of the goods, thinks it fair and right to return the goods to the person of whom he purchased them, I cannot say, that this is done with a view or contemplation of bankruptcy." The case of *Pulling v. Tucker*, 4 Barn. & Ald. 382, is very strong to the purpose of showing, that a voluntary conveyance to one creditor, with the design to give him a preference, to the prejudice of the rest of the creditors, is a fraud upon the bankrupt laws, and an act of bankruptcy. The same doctrine was held in *Newton v. Chantler*, 7 East, 137, 143, 144. In *Wedge v. Newlyn*, 4 Barn. & Adol. 831, it was expressly held, that a trader conveying away property to a creditor, to such an extent as will prevent him from continuing his business, and render him insolvent, commits thereby an act of bankruptcy. See, also, *Newton v. Chantler*, 7 East, 145, per *Le Blanc, J.*; *Compton v. Bedford*, 1 W. Bl. 362; *Carr v. Burdiss*, 1 Crompt., M. & R. 447, *Tyrw.* 136, per *Parke, Baron*; *Baxter v. Pritchard*, 1 Adol. & E. 456; *Abbott v. Burbage*, 2 Bing. N. C. 444. Indeed, I should deduce the general conclusion from the English cases to be, that a conveyance by a person, knowing himself to be insolvent, to one creditor, with a design of giving him a preference over the other creditors, in the event of his own expected bankruptcy and stoppage of business, was of itself an act of bankruptcy, as a fraud upon the bankrupt laws. But whether it be so or not, under those laws, I think it is the natural, if not the necessary, intention, deducible from the whole structure and policy of the bankrupt act of 1841. With this explanation, I should answer the second question also in the affirmative.

As to the third question, whatever may be the case under the peculiar provisions of

the bankrupt laws of England, it appears to me that it ought to be answered in the affirmative, under our bankrupt act of 1841, [5 Stat. 440.] The previous request or demand of the creditor, or the verbal promise of the debtor, when he contracted the debt, to give security upon request, does not make, and ought not to make, any difference as to the rights of the other creditors. Whether the mortgage is spontaneous on the part of the debtor, or requested by the creditor; still, if each knows that the debtor is insolvent, and that he contemplates immediate bankruptcy, and breaking up of his business, and the object of the mortgage is to secure a preference to that creditor over the other creditors, I think that it is a fraud upon the bankrupt act of 1841, and is, therefore, an act of bankruptcy within the meaning of the statute. I shall direct a certificate accordingly to be sent to the district court.

The certificate was as follows:

It is ordered by this court that the following certificate be sent to the district court, in answer to the questions adjourned by the said court into this court, in this case.

1. The first question is answered by this court in the affirmative, it being the opinion of this court, that upon the facts stated, the retailer, who made the mortgage to the creditor, the mortgagee, in the case, must be taken to have known, that he was, at the time of making the mortgage, insolvent, and must stop and break up his business; and that he executed that mortgage in order to give the mortgagee a preference or priority over the rest of his creditors, in contemplation of thus stopping and breaking up his business, and thus being in a state of bankruptcy.

2. The second question is also answered in the affirmative, it not being essential in the opinion of this court, that the retailer should contemplate or intend, at the time of making the mortgage, to apply for the benefit of the bankrupt act of 1841, or thereby to subject himself to be proceeded against by his creditors as an involuntary bankrupt, under the bankrupt act of 1841. But that it is sufficient to make the mortgage so given, a security, conveyance, and transfer, in contemplation of bankruptcy, within the meaning of the bankrupt act, that he should, at the time, know himself to be insolvent, and unable further to carry on his business, and that he contemplated a stoppage and breaking up of his business, and intended by such mortgage to give a preference or priority to the mortgagee over the rest of his creditors, in contemplation of such stoppage of business, and state of bankruptcy.

3. The third question is also answered by this court in the affirmative, this court being of opinion, that, under the bankrupt act of 1841, [5 Stat. 440.] it is wholly immaterial, whether the mortgage was voluntary and spontaneous on the part of the mort-

gagor, or was given upon the request or demand of the mortgagee, or upon a verbal promise made in general terms, when the debt was contracted, to give security upon request, if at the time of giving the mortgage, the mortgagor knew, that he was insolvent, and could not further continue his business, but must stop the same, and he intended by such mortgage to give a preference or priority to the mortgagee over the rest of his creditors, in contemplation of such stoppage of business and state of bankruptcy.

4. The fourth question is answered in the affirmative, as being clearly an act of bankruptcy within the meaning of the Bankrupt Act of 1841.

JOSEPH STORY,

One of the Justices of the Supreme Court of the United States.

Case No. 561a.

ARNOLD v. PECK.

[Betts' Scr. Bk. 193.]

District Court, S. D. New York. 1850.

COLLISION—BETWEEN STEAM AND SAIL—FAULT OF SAILING VESSEL.

[Where a collision between a steamer and sloop was caused by the act of the master of the sloop in jumping overboard, and abandoning her, when he saw the steamer suddenly appear from under the stern of another vessel, he cannot recover any damages from the steamer.]

[In admiralty. Libel by Lewis B. Arnold against William H. Peck to recover the value of the sloop Harmony, sunk in consequence of collision with the steamboat Isaac Newton. Dismissed.]

JUDSON, District Judge. This was a suit in the admiralty court, to recover the value of the sloop Harmony, which was sunk in the North river, in consequence of a collision with the steamboat Isaac Newton. The latter left her berth, foot of Courtlandt street, at the usual hour, the Troy steamboat having just previously left the opposite side of the pier. About this time, the sloop, with Captain Harmony and one man, came from the East river round the Battery. The Isaac Newton, in taking a stretch to avoid the wake of the Troy, came near the sloop, and the man at the helm, instead of availing himself of the advantage of the wind which was from the S. E., to keep away on the larboard side of the steamer, became frightened, abandoned the helm, and jumped into a small boat. The consequence was that the sloop ran into the net work of the steamer, and the hatches of the sloop being open, she careened over in 54 feet of water.

The question was, which vessel was in fault? The court says the sloop had the wind free, and a steamer is to be considered as always having it. Two vessels, having

the wind, each must do all in its power to avoid a collision. The steamer was on her proper course, and did all she could to keep away from the wake of the Troy, and from the sloop. Had the master of the latter considered that he was to do something to avoid a collision, he would have kept away, but instead of that, he deserted the helm, and left the sloop to the mercy of the swell; and the beam, being thrown overboard, struck the steamer, and the consequences were immediate. The decree must be, that this libel is dismissed, with costs.

Case No. 561b.

ARNOLD v. PETTEE.

[3 App. Com'r Pat. 353.]

Circuit Court, District of Columbia. Aug. 3, 1860.

PATENTS FOR INVENTIONS—INTERFERENCE—APPEAL—FOLDING ENVELOPES.

[1. A decision of the commissioner of patents that the manner of folding and fastening the sides of an envelope upon the back is not patentable cannot be reviewed on appeal when the evidence submitted does not bear directly upon that point.]

[2. Where a claim for the manner of folding an envelope is embraced in a claim for the form of the envelope, which is rejected for want of novelty, the former claim becomes too broad for the invention, and should be restricted by amendment before the claimant can have the matter considered on appeal.]

[3. The manner of folding and pasting the sides of an envelope, being merely a matter of neatness of finish, which would be obvious to any one engaged in the manufacture of envelopes, is not patentable.]

At chambers. On appeal [by James G. Arnold] from the decision of the commissioner of patents in the matter of an interference between claim of Jas. G. Arnold and patent of S. E. Pettee for an improved envelope for letters, &c. [Affirmed.]

MERRICK, Circuit Judge. The questions both of law and fact presented by the pending appeal are simple, and lie within a very narrow compass. The invention in dispute is an improved form of letter envelope, cut in such manner as to make the least possible waste of material, and which is so folded as to present the utmost neatness of finish. Upon the question of priority of invention raised by the second reason of appeal, I am quite satisfied from a careful perusal of the testimony that, while the applicant shows by his witnesses—Arnold, Earle, and another—that he produced and exhibited to them the form of envelope in dispute in the months of May and July, 1856, and later, the patentee proves by the testimony of Cobb (interrogatory 7, 11, 12, 15) and of Ellis (11, 13, 45, 46, & 55) that he had produced and exhibited the same form of envelope in March and April preceding. I think, therefore, there is no error in the ruling of the office upon that point.

The fourth reason of appeal is not specific enough to raise any question for my decision under the provisions of the 11th section of the act of 1838. The first and third reasons of appeal present the same question, to wit: that the office has erred in determining that the manner of folding and fastening the sides of the envelope to the back, irrespective of the form of envelope, is not a patentable subject. Supposing this position to be true, it could not avail the appellant for two reasons; he has not proved any precise fact touching the manner of folding as claimed, by either of his witnesses. Their attention is entirely directed throughout the questions and answers to the form of envelope and nothing can be gathered from their testimony, except from mere conjecture as to the manner of the fold. Indeed, it may be safely said that no idea on that subject seems to have been present during their examination. In the second place, the claim for the folding being embraced in that for the form of envelope and the latter being decided against him, the claim is vicious, as being broader than the invention, and should have been restricted by an amendment in their proper limits. But, apart from these considerations, I entirely agree with the commissioner that the inventive faculty is not brought into action by folding and pasting the sides down upon the back or the back down upon the sides. It is mere matter of neatness of finish, and would be obvious to any one engaged in that business. It would moreover be an unwarrantable restriction upon the rights of the prior patentee to hold that he had not the right to use his own patented envelope in any mode in which it was reasonably susceptible of being used. Upon the whole case I am clearly of opinion that there is no ground to disturb the title of the patentee upon any of the reasons of appeal filed. And were it otherwise I should feel myself constrained upon such a state of the case as is presented by this record to certify the case back to the commissioner, with instructions to proceed further to enquire whether the party had not forfeited any prior claim he might have had by abstaining to prosecute it for a period of three years and ten months after he had made it known to others, and he, too, a solicitor of patents by profession, and having actual as well as constructive knowledge of the measure of diligence imposed by the law in such cases upon inventors. Now, therefore, I hereby certify to the Hon. Philip F. Thomas, commissioner of patents, that having assigned the 25 of July for hearing said appeal, and having at request of both parties, adjourned the same to the first of August, I have heard them both by counsel, and considered the decision of office and the reasons of appeal, the response to those reasons, together with the testimony and all the other papers, and, finding no error in the judgment of the office upon any point

presented by the reasons of appeal, the same is affirmed, and a patent is finally refused to Jas. G. Arnold.

ARNOLD, (SMITH v.) See Case No. 13,004.

ARNOLD, (SWATZEL v.) See Case No. 13,682.

ARNOLD, (SWOPE v.) See Case No. 13,702.

ARNOLD, (UNITED STATES v.) See Case No. 14,469.

Case No. 562.

ARNOTT v. WEBB.

[1 Dill. 362.]¹

Circuit Court, D. Kansas. 1870.

FOREIGN JUDGMENT—ACTION ON—DEFENSES—ASSIGNMENT—VALIDITY.

1. In an action on a foreign judgment, the debtor may plead as a defense, that he was not served with a process, and that the attorney who entered an appearance and filed an answer for him, had no authority to do so.

2. Where one of several joint or copartnership debtors himself pays off the judgment to the creditor, and causes it to be assigned to a third person, who advanced to the debtor the money with which he paid it, on an understanding between them (to which the creditor was not a party, nor the other joint debtors), that he was to have the benefit of the assignment as a security for his loan: *Held*, that such assignee could not maintain an action against the other debtors, on the judgment thus assigned to him.

At law. An action was brought, in New York, by a firm creditor, against the three members of the firm, after dissolution, on promissory notes made by the firm. Two of the defendants lived in that state, and the other, the present defendant, resided in Pennsylvania. No summons or other process was issued in the New York action; but an answer was filed by attorneys at law for all of the defendants. Judgment was rendered in that action, against all of the defendants; and the record thereof contains no recital as to the personal appearance of the present defendant (Webb); but only "that the defendants appeared and answered" by attorney, and such an answer is on file, and of record. An action on this judgment was brought against the said Webb, by an assignee thereof, in this court.

Thatcher & Wheat, for plaintiff.

Webb, Burns & Case, for defendant.

Before DILLON, Circuit Judge, and DELAHAY, District Judge.

PER CURIAM, (DILLON, Circuit Judge, and DELAHAY, District Judge, concurring.) *Held*, 1. That the defendant was not estopped by the record of the New York judgment, from showing as a defence that he was never served with process, and never appeared to the action, and never employed, or authorized, or assented to the employment

¹ [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

of the counsel who filed the answer. *Shelton v. Tiffin*, 6 How. [47 U. S.] 163; *Harshey v. Blackmarr*, 20 Iowa, 161, and cases cited at pages 172, 173; *Rogers v. Gwinn*, 21 Iowa, 58; *Bryant v. Williams*, Id. 329; *Pollard v. Baldwin*, 22 Iowa, 328; 5 Amer. Law Reg. (N. S.) 385. Held, 2. That if after the rendition of said judgment in New York, one of the joint debtors paid the same to the creditor, and colorably procured an assignment thereof to be made to the present plaintiff, the latter could not recover thereon, even though he may have loaned the said judgment debtor the money with which he paid the judgment, and have made such loan on the understanding between them that he was to have the benefit of an assignment of the judgment as security for his advance or loan to such judgment debtor.

- AROMA MILLS, The. See Case No. 2,041.
 ARONSON, (HOFFMAN v.) See Case No. 6,576.
 A. ROSSITER, The, (WARD v.) See Case No. 17,147.
 ARREDONDO, (WARD v.) See Case No. 17,148.
 ARROW, The, (BUTLER v.) See Case No. 2,237.

Case No. 563.

ARROWSMITH v. BURLINGIM.

[4 McLean, 489; ¹ 1 Amer. Law J. (N. S.) 448.]
 Circuit Court, D. Illinois. Dec. Term, 1848.

EJECTMENT—COLOR OF TITLE—EVIDENCE—LIMITATIONS—CONSTITUTIONAL LAW.

1. Under the limitation law of Illinois of 1835, two things are necessary to the defense: first, possession, and second, a connected title in law or equity deducible of record, etc. Possession without title counts for nothing. The party in possession must have held under title for seven years next preceding the action brought.

2. To render an auditor's deed evidence of title to land sold for taxes under the law of 1827, it must be first shown that the requisitions of the law have been complied with.

3. The statute of Illinois of 1838-39, "to quiet possession and conform titles to land," is not a limitation law. It is a legislative conveyance and adjudication of one man's land to another, and therefore unconstitutional.

4. Color of title in good faith must be such a title as would pass the land of itself, if a better title be not shown; if it do not amount to that, but is on its face bad, the tenant can not be said to take possession in good faith.

5. The belief of a tenant that his title is good must be a legal and intelligent belief, and can only be arrived at by an inspection of his title. If the court, on such inspection, pronounce it a connected title in law or equity deducible of record, etc., the tenant having been seven years in possession, would be protected under the limitation law of 1835. The same would arise where the occupant held under "claim and color of title made in good faith."

¹ [Reported by Hon. John McLean, Circuit Justice.]

Williams & Lawrence, for plaintiff.
 Browning & Bushnell, for defendant.

POPE, District Judge. The plaintiff showed title derived from the United States, and possession of the premises by the defendant. The defendant shows a connected title from the auditor of Illinois upon a sale of the land for taxes in 1829, under the law of 1827. The deed bears date in 1831. The sale was to Cavarly, who sold the premises to — in 1834, and gave a quit-claim deed reciting that he held under a deed from the auditor upon a sale for taxes. His grantee conveyed by quit-claim deed in 1840, the premises to — under whom the defendant claims. No proof is offered that the auditor complied with the requisitions of the law in making the sale for taxes, beyond what the deed itself imports. He has also proved seven years' residence on the land next preceding the bringing of the suit, and that he has paid the taxes assessed during that time.

The defendant relies, 1st. On the statute of limitations of 1835, [Act Ill. Jan. 17, 1835, § 2.] 2d. On the act of 1838-9, entitled "An act to quiet possessions and confirm titles to land," [Rev. St. Ill. 1845, c. 24, § 8.]

The plaintiff contends, 1st. That the defendant has not shown the title required by the act of 1835, in this: that the auditor's deed conveys no title, unless supported by proof of his compliance with the law under which he sold; 2d. That the act of 1838-39 is unconstitutional in this: that it conveys one man's land to another, acting upon the right, not upon the remedy; 3d. That he has not shown claim and color of title in good faith, as required by the law of 1838-39.

The vast amount of property depending upon the principles involved in this case, gives to it unusual importance. It has therefore been argued on both sides with consummate ability and learning. Feeling appeals were made to the sympathies of the court in favor of settlers and in favor of laws of repose. It is only necessary to take a cursory view of the land titles in Illinois to show how little occasion there is for those appeals. The United States was the great land holder. Before it proceeded to sell, it caused the land to be surveyed into quarter sections, numbered by town, range and section. It sold under great precautions against selling the same tract twice; in truth it very rarely happened; so that the patent was for a determinate and surveyed piece of land. Here was simplicity and no confusion. One wishing to own the same tract could ascertain, by application at the proper land office, if it was sold, and to whom. It is true that the patentee or some one holding under him, might sell twice. In such case, the junior purchaser in good faith would be a fit subject for the protection of the statute of limitations. Can this be predicated of him who sets up a claim

based upon a deed from a man, or officer, who proposes to convey the property of another? I think not. The case was quite different in Kentucky and Tennessee, and in a part of Ohio. Virginia and North Carolina sold and granted their land in Kentucky and Tennessee upon private surveys, and described the land in the patent as directed by the patentee, not knowing that some other may not have obtained a patent for the whole or part of the land. Hence there were instances where the same land was covered by several patents. Hence arose endless litigation, and it became the duty of the legislative department to strain its power to the utmost to afford relief to the settlers. They indeed had claim and color of title in good faith. It was the duty of the courts to give full effect to the benevolent policy of the legislature. It is far otherwise in this state. Here, a man takes possession of another's land, lending himself to the unconscionable purpose of depriving him of his acres for cents. This case had been argued for the defendant as if the military tract were alone interested, forgetting that it is a very small part of the state of Illinois, and that land has been sold for taxes all over the state

The first point of defense, viz: the law of 1835, will be considered. The law provides that every "real, etc., action brought for the recovery of land which any person may be possessed of by actual residence, having a connected title in law or equity deducible of record from this state or the United States, or from any public officer or other person authorized by the laws of the state to sell such land for the non-payment of taxes; or from any sheriff, marshal or other person authorized to sell such land on execution, or under any order, judgment or decree of any court of record, shall be brought within seven years next after possession taken. But, when the possessor shall acquire title after taking such possession, the limitation shall begin to run from the time of acquiring title." The most striking and peculiar feature in this law is that no length of possession without title will protect the occupant. He must have held under title for seven years next preceding the action brought. So, possession without title counts for nothing. Two things are necessary to the defense. First, possession; second, a connected title in law or equity deducible of record, etc.

The first the defendant has shown. Second, has he shown a title as required by law? He relies upon the deed from the auditor. This court is relieved from the construction of the law under which the deed was made, as it has already received a construction by the supreme court of Illinois, in 1837, in the case of *Garrett v. Wiggins*, reported in 1 Scam. 343. The court there declares, "it is a settled principle of the common law that a party claiming under

a summary and extraordinary proceeding, must show that all the indispensable preliminaries to a valid title which the law has prescribed in order to give notice to those interested and to guard against fraud, have been complied with, or the conveyance to him will pass no title." The court classed the giving notice of the sale among the "indispensable requisites." The authority of the auditor to sell is limited to the lands advertised. "Without proof of this fact, the auditor's deed was not evidence of the regularity of the sale, and consequently conveyed no title to the purchaser." In these remarks of the court, this court fully concurs. The case arose under the law of 1827, and the auditor's deed is for land sold for taxes under that law; so is the case at bar. It is, therefore, a decision of the point now controverted. But it is said that the case of *Garrett v. Wiggins*, is not in point, because in that case the plaintiff produced the auditor's deed in support of his action of ejectment. In the case at bar, the defendant produces the auditor's deed to protect his possession. In the former case, it was necessary for the plaintiff to make out a good title. In the case at bar, it is only necessary that the defendant should show an appearance of title to protect his possession. It is sufficient answer to say, that the supreme court of Illinois made no such qualification, but declared in terms that the deed conveyed no title. But the act of limitations requires a title. How, then, can it be satisfied with an instrument that conveys no title at all? The case of *Skyle's Heirs v. King's Heirs*, throws much light upon the subject. It is a decision of the court of appeals of Kentucky, reported in 2 A. K. Marsh. 384. In that case, the defendant in possession showed a connected chain of title under a junior patent from the commonwealth. The court held, that it would protect him, because it would hold the land upon its face when tried by itself. The state was the great landholder. It gave two grants; the younger would hold if the older were not produced. So he has title deducible of record, etc. But it is far different with the case at bar. The auditor does not profess to sell his own land or have any interest in it. His power is, therefore, a naked power. It must appear that he has exercised it in the prescribed manner. This has not been attempted to be shown in this case. For these reasons the defendant has no title, and is therefore not protected by the statute of limitations of 1835.

Is the defendant protected by the statute of 1838-39, "to quiet possession and confirm titles to land?" The defendant contends that it is in effect a limitation law. If not, that it is within the competency of the legislature to act upon the right in this matter so as to divest it. So much of the act as is material to this controversy, is as follows, viz: "Every person in the actual

possession of lands and tenements under claim and color of title made in good faith, and who shall for seven successive years continue in such possession, and shall also during said time pay all taxes legally assessed on such lands and tenements, shall be held and adjudged to be the legal owner of said lands and tenements to the extent and according to the purport of his or her paper title." Is it a limitation law? It does not profess to be one either in its title or body. But it is said at the bar, that limitation laws have their origin as to real actions on the assumption of abandonment. No adjudged case or dictum in support of it has been shown, and none is believed to exist; but abundant authorities can be shown to the contrary. See Bl. Comm. 188, and following pages. That position, then, is dismissed with the remark, that it is more ingenious than solid. It is, then, a legislative conveyance and adjudication of one man's land to another. The land passes against all the world not enumerated in the saving clauses. The divestiture is declared to depend upon the act of another, not for any fault or omission or commission in the true owner, who is not required to improve the land nor to pay the taxes; and if he did pay the taxes regularly, it would not save his property. Can legislatures in this enlightened age, with written constitutions to restrain them, take from one and give to another his property with or without compensation? It is only necessary to state the proposition in its nakedness to meet refutation.

The owner has disregarded no regulation nor violated any law. Has he received any benefit from the occupant for acts done without his request? The occupant has paid the taxes which might benefit the owner if he had not paid them himself; but as they were paid without request, no action would lie against him for reimbursement. But he has improved and cultivated a portion of the land. (In the case at the bar, it is not shown how much, nor that any lasting improvements were made, nor is it necessary under this law.) But he has made improvements. Did they cost much? Probably not, in this prairie country. Was the owner benefitted? It is safe to presume not, if the improved land was prairie. If timber, it would be worse. The scarcity is such that great economy should be observed in its preservation. Most probably the owner was injured. Hence, the occupant can have no legal or moral claim for benefits conferred by his labor. It was different in Kentucky and Tennessee. The lands there were covered with timber, and required great labor and long time to open a farm. This awakened the sympathy of their legislatures for the occupant. But in Illinois the farms are already open, with scarcely sufficient timber for building, fuel and fencing. So, sympathy is misplaced when invoked in behalf of occu-

pants in Illinois. But the great question must be met fearlessly, but with a profound sense of the responsibility incurred by a judge, when he interposes the aegis of the law in defense of a citizen whose property is divested by a legislative act, which imputes to him no blame, and holds out to him no recompense for his loss. This act requires of him nothing, nor does it hold out threats of forfeiture for the doing or not doing any thing, but gives his property to another in terms on specified conditions.

Is it within its constitutional powers? A slight glance at the construction of society may be not without profit in the solution of the problem. Man was sent into the world by his Maker to seek his happiness; furnished with a code of laws, enacted by an all-wise and benevolent God, implanted in his heart. Although those laws were perverted by imperfect man, their perfect beauty and adaptation to the moral government of the world is in a constant course of development as Christianity, civilization and true knowledge advances. His rights and obligations had and have their existence in that law. But man's happiness was insecure in his insulated condition. He was inspired with social tastes. The social state promised increased happiness in the security it would afford to his person and property. Hence, the social compact. In this compact it was agreed that man should surrender as many of his natural rights as was deemed conducive to the general good, and received in return the engagement of the society to protect him in his person and property. And for the surrender of the natural right to take redress for wrongs in his own hands, the society agreed to afford him suitable remedies for the injuries he might be exposed to. These obligations imposed upon the society the duty to establish a government; a legislature, to prescribe rules of conduct; a judiciary to expound them; and an executive, to enforce them.

It would be unprofitable to give here an exposition of the origin and progressive changes in the titles to real estate in England. It is sufficient to say, that, until the latter part of the seventeenth century, they differed widely from ours. With us the tenure is free and common socage; the tenure of a freeman. And a freeman may buy and sell at his pleasure. This right is not of society, but from nature. He never gave it up. It would be amusing to see a man hunting through our law books for authority to buy or sell, or to make a bargain. The search would be vain. Society indeed may prohibit the making contracts injurious to the common good. This is a salutary restraint upon his natural right. No grant is needed. Rights are from nature. Titles and remedies are the invention of society. The latter are changeable at the will of the legislative department. Remedies may be granted or withheld; and as the

legislature has none over it, there is none to control it. But the former—rights—are sacred, and can not be invaded but by upturning the first principles of society; without violating the great, nay the only object and conditions of the social compact. Magna Charta only asserted first principles. So the articles of the constitution of this and other states are only recognitions of those principles that uphold all free governments; the violation of which would dissolve the obligations of obedience.

In this enlightened age no government dare do it, without incurring a moral responsibility that no man will dare encounter. The omnipotent parliament of Great Britain dare not.

This act is so fraught with disaster to the country in the insecurity of property, etc., that this court must assume that the legislature was not aware of a tithe of the evils they were entailing on the country if this law were sustained. The principles embraced and put forward in the law are at war with freedom. For the man is a slave whose property is unsafe. This act presents a strong anomaly. If the plaintiff had committed a crime causing forfeiture, his property could not be taken from him but upon a judicial decision; but for no imputed fault it is taken from him by this act without a trial. Hence, in the argument, the defendant's counsel earnestly repelled the idea of forfeiture in this case. The United States sold their lands for a full price, and gave a grant in fee simple unconditionally. It is under a grant of this kind that the plaintiff claims. In case of actual settlers, full payment of the land must be made, and all the favor they have is in the right of preemption. In this case the state of Illinois gives without price that which is not hers, but a citizen's. "No person shall be dis seized of his freehold, etc., unless by the judgment of his peers or the law of the land." This is only declaratory of first principles. The only value of it is to restrict the government to a particular mode of divesting the title. "The judgment of his peers or the law of the land." The authorities agree that this must be done through the courts.

This law of 1838-39, has been considered thus far as if the defendant rested his defense alone upon seven years' possession, and payment of taxes assessed. But he has an additional reliance. It is insisted that he has shown claim and color of title made in good faith. Connecting the latter part of the sentence with the first, it appears that the legislature intended a paper title; as it conveys to him all the land to the extent and according to "the purport of his paper title." This is an important point in the case, and so thought the defendant's counsel, who directed to it very great exertions with an ability rarely equalled. They insisted with great earnestness that the title shown by

the defendant was "claim and color of title made in good faith," contemplated by the law; that it appeared fair on its face; that the auditor's deed was in the form prescribed, and therefore the occupant was warranted in indulging the honest belief that the title was good. But if in fact bad, still that it was sufficient to protect his possession.

In England, title in ejection, where the defendant shows possession, made no figure but to prove that he was not a wrong doer, and that his possession was adverse. Hence in England and America, under the twenty years' possession, a mere pretence of title might be deemed sufficient to show that the entry was not a trespass, and that he held adversely to the true owner. In such case, there is great force in the argument that it is enough that the occupant believed his title good. In that case, it is the possession that is the principal; the title only explanatory. The statute of Illinois makes the title the principal, the possession only auxiliary. The English decision must be understood to have reference to a different law from the law of Illinois. At the bar, the deed of the auditor has been likened to the grant from the United States or from the state. The difference, however, is manifest. The United States and the state are sovereigns, and every act of a sovereign has all presumptions to sustain it; not so the acts of the auditor. The United States or the state profess to convey their own land; the auditor, the land of another. He, then, stands on no better ground than the sheriff, who is bound to show his authority. The auditor does not profess to be the great land holder, but only to exercise control over another man's property under authority conferred by law; and does not show that he acted in conformity to the authority conferred. Nor has it been proved. See *Garrett v. Wiggins*, 1 Scam. 343; *Thatcher v. Powell*, 6 Wheat. [19 U. S.] 119; *Walker v. Turner*, 9 Wheat. [22 U. S.] 541; *Williams v. Peyton's Lessee*, 4 Wheat. [17 U. S.] 77. All these cases concur in saying, that unless it appear that the officer or agent pursued his authority, the proceedings are void. (I here take occasion to say that I do not adopt the doctrine intimated by the court in the case of *Garrett v. Wiggins*, that the legislature has the power to establish such rules of evidence as will compel the courts to receive the acts of agents as proof, either prima facie or conclusive, that they have executed their duties correctly. But that case is not before the court. The remark is made now only to repel the inference that I acquiesced in that doctrine.) It is not surprising that the defendant's counsel failed to furnish the court with an English definition of "claim and color of title," for the reason given above. But the supreme court of New York has defined it in the case of *Jackson v. Frost*, 5 Cow. 351. The court says it must be, as "I understand the law, such a title as the law will prima facie consider a

good title; otherwise there would be no uniformity." But in Illinois it must be a paper title, and that title must have the appearance of a good title. The consequences which might flow from the doctrine contended for by the defendant's counsel are truly startling. Suppose the defendant's deed had covered the whole of Adams county. Several years' possession of a very small piece would give him all the unoccupied land in the county, if he be released from the obligation of looking into his grantor's title. As the case at bar now stands, the auditor's deed is void, and conveys no title.

Color of title in good faith must be such a title as would pass the land of itself if a better title be not shown; for if it do not amount to that, but is on its face bad, the tenant can not be said to take possession in good faith. For example: If A conveys to B land avowedly the property of C, it is a fraud in B to take the conveyance. If A professes to act by authority from C, or in any other manner, the authority must appear, or, in its absence, it is the duty of B to inquire. The fact of its being confessedly the property of C, is notice to B; and if he neglect to inquire, but accepts the deed, it is a fraud on C, if A in fact had no authority. That the grantee of Cavarly had notice, is proved by the deed from Cavarly. That the defendant had notice, is plain from the fact that he bought without warranty, which he would not do without the exhibition of the title papers. Three years before his deed, the supreme court decided that such a deed conveyed no title, of which he is presumed to have had notice, as the decisions of the supreme court of a state are the law, and every man is presumed to know the law of the land. They were purchasers with notice, and therefore fraudulent. The auditor professes to sell, not his own land, but that of another; his authority to do this is a natural inquiry with the purchaser. Among others, two things must exist: First, delinquency; second, notice of the intention of the auditor to sell. These inquiries will of course be made by the purchaser, and if he fails or neglects to seek information, it is at his risk; he becomes his own insurer, and can not protect himself under the plea of innocent purchaser without notice.

The land in controversy has been sold by the auditor for \$1 84 to Cavarly, a little more than a cent an acre. In a contest between Cavarly and the plaintiff, who would sympathize with Cavarly? Can the defendant who purchased with notice claim more? This court will not inquire into the conscience of the man whose morality will allow him to sleep quietly after appropriating to himself one hundred and sixty acres of valuable land for the pitiful sum of one dollar and eighty-four cents. It is sufficient to say that he can not challenge any sympathy of this court. Nor does his grantee stand better.

With a full knowledge of the nature of the transaction, he thrusts himself forward to assist Cavarly to consummate the speculation. He had sufficient warning. First, Cavarly was a lawyer; if he had no doubt of his title, he would have given a general warranty deed, and would have obtained a sound price for a sound title; his declining to do so was sufficient to alarm the fears of his grantee. Second, it is a notorious fact that there never has been entire confidence in titles derived from tax sales; hence, there were different prices for patent titles from tax titles, the latter much lower. Third, the uniform decisions of the courts of the United States and the states, are that the holders of tax titles must show that the officer selling had complied with all the requisites of the laws under which he acted. So universal has this been, that no case has been shown where a tax title has been maintained; nor is it known that any one has been successful in the assertion of such title in any of the states. This was enough, of itself, to put the purchaser on his guard.

Cavarly, then, and those holding under him, are of equal demerit, so far as to the paper title—all holding under the auditor's deed upon the tax sale, and all with full notice. But it is contended, with great earnestness and ability, that, if the tenant entered and occupied, believing his title good, his seven years' possession will protect him. This is probably true; but the difficulty is not thereby removed. The question still remains, how is this belief to be established? Not by the declaration of the tenant. Not by his acts, because his motives for them might be other than might be ascribed to him. This is properly a question of law. The belief must be a legal and intelligent belief, and can only be arrived at by an inspection of his title. If the judge shall, upon its inspection, pronounce it "a connected title in law or equity, deducible of record," etc., he would be protected under the eighth section of the act of 1835, called the limitation law. The same would arise where the occupant held under "claim and color of title, made in good faith."

It was well contended by the plaintiff's counsel, that any other construction would subject the title to a trial of the intelligence of the occupant, and could not be decided without taking the measure of his capacity to judge. This would make the defense good for one man and fail with another; that it could not be known whether or not he would be protected until it could be ascertained what was the state of his intellect. And how is this to be inquired into? The court can not in any case; and in this case at bar, no proof was offered to the court to enable it to form an opinion. The court then must examine the title offered by the defendant, and decide whether it is such a title as is indicated by the statute. Whatever the law makes it, so it must be assumed that the

party regarded it. All men who are allowed to manage their own affairs, are on a level in court, and presumed to know the law.

Judgment for the plaintiff.

ARROWSMITH, The T. V. See Case No. 5, 337.

Case No. 563a.

Ex parte ARTHUR.

[3 App. Com'r Pat. 287.]

Circuit Court, District of Columbia. March 22, 1860.

PATENTS FOR INVENTIONS—INTERFERENCE—LUBRICATING OIL-CANS—EVIDENCE.

[1. A device for opening and closing the valve in the spout of a lubricating oil-can by means of a flat spring, connected with a lever and thumb piece, is a new and useful improvement, entitled to be patented, on the testimony of machinists and manufacturers of such articles that it is superior, simpler, less liable to get out of order, and can be made at less cost than an old device, accomplishing the same result by means of a coiled spring.]

[2. The testimony of machinists and manufacturers having practical knowledge of the subject-matter is of greater weight than the opinion of the commissioner of patents on the question of the usefulness and cost of an alleged invention.]

Appeal [by William C. Arthur] from the decision of the commissioner of patents refusing to grant unto him letters-patent for an improvement in oil-cans for oiling machinery. [Reversed.]

MORSELL, Circuit Judge. The claim as set forth by Arthur is in these words: "What I claim as my invention is the combination of the spring A with the valve in the spout arranged as above described."

It is alleged that the above description shows the nature of said invention to be the combination of a flat spring and a valve in the spout of the can, so that the spring shall serve as a lever to open and a spring to close said valve.

The report of the examiner, and adopted by the commissioner as his decision, is dated 11 December, 1858. It states that Arthur claims "the combination of the spring A with the valve in the spout, and arranged as above described,"—whether the valve is located in the spout or at its base or lower end does not seem to be material, for the drawings show both modifications, and in the specification it is said that the valve may be placed in either position. The chief distinction between the invention before us and those to which the examiner has referred and to the discussion of which the applicant in his reasons of appeal mainly confines himself is that, whereas there the valve is kept in position by means of a coiled spring, in Arthur's the valve is forced and held upon its seat by the use of a flat spring. The substitution then of a flat spring for a

coiled spring is the point upon which the question of patentability turns. Prima facie such a substitution is not the proper subject of letters-patent, and we must therefore look to the peculiar application and effect of the two springs in the separate arrangements which have been given to them.

The applicant holds: (1) That my (his) can is simple in construction. (2) It is less liable to get out of order. (3) As it requires fewer parts and a simpler arrangement of them, it is cheaper,—and that all these advantages are directly derivable from * * * the employment of a flat spring. Let us see if the allegations of the applicant are correct. The first and second heads may be merged into the third. Arthur's can has "fewer parts" under a simpler arrangement, and "is therefore cheaper to the public." Referring to the patent granted to Levi S. Enos, Feby. 12, 1856, we find that his valve like Arthur's is attached to the upper end of a rod which extends down into the body of the can. This rod is then bent upwards and reaches through the cap, thus forming two legs, the largest end of which, or to that end pressing through the cap, is attached to the thumb piece, while in Arthur's arrangement the rod bearing the valve is attached to the flat spring, which is soldered to the inner side of the can and extends across its mouth, the end thereof opposite to its attachment bearing a rod which extends up through the top of the vessel and is provided with a thumb piece. Enos has a coiled spring encircling the base of the spout, and having its bearings on the under side of the thumb piece and on the cap of the can a spring. Now what is the number of parts necessarily employed in both constructions? Enos' coil spring and forked rod, to the separate ends of which last the valve and thumb piece are connected, perform precisely the same functions that Arthur's valve rod, cross piece, and thumb rod do. Here then two elements of Enos' can are represented by three elements of Arthur's can, and while the two require no preliminary preparation to fit them to their uses but the simple colling of the wire, and the bending of the rod into the shape of a syphon whose legs are parallel, the three require four separate operations: 1st. Bending one end of the cross piece or spring at right angles to the body. 2nd. Soldering the cross piece or spring to the inside of the can. 3rd. The attachment of the valve rod to the cross piece or spring. 4th. The attachment of the thumb rod to the cross piece or spring. To say nothing of the comparative time in which these manipulations may be effected, and it being observed that both cans are provided with tubes through which the thumb rods slide, Arthur's plan requires (counting the valves and thumb pieces in both cases) six individual parts; Enos' whole arrangement is effected by five. Where then is to be found the superior simplicity of Arthur's arrangement, where the diminished cost?

Certainly not in the spring which is the gist of the invention—which in Enos' case serves to support the valve rod and return the valve to its seat when depressed for the outflowing of the oil, and which it cannot be and is not denied, can be manufactured no more cheaply than Enos'. We can, therefore, regard Arthur's plan only as a formal modification of Enos' presenting no superior advantages either in operation or in cost of construction.

It is proper to add that several affidavits have been filed in this matter, but they fail to convince us that our judgment is erroneous. From one of them it does not appear that the affiant is any more capable of judging of the merits of this class of inventions than we are; in two others the affiants may be interested in the invention—as far as appears to the contrary; and to the fourth no oath is annexed, as the inventor places great importance in the use of a flat spring in this class of oil-cans he may as well be informed that the device is not new, it having been found in domestic oil-cans and lubricators for machinery. See Austin & Opdyke's rejected applications and the patent granted to Henry J. Hawkins, July 14, 1857, (lubricator,) on the 13 December, 1858. The foregoing report is confirmed, and the application rejected by the commissioner.

Among the papers laid before me in this case there are the affidavits of eight witnesses, consisting of principal and assistant experienced, practical machinists, who swear that they are not interested, four of whom are alluded to in the report just recited, one of them who says he has long been a manufacturer of tin and brass ware; that he has seen and is acquainted with the machines of Enos' and Arthur's cans, and having made an estimate of the cost of the manufacture of each, says he is prepared to state that he can furnish Arthur's can for fifty per cent. less than that of Enos, making both of the same materials. The others swear that they have been acquainted with the two cans and they consider Arthur's can as much superior, simpler, more durable, less liable to get out of order and cheaper.

To the foregoing decision the appellant has filed five reasons of appeal. The fourth will be particularly noticed; it will be sufficient to refer merely to the others. This was the state of the case when the commissioner laid before me all the papers in the case in compliance with due notice directed to be given of the time and place of the hearing.

The appellant appeared by his attorney and submitted; * * * The fourth reason of appeal states—"The commissioner of patents in his rejection of the 14 December, 1858, has made an allegation injurious to said Arthur's invention, and which is controverted by the sworn testimony of men experienced in this branch of business, and filed in the case, to which * * * allegation the said Arthur has so far been refused or not

allowed to make an explanation that would place him properly before the community and the patent office. That he is prepared to show that his can can be made with fewer pieces and at much cheaper rates than the one with which it has been so unfavorably compared. The witnesses, four of whose affidavits are alluded to in the report just recited appear from the papers laid before me by the commissioner to be eight in number, all of whom swear that they are not interested in the subject,—one of them that he has long been a manufacturer of tin and brass ware, that he has seen and is acquainted with the machines of Enos' and Arthur's cans, and having made an estimate of the cost of the manufacture of each, says he is prepared to state that he can furnish Arthur's can for fifty per cent. less than that of Enos, making both of the same materials,"—he is said to be amongst the largest manufacturers of such kind of machines in the United States. The others swear that they have been acquainted with the two cans, and that they consider Arthur's can as much superior, simpler, more durable, less liable to get out of order and cheaper. The commissioner in his testimony says: "Several affidavits have been filed in this matter, but they fail to convince us that our own judgment is erroneous. From one of them it does not appear that the affiant is any more capable of judging of the merits of this class of inventions than we are; in two others the affiants may be interested in the invention, as far as appears to the contrary; and to the fourth no oath is annexed."

There can be no doubt that the capacity of the commissioner to judge, as he has said, must be considered as greatly superior to that of the witnesses, and his judgment worthy fully to be confided in; but the witnesses testify as to their practical knowledge of the machine—a machinist by trade—what such would cost to make them; and of the opinion in the practical use of them of such kind of opportunities and facts it is presumed the commissioner could not have had knowledge—with respect to their being interested, there is no proof of the fact; on the contrary, they have all sworn that they were not, and from the stations they fill, that of masters and assistant-masters of machinery, it would be too much to suppose they have sworn falsely. I cannot, therefore, deny the credit due to their testimony which is claimed—the amount of which shows that the article according to practical use and experiment has been found to be greatly cheaper, better and more convenient to the public, besides answering all the purposes of Enos' invention, thus falling within the principle of patent law stated in Curt. Pat. § 8. "We are of opinion that if the result produced by such a combination be either a new article, or a better article, or a cheaper article to the public than that produced before by

the old method, that such a combination is an invention or manufacture intended by the statute and may well become the subject of a patent."

I think, therefore, there is an error in the decision of the commissioner, and that the same ought to be and hereby is reversed and annulled, and a patent is directed to be issued to the said William C. Arthur as prayed.

ARTHUR, (BUTTERFIELD v.) See Case No. 2,249.

Case No. 564.

ARTHUR et al. v. The CASSIUS.

[2 Story, 81.]¹

Circuit Court, D. Massachusetts. Oct. Term, 1841.

SHIPPING—CHARTER PARTY—LIABILITY OF OWNERS—REFUSAL TO ACCEPT GOODS—FREIGHT—MEASURE OF DAMAGES.

1. Where the schooner *Cassius* was chartered to the master, as owner, for a certain voyage, and by the terms of the charter-party, the general owners were to share the freight with the master,—it was held, that the general owners were directly liable, as owners, for the voyage; and that the claim of the shippers for damages was not restricted to the master personally, although their agreement was made solely with him.

[Cited in *Skolfield v. Potter*, Case No. 12,925; *Webb v. Peirce*, Id. 17,320; *The Freeman v. Buckingham*, 18 How. (59 U. S.) 190; *Thomas v. Osborn*, 19 How. (60 U. S.) 40; *Harney v. The Sidney L. Wright*, Case No. 6,082a; *The International*, 30 Fed. 377.]

2. Where, also, the master was, by his agreement with the shippers, to deliver the cargo at Velasco, but upon his arriving there, the consignee refused to receive it,—it was held, that, as the cargo was not of a perishable nature, the master was bound to land it at Velasco, and store it for the benefit of the shippers, and could not carry it to another port, nor sell it; although it could not be sold at Velasco.

3. So, also, where freight was payable "on delivery of the cargo at the port of Velasco,"—it was held, that until such a delivery, no freight could accrue; and that the master should have landed the cargo, and secured his lien for freight by placing it in the hands of his agent for the benefit of the owners, but subject to the freight.

[Cited in *Cargo of Salt*, Case No. 2,406; *The Maria White*, Id. 9,083; *Fox v. Holt*, Id. 5,012; *Irzo v. Perkins*, 10 Fed. 780.]

4. But as the master had carried the cargo to New Orleans, and sold it, it was held, that the libellants were entitled to receive the actual value of the cargo at Velasco at the time when the same might have been there landed, deducting all duties and charges, and the freight for the voyage, as if the cargo had been duly landed.

[Cited in *The Joshua Barker*, Case No. 7,547; *The Freeman v. Buckingham*, 18 How. (59 U. S.) 190; *The Maria White*, Case No. 9,083; *The Boston*, Id. 1,671; *Hatton v. The Melita*, Id. 6,218.]

5. The rule of damages in prize cases ordinarily supposes, that the vessel has been captured before she has arrived at the port of

destination, and the court, in odium spoliatoris, will presume the cargo to be worth more at the port of destination than the prime cost by 10 per cent. But to cases where the vessel has arrived at the port of destination this rule does not apply.

[6. Cited in *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (47 U. S.) 436, to the point that proceedings in admiralty may be prosecuted for marine torts in rem and in personam. Cited in *The Clatsop Chief*, 8 Fed. 164, to this same point.]

In admiralty. Libel [by Isaac W. Arthur and others] on a charter-party, in rem against the schooner, and in personam against the master. The libel, in substance, stated:—1st. That Simon E. Cottrell, master of the schooner *Cassius*, on the third day of October, 1838, by a certain charter-party of affreightment at New York, annexed to the libel, made and concluded between him and the libellant, engaged to take and receive on board the said schooner a cargo of white pine and hemlock, and lumber, both under and on deck, and all such lawful goods and merchandise as the libellants might think proper to ship, and transport the same from said New York to the port of Velasco, in Texas, by the way of Kingston on the North river. 2d. That it was engaged, among other things, that the libellants should pay to the said Cottrell for the freight or charter of the said vessel at the rate of fifteen dollars for each thousand feet of inch board measure on delivery at the port of Velasco, in conformity with the bills of lading, with five per cent. primage, such payment to be made in the manner specified in the said charter-party. It was also agreed, among other things, that no freight should be paid on such part of the cargo, if any, as might be lost in rafting the same on shore. 3d. That on the 17th of October, 1838, in pursuance of the said contract, the libellants delivered and shipped on board the *Cassius*, the following goods and merchandise:—47,755 feet hemlock and pine lumber; 29,836 feet hemlock boards, siding, &c.; 9 boxes doors, door-casings, &c.; 10 boxes window glass; 1 box books, stationery, &c.; 1 Franklin stove; 1 box stove; 43 pounds of pipe; 3 boxes paste blacking; all of great value, to wit, of the value of \$1,561, for which the said Cottrell signed four bills of lading, in the usual form, stipulating to deliver the same to one Morgan L. Smith, upon payment of freight, according to the said charter-party, with primage and average. 4th. That soon afterwards the vessel set sail, and arrived at Velasco on the 9th day of November, 1838, and that the said Cottrell did not deliver the said cargo to the said Smith, but set sail and went to New Orleans, and there sold it, and received the proceeds, and still retains the same. 5th. That the libellants have always well and truly performed their covenants and undertakings, but that the said Cottrell has not, by not delivering the said cargo to the said Smith. 6th. That, by reason of such non-

¹[Reported by William W. Story, Esq.]

delivery, the libellants have lost not only all the profits, which they would have received, if the said cargo had been delivered, but also the whole value of the said cargo; and that the said Cottrell wholly refuses to pay them the amount of their damages, or the value of the cargo, or the proceeds of its sale in New Orleans. and that their damages amount to a large sum of money, to wit, \$3,000. Whereupon the libellants pray, that process may issue against the said vessel, and that the said Cottrell and all other persons interested be cited to appear, and that the court will pronounce the damages aforesaid, and decree such other relief to the libellants as shall to law and justice appertain, and condemn the said vessel and all persons intervening, in costs.

The answer of the master stated, as follows: 1st. That the respondent was authorized by the owners of the schooner Cassius, and had made an agreement with the said owners, to victual and man the said schooner, and to receive for compensation therefor, and for his own services as master, one half the freight earned by the schooner, and the other half to be paid to the said owners. 2d. The respondent admitting the several matters in the first, second and third articles of the libel to be true, except the valuation of the goods, farther alleges, that the Cassius set sail and arrived at Velasco on the 9th day of November, 1838, as set forth, and that upon her arrival, the said Morgan L. Smith, consignee of the cargo, came on board with a pilot, and instructed the respondent to raft the said lumber ashore, as the said pilot should direct, and that the said pilot thereafter directed the mode in which the said lumber should be rafted ashore, and about twelve thousand feet of lumber were made into a raft and towed ashore, as nearly as practicable, pursuant to his directions, and then left to drift ashore; and that the same raft was safely landed, and was hauled out of the water by men in the employ of the said Smith, who was himself present. That afterwards, before any more could be so rafted ashore, the said Smith gave notice that he would receive no more of the lumber, and would not pay any freight thereon in case it should be landed, and advised the respondent to throw it overboard, as, in that case, he could call on the underwriters, he being fully insured, and the respondent could also receive from the underwriters the amount of his freight; and that the said Smith asserted to the respondent that there was not money enough in Velasco to pay the freight for the said cargo; and that the winds and weather were as favorable for landing the remainder of the said lumber as they were when the raft was landed; and that the said Velasco is a small and poor place, containing not more than twenty-eight houses, and not more than one hundred and twenty-six inhabitants, and that there was no mar-

ket at Velasco for the said lumber, and that the same could not have been there sold for sufficient to pay the freight agreed upon by the charter-party; whereupon the respondent set sail for New Orleans, that being deemed to be the best port to make with such a cargo, with the residue of the cargo on board, and there sold the same, and the net proceeds of the sale amounted to \$1,277.16. 3d. That the respondent has well and truly performed his covenants and undertakings, inasmuch as he had no means in his power to compel the said Smith to receive the said cargo, and to pay the freight thereon, and was not bound to part with the possession of the said cargo, until the said freight was paid; and the respondent avers that he was ready and willing, and offered to deliver the said cargo according to the terms of the charter-party; but that the said Smith would not receive it, nor pay freight, and, therefore, that the libellants did not well and truly perform their covenants and agreements in the said charter-party, and in consequence thereof, the respondent was compelled to convey the cargo to New Orleans, and there to sell it. 4th. The said respondent denies, that the libellants have lost any profits upon the said lumber, and avers, that it could not have been sold at Velasco for enough to pay the freight, and the respondent claims, to be paid by the libellants, the amount of freight according to the term of the charter-party, to wit, \$1291.50, and the farther sum of \$800 for the detention and delay at Velasco, and for transporting the cargo to New Orleans, and he claims to hold the whole proceeds of the sale of the said lumber at New Orleans, to pay the sum due to him from the libellants; and he prays the honorable court to decree, that the balance remaining due to him from the libellants, shall be by them paid to him; and he denies that the libellants have suffered any damages. Wherefore he prays the court to pronounce against the libel and condemn the libellants in costs. The answer was subsequently amended, by stating, that the box of books and stationery, and the three boxes of paste blacking, were not sold with the cargo at New Orleans, but were sent to the said Smith by the schooner William Bryant, from New Orleans, and the stoves and pipe were not sold, and that their value when taken on board at New York, was about twelve dollars, and that in addition to the proceeds of the said sale, the said stoves and pipes are insufficient to pay to the respondent the amount due to him, and, therefore, he claims to hold them.

The answer of the owners corresponded in substance to the answer of the master, and stated, that by the agreement existing between them and the said master, the said master was owner, for the voyage, of the said schooner, and as such owner solely responsible for all contracts relative to the same, and that the owners are not liable for any

default, neglect, or other liability of the said master in relation to the said voyage; that the owners never received any account from the said Cottrell, nor from any other person during the time in which the schooner was performing her said voyage to Velasco, any more than the sum of \$638.58, except that they received from the said Cottrell the said stoves and pipes, and that they, the owners, insist that they are entitled to the said sum, and the said stoves and pipes, as having been paid and delivered by the master under his contract with them.

There was evidence tending to show, that the consignee, subsequently to his refusal, offered to receive the cargo.

At the hearing in the district court, there was a decree dismissing the libel, and from that decree an appeal was brought to this court.

The cause was argued by F. C. Loring, for libellants, and by William Gray, for respondents.

For the libellants, it was contended as follows: The matters put in issue by the pleadings are, 1st, the cause of the departure from Velasco; 2d, its sufficiency in point of law, to excuse the departure.

The respondents allege, 1st, that the consignee refused to receive the cargo at Velasco; 2d, that it could not be sold there for enough to pay the freight; and then argue that the master was justified in taking the cargo to New Orleans, and selling it there, and has the right to retain the proceeds in payment of the freight stipulated to be paid on the delivery at Velasco.

The libellants deny both the fact and the law. The alleged refusal of the consignee to receive the cargo, is relied upon as the main ground of defence. The proof of this is drawn from an abandonment made by him to the insurers on the cargo, on account of the unfortunate result of an attempt to land a part of it, and the state of the weather, and from some testimony, as to a refusal by the consignee to pay the freight. The abandonment was a matter between the shippers and insurers, which did not in any wise affect the master, nor discharge him from his contract to land the cargo according to the charter-party. The testimony as to the refusal to pay the freight is by no means satisfactory or unequivocal, and is entitled to little weight. But however this may be, it is fully proved, that afterwards, the consignee urged the master to wait for a favorable opportunity and land the cargo, and promised to pay the freight if landed according to the charter. If there had been a refusal, it was fully retracted, and the parties stood as if none had been made. But if the consignee did refuse, the question remains whether the master was thereby justified in leaving the port, taking the cargo to another port and selling it. By the maritime law, the shippers are bound to pay the freight.

The consignee is not, unless he receive the goods.

The master is bound to carry and deliver the cargo, unless prevented by perils of the seas. He is a mere carrier, having no interest in the cargo, or the result of the adventure; if it arrive at a poor market, it does not diminish his freight. By the charter-party, the owners, not the consignee, were to pay the freight: he therefore did not look to the cargo, and had not even a lien upon it for the freight. His duty was simply to deliver the cargo according to his contract, and look to the charterers for the freight. If after the delivery the consignee had refused to give the stipulated bills on the charterers for the freight, he might perhaps have had the right to sell enough to pay it: at any rate, he would have earned his freight; and if the consignee had then refused to receive the cargo, the loss would have fallen on the owners, and not on the master. Marine Ordinances, bk. 3, tit. 3, § 517; *Chickering v. Fowler*, 4 Pick. 372; *Story, Bailm.* pp. 340-350. As to the allegation, that the cargo, if landed, could not have been sold for enough to pay the freight: the fact, if proved, would be wholly immaterial, especially as the freight was payable in New York, and could not be affected by the state of the market at Velasco: but the evidence shows, that if landed in good order, it could have been sold at a large profit, and for much more than the freight. The testimony to the contrary comes from persons who evidently have no knowledge as to this matter. This is the defence set up in the answer; but there is a fact in the case, not stated in the answer, which explains the conduct of the master in going to New Orleans, and clears up the mystery which otherwise overhangs the proceedings at Velasco. It appears, from the testimony of various witnesses, and also from the protests made by him, that he was alarmed for the safety of his vessel, while lying off Velasco; that he considered her to be in a dangerous situation, and did not deem it prudent to remain there longer. There can be no doubt, on the evidence, that this was the true cause for the departure; and none but that this fear was without just cause; and that, if the vessel were seaworthy, it would have been perfectly safe and prudent to have remained, until a favorable opportunity should occur to land the cargo. It was not the alleged refusal of the consignee to receive the cargo, nor the state of the market at Velasco, but an unfounded fear for the safety of his vessel, which induced him to go to New Orleans, against the remonstrance of the consignee. And if this be proved, there can be no question as to the liability of the owners to indemnify the shippers for the loss occasioned thereby. As to damages, the authorities seem to establish the rule, that where the cargo has not been delivered at the port of destination, the amount to be recovered shall be the value at

the time and place of shipment, with the addition of ten per centum and interest. The *Lively*, [Case No. 8,403;] *Wheelwright v. Beers*, 2 Hall, 391; *The Amiable Nancy*, 3 Wheat. [16 U. S.] 546; *Smith v. Richardson*, 3 Caines, 319; *Bridge v. Austin*, 4 Mass. 115; *Dusar v. Murgatroyd*, [Case No. 4,199;] *Gilpins v. Consequa*, [Id. 5,452;] *Willings v. Same*, [Id. 17,766;] *Youqua v. Nixon*, [Id. 18,189;] *The Lucy*, 3 C. Rob. Adm. 238. No deduction is to be made for freight, as the cargo was not delivered according to the charter-party. *Lawes, Charter Parties*, 148; *Abb. Shipp.* 273. Delivery precedes the right to demand freight. *Logs of Mahogany*, [Case No. 2,559.] No pro rata freight was earned; the libellants derived no benefit from the carriage to New Orleans, and none can be claimed for the raft landed, because it does not appear that it was landed according to the charter-party, nor in good order, nor how much was landed, and because the contract was to deliver the whole and not a part.

For the respondents, it was contended as follows: The charter-party was merely a personal contract between *Simon G. Cottrell* and the shippers, and no liability attaches to the owners of the schooner. *Cottrell* was the owner for the voyage. *Taggard v. Loring*, 16 Mass. 336; *Abb. Shipp.* (Ed. 1829,) p. 22. And as such, neither the general owner nor the vessel is liable for his acts. We concede, as a general proposition, that the ship is bound to merchandise, and merchandise to the ship. *Abb. Shipp.* 93; *Volunteer and Cargo*, [Case No. 16,991.] But we contend that this principle does not extend to cases where the general owner is not the owner for the voyage. It is well settled that a lien on a cargo for freight may be displaced by particular circumstances, which denote a clear and determinate abandonment. *Logs of Mahogany*, [Id. 2,559.] If, therefore, a lien for freight may be displaced, so may a lien upon the vessel; and we take the position that where the owner of the voyage is distinct from the general owner, the lien is displaced. If the owners have made a special contract for the employment of a ship, as was the case here, the master cannot substitute another contract. *Abb. Shipp.* 99. The owner is not liable for goods clandestinely taken on board. *Walter v. Brewer*, 11 Mass. 99. In *Kleine v. Catara*, [Case No. 7,869,] the court say, that where the charterer becomes owner for the voyage, there is no lien of the general owner for freight. It is confined to cases where the carrier for freight is the owner for the voyage. The rights are reciprocal; if the general owner has merely a personal action, the shipper should have no more. Now *Cottrell* was the owner, and the general owners never received more than \$638.58, and the stoves and pipe, valued at \$12; and yet it is sought to make them responsible for the whole. If, however, the court is of opinion that the owners of this

vessel are liable, then we come to the merits. The making of the charter-party, loading the vessel, and arrival at *Velasco*, are not disputed. The libellants' ground of action is upon non-delivery at *Velasco*, going to *New Orleans*, selling cargo, and retaining proceeds. The non-delivery, sale, &c., are admitted; but the reasons assigned for this course constitute the defence. These are, 1st. That the consignee, who was owner, or agent for the owners, refused to receive the cargo, and to pay the freight according to the charter-party. 2. That the cargo could not have been sold at *Velasco* for enough to pay freight.

What, then, are the principles of law which govern such a case? The master has a lien upon a cargo for freight, and is not bound to part with the cargo until the freight is paid. *Abb. Shipp.* 247, 273; *Bradstreet v. Baldwin*, 11 Mass. 229. An express contract is no waiver of lien. *Peyroux v. Howard*, 7 Pet. [32 U. S.] 324. *Volunteer and Cargo*, [Case No. 16,991.] It cannot be denied, that he has such lien upon the cargo, and, as a necessary result, has the right to retain it. If, therefore, the master forward goods, or be prevented or discharged from so doing, he is entitled to his whole freight. *Hunter v. Prinsep*, 10 East, 394. If the consignee refuse to receive the cargo, the master may, by authority of a magistrate, sell a part for payment of his freight, and deposit the rest in a warehouse. *Valin, Ord. Mar. bk.* 3, tit. 3, art. 17. The voyage being performed, and the master ready to deliver the cargo, he is entitled to freight. [*Griswold v. Insurance Co.*] 1 Johns. 213; [*Ludlow v. Bowne*,] *Id.* 14; [*M'Kinstry v. Pearsall*,] 3 Johns. 319; [*Mayell v. Potter*,] 2 Johns. Cas. 371; *Abb. Shipp.* note, pp. 288, 298; *Morgan v. Insurance Co. of North America*, 4 Dall. [4 U. S.] 455. If it could not be sold, he would have a right to carry it to the nearest and most convenient port. But if the cargo could have been sold at *Velasco* for enough to pay freight, yet, after the refusal of the consignee to accept, the master became agent for the owners of cargo; and the owners of the vessel are not responsible for his acts in that capacity. Then if the master had no right to go to *New Orleans*, we say, that after the cargo was carried to *Velasco*, and the consignee refused to receive it, the master thereupon became the agent of the shippers, and his acts in that capacity cannot affect the owners. *The Sarah Ann*, [Case No. 12,342;] *The Gratitude*, 3 C. Rob. Adm. 240; 1 Phil. Ins. 192; *Stocker v. Harris*, 3 Mass. 417; 1 Phil. Ins. 471; *Waldens v. Phoenix Ins. Co.*, 5 Johns. 324, 325; *Young v. Smith*, 3 Dana, 92. If the consignee refuse to receive the cargo, the master must act as agent for the owners; that is, he alone is accountable to them. It may become important to consider where is the burden of proof; and, in such case, if we show a refusal to receive and pay freight,

and the libellants rely upon a waiver, they take the onus.

[Before STORY, Circuit Justice, and SPRAGUE, District Judge.]

STORY, Circuit Justice. This cause has been very fully argued upon the appeal. The merits of the whole controversy mainly turn upon the following points. 1. Whether there was in fact a final refusal on the part of the consignee at Velasco to receive the goods there. 2. If there was, whether the master had a right, under all the circumstances, to carry the same to New Orleans, and there to make sale of them on account of the shippers. 3. If the respondents fail, on these points, to make out a satisfactory defence in proof, whether, as owners of the *Cassius*, they are responsible for damages to the libellants. 4. If they are so liable, what should be the rule and measure of the damages.

In respect to the liability of the owners of the *Cassius*, (who have intervened for their own interest,) in this suit, I have no difficulty. The charter-party is in no just sense a mere personal contract of the master. It contains an express stipulation, pledging not only the personal security of the master, but also the *Cassius* and her freight and appurtenances, for the due fulfilment of the covenants of the charter-party on his side. Now, if the master was, as the owners of the *Cassius* by their answer assert, owner for the voyage, under a special agreement with them, I do not perceive why he is not to be deemed so for all purposes whatsoever, and to have a perfect right as such owner to pledge the *Cassius* for the due fulfilment of the charter-party. If, on the other hand, the general owners were owners for the voyage, as I am of opinion upon their own statement of their agreement with the master, they ought to be held to be, then the *Cassius* is liable upon the charter-party, which is not denied to have been only authorized to be made for the voyage therein stated. What was that agreement, as stated in the answers both of the master and the owners? That the master "should employ and navigate the *Cassius*, and victual and man her, and should be entitled to retain as his compensation therefor, and for his own services as master, one half of the freight, which should be earned by the *Cassius*, and he was to pay the other half of the freight to the owners of the said schooner." The owners, then, were, upon acknowledged principles of law, jointly interested with the master in the freight; and jointly responsible with the master to the shippers, as partners or part owners in the freight and profits of the voyage (the gross freight); or he was to receive the half freight in lieu of and as a compensation for his services as master, and then the owners were directly liable as owners for the voyage, as well as general owners. In either view, the case would fall within the principles applicable to the jurisdiction of courts

of admiralty by proceedings in rem upon charter parties, which were recognized in the case of *The Volunteer*, [Case No. 16,991,] with which I have not since seen any reason to be dissatisfied. The case of *Taggard v. Loring*, 16 Mass. 336, has been cited at the bar as establishing, that the master was owner for the voyage. That case is distinguishable in its actual circumstances from the present. The agreement in that case does not appear from the statements of the Report to have been identical with the present. And if it were, I must say, that I should have some difficulty in acceding to the authority of that case, if it meant to establish, that the master had an exclusive special ownership in the ship for the voyage. I should rather incline to the opinion, that if he had any ownership at all for the voyage, it was in common with the general owners. In the present case there does not appear to be any distinct proof of what the agreement between the owners and master was. None is produced in writing, and none is established in the testimony. It rests wholly upon the answers of the owners and master, whose statements on such a point, even if responsive to the allegations of the libel, (which they are not,) would not of themselves, in a court of admiralty, be satisfactory evidence. Besides, there is this additional consideration, that the charter-party, in this very case, was executed by the master in his character as master, and not as charterer and owner for the voyage. The respondents have admitted, in effect, that he was entitled to make the charter-party; and they held him out to the public, from the nature of this employment as a freighting vessel, as having general authority to bind the owners on a freighting voyage. The secret agreement, therefore, between the master and the owners, as to the shares of the freight between them, or the rights of the master in the navigation and control of the vessel, cannot, as they were not made known to the charterers, bind them, or vary their rights against the general owners. This objection, therefore, in every view is unmaintainable.

Then as to the merits of the case. In the first place, was there any absolute, positive, and final refusal of the consignee to receive the cargo? There certainly is something in the conduct and management both of the master and the consignee in respect to their proceedings at the port of Velasco, which is exceedingly suspicious and mysterious, not to say, which gives rise to great doubts, whether there was not some connivance between them for purposes adverse to the interests of the charterers, on whose account the shipment was made. It has been suggested at the argument, that the consignee was, or at least might fairly be presumed to be, the real owner of the shipment. I see no sufficient foundation for such a suggestion in the facts of the case. It is repugnant to the apparent objects and intentions of the

charter-party; and if the consignee had been the intended shipper in the original enterprise, it is inconceivable, why he was not made a direct party to the charter-party. His conduct at Velasco, while it may furnish some reason to doubt (if the evidence is believed) his good faith to the charterers and shippers, cannot be admitted to control their rights or change their property without their knowledge and adoption of all his conduct. It is said, that he might have been made a witness in the cause on the part of the libellants. Perhaps he might, but certainly not without a release, which, if he has sacrificed their interests, they would be very unwise to give. On the other hand, the respondents could have used him as a witness without a release; and if they meant to rely upon his being the owner of the shipment, it was their own fault not to take it, or to exhibit other proofs of the fact, since it is properly a matter of defence to the suit.

The conduct of the master in signing two protests, each of which was false in its statements, as he in his answer on oath now admits, is utterly without excuse. It was done in connivance with the consignee, under the pretence on his side, (as his letter to the master shows), that the landing of the cargo was either impracticable, or so dangerous and expensive, that the whole might be abandoned to the underwriters, and thus the loss thrown on them; when in point of fact, as all the evidence now in the case conclusively shows, the landing might have been effected without danger or difficulty. These protests were drawn up and signed by the master for the purpose of giving this very gloss to the transaction. Neither of these protests alludes in the slightest manner to the refusal of the consignee to receive the cargo. On the contrary, both of these protests, as well as the letter of the consignee, put the case upon the other ground. But I cannot but entertain some suspicion, founded upon the positive evidence in the case, that another motive had its operation upon the mind of the consignee, that is, a desire to have the cargo landed and sold by the master at auction on account of the underwriters, so that it might be bought in at a low price for his own benefit. Be this as it may, for such has been the conduct of these parties that I cannot judicially repose confidence in their acts or statements, if Capt. Hendley is to be believed (and I do not well know what reason to assign why he should not) it is certain that the consignee did subsequently offer to receive the cargo and comply with the charter-party, nay, did require that the cargo should be landed, and the master refused to land it, alleging the dangerous situation of his vessel and the extreme difficulty, if not impracticability, of so doing. Now, even if the consignee did at first refuse to receive the cargo; yet, if before the departure of the *Cassius* from the port he was willing and ready to receive it,

it was the duty of the master to proceed and land it. If he could have landed it (of which there is now no doubt) and he did not, it was a plain breach of the contract. It was an idle pretence to suggest that the cargo could not be sold at Velasco for the want of sufficient money to be had to pay for the same. That was nothing to the master. The freight was not payable in money at Velasco, but was payable by a bill to be drawn by the consignee on New York. It was, therefore, wholly immaterial to the master whether the cargo could be sold at Velasco or not. In this view of the case there was a clear breach of the charter-party by the master, in the non-delivery of the cargo at Velasco.

But, suppose, in the next place, there was a final refusal to receive the cargo by the consignee, did that authorize the master to carry it to New Orleans? The learned counsel for the respondents has insisted, at the argument, that it did. I agree, that in cases of necessity, the master becomes, by mere intendment and authority of law, the agent of all concerned, as well of the owners of the cargo, as of the ship—*ut res magis valeat quam pereat*. But this right of the master is to be clearly made out by unquestionable proof of such necessity. In the present case, the cargo could have been landed at Velasco, which was the port of destination. Then there was no necessity of carrying it elsewhere. It is said, that it could not have been sold at Velasco, for want of money in the hands of purchasers. Be it so. But there was no necessity of any sale; the cargo was not perishable; and, therefore, the sale would have been unjustifiable on the part of the master; since it would not have been a sale of necessity. The cargo might have been landed and stored, and kept until the charterers at New York could have received information, and given orders as to what should be done with it. But it is said, that the master was not bound to give up the cargo before his freight was paid or secured according to the charter-party; and that he had a right to retain it for the lien created by law. Assuming, that such a lien existed under the terms of the present charter-party, still it is perfectly clear, by the language of the same instrument, that the freight was payable only "on delivery of the cargo at the port of Velasco," and "that no freight was to be paid on such part of the cargo, if any, as may be lost in rafting the same on shore." So that until a right delivery on shore, no freight could accrue due. If the consignee refused to receive the cargo after it was landed, and to give the bill on New York for the freight, then it became the duty of the master to place the same in the hands of some trustworthy person for the security of his lien for the freight, and, subject thereto, for the benefit and account of the owners. But no right, even under such circumstances,

could exist on the part of the master to sell the cargo, unless it was perishable, and might otherwise have been lost or have perished, which is not proved or pretended by the answer. A fortiori, if the master had no right to sell at Velasco, because there was no necessity therefor, he could not have a right to carry the cargo to New Orleans and sell it there; since it is just as clear that there was no necessity therefor. This act, therefore, in carrying it to New Orleans, was a gross breach of his duty, and the sale a tortious conversion of the property. It might, perhaps, have admitted of a very different construction, if the cargo could not have been landed at Velasco, or there deposited in safety for the owners; or if the sale at Velasco or at New Orleans had become indispensable from the perishable nature and condition thereof. Such a case has not been made out; and, therefore, it need not be decided upon the present occasion.

It appears to me, therefore, clear that the non-landing of the cargo at Velasco, and the carrying of the cargo to New Orleans, and the sale thereof in that port, are all breaches of duty on the part of the master, for which the respondents are liable.

The only remaining question is as to the rule and measure of damages. It appears to me, that, as the cargo safely arrived at Velasco, and might have been landed there, but for the misconduct of the master, the libellants are entitled to recover the actual value thereof at Velasco, at the time when the same might have been there landed, deducting all duties and charges, and the freight for the voyage, as if the cargo had been duly landed. It is said that no freight was due, because there was no delivery thereof. That is true. But still the cargo was carried there, and if it had been rightly delivered there, the freight would have constituted a charge upon the value in that port. So that, if the libellants are to take the value there, as I think is the true rule, they are to be, as to that value, in the same state and condition as if the cargo had been duly landed, and not in a better state and

condition. The rule, adopted in cases of prize, of ten per cent. upon the prime cost, is not applicable to cases like the present. That rule ordinarily supposes, that the vessel has been captured, before she has arrived at the port of destination, and then the court in odium spoliatoris will presume the cargo worth more at the port of destination than the prime cost by ten per cent.; which used to be the old rule of estimating the fair and reasonable profits in ordinary cases, after deducting all charges. But where the vessel actually arrives at the port of destination, in cases like the present, the loss, if any, is susceptible of a more exact computation, by its true and real market value there.

I shall, therefore, refer it to an assessor, to ascertain the value of the cargo at Velasco, deducting the freight and duties, and all other proper charges; and the libellants will be entitled to recover the difference, as the true amount of their loss, with costs. The decree of the district court is, therefore, reversed; and the final decree will be entered according to this opinion.

As the master has died pending the proceedings, and no revivor of the suit, as to him, has been moved for, it is unnecessary to consider whether a proceeding in rem and in personam can be instituted in the admiralty in a case of this sort. The libel must be treated as defunct, so far as the master is concerned.

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- ARTHUR, (DAVIES v.) See Case No. 3,611.
 ARTHUR, (DODGE v.) See Case No. 3,950.
 ARTHUR, (DUDEN v.) See Case No. 4,112.
 ARTHUR, (GAUTIER v.) See Case No. 5-278.
 ARTHUR, (GODDARD v.) See Case No. 5-489.
 ARTHUR, (HAAS v.) See Case No. 5,885.
 ARTHUR, (KEYSER v.) See Case No. 7,749.
 ARTHUR, (MORRISON v.) See Case No. 9-842.
 ARTHUR, (MURRAY v.) See Case No. 9,956.

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